

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 FROM THE UNITED STATES COURT OF  
APPEALS FOR THE THIRTEENTH CIRCUIT**

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**BRIEF FOR RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT**

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**Team K**

*Attorneys*

QUESTIONS PRESENTED FOR REVIEW:

- I. Whether the Fourth Amendment of the United States Constitution prohibits a police officer, acting under reasonable suspicion, from moving aside an exterior garment of a suspect.
  
- II. Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits the termination of a police officer for his participation in an extramarital affair.

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## STATEMENT OF CASE

The Rushmore County, Craven, Police Department brings this action for review of the unwarranted decision of the Thirteenth Circuit 1) holding as invalid a search conducted according to the “stop and frisk” doctrine and 2) holding unconstitutional the termination of an officer due to his participation in an extramarital affair.

1. On June 7, 2005, in Rushmore County, Craven, an officer with the Rushmore County Police Department (the Department), Maxwell Calloway (Calloway), observed the Respondent, William Tracey (Respondent herein), seated on a park bench on the north side of McDonough Square (the Square). Record at 2. Calloway had spent the last eight months investigating an illegal firearms distribution network tied to the private military company, Red Tide (R-T). Record at 2. The Respondent was also a Rushmore County Police Officer, but he was affiliated with a different precinct and was investigating the sale of illegal firearms in Rushmore County. Record at 2. The Respondent had been part of an undercover operation for the majority of Calloway’s tenure, thus Calloway was unaware that the Respondent was an officer. Record at 2.

Calloway was pursuing a lead that an R-T official was meeting with prospective buyers in the Square when he spotted the Respondent and observed his closely cropped hair and black nylon bomber jacket. Record at 2. Calloway’s suspicions were raised because the temperature was in the low seventies and the Respondent had a military style haircut. Record at 2. Over the next twenty minutes Calloway’s concern increased as he observed the Respondent’s agitation and his surveillance of the layout of the surrounding buildings. Record at 2.

Although hesitant to compromise his investigation, Calloway approached the Respondent and identified himself and asked the Respondent to do the same. Record at 2. The Respondent did not immediately respond but became visibly angry and glanced to his left and right repeatedly. Record at 3. The Respondent eventually stated that his name was “Bill.” Record at 3.

Calloway's suspicions were not assuaged by the Respondent's responses so he briefly detained the Respondent and conducted a pat down of the exterior surface of the Respondent's clothing to determine if the Respondent was armed. Record at 3. The Respondent submitted physically to the pat down but became verbally abusive by cursing and berating Calloway. Record at 3.

Calloway did not feel any object that was consistent with a weapon, but as the Respondent turned to leave, Calloway noticed a vertical leather strap underneath the Respondent's unzipped jacket, located around the Respondent's upper chest area. Record at 3. While Calloway was not able to immediately ascertain the strap's purpose, the strap was consistent with a strap used to carry a concealed weapon. Record at 3. Therefore Calloway once again detained the Respondent and attempted to move aside his jacket. Record at 3. The Respondent thwarted Calloway's attempt to move aside the jacket by brushing Calloway's hand aside, so Calloway moved aside the jacket more forcefully to reveal a "Glock 21" .45 caliber pistol which Calloway seized. Record at 3.

As Calloway placed the Respondent under arrest for violating Craven Statute 19-166.81 (possession of a concealed firearm), the Respondent began to protest and explain that he was also a police officer and his investigation could be compromised by forcing him to reveal himself. Record at 3. The Respondent was unable to comply with Calloway's request for law enforcement identification so Calloway detained him so that he could investigate the Respondent's story. Record at 3.

Officer Calloway took Respondent to the Charlestown precinct where a full search was conducted. Record at 3. The Respondent's seized cellular phone contained the phone numbers of several R-T officials. Record at 3. Calloway also discovered the phone number of Jacqueline Malone (Jacqueline), the daughter of the Rushmore County Police Chief, Patrick Malone (the

Chief). Record at 3. Jacqueline's estrangement from her father was public knowledge due to her highly publicized attempts to discredit the Department by making false allegations of corruption in the Department to the local newspapers. Record at 3-4.

Still unsure of the Respondent's status as an officer, Calloway was concerned for Jacqueline so he contacted her. Record at 4. Jacqueline was surprised by the call and spontaneously admitted to having an affair with the Respondent and confirmed he was an undercover police officer. Record at 4. After Jacqueline's confirmation of the Respondent's identity, Calloway immediately called the Respondent's precinct, explained the situation, and apologized for the arrest. Record at 4. Calloway also disclosed the information about Jacqueline and the Respondent's affair. Record at 4. After consulting with the Respondent about the firearm, Calloway apologized and released the Respondent. Record at 4.

On June 8, 2005 the Respondent was terminated by the Department for "behavior unbecoming of an officer." Record at 4. The Chief conceded that the behavior at issue was the extramarital affair in violation of the state's adultery statute. Record at 4. The Respondent was married at the time of his relationship with Jacqueline who was unmarried. Record at 4. Although the Respondent was not on duty when he was with Jacqueline, he did violate Craven Statute 11-198.01 which prohibits adultery and remains good law even though no prosecutions have been brought recently. Record at 4.

2. The Respondent brought a claim pursuant to 42 U.S.C. § 1983 against the Department for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment in the United States District Court for the District of Craven (J. MacGowan presiding). Record at 2. The Respondent alleged that Calloway's search, resulting in the discovery of a concealed weapon, violated the Fourth Amendment and that his termination from

the Department for an extramarital affair violated the Fourteenth Amendment Due Process Clause. Record at 2. The Department filed a motion for summary judgment contending it was entitled to judgment as a matter of law because the Respondent's constitutional rights were not violated. Record at 2. The United States District Court for the District of Craven granted the Department's motion for summary judgment in an opinion dated February 19, 2006. Record at 7.

3. The Respondent appealed the grant of summary judgment in favor of the Department to the United States Court of Appeals for the Thirteenth Circuit (J. McGurk presiding). Record at 8. In an opinion dated April 29, 2007, the Court of Appeals reversed the grant of summary judgment by the District Court. Record at 12. The Court of Appeals concluded that the Respondent's constitutional rights had been violated and remanded the action for further proceedings. Record at 12.

Petitioner, the Rushmore County, Craven, Police Department, then filed a petition for *writ of certiorari* with this Court which was granted.

#### ARGUMENT SUMMARIES

I. Under the Fourth Amendment, the *Terry* frisk doctrine permits a police officer to move aside a suspect's exterior garment based upon reasonable suspicion.

a. *Terry v. Ohio*, 392 U.S. 1 (1968), builds off this Court's interpretation of the protections afforded by the Fourth Amendment to create a reasonableness analysis for encounters between agents of the state and the public based on a reasonable suspicion of criminality. The Court articulated this doctrine in order to allow officers the limited authority to detain and frisk subjects when warranted by the totality of the circumstances. This doctrine is meant to be applied based on a fact intensive inquiry into the circumstances surrounding each particular case.

1. A number of lower courts have recognized reasonable extensions of the frisk permitted in *Terry* based on the circumstances. These decisions all seem to stand for the basic premise that *Terry* is a limited but elastic doctrine which should be used in order to serve its overarching purpose of securing officer safety.

b. The Thirteenth Circuit Court of Appeals is misguided in its reliance on *Sibron v. New York*, 392 U.S. 40 (1968), as defining the permissible “scope” of reasonable a *Terry* frisk. The Thirteenth Circuit misunderstands the nature of this Court’s decision in *Sibron* because the Court merely used *Terry* as an example to contrast against the over intrusive search in *Sibron*.

c. This Court has expressly shunned the type of “bright-line” standard for cases implicating the Fourth Amendment that the judgment of the Thirteenth Circuit would create. Instead the Court has taught that the inquiry must be one based on an analysis of the reasonableness of the officer’s conduct. Upholding the judgment of the Thirteenth Circuit would, in effect, create such a bright line rule.

II. The Due Process Clause of the Fourteenth Amendment does not prohibit the Rushmore County Police Department from terminating a police officer for his participation in an extramarital affair in violation of a state statute prohibiting adultery. *Lawrence v. Texas*, 539 U.S. 558 (2003) did not announce a fundamental right to sexual privacy, thus the reason for the termination need only be rationally related to a legitimate governmental purpose.

a. The decision below improperly reads a fundamental right to sexual privacy into the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court in *Lawrence* did not apply the requisite two-step substantive due process analysis that the Court outlined in *Washington v. Glucksberg*, 521 U.S. 702 (1997). There was no analysis of the history and legal tradition of the

right to adult, consensual sodomy between homosexuals nor was there a careful description of the asserted right. Since there was not a new fundamental right announced in *Lawrence*, the department's termination of the respondent need only be rationally related to a legitimate governmental purpose. Here, the department is justified in firing an officer who is engaging in illegal conduct with an enemy to the very department he has sworn to serve.

b. The Court in *Lawrence* was more likely concerned with protecting the minority group of homosexuals from discrimination for their sexual choices than it was in announcing a new, broad fundamental right to sexual privacy. Since the respondent is not a member of this minority group, the department's termination of his employment should not be subjected to heightened scrutiny and is not unconstitutional.

#### ARGUMENTS

#### I. UNDER THE FOURTH AMENDMENT, THE *TERRY* FRISK DOCTRINE PERMITS A POLICE OFFICER TO MOVE ASIDE A SUSPECT'S EXTERIOR GARMENT BASED ON REASONABLE SUSPICION.

The United States District Court for the District of Craven correctly applied the *Terry* doctrine in permitting Officer Calloway to frisk under respondent's open jacket in light of the totality of the circumstances present at the time of the frisk. The Thirteenth Circuit Court of Appeals incorrectly held that the frisk beneath respondent's jacket was impermissible in the absence of probable cause to search and thus violative of the respondent's Fourth Amendment rights. This Court should hold that Officer Calloway's split-second decision to move aside the respondent's jacket was permissible because it was reasonable in light of the perceived threat posed to the officer's safety and consistent with this Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968); thus this Court should reinstate the judgment of the district court.

- A. *Terry v. Ohio* builds off this Court’s interpretation of the protections afforded by the Fourth Amendment to create a reasonableness analysis for encounters between agents of the state and the public based on a reasonable suspicion of criminality.

The Fourth Amendment to the Federal Constitution of the United States provides “[t]he right of the people to be secure in their persons...against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV. Thus, this Court has determined that the Fourth Amendment, by its terms, does not bar all state searches and seizures not made pursuant to a warrant and probable cause, but only those that are unreasonable. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). In fact, the *reasonableness* of such searches and seizures is “the touchstone of Fourth Amendment analysis.” *Id.*; *U.S. v. Knights*, 534 U.S. 112, 118 (2001).

In analyzing the reasonableness of a given state action, this Court stated in *Knights* that “the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *Id.* at 118-119. (Internal quotations omitted). In *Knights*, as here, the Court considered the constitutionality of searches by the state upon a lesser standard than probable cause. There, the context was a California statute mandating that probationers submit to a search “by any probation officer or law enforcement officer.” *Id.* at 116. In upholding the statute and the conviction based on evidence seized under a search pursuant to it, the Court stated that “[a]lthough the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause,’ a lesser degree satisfies the Constitution when the balance of governmental interests makes such a standard reasonable.” *Id.* at 121.

Likewise, in *Terry*, the prototypical example for analyzing encounters such as the one presented on the facts herein, this Court expressly and repeatedly referred to “reasonableness” as

the standard for analyzing Fourth Amendment implications. In *Terry*, the facts of which are very similar to those herein, the officer observed the defendant and another man repeatedly walking down a city street, looking into a store window, and walking back and conferring with one another in a manner the officer, based on his experience, found consistent with preparation for an armed “stick-up job.” *Terry*, 392 U.S. at 5-8. Becoming increasingly suspicious of the behavior of the men, the officer eventually approached them, identified himself as a police officer, and asked their names. *Id.* at 7-8. When one of the men “mumbled” a response, the officer immediately seized the defendant, spun him around between the officer and the other men, and began to frisk him outside of his clothing; in doing so he felt what was obviously a handgun and arrested the defendant who was subsequently convicted of carrying a concealed weapon. *Id.* at 7-8.

In its decision in *Terry*, this Court created the “Stop and Frisk” doctrine allowing officers to conduct brief detentions of individuals based upon particularized and articulable reasonable suspicion and, if reasonably warranted, limited searches for weapons. The *Terry* Court repeatedly referred to reasonableness as the method through which to analyze the Fourth Amendment implications of the encounter in stating:

[i]n order to assess the reasonableness of [the officer’s] conduct as a general proposition, it is necessary ‘first to focus upon the governmental interest which allegedly justifies official intrusion upon constitutionally protected interests of the private citizen,’ for there is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails”

*Id.* at 20-21. In elaborating, Chief Justice Warren wrote that that the “Fourth Amendment only becomes meaningful when it is assured that...[officer conduct will be subject to the scrutiny of]...a judge who must *evaluate the reasonableness* of a particular search or seizure in light of

*the particular circumstances.*” *Id.* at 22. (Emphasis added). The essential question for the Court in *Terry* was “would the facts available to the officer at the moment of the seizure (or search) ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” *Id.* at 21.

Thus, the Court first considered the nature of the state’s interest at the time the officer frisked the defendant based merely upon reasonable suspicion of criminal activity and his fear the defendant might be armed. The obvious interest was that of preventing crime and the Court thought the officer’s conduct in approaching and detaining the defendant based on reasonable suspicion to be proper police work. *Id.* at 23. The Court then turned to the officer’s decision to frisk the defendant absent probable cause; here, the Court found a second, “more immediate interest” of the officer in guarding his own safety and that of bystanders from “a weapon that could unexpectedly and fatally be used against him.” *Id.* Thus the Court arrived at its conclusion that the Fourth Amendment must permit a “narrowly drawn” but “reasonable” search for weapons for the protection of the officer, where he has reason to believe he is dealing with an “armed and dangerous” individual. *Id.* at 27. The Court stressed that “[e]ach case of this sort will, of course, have to be decided on its own facts” and that the *Terry* holding was thus appropriate to its on particular facts. *Id.* at 30. Based on the new doctrine, the *Terry* Court upheld the officer’s split-second decision to frisk the defendant as reasonable under the circumstances and sustained defendant’s conviction.

The search conducted in *Terry* is also distinguishable from the later search this Court deemed in violation of the Fourth Amendment in *Minnesota v. Dickerson*, 508 U.S. 366 (1993). In *Dickerson* the Court considered whether evidence (crack cocaine) recovered during a *Terry* frisk was admissible against Dickerson. *Id.* at 370-371. The Court granted *certiorari* in order to

resolve a question as to whether contraband felt by the officer during a properly executed *Terry* frisk could be seized and admitted against the suspect. *Id.* Holding that such evidence was admissible in general, the Court sanctioned the so-called “plain-feel” doctrine permitting such seizures; however, the Court concluded that the evidence at issue in *Dickerson* was the result of an unconstitutional search exceeding the bounds of *Terry* and held it inadmissible. *Id.* at 378-379. The problem with the search in *Dickerson* arose when, after feeling a “small, hard object wrapped in plastic” in the defendant’s pocket, the officer determined that the lump was cocaine by “squeezing, sliding, and otherwise manipulating” the contents of the pocket. *Id.* at 377-378. The *Dickerson* Court found this search violative of *Terry* because the officer continued to search even though “he never thought the lump was a weapon” which was, as the Court noted, could only be justified under *Terry* for “the protection the police officer and others nearby.” *Id.* at 378.

The facts herein closely mirror those presented in *Terry* and are clearly distinguishable from evidentiary search in presented in *Dickerson*; neither lower court, nor apparently the respondent, seriously contest that Officer Calloway had reasonable suspicion justifying a *Terry* stop and then a *Terry* frisk during his encounter with the respondent. Record at 5, 8-9. Officer Calloway’s knowledge of and extensive experience investigating the illegal arms trade, the respondent’s jacket suspiciously worn on a warm day, his state of obvious agitation and nervousness, and his repeated surveying of the scene as if fearing surveillance created the specific and articulable facts necessary to satisfy the *Terry* stop standard. Record 4-6, 8-9. Once so detained, the respondent’s combativeness, obvious unease and agitation during the encounter, the Officer’s knowledge that the area was commonly involved in the arms trade, his opinion that the demeanor of the respondent matched that of a person engaged in such trade, and the Officer’s knowledge that jackets are often worn during warm weather by those attempting to conceal

weapons created in Officer Calloway a reasonable suspicion that the respondent was armed and dangerous, and thus justified the *Terry* frisk conducted by Officer Calloway for the safety of himself and bystanders. Record 5-6, 9. However, here a major factual departure between the facts of *Terry* and those herein arises.

As the district court wrote, “[s]hortly after the frisk was concluded, the respondent once again turned to leave...[and]...Officer Calloway noticed a vertical leather strap underneath the Respondent’s unzipped jacket.” Record at 3. The officer immediately recognized the strap as consistent with “those used to carry a concealed firearm.” *Id.* He then requested the respondent to stop and turn around and, when the respondent reluctantly complied, Officer Calloway reached toward the respondent, only to have the respondent brush away his hand; Officer Calloway then reached forward more forcefully, moved aside the jacket and revealed a concealed “Glock 21” pistol. *Id.*

The facts herein also clearly paint a different picture than that present in *Dickerson* where the officer was seeking evidence of a crime as opposed to guarding his safety; by contrast, Officer Calloway did reasonably fear that the strap momentarily visible beneath the respondent’s jacket signaled the existence of a weapon because the strap was visually consistent with a carrying device, and he acted in a minimally intrusive manner to defuse this potential threat. In reaching out to look under the respondent’s jacket, Officer Calloway reasonably made a minimal extension to his prior frisk to the degree “necessary for the discovery of weapons which might be used to harm the officer or others nearby.” *Id.* at 373; *Terry*, 392 U.S. at 26.

Officer Calloway’s split-second decision to incrementally extend the scope of the Frisk approved for the specific facts of *Terry* was both reasonable and necessary to vindicate the “more immediate interest” of protecting officer and bystander safety this Court sought to protect

in its holding in *Terry*. In keeping with *Terry*, Officer Calloway limited his search to “strictly what was minimally necessary” to discover dangerous weapons. *Id.* at 30. He merely pushed aside the respondent’s already open jacket to determine with certainty whether, as he then reasonably believed based on the strap, the respondent was armed and dangerous. As noted repeatedly above, the focus of the Court in crafting its decision in *Terry* was in Chief Justice Warren’s words “would the facts available to the officer at the moment of the seizure (or search) ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” *Id.* at 21. This Court should find that Officer’s Calloway’s response to the quickly developing situation was reasonable in light of the balance of his right and duty to protect his own safety and that of others versus the minimal intrusion of moving aside the respondent’s jacket. To find otherwise would be at odds with this Court’s own precedent in *Terry* and a serious setback to *Terry*’s overarching interest in the protection of police officers and the public.

1. A number of lower courts have recognized reasonable extensions of the frisk permitted in *Terry* based on the circumstances.

Lower federal and state courts have also recently considered the permissible extent of *Terry* frisks on facts similar to those herein. In *United States v. Reyes*, 349 F.3d 219 (5th Cir. 2003), the Fifth Circuit Court of Appeals address whether a border patrol agent acting pursuant to reasonable suspicion that the subject was armed and dangerous exceeded the permissible scope of *Terry* frisk by “ask[ing] the defendant to empty his pockets and raise his shirt.” *Id.* at 225. The Fifth Circuit found that “*Terry* does not in terms limit a weapons search to a so-called ‘pat-down ’ search. Any limited intrusion designed to discover guns, knives, clubs, or other instruments of assault are [sic] permissible.” *Id.* (quoting *United States v. Hill*, 545 F.2d 1191,1193 (9th Cir. 1976).) *See also United States v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979) (officer justified in reaching into suspect's pocket during *Terry* stop because suspect

repeatedly attempted to reach into pocket despite officer's warnings not to, and officer could not determine from pat-down whether pocket of bulky coat contained weapon).

Likewise in *State v. Triplett*, the Wisconsin Court of Appeals confronted the conviction of Triplett for possession of narcotics discovered during a *Terry* Frisk. 707 N.W.2d 881, (Wis. Ct. App. 2005), *review denied*, 712 N.W.2d 35 (Wis. 2006). During a traditional pat down of the defendant's "waist area", the officer "found it difficult to get a good feel for that area" because of the defendant's size and the clothing he was wearing. *Id.* at 882. The officer feared that weapons might be concealed in the defendant's waistband and thought he might be able to perform a better pat down if he shook them loose. *Id.* Thus, he "tugged on [the defendant's] belt loops and gave the waistband a few shakes." *Id.* As he shook, a clear plastic bag containing a white powder that turned out to be cocaine fell out of the defendant's pant leg. *Id.*

In considering the permissibility of the officer's decision to shake the defendant's waistband, the court stated that "[t]he prevailing rule seems to be that an officer is entitled not just to a pat down but to an *effective* pat down in which he or she can reasonably ascertain whether the subject of the pat down has a weapon; where an effective pat down is not possible, the officer may take other action reasonably necessary to discover a weapon." *Id.* at 884. (emphasis in original).

Other state courts have reached similar conclusions in allowing extensions beyond the explicit terms provided in *Terry* based on reasonableness under the circumstances. *See State v. Hudson*, 874 P.2d 160, 163 (Wash. 1994) (en banc) ( in "cases where the pat down is inconclusive ... reaching into the clothing is the only reasonable course of action for the police officer to follow"); *State v. Roach*, 796 A.2d 214, 219, 220 (N.J. 2002) ("courts have upheld seizures of unidentifiable objects on a suspect's person where a lawful pat-down is either

inconclusive or impossible;” where police were “faced with a nervous and intoxicated defendant who refused to obey their lawful orders and continued to move his hands toward the unidentified bulge,” officers were justified in removing object from suspect's waistband); *State v. Mackey*, 752 N.E.2d 350, 357 (Ohio Ct. App. 2001) (where protective frisk of overalls was inconclusive due to “thick and heavy material,” reasonable for officer to unhook overalls to complete search); *State v. Vasquez*, 807 P.2d 520, 524 (Ariz. 1991) (en banc) (reasonable to reach in pocket where, because leather jacket “was extremely bulky, the officer could not tell from the pat-down alone what, if anything, the jacket pockets contained”).

B. The Thirteenth Circuit Court of Appeals is misguided in its reliance on *Sibron v. New York* as defining the permissible “scope” of reasonable a *Terry* Frisk.

The dependence of the Thirteenth Circuit Court of Appeals on this Court’s decision in *Sibron v. New York*, 392 U.S. 40 (1968), is misguided insofar as the court of appeals relies on language analyzing a very different set of factual circumstances from those presented herein and takes the language out of context to reach the conclusion found in its opinion. In the first instance, the Thirteenth Circuit relies on a section of *Sibron* specifically addressing the case of defendant Sibron. *Id.* at 65. Sibron concerned a drug seizure case where the officer was clearly seeking narcotics, was not searching the suspect out of a reasonable (or even unreasonable) fear the suspect was armed, and where the state initially argued the search was supported by probable cause (never actually contending that the seizure of drugs from defendant Sibron’s pocket was a *Terry*-style frisk for officer safety until after an appellate ruling at the state-level suggested the idea to the prosecution). *Id.* at 47-48. In relying on the *Sibron* decision as precedent, the court of appeals would have more logically quoted sections relating to defendant Peters case, a second New York case consolidated in the *Sibron* decision, wherein an off duty officer confronted a man

apparently attempting a burglary after chasing the man through the officer's own apartment building. *Id.* at 48-49. There, this Court was actually addressing a *Terry*-like situation where an officer searched a suspect to ensure his own safety (though this Court ultimately found the search supported by probable cause as incident to a lawful arrest). *Id.* at 65.

More importantly, the Thirteenth Circuit quotes this Court in stating that, “[t]he search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault.” *Id.* at 65. However this language must be read with the language immediately before and after it to gain the proper context and understanding. In this section, the *Sibron* Court assumed *arguendo* that the officer searching defendant *Sibron* had “adequate grounds” to search *Sibron* for weapons and, immediately prior to the quote above, the Court writes that “the nature and scope of the search conducted by [the officer] were so clearly unrelated to the justification as to render the heroin inadmissible.” *Id.* at 65. Immediately after the quoted language, the Court writes that “[i]n this case, with no attempt at the initial limited exploration for arms [permitted by *Terry*], [the officer] thrust his hands into *Sibron*'s pocket and took from him envelopes of heroin.” *Id.* at 65. Thus, it seems that what the *Sibron* Court was in actuality communicating in the section as a whole was that the officer may not use the *Terry* doctrine of protective frisk as a predicate for conducting a search unrelated to “the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man.” *Id.* at 65. In other words, the real import of the cited language in its totality is that agents of the state may not perform frisks in the absence of probable cause for the purpose of gaining evidence of criminal conduct as opposed to the stated purpose in both *Sibron* and *Terry* of protecting the safety of officers and bystanders from the threat posed by potentially armed and dangerous criminals. Thus, *Sibron*

states no express rule as to the scope of *Terry* frisks but merely utilizes the search approved for the facts in *Terry* as a contrasting example in demonstrating why the search conducted on defendant *Sibron* is improper in purpose (rather than necessarily in scope) and must be invalidated.

The Thirteenth Circuit is thus mistaken in its reliance on *Sibron* to invalidate the scope of the frisk conducted by Officer Calloway. Because this frisk was reasonable under the standard articulated in *Terry* in terms of both its scope (the extent minimally necessary to assure the officer that the subject does not possess dangerous weapons) and its purpose (to find such weapons rather than to find evidence), this Court should reinstate the judgment of the district court.

- C. This Court has expressly shunned the type of “bright-line” standard for cases implicating the Fourth Amendment that the judgment of the Thirteenth Circuit would create.

In determining what is *reasonable*, this Court has “expressly disavowed any ‘litmus paper’ or single ‘sentence or paragraph rule’ in recognition of the ‘endless variations in the facts and circumstances’ implicated in the Fourth Amendment.” *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983)). Sanctioning the judgment of the Thirteenth Circuit by this Court would have precisely that outcome. Instead, this Court has stated that “[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances.” *Robinette*, 519 U.S. at 39 (1996). In *Robinette*, this Court considered the conviction of a motorist for narcotics possession after recovery of the narcotics during a consensual search; the Ohio Supreme Court, in overturning the conviction, interpreted the Fourth Amendment to require police officers to inform detained motorists that they were “free to go” before seeking consent to search the motorist’s vehicle. *Id.* at 35-36. In rejecting the Ohio

Supreme Court's attempt at the creation of a "bright-line" rule, the *Robinette* Court "instead emphasize[d] the fact specific nature of the reasonableness inquiry" with regard to analyzing whether consent to search had been freely given. *Id.* at 39.

The respondent essentially argues that because the frisk conducted by the officer in *Terry* did not enter the "pockets or under the outer surface of [the defendant's] garments until he had felt weapons" that the frisk conducted by Officer Calloway must necessarily be unreasonable because, in shifting aside the Respondent's jacket, Officer Calloway penetrated beneath the outer layer of clothing. However such a position, in effect a "bright-line" rule that a *Terry* frisk may never penetrate below the outermost layer of a subject's clothing, is wholly at odds with this Court's Fourth Amendment reasonableness analysis. As noted above, the *Robinette* Court expressly disavowed such a strict rule in favor of a reasonableness-under-the-totality-of-the-circumstances-approach. Such a position would be at odds with the spirit of *Terry* which was designed to allow officers limited, but reasonable freedom to react to frisk suspects that officers reasonably suspected to be armed and dangerous based on the facts available to the officer at the time of the encounter in order to protect the officer's safety.

A bright-line rule would prove unworkable in the face of the myriad of factual circumstances faced by officers in confronting criminals during the course of their duty. As such this Court should reject the judgment of the Thirteenth Circuit and reinstate the judgment of the district court.

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE TERMINATION OF A POLICE OFFICER FOR HIS PARTICIPATION IN AN EXTRAMARITAL AFFAIR BECAUSE THERE IS NO FUNDAMENTAL RIGHT TO SEXUAL PRIVACY AND THE REASON FOR THE TERMINATION NEED ONLY BE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE.

A. No fundamental right to sexual privacy was announced in *Lawrence v. Texas* because the Court did not apply the two-step substantive-due-process analysis as outlined in *Washington v. Glucksberg*.

1. The creation of a new, unenumerated fundamental right requires that the right be firmly rooted in the Nation's history and legal traditions.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court was asked to determine if a fundamental right to assisted suicide was protected by the Due Process Clause of the Fourteenth Amendment. When faced with the extension of substantive due process the Court applied a careful two-step analysis, the first step of which was to examine "our Nation's history, legal traditions, and practices." *Id.* at 710. After an extensive, five page review of the Nation's laws against suicide and assisted suicide, the Court concluded that, although attitudes may have changed, "our laws have consistently condemned, and continue to prohibit, assisting suicide." *Id.* at 719. After establishing a lack of protection in the Nation's legal tradition for a right to assisted suicide the Court held there was no fundamental right warranting constitutional protection and requiring strict scrutiny analysis. *Id.*

To the contrary in *Lawrence v. Texas*, 539 U.S. 558 (2003) the Court did not establish a history of protecting a fundamental right to sexual privacy. Rather the Court reviewed the history of laws prohibiting sodomy and noted that changing attitudes and developments in state laws were relevant in determining whether a liberty interest existed in adult, consensual sodomy. *Id.* By quoting *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."), the Court in *Lawrence* acknowledged the importance of history, legal tradition and practices protecting adult, consensual sodomy as the starting point for fundamental rights analysis. *Id.* at 572. The Court's acknowledgement of this first step as outlined by the Court in *Glucksberg* indicates that that analysis is still proper when determining if an unenumerated fundamental right

exists. However, the Court did not satisfy this first step in the two-step substantive due process analysis because of its failure to identify a history or legal tradition of protecting homosexual sodomy.

The petitioners in *Lawrence* had been convicted under Texas law of “deviate sexual behavior” as described by the Texas law as “intercourse with another individual of the same sex.” *Id.* at 563. A similar issue had been raised in the Court’s consideration of *Bowers v. Hardwick*, 478 U.S. 186 (1986) where the petitioner sought to invalidate a Georgia statute prohibiting sodomy after a police officer had observed him engaged in sodomy with another adult male. While *Lawrence* expressly overruled *Bowers*, it did not expressly overrule *Glucksberg*, thus the substantive due process analysis set forth in *Glucksberg* remains the analysis to be applied when determining whether substantive due process protections ought to be extended to a new fundamental right. Since the Court has always been careful about expanding substantive due process protection to rights not enumerated in the Constitution, the Court in *Lawrence* would have been explicit had it meant to replace the two-step substantive due process analysis of *Glucksberg* with the inquiry made in *Lawrence*.

The Eleventh Circuit in *Lofton v. Secretary of the Dep’t of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004) addressed whether a fundamental right to sexual privacy was announced in *Lawrence* when it evaluated Florida’s prohibition against homosexuals adopting children. Referring to the two-step analysis from *Glucksberg*, the court pointed out that *Lawrence* did not evaluate the history and tradition of the asserted right, which is one of the primary features of fundamental rights analysis. *Id.* The conclusion was that “it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.” *Id.* at 817.

When the Court extends constitutional protection to “an asserted right or liberty interest” the Court places “the matter outside the arena of public debate and legislative action”. *Glucksberg v. Washington*, 521 U.S. 702, 720 (1997). When the Court declares a right to be fundamental it heightens the level of scrutiny applied to legislative action that may seek to limit that right to strict scrutiny which is often fatal in fact to the legislation. The *Lawrence* Court was certainly aware of the caution and prudence with which the Court proceeded in this area and would have applied the same level of care to extending constitutional protection to a right of sexual privacy if the Court had intended to create such a fundamental right.

In this case, the respondent would be unable to show a history and tradition in this country of protecting a right to extramarital affairs. As the Craven statute illustrates, adultery does not have a history of protection by the laws of the states. To the contrary there is a history and tradition of making this conduct illegal. While after *Lawrence* changing societal attitudes may be relevant to the substantive due process inquiry, the respondent is unlikely to show a growing acceptance of adultery similar to involving acceptance of homosexuals relied upon in *Lawrence*.

2. The creation of a new, unenumerated fundamental right also requires a careful description of the asserted fundamental liberty interest.

The second step of the substantive due process analysis requires “a ‘careful description’ of the asserted fundamental liberty interest”. *Glucksberg v. Washington*, 521 U.S.702, 721 (1997). In *Glucksberg*, the respondents tried to frame the issue as whether the Constitution protected a right to die, but the Court identified the interest with more specificity by framing the issue as “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.” *Id.* at 723. The Court in

*Lawrence* addressed the idea of autonomy, especially in choosing personal relationships, but it did not define a sweeping right of sexual privacy. *Lawrence v. Texas*, 539 U.S. 558 (2003). Rather the Court in *Lawrence* addressed whether the Texas law can criminalize conduct of “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.” *Id.* at 577.

While the Court in *Lawrence* was invited to announce a new fundamental right to sexual privacy, nowhere in the decision is such a right declared. See *Lofton v. Secretary of the Dep’t of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004). Rather than a careful description as mandated by traditional substantive due process analysis, the Court writes, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). Additionally, the language used harkens to a liberty interest protected by the Fourth Amendment’s prohibition against unreasonable intrusions into the home or private places rather than a protection of a broad right of sexual privacy. *Id.*

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

*Lawrence v. Texas*, 539 U.S. 558, 572 (2003). The Court is concerned with the State’s infringement on the right to define adult relationships rather than a broad protection of sexual privacy.

Justice Scalia, writing in dissent in *Lawrence*, addressed the Court’s failure to announce a new fundamental right because “nowhere does the Court’s opinion declare that homosexual

sodomy is a ‘fundamental right’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right.’” *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). In footnote two of his dissent Justice Scalia addresses the “societal reliance” on *Bowers* by listing decisions from the various circuits that relied on *Bowers* in denying fundamental rights challenges to state and federal laws and policies. *Id.* at 590, n.2. The majority in *Lawrence* was aware of this reliance on *Bowers*’ denial of a fundamental right and would have carefully considered the effect of announcing a new fundamental right in *Lawrence*. Such awareness of the consequences of creating a new, broad fundamental right to sexual privacy rather than just protecting the liberty interest of homosexuals to engage in intimate conduct as an expression of their personal relationships would have led the Court to articulate with specificity and clarity a fundamental right to sexual privacy, if that had been the Court’s intention in *Lawrence*. Respect for *stare decisis* as well as the care with which expansion of substantive due process protection had been conducted in the past required the Court to declare with a certain description the right it sought to protect. In *Lawrence* the Court did not seek to protect a broad, sweeping right to sexual privacy as the respondent in this case would have the Court believe. Rather the Court in *Lawrence* sought to protect the liberty of consenting, adult homosexuals to choose their partners without interference from the government.

Similar to the respondents in *Glucksberg* who sought to expand substantive due process protection to a right to die, the respondent in this case has not carefully described the right he wishes to have protected by substantive due process. Were he to define the right with the requisite specificity he would have to ask the Court to hold there is a fundamental right to extramarital, sexual relationships. To allow the respondent to define the asserted right with such

broad strokes as a right to sexual privacy would be to call into question the legal tradition of regulating intimate conduct between consenting adults that is harmful to society, such as prostitution. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting). As the Court in *Lawrence* emphasized, the asserted right was not a broad right to sexual privacy that would place some conduct beyond the competence of the legislature, but was a right to consensual sodomy between homosexual adults who sought to express their personal relationships by this form of intimate conduct. *See Id.* The respondent would incorrectly have the Court hold that *Lawrence* stood for a much broader, less well-defined right to sexual privacy that simply was not announced by the Court.

3. Governmental intrusions into fundamental rights are subject to strict scrutiny, and the Court in *Lawrence* only applied the rational basis test to the Texas law.

If the Court in *Lawrence* had announced a new fundamental right it would have applied strict scrutiny to the Texas law in order to rule the law unconstitutional. However, the language used by the Court is that of the rational basis test. In holding the Texas law unconstitutional the Court says, “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In *Lofton v. Secretary of the Departmentt of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), the Eleventh Circuit placed a great deal of significance on the *Lawrence* Court’s failure to use strict scrutiny as evidence that a new fundamental right was not announced. Additionally, the Fifth Circuit upheld a Texas prohibition against the promotion of sexual devices stating that “[t]he Court in *Lawrence* did not announce a fundamental right that would have triggered a strict scrutiny analysis but rather recognized only a narrow liberty interest.” *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 358 (5th Cir. 2008).

Infringement of a fundamental right requires the infringement to be narrowly tailored to serve a compelling state interest, in other words, to survive strict scrutiny. *See Glucksberg v. Washington*, 521 U.S. 702, 721 (1997) (holding that right to assisted suicide was not fundamental and rational basis review was appropriate scrutiny for Washington's ban). On the other hand, if no fundamental right is implicated the legislative action is only subject to rational basis review which requires only that the government action be rationally related to some legitimate governmental purpose. *See Heller v. Doe*, 509 U.S. 312 (1993) (holding that rational basis review was the appropriate standard to review statutory scheme requiring higher standard of proof for involuntary commitment of mentally ill, as opposed to mentally retarded.)

The Court in *Lawrence* invalidated the Texas statute by using the language of rational basis review holding that there was no legitimate governmental interest. If the Court had announced a carefully described fundamental right with its roots in the history and traditions of the Nation, the Court would likely have applied the most searching level of review possible to invalidate the law. Instead of heightened review, the Court held that the law was an attempt by the majority to regulate the morals of the minority and as such the law had no rational basis. *See Lawrence v. Texas*, 539 U.S. 558, 572 (2003). The Court mentioned neither narrow tailoring nor a compelling state interest which is undoubtedly required by the Court's precedent when evaluating an infringement upon a fundamental right. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (Connecticut law forbidding the use of contraceptives infringed fundamental right to marital privacy and was subject to strict scrutiny review), *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (regulations burdening fundamental right to decide whether to bear or beget a child subject to strict scrutiny review).

Since there was no new fundamental right announced by *Lawrence*, the termination of the respondent in this case was justified as long as the action could be tied to a rational basis for the action. After *Lawrence*, regulating morality is unlikely to suffice as a rational basis for government action. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). However the Rushmore County Police Department's action was not motivated by a desire to regulate the morality of the respondent. By engaging in an affair with the police chief's daughter while the respondent remained married, the respondent had committed adultery in violation of the statute in prohibition of this conduct. The police department has a legitimate interest in regulating the conduct of officers who are in violation of the very laws that they have sworn to uphold.

Police departments have a history of regulating the off-duty conduct of their officers. In *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983) disciplinary action against officers who engaged in off-duty dating did not violate the officers' privacy interests. The officers in *Shawgo* attempted to attack the state's and the department's ability to regulate their off-duty conduct, but the Fifth Circuit recognized that the state has a greater interest in regulating its employees' activities than those of the population in general. *Id.* at 483. The regulation forbidding members of the department was held to be rationally related to the department's interest in the discipline of its force. *Id.* Here, the Rushmore County Police Department's interest in maintaining a law-abiding force is rationally related to the respondent's dismissal for unbecoming conduct.

A more recent, post-*Lawrence* decision by the Tenth Circuit held that a police officer who had engaged in an off-duty affair did not have a fundamental liberty interest in private consensual sex and that rational basis was the appropriate level of review. See *Seegmiller v. Laverkin City*, 528 F.3d 762 (10th Cir. 2008). The Tenth Circuit was unable to read an announcement of a fundamental right to private sexual activity into the *Lawrence* decision, and

finding no fundamental right at issue, applied only rational basis scrutiny to the police department's policy. *Id.* The city's law enforcement code of ethics required each officer to keep his or her private life unsullied so as not to discredit the officer or the agency, and the court held this requirement enforced discipline in the department and kept credibility for the department in the eye of the public, thus the reprimand was rationally related to a legitimate government interest. *Id.* at 772. The Rushmore County Police Department, just as the Laverkin City Police Department, has a legitimate interest in maintaining discipline in the police force and credibility in the public eye and should be allowed to discipline officers when they break the law and engage in unbecoming conduct.

In addition to the illegality of the respondent's action, the police department also had to be concerned with the respondent's willingness to enter into an intimate relationship with a woman who had proven herself capable of making false allegations of corruption against the department. Similarly in *Baron v. Meloni*, 556 F.Supp. 796 (W.D.N.Y. 1983) an officer's termination for his repeated association with a mobster's wife did not violate the liberty interest of the Fourteenth Amendment because of the sensitive nature of a police officer's job and the possible negative impact on the department's credibility that could result from such a relationship. Members of the police department must be able to trust one another and must have a sense of loyalty to each other and to the department. An intimate relationship with someone who had sought to undermine the credibility of the department by making false claims of corruption could lead to a conflict between the respondent's loyalties. The police chief is responsible for the safety and wellbeing of all of the county's citizens as well as the members of his department. His authority would be undermined if he were forced to allow a member of the department who had engaged in not only unbecoming, but illegal, conduct to continue to serve in

the department. Since the police chief's reason was rationally related to a legitimate government interest the termination of the respondent did not violate the Constitution.

- B. Rather than announcing a new fundamental right to sexual privacy, the Court more likely sought to remedy invidious discrimination against homosexuals.

*Lawrence* is subject to numerous interpretations, but an interpretation adopted in *Williams v. King* that *Lawrence* may be more about remedying prejudice against the minority group of homosexuals is most appropriate in light of the language of *Lawrence*, which mixes substantive due process with equality. 420 F. Supp. 2d 1224 (N.D. Al. 2006). The language and conclusions of *Lawrence* are reminiscent of the famous footnote four in *United States v. Carolene Products*, 304 U.S. 144 (1938). Legislation motivated by animus may spark the need for more searching judicial inquiry. When legislation is directed at “discrete and insular minorities” and when political processes which should protect those minorities through repeal of such legislation fail, “more searching judicial inquiry” may be required for the review of those statutes. *Id.* at 152-53 n.4 (1938).

Lawrence Tribe addresses the effect of legislation directed at homosexuals in his interpretation of *Lawrence*:

...*Lawrence* quickly becomes a story about how the very fact of criminalization, even unaccompanied by any appreciable number of prosecutions, can cast already misunderstood or despised individuals into grossly stereotyped roles, which become the source and justification for treating those individuals less well than others.

Lawrence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L.Rev. 1893, 1896-97 (2004). This animus toward a particular group led Justice O'Connor to observe in her concurrence in *Lawrence* that the Court has

“consistently held, however that some objectives, such as ‘a bare ... desire to harm a politically unpopular group’ are not legitimate state interests, and that ‘[w]hen a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause”.

*Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)).

While *Lawrence* was decided using the doctrine of substantive due process, its mixture of substantive due process and equal protection is also evinced in the majority’s reference to the importance of *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer* an amendment to Colorado’s Constitution was invalidated because of its disparate treatment of homosexuals. *Id.* The Court held the amendment was a violation of the Equal Protection Clause because the animosity toward homosexuals which inspired the amendment was not a legitimate government purpose. *Id.* The majority in *Lawrence* refused to invalidate the Texas statute on equal protection grounds due to concerns over the ability of the legislature to rewrite the law to satisfy the Equal Protection Clause while continuing to discriminate against homosexuals. *See Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003). However, the majority recognized the interconnectedness of the two doctrines stating: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests”. *Id.* at 575.

Post-*Lawrence* decisions have addressed the constitutionality of the “Don’t Ask, Don’t Tell” (DADT) statute which requires separation of homosexuals from the United States armed services and have applied heightened scrutiny. In *Cook v. Gates* the First Circuit evaluated an as-applied challenge to the DADT statute brought by former armed services members and recognized “a narrowly defined liberty interest in adult consensual sexual intimacy in the

confines of one's home and one's private life." 528 F.3d 42, 56 (1st Cir. 2008). However, when the court balanced the congressional interest in an effective military force and legislative competence against the intrusion into the narrow liberty interest announced in *Lawrence*, there was no substantive due process violation and the DADT statute was upheld. *Id.* Additionally, in *Witt v. Department of the Air Force*, the Ninth Circuit remanded the case back to the district court for a heightened level of review of the as-applied challenge to the DADT statute brought by an Air Force reservist nurse who had been suspended from duty because of her private relationship with a civilian woman. 527 F.3d 806 (9th Cir. 2008). The court in *Witt* extrapolated a heightened test from the decision in *Sell v. United States*, 539 U.S. 166 (2003) in which the Court held that the government could force a defendant to take anti-psychotic drugs to render that defendant competent to stand trial if there was a significant governmental interest that would be significantly furthered and if the involuntary administration of those drugs was necessary and medically appropriate. Using the holding in *Sell*, the court in *Witt* held that "when the government attempts to intrude upon the personal and private lives of *homosexuals*, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt v. Department of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008).

In both *Cook* and *Witt* it is important to note that the courts were dealing with challenges to the DADT statute from members of a minority group which may explain the need for a heightened level of review that would not be necessary in this case. In the DADT cases the courts also read into *Lawrence* heightened review that was not necessarily clear from the language of the decision. Here, the Court does not need to protect the respondent from invidious

discrimination due to his membership in a discrete and insular minority because the respondent is not a member of such a minority group. The respondent is a heterosexual male whose sexual preferences do not make him the target of legislation that discriminates against him because of his choice of personal relationships or sexual partners. The adultery statute and the department's action at issue in this case are not directed at stereotyping a minority or criminalizing the very conduct that makes the person a member of that minority group. This statute is not born of animosity toward a minority group that would require the Court to afford the group protection that the political process may not afford the group, such as in *Romer* or as predicted would happen in *Carolene Products*. The department's action in terminating the defendant did not target him because of his membership in a minority group. Neither the respondent's equality nor his substantive due process rights are implicated by the adultery statute or the department's decision to terminate him for unbecoming conduct.

### Conclusion

For the foregoing reasons, the Court should reverse the judgment of the Thirteenth Circuit Court of Appeals and reinstate the judgment of the United States District Court for the District of Craven.

Respectfully submitted,

Team K

*Attorneys*

## Appendix

U.S. Const. Amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. XVI. provides in relevant part:

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

(emphasis added).