

No. 08-31958

In The
Supreme Court of the United States

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RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,

Petitioners,

v.

WILLIAM R. TRACEY

Respondent.

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**On Writ of Certiorari To The
United States Court of Appeals
For The Thirteenth Circuit**

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RESPONDENT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Is it reasonable under the Fourth Amendment for a police officer, acting under only a reasonable suspicion, to extend his search by moving aside a suspect's exterior garment to view what is beneath?
- II. Does the Due Process Clause of the Fourteenth Amendment protect an individual's ability to participate in a private and consensual sexual relationship between adults without an employer's interference or a risk of ultimately losing his job?

STATEMENT OF THE CASE

In February 2006, William R. Tracey (“Tracey”) filed a lawsuit against the Rushmore County, Craven, Police Department (“the Police Department”) in the United States District Court for the District of Craven. In that claim, Tracey challenged the constitutionality of the Police Department’s actions pursuant to 42 U.S.C. § 1983 (2000) for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. The Police Department responded by filing a motion for summary judgment, claiming that it was entitled to judgment as a matter of law. The District Court granted the Police Department’s motion for summary judgment on February 19, 2006. Subsequently, Tracey appealed to the United States Court of Appeals for the Thirteenth Circuit. The Appellate Court reversed the District Court’s ruling on April 29, 2007. Upon petition, the United States Supreme Court granted certiorari to the Court of Appeals for the Thirteenth Circuit in October 2008.

FACTS

On June 7, 2005, in Rushmore County, Craven, an officer with the Police Department, Maxwell Calloway, (“Officer Calloway”) performed an intrusive search of Tracey. This search resulted in the discovery and seizure of his firearm and ultimately his arrest. (R. p. 2). Tracey was a fellow officer in Rushmore County who was involved in an undercover investigation at the time of the confrontation. Id. However, Officer Calloway was unaware that Tracey was an undercover officer. Id.

Before the arrest, Officer Calloway initially observed Tracy in an area where he anticipated confrontation with a prospective firearms purchaser. Id. Though Tracey did

not match the description of the prospective purchaser, Officer Calloway became suspicious due to Tracey's dress and behavior. Id. Officer Calloway then approached and confronted Tracey. Id. As Tracey stood to walk away, Officer Calloway stopped and frisked him, grabbing him by the wrist, spinning him around, and patting down his outer clothing. (R. p. 3). During this frisk, Officer Calloway did not feel any object that was consistent with a weapon. Id. When Tracey turned to walk away, Officer Calloway noticed a leather strap underneath Tracey's jacket, and even though he did not know the strap's purpose, asked Tracey again to stop and turn around. Id. At this point, Officer Calloway forcefully moved Tracey's jacket, despite resistance, and found a firearm. Id. Officer Calloway seized the firearm and placed Tracey under arrest. Id.

Upon Tracey's arrest, the additional items seized included a cellular phone containing the contact information for Jacqueline Malone ("Malone"). Id. Upon a call to Malone, the Police Department discovered that she and Tracey were involved in a romantic relationship. Id. As a result, on June 8, 2005, the Police Department terminated Tracey for his participation in an extramarital affair. (R. p. 4). The Police Department publicly justified Tracey's termination based upon "behavior unbecoming of an officer," though the police chief admitted that the true reason behind Tracey's termination was his involvement in the extramarital affair in violation of the State's adultery statute. Id. In truth, while Tracey is married, at the point of his termination he was separated from his wife and had been served with divorce papers. Id. Additionally, according to court records no prosecutions had been brought under the Craven Statute § 11-198 in over twenty years. Id.

Tracey claims the right to conduct an undercover investigation free from unreasonable search and seizure pursuant to the Fourth Amendment. Additionally, Tracey claims the right to enjoy his freedom to participate in a private, consensual sexual relationship without the interference of any outside party.

ARGUMENT

I. BECAUSE OFFICER CALLOWAY LACKED THE REQUISITE PROBABLE CAUSE TO LOOK BENEATH TRACEY’S JACKET, THE COURT OF APPEALS PROPERLY DEEMED HIS ACTIONS OUTSIDE THE BOUNDS OF THE TERRY DOCTRINE AND AN UNREASONABLE SEARCH AND SEIZURE FOR THE PURPOSES OF THE FOURTH AMENDMENT.

The text of the Fourth Amendment reads: “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. IV. When citizens are subjected to search and seizure, the Fourth Amendment makes it clear that a warrant, supported by probable cause, is the cornerstone of their protection against unlawful searches. At the heart of the Fourth Amendment is the individual’s “right to be let alone – the most comprehensive of rights and the right most valued by civilized men.” Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

In light of Terry v. Ohio, 392 U.S. 1 (1968) and its progeny, police officers are not required to receive prior judicial authorization to make an investigative stop upon a reasonable suspicion of the existence of a potential danger to an officer or the community. However, “[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must

surely be an annoying, frightening, and perhaps humiliating experience.” Id. at 24-25. In Terry, this Court also warns that it is unreasonable for an officer to act on “inchoate and unparticularized suspicions or hunch[es].” Id. at 27. Ultimately, while an officer needs to have reasonable and articulable suspicion in order to stop and frisk a suspect under Terry, any invasion of a suspect’s privacy beyond an authorized Terry search for weapons requires the much higher standard of probable cause.

Against this backdrop, as a citizen of the United States, Tracey asserts a fundamental right to be secure against unreasonable searches and seizures pursuant to the Fourth Amendment. The Court of Appeals for the Thirteenth Circuit has confirmed this right and held that the Police Department’s restrictions violated the guarantees under the Fourth Amendment. Therefore, Tracey requests that this Court uphold that decision.

A. Because Officer Calloway’s Intrusion Beneath Tracey’s Outer Garments Falls Outside the Bounds of the Terry Doctrine, the Officer’s Lack of Probable Cause Constitutes a Violation of Tracey’s Fourth Amendment Right.

On June 7, 2005, Officer Calloway searched fellow officer Tracey and subsequently seized his property. The Fourth Amendment limits governmental action; searches and seizures are only reasonable if they are conducted with probable cause. In Terry, however, this Court carved out a narrow exception to this general rule that allows the “stop and frisk” of a suspect by a police officer who possesses a reasonable belief that a suspect may be armed and dangerous. Id. at 27. In accordance with this decision, in determining whether a justifiable suspicion exists, an officer may draw specific, reasonable inferences in light of his experiences to make a decision about whether to frisk

that individual. Id. Only when this narrowly tailored determination has been met may an officer make a limited search without probable cause. Id.

1. Officer Calloway's Initial Suspicion that Tracey was Armed Should Have Been Dispelled After His Unfruitful Terry Stop and Frisk.

Even if Officer Calloway's initial Terry stop and frisk constituted a justified intrusion, the Officer's initial suspicion should have disappeared based upon his unfruitful pat down of Tracey's outer garments. In light of the circumstances surrounding Officer Calloway's assigned duties on June 7, 2005, it was concededly, objectively reasonable for him to conduct a Terry Frisk on Tracey. Officer Calloway's knowledge of reported criminal activity, involving illegal weapons put him on notice for suspicious individuals in the area. In addition, his observations of Tracey's peculiar clothing as well as his furtive scanning of the rooftops and surrounding areas contributed to his suspicions. These factors along with Tracey's reaction to his initial contact most likely amounted to the reasonable and articulable suspicion as required under Terry to frisk an individual for weapons. After assessing the "totality of the circumstances," it was most likely objectively reasonable for Officer Calloway to frisk Tracey for weapons. See Ohio v. Robinette, 519 U.S. 33 (1996).

However, Officer Calloway's frisk of Tracey was unfruitful. His permitted search failed to locate a weapon and, therefore, dispelled any objectively reasonable suspicion that he might have garnered in light of the circumstances and his experience. At the point that Officer Calloway extended his search beneath Tracey's clothing, his actions exceeded the bounds of the Terry doctrine and transformed into an unreasonable search and seizure. The text of the Fourth Amendment itself provides that searches and seizures are reasonable only if they are conducted with probable cause; hence, searches and

seizures without probable cause are constitutionally unreasonable. Here, as Officer Calloway's initial pat down was fruitless, his permissible Terry frisk did not give rise to any probable cause which would have allowed a more extensive search. See 392 U.S. at 26 (defining the principle of particular justification mandating that suspicious officers must stay within the scope of justification). Against this backdrop, the Thirteenth Circuit Court of Appeals correctly concluded that Officer Calloway, lacking the requisite probable cause, was not allowed to extend his search beyond the outer garments, as the Terry frisk should have dispelled any reasonable suspicion of a weapon.

2. Because the Scope of a Terry Stop is Limited to a Patting of the Outer Garments, Officer Calloway's Intrusive Search Underneath Tracey's Outer Garment Exceeded His Authority.

When Officer Calloway moved aside the left exterior portion of Tracey's jacket, he exceeded the bounds of the Terry doctrine. Since he lacked the requisite probable cause to justify his actions, Officer Calloway's unreasonable search violated Tracey's rights pursuant to the Fourth Amendment. As this Court held in Sibron v. State of New York, such an intrusive search conducted merely on the grounds of reasonable suspicion "violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents." 392 U.S. 40, 65-66 (1968).

In Sibron, this Court clearly defined the scope of a Terry search:

The 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. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched.

Id. at 65 (emphasis added) (comparing an officer's search in Sibron to another officer's search in Terry in order to define the nature and scope of Terry searches more generally);

(R. p. 9). While the Terry doctrine has been expanded since these seminal cases in 1968, this Court has unarguably held that each case should be decided according to the specific facts at hand. A ruling that allowed Officer Calloway to intrude underneath Tracey's clothing without probable cause would be a departure from the Terry doctrine as it stands today no decision has been rendered to allow such an extension of a Terry search based merely on an officer's reasonable suspicion.

In the present case, during the initial frisk Officer Calloway did not discover a weapon which would have given him the authority to further search Tracey and to seize his property. Therefore, the facts in this case notably differ from those presented in Terry, where the officer did find a handgun upon his Terry frisk. The facts in this case are more similar to those in Sibron, where an officer violated the nature and scope of the Terry stop by placing his hands into the suspect's pocket upon mere suspicion of contraband. See Sibron, *supra*. An intrusion underneath Tracey's outer garment is arguably even more intrusive than a reach into a pocket. Ultimately, because Officer Calloway failed to find a weapon and therefore lacked probable cause to search Tracey, his actions amounted to an unreasonable and unconstitutional search and seizure and violated Tracey's rights under the Fourth Amendment.

3. Tracey Did Not Take Any Unprovoked Actions After the Initial Frisk to Warrant Officer Calloway's Intrusive Search which Amounted to an Unreasonable Search and Seizure.

Though Officer Calloway's initial, fruitless Terry stop of Tracey should have dispelled his suspicions, it did not. During Officer Calloway's search, Tracey was cooperative, albeit frustrated. (R. p. 3). This Court has held in Terry that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief,

intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.” 392 U.S. at 24-25. After such an experience, when Tracey again turned to leave, Officer Calloway again “seized” his person by requesting him to “stop and turn around.” (R. p. 3). Based upon the principle of particular justification, as this Court set forth in Terry, a police officer’s actions must be (1) justified at its inception and (2) reasonably related in scope to circumstances justifying conduct in the first place. 392 U.S. at 26. At this point in his investigation, Officer Calloway had no further suspicion other than a vertical leather strap, of which he was unsure of the purpose and unable to closely examine. (R. p. 3). As the Court of Appeals noted, Officer Calloway had, at most, a reasonable suspicion with respect to this strap which does not rise to the level of probable cause required to justify the officer’s subsequent action in moving aside Tracey’s jacket.

For this reason, it is understandable that Tracey reacted when Officer Calloway extended his search beyond the nature of a Terry stop. In his position as an undercover officer, Tracey surely possessed a clear understanding of the nature and scope of a Terry stop, and did not become provoked until Officer Calloway illegally attempted to search underneath his jacket. The fact that Tracey attempted to brush aside Officer Calloway’s hand as he violated the Fourth Amendment (well known to Tracey) does not transform Officer Calloway’s search into a permissible one.

4. Officer Calloway Lacked Both Specific Information About a Weapon from an Informant and a Compromised Vantage Point which could have Allowed him to Make a More Extensive Search.

As this Court recognized in Terry, a policeman making a reasonable investigatory stop may conduct a limited, protective search for concealed weapons upon a reasonable

belief that the suspect is armed and dangerous. In Adams v. Williams, this Court made a notable and narrow decision which upheld an officer's actions in reaching and removing an unseen handgun from a suspect's waistband though the weapon was not in plain view. 407 U.S. 143 (1972). As this scenario may be likened to the present case, it is relevant to address and distinguish it from the facts of Tracey's case.

In Adams, this Court upheld the officer's actions in reaching toward and seizing an unseen gun. Id. In Adams, however, the officer's knowledge of the gun's location was provided by an informant whom the officer knew personally. Id. Based upon the information from this informant, this Court held that the officer had enough indicia of reliability to justify the officer's forcible stop of the petitioner and protective seizure of his weapon. Id. at 145-149 (emphasizing the suspect's refusal to step outside of the car as compromising to the officer's safety). In Adams, Court held that the informant's tip afforded reasonable ground for the intrusive search that ensued. Id.

The circumstances that justified the search and seizure of the handgun in Adams differ drastically from the case at hand. In Tracey's situation, Officer Calloway had spoken with no informant. As this Court held in Adams that "the information carried enough indicia of reliability to justify the officer's forcible stop of Williams (the suspect)" Id. at 147, no such indicia of reliability existed here. Officer Calloway's view of the leather strap did not rise to such a level. Additionally, Officer Calloway confronted Tracey in broad day light in a public area, resulting in no sense of heightened danger, especially due to his prior Terry frisk.

Officer Calloway's extended search was not limited in scope to its purpose. He acted on an inchoate hunch that leather straps can be consistent with concealed weapons.

If uninformed Terry searches are permitted to be extended underneath outer garments based on the viewing of a leather strap, every individual wearing a pair of suspenders could be intruded upon by overzealous law enforcement officers. Ultimately, Officer Calloway's actions, unlike the officer in Adams, constituted an unreasonable search and seizure and violated Tracey's Fourth Amendment rights.

B. Officer Calloway's Glimpse of Tracey's Leather Strap Does Not Fall Within the Bounds of the Plain View Exception to the Fourth Amendment's Probable Cause Requirement

The Police Department relies on the "plain-view doctrine" as permissible grounds for Officer Calloway's seizure of Tracey's weapon. However, the plain view doctrine does not apply in this case, as Officer Calloway moved the exterior of Tracey's jacket without probable cause and conducted an illegal search in violation of the Fourth Amendment.

In Coolidge v. New Hampshire, this Court first established the "plain-view doctrine" as an exception to the Fourth Amendment and a permissible ground for the seizure of a suspect's weapon. 403 U.S. 443 (1971). In Coolidge, this Court noted that certain circumstances may allow a police officer's warrantless seizure of an item that comes within plain view. See id. at 465-71. This Court subsequently clarified this exception to the warrant requirement in Arizona v. Hicks, 480 U.S. 321 (1987), when it established that the plain view doctrine does not apply if an officer lacks probable cause. This Court held that, "to say otherwise would be to cut the plain view doctrine loose from its theoretical and practical moorings." Id. at 327. In Hicks, police officers searching for weapons during a shooting investigation noticed stereo equipment which they reasonably believed had been stolen. Id. at 324. However, because the officers moved the equipment

to view the serial numbers, this Court found that even this minimal intrusion constituted an illegal search. Id. at 325. Though the equipment itself was in plain view and was in fact stolen, the Hicks court suppressed the evidence due to the officer's lack of probable cause before such an intrusion.

In the instant case, Officer Calloway noticed a vertical leather strap underneath Tracey's jacket after the completion of a Terry stop and frisk. Officer Calloway admittedly did not know the strap's purpose nor did he get a good look at the strap. (R. p. 3). Noticing that the strap was consistent with those used to carry a concealed weapon, Officer Calloway was justified, at best, in revisiting his previously dispelled suspicions. In light of this new reasonable suspicion, a subsequent Terry frisk in the area of the leather strap would have been his only recourse. Here, no weapon was in plain view giving rise to probable cause and direct seizure of a weapon. Therefore, the plain view doctrine does not apply and Officer Calloway conducted an illegal search.

This Court has addressed the plain view doctrine in Horton v. California, 496 U.S. 128 (1990). In Horton, this Court clearly set out guidelines for when this exception is triggered. In order for evidence to be properly seized under the plain-view doctrine: (1) the officer must be legally on the premise, (2) the incriminating character of the evidence must be "immediately apparent," and (3) the officer must have a lawful right of access to the object itself. Id. at 136-137. Here, while Tracey concedes that Officer Calloway viewed the leather strap from a lawful vantage point, he maintains that the incriminating character of the evidence was not "immediately apparent." (R. p. 9). As previously mentioned, Officer Calloway has admitted that he did not know the strap's purpose (R. p. 3), and therefore the strap's incriminating character could not possibly have been

“immediately apparent.” Additionally, Officer Calloway’s lawful vantage point from which he viewed the leather strap was compromised when he made an intrusive, illegal search without probable cause.

Ultimately, both Hicks and Horton apply to the facts of this case to demonstrate that the plain view doctrine does not apply. Officer Calloway’s reasonable suspicion that the leather strap could be used to hold a gun does not excuse his illegal search. By moving the exterior of Tracey’s jacket to further investigate the purpose of the leather strap, Officer Calloway conducted an illegal search in violation of the Fourth Amendment.

II. BECAUSE THE POLICE DEPARTMENT TERMINATED TRACEY BASED SOLELY UPON HIS PARTICIPATION IN A CONSENSUAL SEXUAL RELATIONSHIP, CONDUCTED OFF DUTY AND IN PRIVATE, THE COURT OF APPEALS PROPERLY HELD THAT THE FIRING VIOLATED TRACEY’S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Due Process Clause of the Fourteenth Amendment generally prohibits any governmental entity from depriving any person of life, liberty or property without due process of the law. U.S. Const. amend. XIV. Private sexual conduct between consenting adults, as it arises in the instant case, is a potential liberty interest, the protection of which must be resolved under the Due Process Clause of the Fourteenth Amendment. In addressing such a controversy, this Court has historically examined the extent of the governmental interference and whether that interference is justified by a sufficient purpose. Here, the Police Department’s interference in the private sexual affairs of an employee is not sufficiently justified and its actions in terminating Tracey are unconstitutional pursuant to the Due Process Clause of the Fourteenth Amendment.

A. Because Private Sexual Relationships Represent a Fundamental, Protected Liberty Interest Requiring the Application of Strict Scrutiny, the Police Department’s Termination of Mr. Tracey Constituted a Violation of his Constitutional Rights.

In Lawrence v. Texas, 539 U.S. 558 (2003), this Court established that private, consensual sexual relationships between adults are a protected fundamental right under the Due Process Clause of the Fourteenth Amendment. The case involved the prosecution of two men under Texas’ anti-sodomy law for engaging in consensual homosexual activity in one of the men’s apartments. Id. at 563. The ruling in Lawrence represents the latest entry in a line of cases which recognize that a fundamental right to privacy arises from the First Amendment. Historically, the progression in these decisions has worked to expand the boundaries of this right with regard to private consensual sexual activity between adults. For example, in Griswold v. Connecticut, 381 US 479 (1965), this Court upheld the right of married couples to learn about, obtain, and use contraceptives. In Griswold, this Court explained that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Id. at 484. Hence, the rights specifically provided by the First Amendment afford the citizen less protection if the government is free to restrict all the necessary but unmentioned appurtenant rights. Id. at 483. In this case, this Court recognized a fundamental right to privacy which included the sexual facet of the marital relationship.

In Eisenstadt v. Baird, 405 US 438 (1972), this Court extended the scope of Griswold to apply to individuals by holding a State law barring unmarried persons access to contraceptives to be in violation of the Equal Protection Clause and unconstitutional. While this Court employed rational basis review to dismantle the statute in Eisenstadt, it

noted that a higher level of review may have been necessary if the State's justification had been sufficient so as to pass rational basis muster. Id. at 447, n.7. This Court carried this momentum in Carey v. Population Services Int'l, 431 U.S. 678 (1977), where it used strict scrutiny to invalidate a New York statute prohibiting the sale of contraceptives to people under the age of sixteen. Therefore, as announced in Griswold and expanded in Eisenstadt and Carey, this Court's ruling in Lawrence represents a continuation and further expansion of this line of cases which recognize sexual privacy as a fundamental right.

This Court's opinion in Lawrence overturned its previous decision in Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld a Georgia sodomy statute as constitutional in its failure to impinge upon any fundamental right. In Lawrence, this Court noted that in Bowers, the narrow framing of the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," revealed "[its] own failure to appreciate the extent of the liberty at stake." 539 U.S. at 566-67. In Lawrence, this Court went on to explain that while the statutes involved in each case "purport to do no more than prohibit a particular sexual act...their penalties and purposes...have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home." Id. at 567. Hence, the Lawrence decision reveals this Court's recognition that "liberty under the Due Process Clause gives [people] the full right to engage in their [chosen form and manner of sexual] conduct without intervention of the government." Id. at 578. This Court also noted in Lawrence that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Id. at 562. Here, this Court likens sexual

privacy to the right to free speech and religion, fundamental First Amendment rights which unquestionably receive the protection of strict scrutiny. Ultimately, the Lawrence decision demonstrates this Court's declaration that the broad right to sexual privacy deserves a heightened level of protection.

It is important to note that the Lawrence decision involves two consenting adults who choose to engage in certain sexual practices in the privacy of their own homes. Just as importantly, the case does not deal with minors, with persons who might be coerced, or with persons "situated in relationships where consent might not easily be refused." Id. In addition, the case does not involve any public actions or prostitution nor does it require the government to formally recognize any new relationships. Id. In Lawrence, this Court specifically addressed the rights of adults to enter into consensual intimate relationships without fearing government prosecution. Therefore, Lawrence provides a sound basis for this Court's recognition of sexual privacy as a fundamental right which should be protected from government interference, especially when those relationships involve: (1) private sexual conduct (2) between consenting adults (3) in the privacy of the home.

In assessing the Police Department's termination of Tracey for his private, consensual sexual conduct, the Court of Appeals correctly applied this Court's analysis in Lawrence in determining that Tracey's constitutional rights had been violated. While Tracey has not been accused of violating any anti-sodomy laws, his relationship with Malone falls within the scope of the Lawrence decision. Therefore, any government interference with that relationship must face strict scrutiny review. First, to claim that the present case is "about the right to commit adultery" is no more accurate than the Court's characterization of the issue in the Bowers case as "whether the Federal Constitution confers a

fundamental right...to engage in sodomy.” Id. at 567. Like Lawrence, the present case poses a larger question concerning the “substantial protection [of] adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Id. at 572. Second, as in Lawrence, the relationship in the present case does not involve minors, persons whose consent has been compromised, public acts, prostitution, or any request that the state formally recognize some new form of sexual relationship. See id. at 578. It involves only private sexual conduct by consenting adults. There is no evidence to suggest that either Tracey or Malone had any objections to participating in the relationship or that the relationship involved any public intimate conduct. Hence, Tracey’s relationship with Malone meets the requirements emanating from Lawrence of (1) a private sexual relationship (2) between consenting adults (3) in the privacy of the home and therefore falls under the protection of the fundamental right to sexual privacy.

In order to validly impinge on a fundamental right, a state action or statute must pass strict scrutiny. Strict scrutiny requires that the state action or statute be necessary to achieve a compelling purpose. See Reno v. Flores, 507 U.S. 292 (1993). The Police Department’s termination of Tracey as an employee for his participation in a private sexual relationship with Malone was not necessary to achieve any compelling purpose. While it is true that the government has an interest in regulating the behavior of its police force in order to assure public safety, this interest does not extend to regulating the “most private human conduct...in the most private of places.” Bowers, 539 U.S. at 567. This explains the validity of the regulations of some police departments which prohibit officer dating and cohabitation. See Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983). As the lower court noted, Tracey’s relationship with Malone occurred exclusively while Mr.

Tracey was off-duty. (R. p. 10). Therefore, the Police Department's attempts to regulate Tracey's personal intimate relationship served no compelling purpose, and were unconstitutional under the Due Process Clause of the Fourteenth Amendment.

B. Even if Private Sexual Relationships like Tracey's Do Not Implicate a Fundamental Liberty Interest, Such Relationships Receive Heightened Protection Under the Due Process Clause of the Fourteenth Amendment and Require, At Least, an Application of Intermediate Scrutiny.

While any state action which interferes with an individual's liberty interest must closely examined in accordance with the Due Process Clause of the Fourteenth Amendment, this Court has assigned certain liberty interests a heightened level of importance. Consequently, these interests receive a heightened level of protection. In Lawrence, this Court explicitly discussed the heightened importance of the right to sexual privacy and autonomy. Therefore, any state actions impinging that interest must pass a review more stringent than rational basis. In Lawrence, this Court noted that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." 539 U.S. at 562. Here, again, this Court likened the right to sexual privacy to the freedoms of speech and religion. In addition, this Court sought to give "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id. at 572 (emphasis added). Speaking in reference to the rights at issue in Lawrence, this Court also quoted its prior decision in Carey: "it is the promise of the Constitution that there is a realm of personal liberty which the government may not enter." Id. at 578 (quoting Carey, 431 U.S. at 847). Hence, Lawrence clearly demonstrates that this Court regards sexual privacy as a right that deserves a level of heightened protection from government interference.

Although this Court, in Lawrence did not specify what level of scrutiny it was applying, there is authority to suggest that at the very least intermediate scrutiny was applied. The Lawrence decision cites precedent which applies a heightened level of scrutiny to governmental interference with sexual autonomy. Griswold recognizes a right to privacy equal to other fundamental and protected rights, such as the right to freedom of association. See 381 U.S. at 479. Also, though Eisenstadt applies a rational basis test, this Court noted that if it determined that statute in question violated a fundamental liberty, as in Griswold, strict scrutiny would be the appropriate review. Eisenstadt, 405 U.S. at 420, n.7. In addition, Carey explicitly employed the language of strict scrutiny and recognized that the decision to “accomplish or prevent conception” is a fundamental right that can only be burdened by regulations supported by “sufficiently compelling state interests, and must be narrowly drawn to express only those interests.” 431 U.S. at 686. Hence, those cases to which this Court looked for guidance in the Lawrence decision clearly use heightened levels of review to determine the validity of the relevant state actions.

Two recent cases from the Ninth and First Federal Circuits, in which Courts have reviewed the military’s “Don’t Ask Don’t Tell” policy towards homosexual military members, also serve to shed light on the level of review applicable to government interference with sexual autonomy. Both courts addressed the Lawrence decision and both courts concluded that this Court applied a heightened level of scrutiny. In Witt v. Department of Air Force, 527 F.3d 806 (9th Cir. 2008), the Ninth Circuit determined that Lawrence applied intermediate scrutiny. In reaching its decision, the Ninth Circuit considered the language of Lawrence, the precedent on which this Court relied, and this

Court's rationale for its holding. The Ninth Circuit ultimately concluded that it could not "reconcile what the Supreme Court did in Lawrence with the minimal protections afforded by traditional rational basis review." Witt, 527 F.3d at 816. In Cook v. Gates, 528 F.3d 42 (1st Cir. 2008), the First Circuit concluded that Lawrence used a balancing test as opposed to either rational basis or strict scrutiny review. The First Circuit stated that it was "persuaded that Lawrence did indeed recognize a protected liberty interest for adults to engage in private, sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label." Cook, 528 F.3d at 52. The court concluded that a balancing test which pits the government's interest against the personal liberty invaded is the appropriate method of review under Lawrence. Much like the Ninth Circuit, the First Circuit based its conclusions on the language in Lawrence, the precedent on which Lawrence relies, and the rationale of the final holding. See Cook v. Gates, 528 F.3d 42 (1st Cir. 2008).

While Witt and Cook are not binding precedent in the present case, the Circuits' method of interpreting Lawrence and their respective conclusions certainly inform the analysis of Tracey's claim. Like the military personnel in Witt and Cook, Tracey's consensual sexual conduct was committed in private and while off duty. Although the Cook court ultimately concluded that Congress' interest in maintaining the standing military as an effective fighting force outweighed the plaintiff's substantial liberty interest in his own private sexual conduct, in the present case, the Police Department's alleged interest does not sufficiently justify its behavior. While the Police Department may attempt to liken the military and a police department in efforts to strengthen the relevance of Cook's holding to the present case, a significant distinction exists between

the personal sacrifices expected from a citizen choosing to join the military and the duties of an officer employed by a local police force. While both are undoubtedly honorable endeavors, the nature of the military service offers a much more acceptable arena for governmental interference. Military personnel are subject to being moved anywhere in the country or the world depending on the government's needs. In times of war, military personnel can be shipped off to foreign lands to protect the country's interests, separated from their families for months or years at a time. Most personnel live on government bases as opposed to in their own private homes. In addition, military personnel are subject to a set of courts and judicial proceedings outside the United States' judiciary branch. Men and women who join the military are aware of these sacrifices.

On the other hand, a Police Department may not interfere with an employed officer's personal life in the same manner as the Federal Government may restrict or control a member of the military. While police officers may be required to wear uniforms, to keep their hair trimmed within certain parameters, and to maintain a certain level of fitness, many workforce positions are accompanied by particularized job requirements. These rules and requirements are often set forth and agreed to by employees upon job acceptance. When Tracey joined the Police Department, he certainly did not expect his employer to control his private, off duty sexual conduct. Additionally, the Police Department has asserted no convincing justification explaining why such an off duty relationship would interfere with his duties as an officer. Hence, the state government's interest in maintaining an effective police force does not rise to the same level as the federal government's most compelling interest in maintaining the effectiveness of the military. Therefore, the Police Department's interest in regulating its

officers does not justify its encroachment on Tracey's right to privacy in his sexual conduct and its actions in terminating Tracey are unconstitutional pursuant to the Due Process Clause of the Fourteenth Amendment.

C. Even if Private Sexual Relationships Do Not Receive Heightened Protection under the Due Process Clause, the Police Department's Actions in Firing Tracey Fail Rational Basis Review and were Therefore Unconstitutional.

The Police Department claims to have fired Tracey pursuant to its interest in regulating officer conduct. (R. p. 6). Even if the Police Department's interest in regulating its police force is a legitimate state interest, its interference with Tracey's private sexual conduct is unconstitutional as its actions are not rationally related to its claimed interest. Tracey's liberty interest in sexual autonomy trumps the Police Department's claimed interest in the moral ongoings of its employees.

All state actions which impinge upon a liberty interest must pass rational basis review pursuant to the Due Process Clause of the Fourteenth Amendment. Therefore, a government action must be rationally related to a legitimate state interest. The Police Department has implemented numerous regulations controlling officer behavior while on duty. Concededly, some of these regulations also affect the private life of these officers, as they must maintain a certain haircut or a certain level of fitness. These regulations are reasonable as they affect the officer's ability to perform required tasks while on duty.

Some of these regulations may even reasonably affect solely off duty conduct in the interest of preserving an officer's effectiveness while on duty. In Shawgo v. Spradlin, the Fifth Circuit held that a police department's regulation which prohibited dating and cohabitation between officers passed rational basis review. 701 F.2d 470. This regulation was deemed reasonable in light of the potential negative impact of the off-duty dating on

the on-duty coworker relationship. However, Shawgo markedly differs from Tracey's situation. Here, Tracey's off-duty private sexual conduct did not involve any other officers or employees of the Craven Police Department. In fact, his participation in a consensual, sexual relationship conducted off duty and in private, in no way affect his ability to carry out his on-duty responsibilities. Therefore, no rational relation exists between the Police Department's interest in maintaining an effective police force and its actions in terminating Tracey's employment based upon an off-duty, private sexual relationship. For this reason, even if private sexual relationships do not receive heightened protection under the Due Process Clause, the Police Department's actions in firing Tracey were unconstitutional.

CONCLUSION

For the reasons stated above, Tracey respectfully requests that this honorable Court recognize that Officer Calloway conducted an illegal search of Tracey in violation of his Fourth Amendment rights. Additionally, Tracey requests that this Court affirm that the Police Department's termination of Tracey due to his participation in an extramarital affair conducted off duty and in private is unconstitutional under the Due Process Clause of the Fourteenth Amendment. Consequently, Tracey requests that this Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit and remand this matter for further proceedings.

Respectfully submitted,

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