

No. 08-31958

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2008

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**RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,**

*Petitioner,*

v.

**WILLIAM R. TRACEY**

*Respondent.*

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

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**BRIEF FOR PETITIONER**

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TEAM CODE: R

## **QUESTIONS PRESENTED**

1. Whether the Fourth Amendment allows a police officer acting under a reasonable suspicion to brush aside the exterior garment of a suspect after observing a vertical leather strap commonly worn to carry a concealed firearm.
2. Whether the Due Process Clause of the Fourteenth Amendment prohibits the termination of a police officer for engaging in an extra-marital affair in direct violation of the Craven Statute 11-198.01 prohibiting adultery and police department behavioral protocol.

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## STATEMENT OF THE FACTS

On June 7, 2005 the Rushmore County Police Department (“Petitioner”) was investigating an illegal firearms distribution network. Record 2. Officer Calloway, working on the investigation, was pursuing a private military company, Red Tide “R-T” in McDonough Square. Id. On the same day, William R. Tracey (“Respondent”) was working undercover in McDonough Square with another one Petitioner’s precincts in an effort to make a controlled purchase of an illegal firearm. Id. Neither officer was aware of the other officer’s ongoing investigation. Id.

Officer Calloway became aroused by Respondent’s suspicious behavior. Respondent appeared extremely agitated. Id. Officer Calloway took particular notice of Respondent’s constant surveillance of his surroundings, his bomber jacket worn in warm temperatures, and his closely cropped haircut. Id. Based upon Officer Calloway’s undercover and investigative experience coupled with a lead that an R-T official was present in McDonough Square, Officer Calloway decided to approach Respondent. Officer Calloway identified himself as a police officer to Respondent, who immediately became noticeably angry. Record 3. The exchange to this point did not alleviate Officer Calloway’s suspicions that Respondent was in McDonough Square for a less than innocent purpose. Id. Respondent began to turn away. Id. Thinking on his feet, Officer Calloway responded quickly to ensure his safety and the safety of those around him. Id. He grabbed Respondent and began to pat him down. Id. Although Officer Calloway did not feel any object from his frisk of Respondent’s exterior surface, his suspicions were not dispelled as Respondent began to verbally berate him. Id.

Upon conclusion of the frisk, Respondent turned abruptly to leave, revealing a vertical leather strap underneath his unzipped jacket. Id. The strap was located on Respondent’s upper chest area, which is consistent with those used to carry a concealed firearm. Id. Respondent

grudgingly agreed to Officer Calloway's request to stop and turn around. Since Officer Calloway did not get a close look at the strap, with heightened concern for his safety, he reached towards Respondent to move aside his jacket. Id. His attempt was unsuccessful as Respondent pushed his hand away, forcing Officer Calloway to reach out again and move the jacket aside. Id. His suspicions were affirmed when a "Glock 21" .45 caliber pistol was revealed under Respondent's jacket. Id. Only then did Respondent identify himself as a police officer working undercover. Id. Respondent had no identification to prove this and was therefore taken to Officer Calloway's precinct for violating Craven Statute 19-166.81 prohibiting possession of a concealed firearm. Id.

At the precinct, Officer Calloway seized Respondent's cellular phone where he came across contact information for R-T officials and for Jacqueline Malone, the daughter of Rushmore County Police Department Chief Patrick Malone. Id. Concerned for Ms. Malone's safety, Officer Calloway contacted her, at which time she spontaneously disclosed the nature of her relationship with Respondent. Record 4. Ms. Malone and Respondent had been having an extra-marital affair. Id. Although Respondent was separated for eighteen months and had been served with divorce papers, he remained married throughout the duration of the affair. Id. Although Respondent was not on duty when he engaged in the affair, he was subsequently terminated for violation of Craven Statute 11-198.01, a statute that has been enacted for over twenty years despite minimal prosecutions. Id.

## SUMMARY OF THE ARGUMENT

### I.

This Court should affirm the decision of the United States District Court for the District of Craven and find that Officer Calloway did not violate Respondent's Fourth Amendment rights against unreasonable searches and seizures. Officer Calloway acted under reasonable suspicion in conducting a limited protective search of Respondent. Even if this Court finds that Officer Calloway's search was more intrusive than necessary under Terry, Officer Calloway's slight displacement of Respondent's outer garment was still constitutional under the 'plain view' doctrine. Although securing an individual's privacy by protecting them against unreasonable searches and seizures is an important interest, Officer Calloway's actions were completely justified in ensuring that himself, as well as those surrounding him, were protected from harm by an armed and dangerous individual.

### II.

This Court should also affirm the decision of the District Court and find that the Petitioner was not prohibited from terminating Respondent's employment as police officer for his participation in an extra-marital affair with the Police Chief's daughter. The Due Process Clause of the Fourteenth Amendments does not recognize a right to sexual privacy in an adulterous relationship. Only a limited number of intimate associations are protected under the umbrella of sexual privacy protections. Even if this Court finds Respondent's adulterous relationship to be protected under the sphere of sexual privacy, Petitioner's termination was still constitutional because Petitioner had substantial governmental interests to enforce. Petitioner had an interest in promoting the sanctity of marriage and in deterring behavior that is unsuitable for a police officer under its employ. The termination of Respondent was therefore warranted

and did infringe upon Due Process guarantees. Therefore, the holding of the District Court for the District of Craven should be affirmed.

## ARGUMENT

### **I. OFFICER CALLOWAY WAS NOT PROHIBITED FROM MOVING ASIDE THE GARMENT OF A SUSPECT WHEN ACTING UNDER REASONABLE SUSPICION BASED ON HIS OBSERVATION OF A LEATHER STRAP CONSISTENTLY WORN TO CONCEAL FIREARMS**

The Supreme Court must reverse the Thirteenth Circuit Court of Appeals and find that Officer Calloway's search of Respondent was minimally intrusive under Terry. The Fourth Amendment of the United States Constitution protects every individual against unreasonable searches and seizures.

*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

There are certain circumstances that allow for intrusive searches on an individual and their property without probable cause for a warrant. In Terry v. Ohio the court proscribed an exception to the prohibition against warrantless searches of a person. The Court held that an officer with a reasonable suspicion that a suspect was armed and dangerous was permitted to conduct a limited protective search to determine if the suspect is armed. When a police officer satisfies the test laid out by Terry and its progeny, a police officer is entitled to stop or seize the suspect and conduct a frisk search of the suspect. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Terry aimed to protect officers and other prospective victims from violence in situations where there is a lack of probable cause for arrest. Terry, 392 U.S. at 24.

A search without probable cause for arrest must be justified by the initial stop and limited to that which is necessary for discovery of weapons which may be used to harm officers or

others. Terry, 392 U.S. at 19. “The sole justification of the search is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” Terry, 392 U.S. at 29. The search under Terry is justified by a search for weapons to ensure officer safety. Sibron v New York, 392 U.S. 40, 88 S.Ct 1889 (1968). The purpose of allowing an officer to conduct a search after stopping a suspect under Terry is to allow an officer to pursue an investigation without fear of violence. Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921 (1972). As the facts regarding the manner of the search conducted by Officer Calloway are undisputed, this Court should reverse the holding of the Court of Appeals for the Thirteenth Circuit by applying the de novo standard of review.

A. Officer Calloway Did Not Violate the Fourth Amendment By Performing A Minimally Intrusive Protective Search When Acting Under A Reasonable Suspicion That Respondent Was Armed And Dangerous

Petitioner must show that the facts surrounding the case warranted an intrusion. Terry, 392 U.S. at 21. At issue is whether the slight displacement of the outer jacket of Respondent was constitutional under the Terry stop and frisk doctrine thus, only requiring reasonable suspicion. The circumstances surrounding Officer Calloway’s stop and frisk give rise to reasonable suspicion warranting Officer Calloway to move aside Respondent’s jacket. Moreover, Officer Calloway’s search was conducted in a minimally intrusive way, done solely to ensure that himself, as well as those in the surrounding area, were safe from an armed and dangerous individual.

1. Officer Calloway established reasonable suspicion upon observing a leather strap located under Respondent’s jacket consistent with one used to carry a concealed firearm

A police officer must be able to point to specific and articulable facts that show under reasonable suspicion that criminal activity was taking place. The facts must, when taken in light of rational inferences drawn from those facts, warrant a man of reasonable caution to believe that criminal activity has taken place, in order to justify the intrusion. Terry, 392 U.S. at 21-22. See also, Pennsylvania v. Mims, 434 U.S. 106 (holding that the officer was justified, as any man of reasonable caution, when observing a bulge in a jacket to conduct a pat-down).

In the case at bar, Officer Calloway became suspicious of Respondent while patrolling an area in pursuit of prospective firearm buyers. Police Officer Calloway was working off a tip that an illegal buy was to take place in McDonough Square. While patrolling this area Officer Calloway noticed that Respondent was wearing a bomber jacket despite high temperatures, appeared to be agitated and was continuously surveying the surrounding area. The information prior to patrol, in combination with Officer Calloway's observations, lead Officer Calloway to believe that Respondent could be involved in the illegal sale of firearms. Record 3. Officer Calloway was under the impression that the bomber jacket may have been being used for other purposes considering the high temperatures, especially in light of the fact that Respondent was persistently surveying the area. Officer Calloway believed that Respondent's behavior was consistent with the activities of an individual involved in the sale of illegal firearms. Thus, these circumstances would lead any experienced officer, as it lead Officer Calloway, to form reasonable suspicion to perform an investigatory stop.

Moreover, subsequent to the initial investigatory stop Respondent was reluctant to give his name and repeatedly looked around, increasing Officer Calloway's suspicions even more. Record 2. Officer Calloway performed a pat-down on Respondent, while Respondent cursed and berated Officer Calloway. While the initial frisk did not reveal a weapon by touch, as

Respondent turned to leave Officer Calloway noticed an object located on Respondent that he believed was suspicious in light of the other exigent circumstances. As Officer Calloway neared the end of his search he noticed a strap located on Respondent's upper chest area, which he immediately became suspicious of because he recognized that it was of the type consistently used to carry a concealed firearm. Record 3. Viewing this strap is analogous with the bulge in Mimms, which the Court held constituted reasonable suspicion to conduct a pat-down. It is only logical that the appearance of a leather strap, situated vertically across Respondent's upper chest area whose sole purpose is to conceal a firearm, must also constitute reasonable suspicion to conduct a protective search.

Even if the Court does not find viewing a chest strap that consistently holds firearms to be analogous to viewing a bulge as in Mimms, Officer Calloway still had reasonable suspicion to conduct the stop and frisk. A police officer may base his belief that a suspect is armed and dangerous on the nature of the criminal activity even if the officer didn't personally observe any physical indication of a weapon such as a bulge. Terry, 392 U.S. at 27-28. In light of these facts it is apparent that any experienced officer in a similar situation would perform a protective search enabling them to continue their duties.

2. When considering the safety of the police officer and of the public, the search of Respondent was no more intrusive than necessary

A mere protective search, such as the slight displacement of jacket, performed to assure the safety of the officer and those around him can not be considered an intrusive exploratory search considering the circumstances in the case at bar. The Court in Terry held that an officer may conduct a limited protective search for concealed weapons when involved in an investigatory stop. Id. at 24. However, "the search must be limited to that which is necessary for

the discovery of weapons which might be used to harm the officer or others nearby.” Terry at 26.

A pat-down is not the only permissible way to conduct a Terry search; therefore, Officer Calloway was justified after performing the initial pat-down and viewing the leather strap to slightly displace Respondent’s outer garment. U.S. v. Baker, 78 F.3d 135, 64 USLW 2643 (4th Cir. 1996) (holding that officer acted reasonably in directing the suspect to raise his shirt because this act was less intrusive than the pat-down sanctioned in Terry). Terry does not limit a search for the protection against weapons to a pat-down search. U.S. v. Hill, 545 F.2d 1191, 1193 (9<sup>th</sup> Cir. Ariz. 1976) but instead states that the search must be a reasonably limited intrusion that is only used to uncover weapons and not a general exploratory search.<sup>1</sup> Such a frisk is less intrusive than the pat-down frisk sanctioned in Terry. Baker, 78 F.3d at 138.

A pat-down search includes touching and feeling an individual for harmful objects. In the case at bar, Officer Calloway merely moved aside an *outer* garment to expose a strap across Respondent’s chest. His sole purpose was to dispel his suspicions that Respondent was armed and dangerous, it was not a general exploratory search. He wanted to further investigate to see if what he saw was in fact what he thought, a leather strap that used to conceal a weapon. The intent of the limited intrusion was to assure officer and bystander safety, that is all. If an officer

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<sup>1</sup> See also: U.S. v. Colon, 1998 U.S. Dist. LEXIS 3259 (S.D.N.Y. 1998), aff’d 201 F.3d 433, 1999 U.S. App. LEXIS 34084 (2d Cir. N.Y. 1999). U.S. v. Terry, 718 F.Supp. 1181, 1187 (S.D.N.Y. 1189) (holding that an officer was permitted to reach into a suspect’s coat pocket or to lift the suspect’s shirt); States v. Thompson, 597 F.2d 187, 191 (9th Cir. 1979) (holding an officer reaching into a suspect’s coat pocket was a limited intrusion under Terry); U.S. v. Hill, 545 F.2d 1191, 1193 (9<sup>th</sup> Cir. 1976) (holding officer’s lifting of suspect’s shirt was reasonable despite lack of preliminary pat-down when officer had seen a bulge which he suspected was from a weapon); U.S. v. Edmonds, 1998 U.S. App. LEXIS 10807 (4th Cir. Va. May 29, 1998) (holding that the officer was justified in directing the suspect to lift his shirt to ensure the officer’s safety after three refusals by the suspect).

is permitted to reach into a pocket or move aside T-shirts, then clearly the slight displacement of a jacket is a search that is no more intrusive than necessary.

**a. Even if the court finds that only a pat-down search was permissible under Terry, Officer Calloway had justification to brush aside Respondent's jacket after conducting the pat-down**

Officer Calloway's action in moving aside Respondent's jacket after observing the leather strap is analogous to permissible searches when an officer feels something during a pat-down. When an outside clothing pat-down reveals something that reasonably suggests an object might be a weapon, the officer can progress the search to inner garments. An officer can not be sure the object is a weapon without further being allowed to continue the search on inner clothing where the object is located. However, there can be a condition imposed that the officer reasonably believes the object is a weapon ensuring that the officer is not just conducting a random search. State v. Zearley, 468 N.W.2d 391, 392 (N.D. 1991). A pat-down search does not allow an officer to conduct a pocket search without more; therefore, the officer must have a reasonable suspicion the suspect is armed and dangerous. State v. Heitzman, 632 N.W. 2d 1, 2001 ND 136 (N.D. 2001) quoting, State v. Zearley, 444 N.W. 2d 353, 359 (N.D. 1989) and State v. Zearley, 468 N.W.2d 391, 392 (N.D. 1991).

In viewing this strap after the initial pat-down Officer Calloway's suspicions were again aroused. The leather strap on Respondent's chest is an object that consistently is used to carry a weapon, indicating that Respondent may be armed and dangerous. If a police officer is allowed to reach into a the inner garments, or pockets, of a suspect after feeling a bulge, surely an officer protecting himself may slightly move aside an outer garment to get a closer look at what could potentially be holding a dangerous object. Officer Calloway had reasonable suspicion to further

conduct a protective search of Respondent by brushing aside his unzipped jacket to continue the search to the inner garment to determine whether Respondent was in fact carrying a weapon.

In U.S. v. Askew, 529 F.3d 1119, 1123 the court held that the officer's action of unzipping appellant's jacket to expose the sweatshirt underneath for purposes of identification went beyond what is necessary to protect the investigating officers. Askew followed the Court's holding in Dickerson which held that the search exceeded what is necessary to determine if Respondent was armed because the search in actuality was an evidentiary or exploratory search going beyond the confines expressed in Terry. Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993). Dickerson also relied on a line of cases such as: Sibron 392 US 40; Ybarra v. Illinois, 44 U.S. 85, 100 S.Ct. 338 (1979) (holding search was not supported by reasonable suspicion that suspect was armed and dangerous and Terry did not allow a cursory search for weapons or a search for anything but weapons); and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983) (holding a passenger compartment of a car maybe searched if the officer has reasonable suspicion the suspect is armed and may gain immediate control of weapons). These cases support the holding that an individual, when stopped on reasonable suspicion, may not be searched for the purpose of revealing and gathering evidence that relates to the illegal behavior that they were suspected of doing. Askew, at 1129.

However, in the case at bar the purpose of slightly moving Respondent's jacket was to determine if he was armed and potentially dangerous to protect the officer's safety and those nearby, it was not to capture evidence to show that he committed the crime of possession of a concealed firearm. A suspect wearing a leather strap used to conceal a firearm can immediately gain control of the weapon and is surely a threat to safety and must be stopped. Officer Calloway was simply ensuring his safety, as well as those in the public park by determining

whether the leather strap in view was being used to conceal a firearm. “The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law” Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921 (1972). Officer Calloway’s actions were consistent with the holding in Terry, allowing minimally intrusive searches provided that they are for the purpose of ensuring officer, and bystander safety.

In Sibron v. New York, 392 U.S. 40 at 65, the Court held that a Terry search consists solely of patting down exterior clothing for concealed objects used for an assault. However, this confines a search in a way that ignores the true purpose of the Court’s decision in Terry, which was to ensure the safety of officers. Terry held that the pat-down was constitutional, but it in no way limited protective searches to a pat-down, especially when the search was minimally intrusive as it is in the case at bar. “The Sibron Court, applying Terry’s holding, made clear that Terry did not permit police officers to undertake searches not justified on a safety rationale.” United States v. Askew, 529 F.3d 1119, 1127, 381 U.S. App.D.C. 415 (2008).

The circumstances surrounding Officer Calloway, such as being in an area known to distribute firearms, and encountering a suspect who was agitated and wearing a jacket typically used to conceal weapons despite high temperatures, would give any officer reasonable suspicion to conduct an investigatory stop. In addition the protective search was also constitutional to dispel any fears that the suspect was armed and dangerous. Officer Calloway never moved beyond what was permissible under Terry and his search never rose to the requirement of probable cause. Officer Calloway acted within the confines of the Fourth Amendment and thus the District Court’s ruling must be affirmed.

3. Officer Calloway's interest in personal and public safety outweighs the minimal intrusion experienced by Respondent

In light of the minimal intrusion by brushing aside Respondent's jacket compared to the critical interest in officer and bystander safety it is clear that Officer Calloway's actions were reasonable, and thus constitutional under the Fourth Amendment. To determine whether Officer Calloway's action were reasonable the Court should balance the importance of the search against the invasion of the suspect resulting from that search. Terry at 21. The test for determining reasonableness balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. U.S. v. Hensley 469 US 221, 228 105 S.Ct. 675 (1985). It is apparent that "what is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." Pennsylvania v. Mimms, 434 U.S. 106, 111 98 S.Ct. 330 (1977).

While the reasonableness of a protective search depends on the circumstances of each case, U.S. v. Baker, 78 F.3d at 138 citing Terry 392 U.S. at 29, it is clear that such interests are satisfied here. There is a crucial interest in protecting officers and those in the surrounding areas. Moreover, such a search is necessary; it enable officers to take steps that assure themselves that they are not dealing with someone who is armed. These important interests clearly outweigh the minimal intrusion of a protective search, such as the one conducted in the case at bar. The mere displacement of the outer portion of a garment is minimal compared to the risks that officers would take if they hadn't been assured they were not in a potentially dangerous or fatal situation.

4. If the Supreme Court finds brushing aside the exterior garment of a suspect more intrusive than necessary, the search was still justified because Respondent prevented Officer Calloway from performing an effective protective search

Officer Calloway was hindered by Respondent's preclusive actions when Officer Calloway attempted to further conduct a search to determine if Respondent was armed and dangerous. If a

suspect prevents an officer from performing an effective pat-down a more intrusive search may be justified under Terry. Adams v. Williams, 407 U.S. at 148.<sup>2</sup> If the courts have allowed an officer to actually reach into a suspect's pocket when the suspect becomes suspicious and pushes the officer's hand away, it is only logical that the mere displacement of an outer garment was proper when Officer Calloway attempted to investigate the leather strap on Respondent's chest. Respondent became agitated, cursed at, and berated Officer Calloway during the initial pat-down. When further suspicions were raised after viewing the leather strap, warranting a second search, Respondent then pushed aside Officer Calloway's hand, which hindered him from performing the necessary protective search. Therefore, the slight movement of brushing aside Respondent's outer jacket, a less intrusive search than reaching into a suspect's pocket, is justified under Terry and the Fourth Amendment.

B. Even If Moving Aside Respondent's Exterior Garment Requires More Than Reasonable Suspicion, Officer Calloway Had The Requisite Probable Cause Under The 'Plain View' Doctrine Upon Observing A Leather Strap Consistent With Those Used to Carry Concealed Firearms Worn By Respondent

The circumstances surrounding Officer Calloway's encounter with Respondent gave rise to the 'plain view' doctrine. The 'plain view' doctrine applies when police are constitutionally permitted to search an area and in the course of the search come across something of incriminating character. Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022 (1971). "The seizure of property in plain view involves no invasion of privacy and is presumptively

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<sup>2</sup> See also State v. Warran, 124 Ariz. 279, 603 P.2d 550, 552 (1979) (allowing an officer to reach in the suspect's pants pocket when observing a bulge after the suspect pushed the officer's hand away during an attempted frisk); Hayes v. State, 202 Ga. App. 204, 414 S.E.2d 321, 323-324 (1991) (allowing an officer to reach into the pants pocket of suspect when the suspect grabbed and pushed the officer's hands away and turned his body to prevent the officer from touching the outside of his pocket); State v. Kearney, 183 N.J.Super. 13, 443 A.2d 214, 216 (1981) (allowing an officer to search a suspect's pocket when the suspect grabbed the officer's hand and backed away when the officer tried to touch the bulge in the clothing).

reasonable, assuming that there is probable cause to associate the property with criminal activity.” Texas v. Brown 460 U.S. 730, 738, 103 S.Ct. 1535 (1983) quoting Payton v. New York, 445 U.S. 573, 586-587, 100 S.Ct. 1371 (1980). In determining whether the ‘plain view’ doctrine has been satisfied Petitioner must meet the three-prong test set out in Coolidge and further refined by subsequent cases. Texas v. Brown, 460 U.S. 730. Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149 (1987). Petitioner must show that (1) Officer Calloway’s initial intrusion was justified or that the object was viewed from a lawful vantage point; (2) viewing the object was inadvertent and; (3) the incriminating character of the object was immediately apparent. Coolidge, 403 U.S. 443.

Officer Calloway had reasonable suspicion to conduct a stop and frisk of Respondent according to Terry, and in the course of his pat-down of Respondent inadvertently came across a vertical leather strap situated on Respondent’s upper chest area. Officer Calloway immediately associated Respondent’s strap with those used to commonly carry a concealed firearm. In viewing the leather strap after conducting a lawful Terry search Officer Calloway met the requirements of the ‘plain view’ doctrine and thus, was permitted to seize Respondent’s weapon.

1. Officer Calloway’s initial intrusion was lawful because he was at a lawful vantage point and he had prior justification

Officer Calloway was in a proper position to view the leather chest strap, and in addition was in view of the leather strap subsequent to a lawful initial intrusion. A police officer must either be at a lawful vantage point or have a prior justification for the initial intrusion which leads to plain view of the object in question. Coolidge, at 466. Therefore, Officer Calloway must have been acting within the lawful bound marked by Terry or at a lawful vantage point when gaining probable cause to believe the object was a weapon. The initial intrusion that

brings the police within plain view of the evidence must be supported by one of the recognized exceptions to the warrant requirement, such as a Terry stop. The continued search, after the initial intrusion, must be related to the sole justification of the Terry search, which is the protection of the police officer and others nearby. Dickerson at 377-378.

Officer Calloway was standing in McDonough Square when he initially encountered Respondent. Officer Calloway was placed in this public location for the sole purpose of investigating illegal firearms sales known to occur there. Upon viewing Respondent, Officer Calloway became suspicious of Respondent's activities, which warranted a Terry stop. It is apparent that Officer Calloway's initial pat-down of Respondent was constitutional under the Fourth Amendment as Officer Calloway was following the procedures laid out under Terry. At the close of the lawful search Officer Calloway noticed the leather strap which he identified as being consistently used to conceal a firearm. The strap was easily seen because of the way Respondent moved, and the fact that his jacket was unzipped. Therefore, Officer Calloway was at a lawful vantage point as well when viewing the leather strap. Officer Calloway was in the process of concluding a lawful protective search and additionally was at a lawful vantage point when he came across the leather strap in plain view.

2. Officer Calloway inadvertently noticed the leather strap as Respondent turned to leave after the Terry search

Officer Calloway also viewed the leather chest strap inadvertently. Coolidge requires that the object be viewed inadvertently. The person viewing the object must not be aware that it is there. Coolidge, at 469. When Officer Calloway approached Respondent there was no way Officer Calloway could have known that Respondent had on a leather chest strap, thus Officer Calloway satisfies the prong requiring that the object be viewed inadvertently under the 'plain view' doctrine.

Officer Calloway satisfied the ‘plain view’ doctrine’s prong of inadvertence when discovering the leather strap on Respondent. Under the ‘plain view’ doctrine a police officer must not know that the object is there. This requirement ensures against searches that are unlawful under the Fourth Amendment. It would be an inconvenience, and even dangerous to the police to require them to ignore it until they have obtained a warrant particularly describing it, after an otherwise lawful search is in progress. Coolidge, 403 U.S. at 467-468. Police may seize an object in plain view without a warrant so long as the view was inadvertent to ensure that the plain-view seizure will not turn an initially valid search into a general one. If the police know the location of the evidence in advance and intend to view the evidence the warrant requirement imposes no inconveniences to the searching officer. Coolidge, 403 U.S. at 469-470.

Officer Calloway was unaware that upon approaching Respondent he was going to come across a leather strap on Respondent’s chest. In fact, Officer Calloway was unaware that he was even going to encounter Respondent when his duties commenced in McDonough Square. Even more persuasive is the fact that the initial pat-down did not reveal the leather strap; it was Respondent’s gesture to turn and leave that revealed the vertical leather strap across his chest. It is inconceivable to say that Officer Calloway knew of the evidence, and knew of the location of the evidence upon approaching Respondent. It is only reasonable to say that Officer Calloway inadvertently viewed the leather chest strap on Respondent during his encounter and therefore satisfies this prong of the ‘plain view’ doctrine.

3. The incriminating character of the leather strap was immediately apparent and established probable cause because it was consistent with those used to carry a concealed weapon

The purpose of the leather strap was immediately apparent to Officer Calloway. The actions of Respondent, along with Officer Calloway’s knowledge and experience as a police

officer, gave rise to probable cause to justify the search and seizure of the weapon. When an officer comes across an object in plain view it must be immediately apparent to the police officer that they have evidence before them. The police officers may not use the ‘plain view’ doctrine to perform a general exploratory search from one object to another until something incriminating emerges. Coolidge, at 466. This rule was further clarified, and now requires that police officers have probable cause to believe that item in question is evidence or contraband Arizona v. Hicks, 480 US 321.

While Officer Calloway did testify that he was unsure of the strap’s purpose, he did identify that the strap as being consistent with what is ordinarily used to carry a concealed firearm. Even though Officer Calloway was not absolutely certain of the strap’s purpose, or that it was being used to conceal a firearm, he did recognize that the strap is the kind that is consistently used for the purpose of concealing a firearm. If the purpose of the strap was not immediately apparent to Officer Calloway he would have no reason to move aside Respondent’s outer jacket. To an ordinary person a simple leather strap across an individual’s chest would not raise any suspicions; however, Officer Calloway immediately recognized the strap as that which is used to conceal a firearm, prompting him to further search the Respondent. It was Officer Calloway’s experience in law enforcement which clued him in to the true purpose of the leather strap. Therefore, the incriminating nature of such a strap was immediately apparent to Officer Calloway.

- a. Officer Calloway had the requisite probable cause upon viewing a leather strap worn by Respondent that was consistent with a holster for an illegally concealed firearm**

Officer Calloway’s view of the leather strap in combination with the surrounding circumstances and his experience in law enforcement gave rise to probable cause. Probable

cause means that the facts available to the officer would warrant a man of reasonable caution to believe that certain items may be contraband or may be used as evidence. However, this requirement does not demand a showing that the belief be correct or more likely true than false. Brown 460 U.S. 730 quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280 (1925). The ‘plain view’ doctrine is not satisfied when the incriminating character of the object is not immediately apparent and when the police lack probable cause to believe that the object is contraband without further searching the object. Dickerson, at 375 citing Horton v. California, 496 U.S. 128, 136-137, 110 S.Ct. 2301 (1990).

Despite the fact that Officer Calloway was unsure of the strap’s purpose, he testified that he recognized the strap as one which is consistently used to conceal a firearm. When combining Officer Calloway’s knowledge of leather chest straps with the fact that Respondent pushed away Officer Calloway’s hand and the fact that Respondent was wearing a rather heavy jacket in warm temperatures, it is apparent that the surrounding circumstances indicated a potential threat. Officer Calloway had probable cause to conduct a further search and subsequently seize the weapon. Officer Calloway’s actions cannot be said to constitute a general exploratory search, rather it was a search within the confines of the ‘plain view’ doctrine and the Fourth Amendment.

The case at bar is analogous to the holding in Texas v. Brown, 460 U.S. 730, 1983 U.S. LEXIS 143 (U.S., April 19, 1983, Decided). The Court in Brown held that the officer had probable cause to believe that the balloon in Brown’s hand contained an illegal substance and warranted seizure. The officer was aware from previous participation in narcotics and from other discussions with officers that balloons were consistently used to carry narcotics. The distinctive character of the balloon, even though opaque, was enough to justify probable cause

that the balloon had illegal contents, especially to a trained officer. Officer Calloway was able to use his knowledge and experience as an officer to form probable cause similar to the officer in Brown. Both officers identified an object in plain view and recognized it as an object connected with criminal activity, thus forming the basis for probable cause to further search the item

The Court in Dickerson held that the officer's conduct of feeling a hard object wrapped in plastic in the suspect's pocket went beyond Terry and the seizure of the cocaine was unconstitutional. Dickerson, 508 U.S. 366. In Dickerson after the officer concluded that the object was not a weapon the search should have ended. The officer gained probable cause only after a continued exploration of the suspect's pocket and after concluding that there were no weapons thus, the search was not lawful under Terry. The holding of Dickerson cannot apply to the case at bar. Officer Calloway's justifications for probable cause were not a result of an exploratory search of Respondent revealing the strap. Instead, Officer Calloway's justification for probable cause arose when Respondent acted suspiciously and when Officer Calloway viewed the strap and recognized it as one that is consistently used in criminal activity.

Arizona v. Hicks is also inconsistent with the facts of this case. The Court in Hicks held that the seizure of stereo equipment was not justified by the plain-view doctrine because the incriminating character of the stereos, they were stolen, was not immediately apparent. The officers had to move the equipment to expose the serial numbers and then run a check to see if the stereos were in fact stolen to establish probable cause. Hicks, 480 U.S. 321. Respondent may argue the firearm in this case is similar to the stereos because the incriminating character of the strap was not immediately apparent. However, a leather strap, such as the one Respondent was wearing, was consistent with the leather strap commonly used to conceal a firearm. When

an officer views stereo equipment they do not automatically presume the stereos are connected with criminal activity, such as theft. Viewing a leather chest strap is different; a leather chest strap is consistently used with criminal activity, concealing a firearm. This in connection with the fact that Respondent was wearing a bomber jacket in warm weather, and that Respondent pushed aside Officer Calloway's hand when further investigating illustrates that Officer Calloway could reasonably believe that it was immediately apparent that Respondent was armed. Unlike in Hicks, where the officers had to move the stereo equipment to locate the VIN, Officer Calloway did not have to perform such a laundry list of tasks to establish that there was probable cause that Respondent was armed. Officer Calloway was justified after immediately viewing the strap to further investigate by slightly brushing aside Respondent's jacket.

Based on the circumstances of the situation and the knowledge of Officer Calloway as an established Police Officer well versed in the conduct occurring in McDonough Square it is apparent that probable cause was established. By establishing probable cause and by becoming immediately aware of the incriminating nature of the strap, Officer Calloway was justified under the test set out in Coolidge to further search and subsequently seize Respondent's weapon concealed by the leather chest strap.

Therefore, this Court should reverse the Thirteenth Circuit and hold that Officer Calloway did not violate Respondent's Fourth Amendment rights because his actions were based a reasonable suspicion and his search was no more intrusive than necessary under Terry.

**II. RUSHMORE COUNTY POLICE DEPARTMENT'S TERMINATION OF RESPONDENT DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE RESPONDENT DOES NOT HAVE A DUE PROCESS RIGHT TO SEXUAL PRIVACY WHEN ENGAGING IN AN EXTRA-MARITAL AFFAIR.**

Rushmore County Police Department (“Petitioner”) was not prohibited from terminating William R. Tracey (“Respondent”) as police officer for his participation in an extra-marital relationship. The Due Process Clause of the Fourteenth Amendment serves to protect certain fundamental liberty interests from unwarranted governmental intrusion. Specifically, the right to sexual privacy was established as a protected liberty interest by Lawrence v. Texas. 539 U.S. 558, 123 S.Ct. 2472 (2003). Respondent participated in an extra-marital affair with Jacqueline Malone, daughter of Police Chief Patrick Malone. Lawrence does not apply when injury or coercive behavior may result. Id. Also, the holding does not apply when one party is single and the other party is still in a legally binding marriage. Id. Only certain intimate associations are protected. Respondent’s adulterous relationship is not an intimate association protected under the sphere of privacy established in Lawrence. Therefore, the holding of Lawrence does not apply in the case at bar. Additionally, Respondent committed adultery in direct violation of Craven Statute 11-198.01. In enforcing this statute, Petitioner had an interest in promoting the sanctity of marriage and in deterring behavior that is unsuitable for a police officer under its employ. The termination of Respondent was therefore warranted and did infringe upon due process guarantees. This Court should grant Petitioner summary judgment because there are no questions of facts and should apply the de novo standard of review in deciding the questions of law.

A. Respondent’s Adulterous Relationship Is Not A Constitutionally Protected Liberty Interest Enumerated By Lawrence v. Texas

This Court should reverse the Court Of Appeals for the Thirteenth Circuit because the Due Process Clause of the Fourteenth Amendment does not prohibit the termination of a police officer for his involvement in an extra-marital affair. The Due Process Clause serves to protect certain fundamental liberty interests from unwarranted governmental infringement. In the

historic decision of Lawrence v. Texas, a right to sexual privacy of two consenting adults was established as a protected interest when the Court struck down a Texas anti-sodomy statute. 539 U.S. 558, 123 S.Ct. 2472 (2003). The holding of Lawrence is inapplicable to the case at bar, because the liberty interest established in Lawrence was not meant to protect activities which can harm or injure others. Therefore, the holding of Lawrence cannot be extended to situations such as Respondent's extramarital affair.

Specifically, the holding of Lawrence applied to "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle". Lawrence, 539 U.S. at 578. Assuming arguendo, that this Court is willing to extend the holding to consensual sexual practices of *all* couples, homosexual and heterosexual, the holding still does not apply to the situation at bar. Here, Respondent was involved in an extra-marital affair with Ms. Malone, daughter of Rushmore County Police Chief Patrick Malone.<sup>3</sup> Although the Court in Lawrence did not expressly require that individuals be in a monogamous relationship in order to be afforded sexual privacy protection, there are substantial indicators that the Court did not intend the Lawrence holding to protect individuals in adulterous relationships. Most notably, the Court in Lawrence specifically stated that the holding does not apply to minors, prostitution, or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Id.* See generally State v. Romano, 114 Haw. 1, 155 P.3d 1102 (Hawaii 2007) (holding that Lawrence is inapplicable to state statute prohibiting prostitution); State v. Senteres, 699 N.W.2d 810, 270 Neb. 19 (2005) (holding that Lawrence is inapplicable to sexual conduct of minors).

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<sup>3</sup> "Ms. Malone disclosed that she had been having an affair with the plaintiff, undercover Police Officer Tracey." Record 4.

1. Lawrence did not afford a liberty interest to sexual privacy for sexual activities that injure others

Lawrence does not apply to “persons who might be injured.” Lawrence, 539 U.S. at 578.

In the case at hand, individuals may be injured physically or emotionally as a result of Respondent’s and Ms. Malone’s extra-marital affair. Moreover, the emotional injuries will not be slight by any stretch of the imagination. Disclosure of a spouse’s adulterous affair often causes the other spouse severe emotional distress. Further, the emotional impact on their familial structure and the community at large will be severe as well. It is important to also note that the Court in Lawrence did not specify the type of injury it excluded from protection, whether emotional or physical. In the event the Court intended to refer only to physical injuries, it is a commonly known fact that adultery does not just encompass the sexual relations between Respondent and Ms. Malone. Rather, adultery involves lying, cheating, even stealing, which are all crimes that will lead to emotional or physical injury. Although separated for eighteen months, the emotional harm to Respondent’s wife was potentially severe and Respondent’s actions still constituted a direct violation of Craven Statute 11-198.01, because he was still legally married at the time of the affair. Thus, Respondent’s adulterous relationship is not protected under Lawrence because the Court in Lawrence never intended the holding to extend to situations where a person may be injured.

2. The right to sexual privacy in Lawrence does not extend to persons in adulterous relationships

Respondent is not afforded sexual privacy protections while involved in an adulterous relationship because Lawrence does not apply to relationships where one person is single and one person is married to another. Fourteenth Amendment case law has never addressed nor extended the sexual privacy protections established in Lawrence to adulterous relationships.

Case law used in reaching the holding in Lawrence dealt with substantive due process aspects of liberty with respect to certain basic matters of procreation, marriage, and family life. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66, 93 S.Ct. 2628 (1973). In each of these cases, the Court recognizes that there is a sphere of personal conduct into which the government may not intrude. “The Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood, as well as bodily integrity.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 849, 112 S.Ct. 2791, 2806 (1992). The sphere of protected personal conduct only includes actions by either a single person, a married couple, or two single individuals. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965) (protecting *married* couple’s right to engage in sexual intercourse for purposes other than conception) (emphasis added); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967) (found that a restriction on *marriage* based solely on racial differences deprived citizens of constitutionally protected liberty) (emphasis added); Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038 (1972) (extending Griswold’s holding to *single* individuals, stating that the marital couple is “not an independent entity by the association of two individuals...If the right of privacy means anything, it is the right of individuals, *married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”) (emphasis added); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) (protecting a *married or unmarried* woman’s right to terminate her pregnancy as part of constitutionally protected liberty) (emphasis added). Impliedly, couples in which one person is not single (i.e. couples committing adultery) are excluded from the constitutional protections included in the sphere of personal privacy.

Following the holding of Lawrence, the Third Circuit, in Hollenbaugh v. Carnegie Free Library, declined to afford two people involved in an extra-marital affair the protections to sexual privacy. 436 F. Supp 1328, 1977 U.S. Dist. LEXIS 14006 (W.D. Pa. 1977), aff'd 578 F.2d 1374 (3d Cir. 1978), cert. denied 439 U.S. 1052 (1978). Petitioners, female librarian and male janitor, were involved in an adulterous relationship and had an illegitimate child. Both were discharged by Carnegie Free Library because they cohabitated together in an openly adulterous relationship. The Third Circuit affirmed the district court's finding that nothing in the case law indicates that a protection of sexual privacy exists for two people, one of whom is married.<sup>4</sup> Hollenbaugh, 326 F.Supp at 1335. As in Hollenbaugh, Respondent was terminated when his adulterous relationship became public knowledge. The fact that Respondent and Ms. Malone did not cohabit together is not dispositive; their relationship was just as open and notorious in the community once it came to light. The fact that Respondent and Ms. Malone did not beget a child is irrelevant, because the factual record in Hollenbaugh shows that the termination was not because of the birth of the illegitimate child. Therefore, like the librarian and the janitor, Respondent and Ms. Malone cannot be afforded rights to adulterous sexual privacy because no such rights exist.

### 3. Lawrence must not be extended to protect adulterous relationships

Although the holding of Lawrence has been extended to recognize same-sex marriage, it must not be further extended to grant sexual privacy protections to adulterous relationships. The recognition of same-sex marriage was justified by the notion that such relationships were an

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<sup>4</sup> "Nothing, however, in [the Roe, Eisenstadt, nor Paris Adult Theatre] decisions concerning the right of privacy, intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" for two persons, one of whom is married, to live together under the circumstances of this case. We conclude, therefore, that plaintiffs' discharges were not violative of their constitutional right of privacy." Hollenbaugh, 326 F.Supp at 1335.

exclusive and monogamous union between two people. Goodridge v. Department of Public Health, 798 N.E.2d 941, 440 Mass. 309 (2003) (held that prohibitions against same sex marriages violates the Massachusetts state constitutions). Massachusetts court in Goodridge held that “a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions.” Goodridge, 798 N.E.2d at 949. The principles put forth in the holdings of those cases are inapplicable here because there is no exclusive monogamous union. Respondent has been having an extra-marital affair with Ms. Malone, which is certainly not exclusive. Record 4. Respondent remains married, even if separated and even though divorce papers have been served. Id. Upon a final divorce decree from a court of law, Respondent is free to pursue sexual relations of his choosing with Ms. Malone, who is a single female. Unfortunately, while Respondent remains married, he is not afforded the constitutional protections given to those in exclusive monogamous relationships.

4. Cook v. Gates and Witt v. Department of Air Force are not applicable here because both cases involved exclusive monogamous relationships

In overruling the District Court for the District of Craven, the Court of Appeals placed undue emphasis on the holdings of Cook v. Gates and Witt v. Department of Air Force. 528 F.3d 42, 2008 U.S. App. LEXIS 12357 (1st Cir. 2008); 527 F.3d 806, 2008 U.S. App. LEXIS 10794 (9th Cir. 2008). In both cases, plaintiffs argued that the military’s “Don’t Ask, Don’t Tell” (DADT) policy was unconstitutional because it infringed on plaintiff’s right to sexual privacy pursuant to Lawrence. As already noted, Lawrence is inapplicable to the case at bar because Lawrence only encompasses actions by married persons or single persons, and not by married persons engaged in adulterous relationships with single persons. Cook and Witt both involve females in consensual homosexual relationships. Id. The females were single in both

cases. Id. Therefore, like Lawrence, Cook and Witt are inapplicable to the case at bar because neither case involves the relationships of a married person and a single person, like the adulterous relationship of Respondent and Ms. Malone.

Although Witt recognizes that it is inappropriate for a state or a court to define the “meaning of the relationships or to set its boundaries,” the Ninth Circuit does recognize that this is only applicable to cases “absent injury to a persons or abuse of institution the law protects.” Witt, 528 F.3d at 814. Both exemptions are present in the case at bar. First, injury is likely to occur to the spouse of the Respondent as well as his family, friends, and the community. Second, marriage is an institution that the law protects. With both exemptions present, the State is permitted to exclude relationships born out of extra marital affairs from the protections afforded to parties in monogamous relationships.

B. Extra-Marital Affairs Are Not Afforded A Protected Liberty Interest Because They Are Not Intimate Associations And They Threaten Familial And Marital Relationships

Lawrence is further inapplicable to the case at bar because adultery is not considered an intimate association. This creates a second level of inapplicability, since Lawrence is inapplicable in the first instance because of the type of persons involved in the case at bar, namely a married person and a single person, and in the second instance the type of activity in which Respondent and Ms. Malone are involved, namely adultery. Moreover, it must be noted that none of the cases upon which Lawrence rests its holding deal with adultery, and none of the cases recognize adulterous behavior as being included in the sphere of constitutionally protected sexually privacy.<sup>5</sup> As noted specifically in Casey, the sphere of constitutional protection of

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<sup>5</sup> See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791 (1992).

personal and sexual relations is limited, protecting only the most basic personal decisions and activities. Casey, 505 U.S. 833, 112 S.Ct. 2791 (1992). Personal, familial, and sexual decisions and activities that are constitutionally protected pursuant to the Due Process Clause in the aforecited cases do not include activities and decisions of couples in adulterous relationships.

Intimate association is a recognized and protected right but has been consistently limited in its scope to relationships of monogamous individuals. The Court in Roberts v. United States Jaycees, “recognized the constitutional stature of the freedom to enter into and carry on certain intimate associations.” Christensen v. County of Boone, 483 F.3d 454, 2007 U.S. App. LEXIS 6451 (7th Cir. 2007) citing Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244 (1984). Based on this ruling, circuit courts have limited the scope of the freedom to associate intimately by the type of relationship in question. Only monogamous relationships have been given the protections established in Roberts. See Anderson v. City of LaVergne, 371 F.3d 879, 882, 2004 U.S. App. LEXIS 11734 (6th Cir. 2004) (defined constitutionally protected intimate association as that of a couple, living together, romantically and sexually involved, and monogamous). See also Marcum v. McWhorter, 308 F.3d 635, 640-41, 2002 U.S. App. LEXIS 19251 (6th Cir. 2002) (an adulterous relationship is not an intimate association). Because Respondent is not involved in a monogamous relationship, this adulterous relationship cannot be recognized as an intimate association protected by Lawrence.

Moreover, rights and privileges afforded to married couples or unmarried couples have been withheld from individuals claiming such rights based out of an adulterous relationships. See Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333 (1989) (father of a child born from an adulterous relationships is not constitutionally entitled to parental rights when the mother is still in a lawful marriage and that couple chooses to raise the child as its own). Further, rights

afforded to families and to married couples are often times withheld from unrelated individuals. See Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974) (found no privacy rights involved in family oriented zoning ordinances excluding most *unrelated* groups from the village) (emphasis added). The Court has often times extended rights and privileges to those outside the nuclear family, i.e. to the extended family, but it has consistently declined to extend these rights to unrelated individuals. See Moore v. Cleveland, 431 U.S. 494, 97 S.Ct. 1932 (1977). The Court has historically been hesitant to extend rights afforded to marital and familial relationships to other types of relationships. This is because special weight, attention, and interest must be given to familial and marital relationships. These relationships are societal building blocks and are the most valued and honored relationships. Sanctity of such relationships must be given effect and special rights must be afforded to people in such relationships to ensure their continued existence. Belle Terre and Moore are conclusive that familial rights are not afforded to unrelated individuals, likewise those rights can not be afforded to individuals in adulterous relationships.

In other words, although morality alone is insufficient to determine the scope of protected personal liberties, traditional societal values and virtues, such as family and marriage, have been consistently held to be sufficient. Casey, 505 U.S. 833, 850, 112 S.Ct. 2791 (1992). The well-being and continuation of marital and familial relationships are particularly of high interest to each State and to this Nation as a whole. See Moore, 431 U.S. at 503 (emphasizing the that “Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”) Intuitively, any activity that threatens marital and familial relationships, such as adulterous behavior, will not be protected and will therefore not be afforded additional rights.

C. Even If Adultery Is Found To Be Included In The Sphere Of Sexual Privacy Protected By The Due Process Clause, This Right Is Limited By Legitimate State Interests In The Institution of Marriage and In Regulating The Sexual Exploits Of Police Officers

Even if this Court finds that an adulterous relationship is deserving of constitutional protection under the Due Process Clause, such a right to privacy is “not unqualified.” Roe v. Wade, 410 U.S. at 154. “[A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life...the privacy right involved, therefore, cannot be said to be absolute.” Id. In other words, a State may infringe upon a constitutional right to sexual privacy if the State has a legitimate interest in doing so. In such cases, state action is found constitutional upon satisfaction of the rational basis test. The Lawrence Court made mention of higher levels of scrutiny, including intermediate scrutiny and strict scrutiny, but, as Lawrence is inapplicable in the case at bar, those levels of scrutiny are inapplicable. Only the rational basis test is the appropriate test to use. See generally Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258 (1997) (applying rational basis after determining that assisted suicide is not a fundamental right and does not warrant strict scrutiny nor heightened scrutiny).

Under the rational basis test, Respondent must show that there is no rational connection between the regulation and the state interest. Shawgo v. Spradlin, 701 F.2d 470, 1983 U.S. App. LEXIS 29326 (5th Cir. 1983) (quoting Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440 (1976)). A rational or legitimate interest is one that is not a “purposeless restraint” nor an “arbitrary imposition.” Glucksberg, 521 U.S. at 721 (Souter, J. concurring) (quoting Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752 (1961)). Further, “rational basis only requires a hypothetical rationale regardless of the liberty involved.” Witt, 527 F.3d 806, 816, 2008 U.S. App. LEXIS 10794 (9th Cir. 2008). In order to satisfy the test, the legitimate interest does not have to justify the

governmental action. Id. It must simply be a legitimate and rational interest. Id. If the Respondent is unable to meet his burden of showing no rational connection between the legislation and the governmental interest, the State is permitted to enforce the legislation at issue and further its legitimate and rational governmental interests.

1. The State of Craven has a substantial interest in furthering the institution of marriage by prohibiting adultery

Respondent has failed to meet his burden as there are a number of legitimate state interests that are rationally related to the governmental action in question, namely Respondent's termination from the Petitioner's employ pursuant to a violation Crave Statute 11-198.01 prohibiting adultery. Record 4. The State of Craven and the Nation as a whole have a strong interest in the protection of marital relationships. Marriage is the foundation of human being interaction and cohabitation. Our coexistence is contingent upon deep intimate relationships, companionship, and mutual purpose and support. Marriage holds an enduring place in our laws and in our society. Any state action that enables the furtherance of this institution by way of prohibiting actions which impede it, such as adultery, is surely rational and important.

"[Marriage] is an association that promotes a way of life ... a harmony in living...a bilateral loyalty." Griswold v. Connecticut, 381 U.S. 479, 486, 85 S.Ct. 1678 (1965).

Respondent's actions serve to directly interfere with the State's interests in furthering the institution of marriage. An extra-marital affair tears apart the trust and commitment that is fundamental to the institution of marriage. The extra-marital affair with Ms. Malone prevents any chance of reconciliation between Respondent and his spouse. Further, it causes strife between Respondent and his wife as they attempt to end their divorce amicably. If the State of Craven and Petitioner did not punish Respondent for violation of the anti-adultery statute, it would send a message to the citizens of Craven that adultery is an acceptable activity. This

message would be particularly profound because of Respondent's position in the Rushmore County Police Department. The position of police officer in any community is a highly respected position; such respect is severely tainted by adulterous activities. By terminating the Respondent, Petitioner sent a clear message to the public: no one, especially not police officer, is above the law. Therefore, Petitioner's interests warrant enforcing Craven Statute 11-198.01 and terminating Respondent for his extra-marital affair.

2. Petitioner's enforcement of the Craven anti-adultery statutes ensures that police officers in its employ are law-abiding and morally upstanding models for the community

The State of Craven and Petitioner have an even stronger interest in regulating the actions of the Respondent because Respondent is in the employ of the State of Craven. The State has "more interest in regulating the activities of its employees than the activities of the population at large." Kelley, 425 U.S. at 245. The State has strong interests in organizing its police force in an orderly manner, in keeping police officers morally and ethically responsible, in keeping police officers law-abiding, and in keeping police officer morale high. By doing so, the State is promoting safety of all persons and property in its jurisdiction.

Specifically, police officers are held to a high level of professional responsibility by tax-paying citizens of the State. Many police departments, upon swearing in a new officer, require the police officer to take an oath of courtesy and integrity.<sup>6</sup> They are therefore, by virtue of their

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<sup>6</sup> Example of police officer oath:

"I do solemnly swear that I will support the Constitutions of the United States and of the State of Tennessee, and the ordinances of the City of \_\_\_\_\_, and will well and faithfully perform the duties imposed upon me as a police officer of the City of \_\_\_\_\_ to the best of my ability; and that I will serve the United States, the State of Tennessee, and the City of \_\_\_\_\_ honestly and faithfully, and will obey the orders of the officers and officials placed over me according to law." Rex Barton, *Police Officer Oath*, <http://www.mtas.tennessee.edu/KnowledgeBase.nsf/0/96DA8AA301157A0185256B3E0049CB2C?OpenDocument> January 11, 2002.

position and their duty to tax-payers, not permitted to act in a reckless, dangerous or illegal manner. Whether a statute is newly enacted or established over twenty years ago, such as Craven Statute 11-198.01, a police officer has the utmost duty to abide by the law. If the State of Craven cannot ensure that its police officers are law-abiding individuals, how can the State expect its citizens to be law-abiding? The State also has an interest in ensuring that police officers maintain a respect for the law. Police departments must train their officers to follow commands in order to maintain a rigid chain of command. To do so, officers must follow all orders and abide by all laws, which they are employed to enforce. Here, Respondent will assert that the Craven statute has not been used to prosecute offenders in over twenty years, and therefore should not be used against him. If upheld, this argument would put police officers above the law, allowing them to pick and choose which statutes they want to adhere to.

In Hollenbaugh, the Carnegie Free Library terminated the librarian and janitor because they were no longer able to complete their responsibilities. Hollenbaugh, 436 F. Supp at 1330. The librarian and the janitor were unable to fulfill their respective functions at the library and were therefore unable to serve their community. Id. Likewise, Respondent is unable to fulfill his duties as a police officer when involved in an adulterous relationship, even if the relationship undisclosed and even if it is committed solely when Respondent is off duty. Ms. Malone is the daughter of Rushmore County Police Chief Patrick Malone. Record 3. A relationship with the Police Chief's daughter creates a conflict of interest for the Respondent. He has taken an oath to serve and protect the people, but when in a relationship with Ms. Malone, Respondent may be tempted to impress the Police Chief instead. Further, adulterous relationships involve great amounts of lying and dishonest behavior. If Respondent is able to lie and cheat on his wife, nothing is to say he would not act with similar dishonesty with regard to his position as a police

officer. A police officer who is derelict or dishonest in the completion of his duties is a liability to the police department and to the tax-paying citizens he serves. Therefore, Petitioner has rational and legitimate reasons to terminate Respondent.

3. Deference should be given to Petitioner due to its expertise and experience in managing its police force

Finding the rational basis test satisfied, this Court must show deference to Petitioner's expertise and experience. The rational basis test is highly deferential, described as a "paradigm of judicial restraint." FCC v. Beach Communications, Inc., 508 U.S. 307, 314, 113 S.Ct. 2096 (1993). Judicial restraint is necessary in recognition of expertise and experience of another entity in managing its own affairs. The Court in Kelley found that respondent did not have a liberty interest in equal hair-grooming standards for men and women in the Suffolk County Police Department. 425 U.S. 238, 96 S.Ct. 1440 (1976). Finding the rational basis test satisfied, the Court showed great deference to the Suffolk County Police Department's organizational structure. Kelley, 425 U.S. at 247.

The promotion of safety of persons and property is unquestionably at the core of the State's police power...Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power.

Id. (citing Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 72 S.Ct. 405 (1952)).

Likewise, here, Petitioner has selected a disciplinary protocol for the police officers in its employ as part of Craven's state police power. In their expertise in managing a police force, Petitioner has developed an efficient organizational structure, which allows each officer to carry out his/her duties while maintaining order, discipline, uniformity and esprit de corps. Using this expertise, Petitioner has weighed the interests of Respondent and the interest of the police department, and

concluded that only by terminating Respondent can Petitioner ensure to maintain order among its ranks. Deference must be given to the state police power and to the expertise of Petitioner's rules of discipline and conduct when rationally based in legitimate state interests.

**CONCLUSION**

For the aforementioned reasons, we respectfully request that this Court reverse the holding of the Court of Appeals for the Thirteenth Circuit and find that the search of Respondent was reasonable under the Fourth Amendment and the termination of Respondent was permitted under the Fourteenth Amendment.

Respectfully submitted,

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Attorneys for Petitioner

Team R

## **APPENDIX**

### **Constitutional Provisions**

#### **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. XIV § 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.