

No. 08-31958

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Supreme Court of the United States

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CRAVEN COUNTY, CRAVEN, POLICE DEPARTMENT,

Petitioner,

v.

WILLIAM R. TRACY,

Respondent,

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

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BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

I. Whether it is permissible under the Fourth Amendment for a police officer to move aside the exterior clothing of a suspect to conduct a *Terry* frisk, when the officer has reasonable suspicion that the suspect is armed and conducts the search only to the extent necessary to determine whether the suspect is carrying a weapon.

II. Whether it is permissible under the due process clause of the Fourteenth Amendment for a police department to terminate a police officer for having an extramarital affair, when the police department's regulation against adultery is aimed at fostering officer morale, upholding community acceptance of police, and minimizing conflicts of interest.

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## **STATEMENT OF THE CASE**

### **Procedural History**

The Plaintiff brought a claim against the Rushmore County, Craven, Police Department pursuant to 42 U.S.C §1983 for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. On February 19, 2006, the United States District Court for the District of Craven granted the Defendant's motion for summary judgment. On April 29, 2007, the United States Court of Appeals for the Thirteenth Circuit remanded the case for further proceedings. The Supreme Court of the United States granted Certiorari and Oral Argument for October Term, 2008.

### **Factual History**

Officer Maxwell Calloway of the Rushmore County Police Department searched and arrested William Tracey [hereinafter Respondent] on June 7, 2005. Record on Appeal 2 [hereinafter ROA]. On the day of the events in question, Officer Calloway was investigating an illegal firearm distribution network that was tied to "Red Tide", a private military company. ROA 2. While on duty patrolling for a suspected buyer of illegal firearms, Officer Calloway observed Respondent on a park bench in the search area. ROA 2. Although Respondent did not match the description of the suspected firearm buyer, Officer Calloway's attention was aroused by the man's leery behavior. ROA 2. Respondent was dressed in a heavy bomber jacket despite the temperatures in the low seventies and his hair was closely cropped in a manner consistent with the military. ROA 2. Furthermore, he was engaged in suspicious behavior such as nervously looking back and forth. ROA 2. Officer Calloway approached the man and identified himself as a law

enforcement officer. ROA 3. Respondent angrily told Calloway his name was Bill and stood to turn and leave the square. ROA 3.

Officer Calloway proceeded to frisk Respondent. ROA 3. While being frisked, Respondent cooperated physically but verbally cursed and yelled at Officer Calloway. ROA 3. Finishing the frisk, Respondent turned away from the Officer. ROA 3. As Respondent was turning, Officer Calloway spotted a leather strap on his chest consistent with a strap that would hold a gun. He then requested that Respondent move aside his unzipped jacket so he could see whether the strap was holding a concealed weapon. ROA 3. The man pushed Officer Calloway's hand, at which point the Officer retaliated by moving the jacket thus revealing a "Glock 21" .45 caliber pistol. ROA 3. Officer Calloway seized the gun and arrested Respondent. ROA 3. Only after being arrested, did Respondent admit he was an undercover officer. ROA 3. He explained he did not have identification or a concealed weapon permit on his person as it could compromise his undercover investigation. ROA 3.

Without any identification showing Respondent was an officer, Calloway remained suspicious and proceeded with the arrest for violation of Craven Statute 19-166.81, which prohibits possession of concealed firearms. ROA 3. Officer Calloway took Respondent to the Charlestown precinct where a full search was performed. ROA 3. Respondent's cellular phone was among the items seized in the search. ROA 3. The phone contained the number of Jacqueline Malone, the daughter of the Rushmore County Police Chief. ROA 3. Concerned for the safety of Ms. Malone, Officer Calloway contacted her directly. ROA 4. Without inquiry by Officer Calloway, Ms. Malone explained that Respondent was an undercover officer and she was involved in an

extramarital affair with him. ROA 4. Officer Calloway immediately called Respondent's precinct and confirmed that he had, in fact, arrested one of their undercover officers.

ROA 4. Calloway apologized to the precinct and explained his conversation with Ms. Malone. He then immediately released Respondent and apologized for the confusion.

The next day, June 8, 2005, Respondent was terminated from the Rushmore County Police Department for "behavior unbecoming of an officer". ROA 4. Police Chief Patrick Malone cited the reason for termination was Respondent's involvement in an extramarital affair in violation of the Craven anti-adultery statute, Craven Statute 11-198.01. ROA 4.

## SUMMARY OF THE ARGUMENT

I. This Court should find that Officer Calloway's actions were lawful under the Fourth Amendment. The safety of police officers, especially those investigating operations involving weapons, justifies a limited search for weapons which could be used to harm officers. *United States v. Terry*, 392 U.S. 1, 27 (1968). The means used in conducting a protective search must be related in scope to the circumstances justifying the search in the first place. Officer Calloway's act of pulling aside the suspect's jacket was a reasonable means of discovering whether the suspect was armed, and it was therefore within the permissible scope for a protective search.

A police officer with reasonable suspicion that an individual is carrying a weapon may conduct a limited frisk for weapons, because the government interest in officer safety allows a limited intrusion upon individual rights. There is no clear-cut rule for analyzing the scope of a particular frisk, because the standard of reasonableness balances the governmental interest in question against the level of intrusion involved. This Court has accorded substantial weight to the government's interest in officer safety. *See, e.g., Terry*, 392 U.S. at 24 (holding that only reasonable suspicion, not probable cause, is required to make a protective search); *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that the government's interest in protecting officers justifies warrantless searches incident to arrest, because otherwise “the officer's safety might well be endangered, and the arrest itself frustrated”). Therefore, the government's interest in officer safety permits protective searches, so long as the scope is reasonable in light of the intrusion involved.

Protective searches justified by the officer safety rationale are lawful if the means used are reasonably related to the determination of whether the suspect is carrying any

weapons which might be used to assault the officer. Under *Terry*, courts must look not only “whether the officer's action was justified at its inception,” but also “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 20. Therefore, to be reasonable, a protective search must use minimally intrusive means to determine whether the suspect is armed. No language in *Terry* restricts protective searches to a so-called “pat down,” and therefore courts have upheld searches going beyond the suspect's outer clothing, so long as these searches were reasonably designed to discover weapons. *See, e.g., United States v. Hill*, 545 F.2d 1191 (9th Cir. 1976); *Hodges v. State*, 678 So.2d 1049 (Ala. 1996). On the other hand, courts have found that searches fail the officer safety justification and exceed the lawful scope defined in *Terry* when they are no longer premised upon an effort to find weapons. *See, e.g., United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008); *People v. Aviles*, 21 Cal.App.3d 230 (Cal. App. 1971).

In the fact-specific *Terry* search context, courts look to the reasonableness of a police officer's actions in light of the particular circumstances of the case. Rather than institute a bright-line rule, the proper approach is to determine whether the officer's search was reasonably designed to determine whether the suspect was armed. Particular exigencies, such as a suspect's uncooperativeness or hostility, may allow a more intrusive search than is normally permissible.

Officer Calloway's act of pulling aside respondent's jacket was a reasonable means of discovering whether respondent was armed, and was permissible under the Fourth Amendment. Officer Calloway had reasonable suspicion that respondent was armed. Therefore, Calloway was allowed to make a limited search to ascertain whether

respondent was carrying a weapon. Calloway's search presented a minimal intrusion upon respondent's privacy, was for the sole purpose of determining whether respondent was armed, and therefore was within the permissible scope of a protective search.

II. Respondent's claim that the Craven Police Department violated the due process clause of the Fourteenth Amendment is incorrect. In order to prevail on his claim Respondent must show that the police department either deprived him of a fundamental right without having an overwhelming state interest or that the police department deprived him of a non-core liberty interest in an arbitrary or utterly unreasonable manner. *Mercure v. Van Buren Township*, 81 F. Supp.2d 814 (E.D. Mich. 2000).

There is no fundamental right to commit adultery. While this Court in *Lawrence v. Texas*, 539 U.S. 558 (2003) may have enumerated a new fundamental right to homosexuality it did not extend such a right to adultery. Adultery is antithetical to marriage and personal autonomy and so it is not central to our nation's concepts of ordered liberty. *Sherman v. Henry*, 928 S.W.2d 464 (Texas 1996). Because there is no fundamental right to adultery the proper level of review is rational basis review. *Washington v. Glucksberg*, 521 U.S. 702 (1997). Under rational basis review, the Craven County Police department need only show that it had a substantial interest in firing Respondent for this conduct. *Cook v. Gates*, 528 F.3d 42 (1<sup>st</sup> Cir. 2008). In this case the police department has an interest in police morale and integrity, as well as public acceptance of the police department, and minimizing conflicts of interest and risks of blackmail. *Baron v. Meloni*, 602 F. Supp. 614 (W.D.N.Y. 1985). Even if there was a fundamental right to adultery the previously stated interests are overwhelming; so the police department's actions pass strict scrutiny.

In order for Respondent's claim to prevail under if there is a non-core liberty interest, he must show that the Craven County Police Department deprived him of such interest in an arbitrary or utterly unreasonable way *Mercur*, 81 Supp.2d at 825. Respondent has shown no evidence that his dismissal was arbitrary or utterly unreasonable. The evidence in this case shows that the department police to regulate the conduct of police officers and that conduct unbecoming an officer is subject to regulation. Respondent has not shown that he was fired for any reason other than the violation of the department's conduct policy.

## ARGUMENT

### **I. OFFICER CALLOWAY'S SEARCH WAS REASONABLE UNDER TERRY BECAUSE IT WAS DESIGNED TO DETERMINE IF RESPONDENT WAS ARMED, AND ITS INTRUSION UPON RESPONDENT'S PRIVACY WAS MINIMAL.**

In this case, a police officer investigating an illegal firearms distribution network encountered and searched a suspect he reasonably believed was armed and dangerous. ROA 2. In attempting to ascertain whether the suspect had a weapon, the officer moved aside the suspect's unzipped jacket. ROA 2. The Fourth Amendment prohibits searches and seizures conducted without a warrant issued based upon probable cause. U.S. Const. amend. IV. However, this Court has held that the Fourth Amendment permits certain searches, even warrantless ones, which are justified by a strong state interest, such as protection of police officers in potentially dangerous situations. *See United States v. Terry*, 392 U.S. 1. The act in question – a minor manipulation of Respondent's outer clothing – is permissible under the Fourth Amendment, because it was premised upon a reasonable suspicion the suspect was carrying a weapon and strictly aimed at determining whether the suspect was armed.

The scope of a *Terry* search is lawful if the means used by the officer are reasonably designed to ascertain whether the suspect is armed. The search must be confined “to an intrusion reasonably designed to discover guns ... or other hidden instruments” which could be used to assault the police officer. *Id.* Reasonableness is the touchstone of the analysis. *Michigan v. Long*, 463 U.S. 1032, 1051 (1983), *quoting Terry*, 392 U.S. at 19. No language in *Terry* restricts protective searches to a so-called “pat down,” and therefore courts have upheld searches going beyond the suspect's outer clothing, so long as these searches were reasonably designed to discover weapons. *See*,

*e.g.*, *United States v. Hill*, 545 F.2d 1191; *Hodges v. State*, 678 So.2d 1049. On the other hand, courts have found that searches fail the officer safety justification and exceed the lawful scope defined in *Terry* when they are no longer premised upon an effort to find weapons. *See, e.g.*, *United States v. Askew*, 529 F.3d 1119; *People v. Aviles*, 21 Cal.App.3d 230.

This Court should find that Officer Calloway's actions were lawful under the Fourth Amendment. The means used in conducting a protective search must be related in scope to the circumstances justifying the search in the first place. Officer Calloway's act of pulling aside the suspect's jacket was a reasonable means of discovering whether the suspect was armed, and it was therefore within the permissible scope for a protective search. Holding otherwise would compromise the safety and effectiveness of police officers in the field in encountering potentially armed and dangerous suspects.

**A. Limited Protective Searches are Justified by the Substantial Government Interest in Protecting Police Officers in Dangerous Situations.**

A police officer with reasonable suspicion that an individual is carrying a weapon may conduct a limited frisk for weapons, because the government interest in officer safety allows a limited intrusion upon individual rights. In the Fourth Amendment context, what is reasonable depends upon a balance of interests. The law balances the nature of the government interest involved in conducting the search or seizure against the intrusion on the rights of the individual. The safety of police officers in the field, especially those investigating operations involving weapons, justifies a limited search for weapons which could be used to harm officers.

There is no clear-cut rule for analyzing the scope of a particular frisk, because the standard of reasonableness balances the governmental interest in question against the

level of intrusion involved. The touchstone inquiry in evaluating a protective search under *Terry* is reasonableness. *Long*, 463 U.S. at 1051, *quoting Terry*, 392 U.S. at 19. In assessing an officer's conduct in conducting a frisk, it is necessary to focus upon the government's interest in protecting police officers, and to balance that interest against the intrusion upon the individual's privacy. *Terry*, 392 U.S. at 20; *see also United States v. Hensley*, 469 U.S. 221, 228 (1985) (stating that 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”). The reasonableness standard requires courts “first to focus upon the governmental interest” in question, because there is “no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails.” *Terry*, 392 U.S. at 20-21, *quoting Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967).

This Court has accorded substantial weight to the government's interest in officer safety. In the protective search context, for instance, the Court requires only reasonable suspicion rather than probable cause for an officer to make a limited search. To frisk a suspect, a law enforcement officer must have a reasonable articulable suspicion that the suspect is armed and presents a threat. *Terry*, 392 U.S. at 24. The officer must be able to point to “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officer in believing that the suspect is dangerous. *Terry*, 392 U.S. at 21. The government's interest in officer safety allows that “[t]he officer need not be absolutely certain that the individual is armed,” but must only have “reason to believe that he is dealing with an armed and dangerous individual.”

*Terry*, 392 U.S. at 27. Similarly, in the arrest context, this Court allows searches incident to arrest premised upon an officer safety rationale. *See, e.g., Chimel*, 395 U.S. 752. The government's interest in protecting officers justifies warrantless searches incident to arrest, because otherwise “the officer's safety might well be endangered, and the arrest itself frustrated.” *Id.* at 763.

Frisks for weapons must be evaluated in light of the reasonableness standard, which balances the need to protect officers against the individual rights of the suspect. A frisk effectuates the strong state interest of protecting the safety of police officers. *New York v. Class*, 475 U.S. 106, 117 (1986). When an officer's search is designed to discover whether a suspect is armed, the law will take into account this balance “to allow the weighty interest in the safety of police officers to justify warrantless searches based only on a reasonable suspicion of criminal activity.” *Id.*

**B. The Scope of a *Terry* Search is Lawful if the Means Used are Reasonably Designed to Ascertain Whether the Suspect is Armed.**

With protection of police officers in mind, the law allows limited searches to determine whether the suspect is armed. *Terry* authorizes officers to conduct limited searches without probable cause to determine whether a suspect is carrying weapons which might be used to injure the officer. *Terry*, 392 U.S. at 24. A search is no longer valid when it goes beyond what is necessary to determine if the suspect is armed. *Sibron v. New York*, 392 U.S. 40, 65-66 (1968). Therefore, a search justified by the officer safety rationale will be lawful if the means used are reasonably related to the determination of whether the suspect is carrying any weapons that might be used to assault the officer.

The basic goal of *Terry* is to allow the police officer to ensure that the person he is confronting is not armed. The *Terry* Court considered not only “whether the officer's action was justified at its inception,” but also “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 20. The lower courts have consistently applied the rule that “[b]ecause a pat-down search is for the limited purpose of ensuring the safety of the officer and others around him, the search must ‘be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.’” *United States v. Wilson*, 506 F.3d 488, 492 (6th Cir. 2007), quoting *Terry*, 392 U.S. at 29.

To be reasonable, a protective search must use minimally intrusive means to determine whether the suspect is armed. The *Terry* Court stated that an officer may undertake a “carefully limited search” of the suspect to discover weapons the suspect might use to assault the officer. *Terry*, 392 U.S. at 29. There is no language in *Terry* limiting weapons searches to a so-called “pat down.” *Hill*, 545 F.2d at 1193. The inquiry, then, is whether the search is a “limited intrusion” designed to discover weapons which might be used to injure the officer. *Id.* In *Hill*, the Ninth Circuit ruled that the lifting up of an armed robbery suspect's shirt was not unlawful, because the purpose of the limited search was to discover weapons that might be used to harm the officer. *Id.* The *Hill* court characterized the search as a “direct and specific inquiry” aimed at the limited area where a bulge in the suspect's waistband and shirt area suggested a weapon. *Id.* In holding that the weapons search was reasonable, the court stated that “[a]ny limited

intrusion designed to discover guns, knives, clubs or other instruments of assault is permissible.” *Id.*

A reasonable protective search must not necessarily be preceded by a “pat down” of the particular area to be searched. In *Hodges*, the Alabama Supreme Court held that an officer was justified in lifting up the suspect's pants leg in conducting a frisk because the officer had a reasonable suspicion that the suspect was carrying a weapon in his leather boot. *Hodges*, 678 So.2d at 1051. Though the defendant objected to the lack of a pat-down of his boot, the court concluded that “the police officer's search did not exceed the bounds permitted for a protective patdown search for weapons,” because the defendant was wearing “hard leather” boots in which weapons could easily be concealed. *Id.* The court concluded that “[a] patdown of the hard leather boots might have revealed nothing to indicate that a weapon was there and would not have lessened the police officer's concerns for his own safety.” *Id.* Where the officer has a reasonable belief that the suspect is armed, he is permitted to use reasonable methods to discover a weapon and to preserve his own safety.

A *Terry* search becomes unreasonable not when it goes beyond a “pat down,” but when the search is no longer justified by a reasonable belief that the suspect is armed. In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the Court held that the fruit of a search that “goes beyond what is necessary to determine if [a] suspect is armed ... will be suppressed.” *Id.* at 373; *see also Sibron*, 392 U.S. at 65-66 (holding that *Terry* does not permit officers to make searches not justified by a safety rationale). The *Dickerson* Court held that an officer's continued exploration of a suspect's pocket after the officer concluded there was no weapon was unlawful. *Dickerson*, 508 U.S. at 378. Likewise,

the key consideration in *Sibron's* holding that a *Terry*-type search was excessive in scope was that the officer placed his hands in the suspect's pockets to find narcotics with which to convict him of possession – *not* to find weapons. *Sibron*, 392 U.S. 40, 62-63. As the *Terry* Court stated, the “sole justification” of a protective search is the protection of police officers and others nearby. *Terry*, 392 U.S. at 29. This Court has been unequivocal in explaining that “[t]he purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.” *Adams v. Williams*, 407 U.S. 143, 146 (1972).

The lower courts have followed this Court in holding that an officer who has no further suspicion that a suspect is armed has no reasonable justification for making a more extensive search. In *Askew*, the D.C. Circuit held that an officer's partial unzipping of the suspect's jacket was unlawful in its scope. *Askew*, 529 F.3d. at 1133. The court based its decision upon the fact that the officer was trying to identify the suspect by a sweater he was wearing under the coat, and because the search was not for weapons, but for identification, it was impermissible. *Id.* In *People v. Aviles*, 21 Cal.App.3d 230 (Cal. App. 1971), a California court held that an officer who flipped open a suspect's coat was not justified in his search, because the officer had no basis to believe the suspect was armed. *Id.* at 233-34. The court held that the search was purely exploratory and was therefore impermissible in scope. *Id.*

To be lawful, a protective search must be reasonably designed to discover weapons which might be used to injure the officer. Absent any language in *Terry* limiting protective searches to pat downs, courts look to whether the means used are reasonably related to the circumstances justifying the intrusion. If a search is a minimal

intrusion designed solely to determine if the suspect is armed, it is reasonable under the Fourth Amendment.

**C. The Reasonableness Standard Allows Courts to Weigh the Intrusiveness of a Search Against the Exigencies of the Particular Situation.**

In the fact-specific *Terry* search context, courts look to the reasonableness of a police officer's actions in light of the particular circumstances of the case. Rather than follow a bright-line rule, the proper approach is to determine whether the officer's search was reasonably designed to determine whether the suspect was armed. Particular exigencies, such as a suspect's uncooperativeness or hostility, may allow a more intrusive search than is normally permissible.

Reasonableness guides the approach to *Terry*-type problems, and therefore any attempt to institute a bright-line rule is misguided. The *Sibron* Court stated that “[t]he search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect.” *Sibron*, 392 U.S. at 65. Taken out of context, this language might suggest a bright-line rule prohibiting any search beyond a pat down. However, the *Sibron* Court itself stated that the officer's search “might still have been justified” if the officer “had reasonable grounds to believe that *Sibron* was armed and dangerous.” *Id.* Therefore, the scope of a *Terry* search is not limited to a pat down, but instead must be reasonably aimed at discovering weapons which might be used to injure the officer. Where the reasonable suspicion standard is met, courts agree that “[t]he scope of a *Terry* stop must ... be reasonable,” *United States v. McCargo*, 464 F.3d 192, 198 (2d Cir. 2006), and “[t]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.” *Gilles v. Repicky*, 511 F.3d 239, 245 (2d Cir. 2007).

The flexible reasonableness standard takes into account the need to allow officers to adjust to the evolving nature of any investigation. Rather than imposing a bright-line pat down rule, the proper determination of the permissible extent of the search should be whether the search uses reasonable means to determining whether the suspect is armed. For example, courts have allowed a “more intrusive *Terry* search” where the suspect “attempts to prevent an officer from performing an effective pat-down.” *State v. Heitzmann*, 632 N.W.2d 1, 9 (N.D. 2001). Rather than a rigid rule, the circumstances dictate what is reasonable under the Fourth Amendment. Similarly, this Court has rejected the argument that there should be a bright line time limit for a *Terry* stop. In *United States v. Place*, 462 U.S. 696 (1983), the Court questioned “the wisdom of a rigid time limitation,” stating that “[s]uch a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.” *Id.* at 709, n. 10. In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court rejected a per se rule that a twenty minute detention was too long to be justified under the *Terry* doctrine, stating that “such a result is clearly and fundamentally at odds” with the Court’s reasonableness approach to these situations. *Id.* at 686. In *Terry* situations, the fundamental analysis is reasonableness, and therefore the scope of a permissible search should be defined by whether the methods used are reasonably designed to determine whether the suspect is armed.

**D. Officer Calloway's Slightly Extended *Terry* Search Was Justified by the Need to Preserve his Own Safety in Confronting a Potentially Armed and Dangerous suspect.**

Officer Calloway's act of pulling aside Respondent's jacket was a reasonable means of discovering whether Respondent was armed, and was permissible under the

Fourth Amendment. Officer Calloway had reasonable suspicion that Respondent was armed. Therefore, Calloway was allowed to make a limited search to ascertain whether Respondent was carrying a weapon. Calloway's search presented a minimal intrusion upon Respondent's privacy, was for the sole purpose of determining whether Respondent was armed, and therefore was within the permissible scope of a protective search.

The government interest in officer safety is substantial in this case, because Officer Calloway had reasonable suspicion to believe that Respondent was armed and dangerous. Under *Terry*, an officer must be able to point to “specific and articulable facts” which “reasonably warrant” the officer's belief that the suspect is armed. *Terry*, 392 U.S. at 21. At the time the events in question occurred, Officer Calloway was investigating an illegal firearms distribution network tied to the private military company, Red Tide “R-T.” ROA 2. Calloway believed a meeting between an R-T official and a prospective arms buyer was about to take place in McDonough Square. ROA 2. When Calloway came on the scene, he noticed that Respondent had “closely cropped hair” and was wearing a “black nylon bomber jacket,” which aroused Officer Calloway's suspicions because the temperature was in the low seventies. ROA 2. Respondent was surveying McDonough Square and scanning the rooftops of surrounding buildings. ROA 2. When Calloway approached, Respondent became visibly angry and glanced left and right repeatedly, before finally responding that his name was “Bill.” ROA 3. Given these facts, Calloway was warranted in his reasonable suspicion that Respondent was armed and potentially dangerous. Therefore, under *Terry* the substantial government interest in officer safety allowed him to make a limited search to determine whether Respondent was armed.

Calloway's search was within the permissible scope for a protective search, because it was a minimal intrusion designed to determine whether Respondent was armed. Under *Terry*, a protective search must be “confined in scope to an intrusion reasonably designed to discover guns ... or other hidden instruments” which could be used to assault the officer. *Terry*, 392 U.S. at 29. The *Terry* Court did not limit a weapons search to a “pat down” search, and therefore “[a]ny limited intrusion designed to discover guns ... or other instruments of assault is permissible.” *Hill*, 545 F.2d at 1193. After Officer Calloway's initial pat down failed to produce any weapons, Calloway noticed a vertical leather strap around Tracey's upper chest area ROA 3. The strap was consistent with the kind used to carry a concealed firearm. ROA 3. Respondent's jacket was already unzipped when Calloway reached out and moved the left exterior aside, revealing a “Glock 21” .45 caliber pistol. ROA 3. The intrusion upon Respondent's privacy was minimal. Officer Calloway did not make Respondent take the jacket off, nor did he search areas of Respondent's body where he did not suspect he might find a weapon. The search was direct and specifically targeted a limited area where Calloway reasonably believed Respondent was carrying a weapon. Furthermore, Respondent was hostile and uncooperative throughout Calloway's investigation. During the initial pat down, Respondent was “visibly angry” and cursed and berated Officer Calloway. ROA 3. When Calloway reached out to determine whether the apparent gun holster contained a weapon, Respondent responded by brushing aside Calloway's hand. ROA 3. Given the dangers involved in investigating a potentially armed suspect, Calloway's actions were not excessively intrusive. The reasonableness standard allows officers to adjust their conduct depending upon the particular exigencies of the case. Calloway's search was a

minimal intrusion upon Respondent's privacy, and therefore it was a reasonable protective search.

**II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE TERMINATION OF A POLICE OFFICER WHO COMMITTED ADULTERY.**

Respondent's claim stems from a challenge of his termination under the due process clause of the Fourteenth Amendment. Respondent alleges that he was unlawfully terminated for his participation in an extra-marital affair with the Rushmore County Police Chief's daughter. The Fourteenth Amendment to the Constitution states that no state "shall ... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, §1, cl. 2. In order for the Respondent to prevail on his §1983 claim, he must show either that that the police department infringed on a fundamental right, or if the right in question is non-fundamental, that the action complained of was arbitrary or utterly unreasonable. *Mercurie v. Van Buren Township*, 81 F. Supp.2d 814 (E.D. Mich. 2000).

The United States District Court for the District of Craven was correct in finding no fundamental right to engage in extramarital sexual conduct. ROA 6-7. In light of the legitimate government interest in regulating officer conduct, the District Court granted summary judgment in favor of the of the Rushmore County Craven, Police Department. ROA 6-7. The Circuit Court for the Thirteenth Circuit incorrectly found held that there is protected liberty interest in extramarital conduct, and found for Respondent. ROA 10.

Fundamental rights must be plead with specificity. *Washington v. Glucksberg*, 521 U.S. 702 (1997). Respondent's broad reading of a fundamental right to sexual privacy ignores the fact that the particular right in question – extramarital conduct – has

never been recognized as a fundamental right.<sup>1</sup> The Tenth Circuit correctly noted that “[a] broadly-defined ‘right to private sexual activity’ will clearly not suffice.” *Seegmiller v. Laverkin*, 528 F.3d 762,769-70 (10<sup>th</sup> Cir. 2008). Because there is no fundamental right to engage in private adulterous conduct, this Court should reverse the lower court's decision and find in favor of Petitioner.

**A. The Due Process Clause of the Fourteenth Amendment Does Not Protect Private Extramarital Conduct as a Fundamental right.**

This Court has concluded that there is inherent in the Constitution a right to privacy “founded in the Fourteenth Amendment’s concepts of personal liberty and restrictions upon state action.” *Roe v. Wade*, 410 U.S. 113, 153 (1973). Two distinct areas of privacy have been articulated by this Court. The first is the “individual interest in avoiding disclosure of personal matters” and the second is “the interest in independence in making certain kinds of important decisions.” *Whalen v. Roe*, 429 U.S. 589, 599 (1977). The facts of this case deal with the latter.

No court has held that there is a fundamental right to adulterous affairs, although courts disagree as to whether *Lawrence* created a new fundamental right to sexual privacy generally. However a court may interpret the right to sexual privacy, this right is not all encompassing. *Lawrence v. Texas*, 539 U.S. 558 (2003). Before *Lawrence*, courts held to the long established precedent in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court in *Bowers* established that there was no fundamental right to sexual privacy<sup>2</sup> under

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<sup>1</sup> It should be noted that this Court granted Certiorari on the question of whether the Due process clause prohibits termination of police officers for participation in extramarital affairs. ROA 13.

<sup>2</sup> As stated above the issue here should not be sexual privacy but rather private adulterous sexual conduct, however some cases have framed the question this way and so it is necessary to answer this broad question in order to resolve the narrower one before this Court. Indeed even the *Lawrence* Court stated “[t]o say the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse” *Lawrence*, 539 U.S. 558, 567 (2003).

the due process clause of the Fourteenth Amendment. In *State v. Lowe*, 861 N.E.2d 512 (Ohio 2007) the Ohio Supreme Court found *Lawrence* did *not* articulate a new fundamental right to sexual privacy and that right does not exist. On the other hand, in *Talbert v. Arkansas*, 239 S.W. 3d 504 (Ark. 2006), the Arkansas Supreme Court articulated a very restricted right to sexual privacy. In between some courts have held that *Lawrence* created a new test for substantive due process. *Cook v. Gates*, 528 F.3d 42 (1<sup>st</sup> Cir. 2008). This test is neither rational basis review nor strict scrutiny, but rather a balancing of state interest against individual liberty interest. *Id.*

### **1. Lawrence Did Not Create a Fundamental Right to Adultery**

*Lawrence* was a challenge to a Texas anti-sodomy statute. Lawrence was arrested for having sexual intercourse with another man by police officers that entered the private residence in response to a reported weapons disturbance. *Lawrence*, 539 U.S. at 562-63.

Justice Kennedy delivered the opinion of the Court stating:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”

*Id.* at 578 quoting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Only one sentence later, Justice Kennedy went on to state that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Lawrence*, 539 U.S. at 578. This suggests rational basis review of sexual privacy rather than strict scrutiny when considering the state interest.

A myriad of cases have found that *Lawrence* did not create a fundamental right to sexual privacy, let alone adultery. These courts interpret *Lawrence* correctly to find that

the standard of review is rational basis. In *State v. Clinkenbeard*, 123 P.3d 872 (Wash. Ct. App. 2005), a school bus driver challenged his conviction under a statute which made it a class C felony to have sexual intercourse with a registered student of the school. *Id.* *Clinkenbeard*, held “[w]hile the decision in *Lawrence* restricts the degree to which government may regulate private, adult, consensual sexual behavior, the court did not establish that this behavior rises to the level of a fundamental right.” *Id.* at 563. The court made its decision based on the idea that this Court used rational basis review to invalidate the statute at issue in *Lawrence*. Similarly the court in *Seegmiller* held that *Lawrence* did not articulate a fundamental right to sexual privacy and that it used rational basis review to invalidate the Texas statute. *Seegmiller*, 528 F.3d at 771. *Seegmiller* went on to state “[this] Court declined ‘to recognize a fundamental right to sexual privacy...where petitioners and amici expressly invited the [C]ourt to do so.’” *Id.*, citing *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232 (11<sup>th</sup> Cir. 2004).

The Circuit Court for the Thirteenth Circuit below relied heavily on the holding in *Cook*, which found that the level of scrutiny is between rational basis and strict scrutiny. *Cook* 528 F.3d at 55. However, the governmental interest in *Cook* was so high that the court held in favor of the government. *Id.* Furthermore, the court in *Cook* conceded that “*Lawrence* did not identify a protected liberty interest in all forms and manner of sexual intimacy. *Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one’s home and one’s private life.” *Cook* 528 F.3d at 55.

In *Talbert*, the Arkansas Supreme Court had a similarly restricted view of private sexual conduct. While the court did find that a state could not intrude into the

individual's right to engage in private consensual sex, it stated that such a right is not absolute and can be restricted under certain circumstances. *Talbert* 239 S.W. 3d at 269. (holding that the facts were distinguishable from *Lawrence* because the allegations involved the use of an elevated employment position to coerce sex from a subordinate). As stated previously there is a disagreement in the courts as to the doctrinal limits set out in *Lawrence*, however most courts agree that any right which may or may not have been created in *Lawrence*, such a right does not encompass all sexual activity. The state interest of the Craven Police Department in regulating officer conduct is high enough to pass even a standard that is greater than rational basis.

**2. Pre-Lawrence Decisions Emphasize that Extramarital Conduct Has Never Been Recognized as a Fundamental Right.**

Several pre-*Lawrence* cases dealt directly with the issue of police officers being reprimanded for adultery. The Pennsylvania Supreme Court found that an officer who was fired for having an affair with the wife of another officer was not protected by due process clause. *Fabio v. Civil Serv. Comm'n of Philadelphia*, 414 A.2d 82 (Penn. 1980) (upholding the dismissal of police officer after department investigation discovered he was "wife swapping" and had an affair with his wife's eighteen year old sister). The court in *Fabio* reasoned that although adultery was no longer a crime in the state of Pennsylvania at the time of the occurrence, the state had a "wider latitude and different interest in regulating the activities of its employees than in the behavioral patterns of the citizenry at large." *Id.* at 89, citing *Kelly v. Johnson*, 425 U.S. 238 (1976). The Supreme Court of Texas held similarly in *Sherman v. Henry*, 928 S.W.2d 464 (Texas 1996), when it concluded the failure of a police department to promote an officer who had an affair with the wife of another officer, did not violate the due process clause. The court in

*Henry* relied heavily on the reasoning in *Bowers*. The court found that only rights “which are ‘implicit in the concept of liberty’ such that ‘neither liberty nor justice would exist’ if they were sacrificed, or those liberties which are ‘deeply rooted in this Nation’s history and tradition’ receive constitutional protection...” *Id.* at 469 citing *Bowers* 478 U.S. at 191-92. The court found that the liberty interest protected by the due process clause must originate in the concepts articulated by this Court such as: abortion *see Roe v. Wade*, 410 U.S. 113 (1973); contraception *see Griswold v. Connecticut*, 381 U.S. 479 (1965); procreation *see Skinner v. Oklahoma*, 316 U.S. 535 (1942); marriage *see Loving v. Virginia*, 388 U.S. 1 (1967), child rearing and education *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and family relationships *see Prince v. Massachusetts*, 321 U.S. 158 (1944). *Id.* The court went on to stress that “...adulterous conduct is the very antithesis of marriage and family...” and that “[a]dultery, by its very nature, undermines the marital relationship and often rips families apart.” *Id.* What the court seemed to be saying was that rights are fundamental when they deal with either: 1) autonomous decision making (abortion, contraception, procreation); or 2) familial liberty (marriage, family relationships, child rearing and education). Those liberties it seems are beyond the scope of governmental intervention lacking a substantial overriding governmental interest. The court in *Johnson v. San Jacinto Junior College*, 498 F. Supp. 555 (S.D. Texas 1980), opined with similar reasoning by finding that a junior college could demote one of its employees for having an adulterous affair with a librarian. The holding in *Johnson* stated that “the right of privacy in sexual intimacy is grounded on the marriage relation, and that the right of a single or married individual to do with his or her body as he or she pleases encompasses aspects incident to sexual intimacy, but currently does not protect the sexual

relations themselves.” *Id.* at 575. This line of reasoning was followed in similar cases dealing with police officers *see Hughes v. City of N. Olmsted*, 93 F.3d 238, 242 (6th Cir.1996) (holding police department acted reasonably by investigating officer “because of claims that he had committed acts of sexual misconduct while on duty, an accusation which certainly related to whether [officer] was conducting himself appropriately as a police officer”); *Oliverson v. West Valley City*, 875 F.Supp.1465, 1482 (D. Utah 1995) (upholding police department’s discipline of officer for violating state anti-adultery statute by reasoning that adultery had never been seen as implicit in the concept of ordered liberty and was not deeply rooted in the nations history and traditions). The general consensus of these cases is that that adultery is not a right which is fundamental to our nation’s concept of liberty. Under any of the articulated principals of the right to privacy by this Court, none have held adultery to be one; and most are in the opposite in that they deal with the fundamentals of marriage; not its dissemination. *Commonwealth v. Stowell*, 449 N.E.2d 357 (Mass. 1983) (upholding state anti-adultery statute).

The counterpart to the previously stated line of reasoning is best represented in *Briggs v. N. Muskegon Police Dep’t*, 563 F. Supp. 585 (W.D. Mich. 1983). In *Briggs* a police officer brought an action challenging his dismissal due to his cohabitation with a married woman who was not his wife. The court found that extramarital privacy interests deserve the same kind of protection that marital ones do. In coming to this conclusion the *Briggs* court stated:

The argument, then, is this: Marriage exists to facilitate the expression of emotional and sexual intimacy. That intimacy is so fundamental to individual liberty that it demands constitutional protection. Nothing is different about the psychological and emotional needs of unmarried couples which would justify denying them the same protection. *Id.*

Following this line of reasoning the opinion in *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9<sup>th</sup> Cir. 1983) stated that a female police officer who was not hired after a forced disclosure of previous extramarital affair with another police officer stated a claim which “bears on those matters acknowledged to be at the core of the rights protected by the constitution's guarantees of privacy and free association-appellant's interest in family living arrangements, procreation and marriage.” A twist on this argument was presented in *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Penn. 1979), which dealt with a police officer who began dating an eighteen year old girl while separated from his wife and eventually had her move in with him. The officer was dismissed from his employment for his conduct under department policy. *Id.* The analysis in *Shuman* was based on a zone of privacy concept. *Id.* at 459. The court found that while there are some rights which this Court has found fundamental there are others which are in the zone of privacy “simply because they are private;” “that is, that (they do) not adversely affect persons beyond the actor and hence (are) none of their business.”” *Id.* (parentheses in the original) citing *Ravin v. State*, 537 P.2d 494 (Alaska 1975). However the court in its ultimate holding stated “We conclude that a party's private sexual activities are within the ‘zone of privacy’ protected from unwarranted government intrusion. Such a conclusion flows inevitably from the cases holding that such matters as contraception, abortion, and marriage are private matters within this ‘zone.’” *Id.* citing *Eisenstadt v. Baird*, 405 U.S. 438, 31 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479, (1965).

The right to adultery is not one that is fundamental to this nation’s notions of liberty. The reason that self autonomy and familial privacy are protected is because the

former deals with decision making that affects the self and the later deals with decision that affect what can be arguably called the most guarded of American socio-structures, the family unit. Allowing adultery to hide in the Trojan Horse of substantive due process protection would allow the enemy of these closely held ideas to enter the gates. When a spouse commits adultery they do not make familial decisions, rather they are making autonomous decision that can adversely affect others. The blurring of these two concepts means that both lose their fortitude. The right to be autonomous does not apply because adultery does not involve this idea of self autonomy like making personal decisions about contraception, procreation, and abortion. Likewise adultery serves against the fundamental right to marriage, child rearing and education, and family relationships. For these reasons the right to adultery is not fundamental to our nation's concepts of ordered liberty.

It may be argued that *Lawrence* eroded the concept of history and tradition that was so central to *Bowers* and its progeny. This argument is not backed up by the analysis in *Lawrence*. Justice Kennedy explained that prohibitions against homosexual sodomy did not have a standing tradition in our nation's concept of ordered liberty. *Lawrence*, 539 U.S. at 567-70. The laws that prohibited sodomy, buggery, and crimes against nature were not targeted at homosexuality. *Id.* at 568. Justice Kennedy went on to explain that the majority of these laws were enacted to protect against predatory acts which were not covered under traditional rape statutes. *Id.* The same cannot be said for adultery. Many states use adultery as a basis for divorce. Prohibitions on adultery part of our nation's traditions of ordered liberty.

The Circuit Court's contention that a right to sexual privacy existed based on *Eisenstadt*, 405 U.S. 438 (1972), and *Carey v. Population Services Int'l*, 431 U.S. 678 (1976), is misplaced. While both of these cases dealt with constructs within what could be called a right to privacy, neither articulated such a right. Both dealt with the narrower issue of contraception. Also noteworthy is the fact that *Eisenstadt* dealt with equal protection and not substantive due process. Not only do these cases not extend a right to sexual privacy, they certainly do not extend a right for a police officer to commit adultery.

The fact that *Lawrence* did not articulate any new fundamental right to sexual privacy along with the fact that pre-*Lawrence* decisions did not articulate a fundamental right to adultery means that the proper level of review for this case is rational basis review. Under rational basis review there must be a substantial governmental interest, *Cook*, 528 F.3d at 67. This interest "need only be rationally related to a legitimate government purpose" *Thomson v. Ashe*, 35 F.3d 399, 407 (6<sup>th</sup> Cir. 2001). The interests of the state here are to keep up officer morale, integrity; as well as to promote public acceptance of the police department and to minimize conflicts of interest and risks of blackmail. Although rational basis review does not necessitate that governmental interest be substantial or even overwhelming; the interest here is both. This interest overrides any privacy interest that Respondent may have whether that interest be a fundamental right or simply a non-core liberty interest.

**B. The State's Dismissal of Respondent was not "Arbitrary" or "Utterly Unreasonable."**

If there is a non-core fundamental interest at stake "the deprivation of such an interest still cannot support a claim under 42 U.S.C. § 1983 unless it is 'arbitrary' and

‘utterly unreasonable.’” *Mercur* 81 F.Supp.2d at 825. Under *Connick v. Myers*, 461 U.S. 138 (1983), the interest of the state employee is balanced against that of the state in promoting the efficiency of the public interest which it performs. States have an overwhelming interest in regulating the conduct of their police officers. The conduct of police officers may be regulated in a more restrictive way than that of the public at large. *Shawgo v. Spradlin*, 701 F.2d 470 (5<sup>th</sup> Cir 1983). In *Mercur* a police officer was discharged after it was discovered that he was having an affair with wife of fellow police officer. *Mercur*, 81 F.Supp.2d 817-19. The officer challenged the dismissal under the First Amendment freedom of association claims as well as Fourteenth Amendment substantive due process. *Id.* The court held that both claims fell under a substantive due process right to privacy claim. *Id.* at 821. The court went on to state that the rights which this Court has enumerated all dealt with personal integrity and familial decision making; and that adultery did not fall within this line. *Id.* at 823. The court went further to say that because this act involved police officers, *Kelly* and its progeny dictates that causes of action need to overturn a presumption of legislative validity over how police departments are run. *Id.* at 825. This can only be done by showing that the actions are “irrational” or “arbitrary” *Id.* The court in *Fugate v. Phoenix Civil Serv. Bd.*, 791 F.2d 736 (9<sup>th</sup> Cir.1986), dealt with a similar claim by a police officer who challenged their suspension for committing adultery. The court found that “[t]he City has legitimate interests in maintaining the morale, integrity, and public acceptance of the police department, and in minimizing conflicts of interest and risks of blackmail.” *Meloni*, 602 F. Supp. at 614. is the best example of this concern. There the police officer was discharged for having an affair with the wife of a known organized crime figure. *Id.* at 615. The court upheld the

discharge holding that because the officer had access to files and other investigatory materials and the wife was known to associate with both her husband and other crime figures the department's request that officer stop associating with her were a reasonable and thus not prohibited. *Id* at 618. These cases stand for the proposition that states which act in a rational non-arbitrary way are not subject to judicial micromanagement of their internal policies.

The reason for dismissing Respondent was clearly not arbitrary and was certainly rational. The court below stated that the only interest served by firing Respondent was to enforce regulations condoning immoral conduct; this assertion is misplaced. As stated previously the police department has an interest in officer morale and their perception in the public eye, as well as discouraging blackmail and other misuses of power. Here the Respondent was having an affair that was kept fairly quite, however for the most part these things seem to find a way into the community and the department. Officers could become fearful that members of their force could have an affair with their wife and not be subject to reprimand. The community could also begin to lose the respect and high regard in their police that keeps officers safe and keeps the community cooperative with police investigations. Criminals who find out that certain officers are involved in affairs could blackmail these officers to keep the affairs quiet from their wives and families. By contrast reprimanding officers for such conduct brings it out in the open and keeps them from people who might try to benefit via blackmail. This case is not one about morality or the suppression of rights; it is about allowing the Craven County Police Department to do their job.