

## **II. STANDARD OF REVIEW**

The ultimate questions of reasonable suspicion and probable cause to make a warrantless search are reviewed *de novo*. Ornelas v. United States, 517 U.S. 690, 691 (1996). Questions of substantive Due Process, under the Fourteenth Amendment of the United States Constitution are reviewed *de novo*. Cooper Industries v. Leatherman Tool Group, 532 U.S. 424, 431 (2001).

## **III. STATEMENT OF THE CASE**

On February 19, 2006, Respondent brought a cause of action in the United States District Court for the District of Craven pursuant to 42 U.S.C. 1983 against Petitioner in response to his arrest and subsequent termination from the Rushmore County Police Department. R. 3. The Fourth Amendment violation is alleged to have occurred during the course of his arrest for possession of a concealed firearm in violation of Craven Statute section 19-166.81. R. 3. Petitioner also claimed that the police violated his rights under the Due Process Clause of the Fourteenth Amendment arising from his termination for engaging in an adulterous relationship in violation of Craven Statute section 11-198.01. R. 2. Defense filed a motion for summary judgment, asserting that it was entitled to a judgment as a matter of law because neither the respondent's Fourth Amendment rights nor his Fourteenth Amendment Due Process rights were violated by the police. R. 2. The District Court rejected all of the respondent's claims and granted the defense's motion for summary judgment. R. 7.

Respondent filed an appeal of the district court's grant of the summary judgment and argued before the United States Court of Appeals for the Thirteenth Circuit on March 15, 2007. R. 8. That court, while noting that Respondent was not necessarily entitled to

judgment in his favor, reversed the summary judgment and remanded the case for further proceedings. R. 12. It is from this ruling that we appeal to this Court and seek re-affirmation of the District Court's grant of summary judgment.

#### **IV. STATEMENT OF THE FACTS**

On June 7, 2005, Officer Maxwell Calloway of the Rushmore County Police Department was pursuing a lead as part of a comprehensive eight month long investigation into an illegal paramilitary syndicate that was illicitly distributing firearms. R. 2. The detailed lead contained information that a high level member of the syndicate was meeting with prospective illegal buyers in a specific area of the town known as McDonough Square. R. 2. At the time of his arrest, unbeknownst to Officer Calloway or anyone outside of the respondent's precinct, Respondent was involved in an independent undercover operation into illegal gun sales. R. 2. Respondent did not fit the physical description of the syndicate official provided in the lead, so Officer Calloway decided to conduct a more thorough investigation in conjunction with the information in the lead. R. 2. As part of the investigation, Officer Calloway's suspicions were alerted at the fact that Respondent was wearing a heavy winter coat despite temperatures over seventy degrees. R. 2. This unique behavior was consistent with an attempt to conceal a weapon. R. 8.

Over the next twenty minutes, Officer Calloway observed Respondent become visibly agitated and incessantly scan the square as if he was looking for someone. R. 2. Further, the respondent was scanning the rooftops of the surrounding buildings as if he was afraid he was being watched. R. 2. Although Officer Calloway was initially hesitant about approaching Respondent, his increasing concern, based on his extensive investigation into the activities of the illicit gun dealers and the specific details of the

lead, prompted him to approach Respondent in an effort to alleviate his suspicions. R. 2. At this time the officer identified himself and asked Respondent for his name. R.3. Initially, the mysterious man was reluctant to respond to the routine question, but instead became noticeably angry and continued to act suspiciously by glancing to his left and right. R. 3. Eventually, Respondent said his name was "Bill" and promptly turned away from the officer in an effort to leave the area. R. 3. This communication, or lack thereof, with Respondent did not assuage the officer's suspicions that Respondent may be involved in criminal activity. R. 3. As the respondent tried to get away, Officer Calloway secured Respondent in an effort to continue the conversation face to face. R. 3. At this time, based on Respondent's elusive and suspicious actions, Officer Calloway conducted a protective pat down search of the exterior of Respondent's clothing to ensure that he was not armed and posed no danger to the officer or any innocent bystanders in the town square. R. 3. During the pat down, which did not reveal any object that felt like a weapon, Respondent became demonstrably irate and even started to verbally assault Officer Calloway. R. 3.

Following the routine protective pat down and Respondent's subsequent verbal abuse of Officer Calloway, Respondent immediately tried to leave the area again. R. 3. At this time, Officer Calloway observed a vertical leather strap underneath Respondent's open jacket that appeared to be consistent with the unique straps used to carry concealed firearms. R. 3. Officer Calloway's suspicions were understandably heightened at this observation, and he asked Respondent to stop and turn around. R. 3. After Respondent reluctantly turned around, Officer Calloway motioned toward Respondent's jacket in an effort to get a better look at the strap and Respondent slapped the officers hand aside. R.

3. In response to Respondent's suspicious resistance, the officer deliberately motioned towards the open jacket, which verified Officer Calloway's prior reasonable belief that the strap was being used to hold a concealed handgun. R. 3. The firearm was seized and Respondent arrested for violation of Craven Statute section 19-166.81. R. 3. Then, Respondent claimed to be an undercover officer, but failed to produce any proof of it. R. 3. He was taken into custody and charged with violation of the statute. R. 3.

After being arrested for violating Craven Statute section 19-166.81 for carrying a concealed weapon, Respondent was taken to Officer Calloway's Charlestown precinct house. R. 3. Officer Calloway had found a concealed weapon on a belligerent, suspicious acting man, with a suspicious story and no identification, during an investigation of illegal arms dealing, in the exact location the illegal arms deal was supposed to take place. R. 3. So, Officer Calloway found it prudent to search this man at the station. R. 3. On Respondent's person, Officer Calloway found the contact information of several of the officials of RT, the company being targeted in the investigation. R. 3. He also found contact information for Jacqueline Malone, Police Chief Patrick Malone's daughter. R. 3. RT is a private military company, with access to deadly weapons, and possibly involved in illegally distributing deadly weapons. R. 2. Fearing that the suspicious man, so far known only as "Bill", may be targeting Ms. Malone because she is the daughter of the Police Chief, whose organization is investigating the arms dealing, Officer Calloway swiftly called Ms. Malone. R. 4. Before he could explain himself, Ms. Malone told Officer Calloway she and Respondent had been having an affair, a crime in violation of Craven Statute 11-198.01; and that Respondent was an undercover officer. R. 4. Respondent is married, but not to Ms. Malone. R. 4. Officer Calloway then called

Respondent's precinct, finding out that the man he had in custody was in fact William Tracey, an undercover officer of that precinct. R. 4. He informed someone there that Tracey had violated the Craven state adultery law. R. 4.

Respondent was fired by the Rushmore County Police Department the next day for "behavior unbecoming an officer" because he had violated the Craven statute against adultery and had extramarital sex with Ms. Malone. R. 4. Ms. Malone had publicly made false allegations of corruption within the Rushmore County Police Department. R. 4. She made these untrue claims by contacting the local newspapers. R.3. Craven Statute section 11-198.01 is a lawfully enacted criminal statute, and was at the time of Respondent's termination. R. 4. Respondent had committed adultery with Ms. Malone multiple times before his illegal behavior was discovered. R. 4. The illicit relationship had been going on for some amount of time at that point. R. 4.

Subsequently, Mr. Tracey filed a 42 U.S.C. 1983 action against the Rushmore County, Craven, Police Department in the United States District Court of Craven. R. 2. Tracey claimed that his Fourth and Fourteenth Amendment rights had been violated. R. 2. The Rushmore County Police Department filed a motion for summary judgment, which was granted on February 19, 2006. R. 2. Tracey appealed the District Court's ruling to the United States Court of Appeals for the Thirteenth Circuit. On April 29, 2007, that court reversed the District Court's ruling and remanded the case for further proceedings. R. 8.

## **V. SUMMARY OF ARGUMENT**

The Fourth Amendment has been the subject of extensive deliberation at all levels of state and federal judiciaries, including the United States Supreme Court, since its

inception. As society has changed to adapt to contemporary realities, so have the courts in the matter in which they interpreted the permissibility of police actions under the Fourth Amendment. In modern society, when law enforcement activities are much more difficult and criminal activity is rampant, the courts have demonstrated a greater willingness to permit law enforcement to react under certain circumstances to protect themselves and the public.

The law enforcement officer in this case witnessed a potentially armed and dangerous suspect in the town square. The suspect was acting suspicious and did not answer even the most basic questions. During the subsequent weapons pat-down, the suspect verbally threatened the officer. As both the lower courts concluded, the officer had the requisite reasonable suspicion to approach the suspect. The moving of the open jacket was also permissible under the Fourth Amendment because the court has identified circumstances, such as an uncooperative suspect like Respondent in this case, when a more intrusive pat-down is permitted.

Even if the Court finds that Officer Calloway was not justified in extending his search to moving the open jacket, he was acting within the parameters of the Fourth Amendment under the plain-view doctrine. When the officer approached the suspect, he was acting under a reasonable suspicion that he may be involved in criminal activity. While acting under this reasonable suspicion, he had come to be in a position to see an incriminating gun strap in plain-view, thereby justifying any search and subsequent seizure of the weapon.

For the above stated reasons, this Court should hold that the officer was acting within the boundaries of the Fourth Amendment when he moved the open jacket aside to

conduct a more effective pat-down search and therefore Respondent is barred from asserting a Fourth Amendment claim. If, however, the Court determines that the combative behavior of the of the respondent did not justify the moving of the jacket, the Court should hold that Officer Calloway, while acting under a reasonable suspicion, viewed the gun strap in plain-view and was justified to extend the search and seize the weapon under the plain-view doctrine.

Lawrence v. Texas, 539 U.S. 558 (2003) has been subject to various interpretations by lower courts, because there has been some confusion as to what standard of review this Court employed in Lawrence, and what type of right, if any was announced in that case. Few courts, including the Thirteenth Circuit, have interpreted the standard of review to be some form of intermediate scrutiny, implying some kind of liberty interest. Fewer courts have interpreted Lawrence to have announced a new fundamental right to private sexual conduct, employing strict scrutiny review. The majority of courts to interpret Lawrence found a regular rational basis review standard to have been employed.

The majority is correct. The language of Lawrence is the language of rational basis review. This Court should now eliminate any extant confusion and declare the Lawrence standard to be plain rational basis review. Nowhere in the Lawrence opinion does the Court use the taxonomy of strict scrutiny. Nor does the Court employ any of the established methods of delineating a new fundamental right. The Lawrence Court did not announce a fundamental right to private sexual conduct. Neither did the court employ any signifiers of intermediate scrutiny. In absence of a fundamental right, the appropriate standard is rational basis review. Under rational basis review, the Rushmore County

Police Department had a legitimate interest in regulating officer conduct, and terminating Respondent for engaging in an extramarital affair was not prohibited by the Due Process Clause of the Fourteenth Amendment.

The Thirteenth Circuit Court of Appeals erred in employing a new form of intermediate scrutiny balancing test to rule that Respondent's Due Process rights were violated. That test was adopted directly from one created by the First Circuit in interpreting Lawrence. The First Circuit read the Lawrence opinion incorrectly, and created a balancing test not justified by the language of Lawrence. This test included operative language found nowhere in the Lawrence opinion.

Although Petitioner maintains that Lawrence employs plain rational basis review, the balancing test most justifiable by the Lawrence opinion is a rational basis balancing. Under rational basis balancing, as applied to the specific facts of this case, the legitimate state interest of preventing the leak of covert information regarding an undercover investigation justified the minimal intrusion of terminating Respondent.

We appeal to this court to reverse the Thirteenth Circuit Court's decision and re-affirm the correct ruling of the District Court of Craven.

## **V. ARGUMENT**

**A. OFFICER CALLOWAY'S ACTIONS WERE PERMITTED UNDER THE FOURTH AMENDMENT BECAUSE HE INITIALLY APPROACHED THE SUSPECT BASED ON A REASONABLE SUSPICION THAT HE MAY BE ARMED, DANGEROUS AND INVOLVED IN CRIMINAL ACTIVITY AND, DURING THE INVESTIGATORY STOP, HE DISCOVERED FURTHER EVIDENCE THAT SUPPORTED THIS SUSPICION.**

This brief will first assert that more intrusive investigatory searches do not exceed the permissible scope of the Fourth Amendment when law enforcement, such as Officer Calloway, are in situations when a potentially dangerous suspect threatens their safety or that of the public. Further, this brief will demonstrate that the suspect in this case acted in such a manner that the officer was permitted to move the jacket of the suspect aside out of a strong suspicion that he may have a deadly weapon. In addition, this brief will assert that, under the plain-view exception, Officer Calloway was permitted to search and seize the concealed weapon of the suspect once he saw it and its incriminating nature became apparent.

**1. An officer does not exceed the permissible scope of his authority under Fourth Amendment jurisprudence by setting aside the exterior of an open jacket, when the suspect had been uncooperative and belligerent during the initial pat-down, and the officer had reasonable suspicion, based on specific and articulable facts and personal observations, that criminal activity was imminent involving a suspect who may be armed and dangerous.**

A police officer may conduct a pat-down search of a person when the officer has a reasonable and articulable suspicion that the individual is armed and dangerous. Terry v. Ohio, 392 U.S. 1, 30 (1968). The scope of the Terry decision was defined to be a protective search for weapons, but the officer must point to particular facts from which he reasonably inferred that the individual was armed and dangerous. Sibron v. New York, 392 U.S. 40, 62 (1968). Subsequent to the opinion in Terry, courts have specifically identified that there are situations where a law enforcement officer is justified in employing a more intrusive means of “frisking”. See State v. Smith, 345 Md. 469, 472

(Md. Appeals 1997) (reasoning that a more intrusive *Terry* frisk may be constitutionally permissible... in instances where a police officer is unable to conduct an effective pat-down).

In Adams v. Williams, 407 U.S. 143, 153 (1972), the court concluded that, although the seizure of the gun was not preceded by a pat-down and the actions of an officer were clearly more intrusive than a pat-down, the officer acted reasonably under the circumstances. The court reasoned that the officer was justified due to the threat posed by the suspect and due to the suspect's failure to comply with the officer's directives and the resulting inability of the officer to conduct an effective pat-down. Id. Officers acted moments after receiving a tip that the suspect was armed and had narcotics. Id. at 143. Upon arriving on the scene, the officers saw the suspect sitting in his car with the windows up. Id. In response to the officer's request to open the door, the suspect rolled down the window. Id. At this time, the officer immediately reached into the car and removed a weapon from the suspects' waistband. Id. at 145.

Conversely, in Minnesota v. Dickerson, 508 U.S. 366, 368 (1993), the court held that police officers had wrongly expanded the scope of their "strictly circumscribed" search for weapons allowed under Terry. Id. at 378. Police stopped the defendant on suspicion of drug possession while he walked down the street in a known drug area. Id. at 368. The officers conducted a pat-down search and concluded that the defendant was not in possession of any weapons. Id. After concluding that the defendant's pocket did not contain a weapon, the officer continued to search until he found the illegal drugs. Id. The court reasoned that the main justification for a Terry search is the protection of the police officer and those nearby. Id. at 378. Once this justification is no longer applicable, any

subsequent search is an expanded search that the Terry court expressly refused to authorize. Id.

Similar to both Adams and Dickerson, the court considered the totality of the circumstances when determining whether the officers went outside the scope of their authority. In Adams, the court held that the circumstances, such as the potential that the suspect was armed, was dispositive to allow the expanded search of the suspect in the interest of officer safety. As in Adams, the officer in this case was relying on specific information provided to him about the location of an armed suspect. Officer Calloway had similar information that the suspect is likely armed in addition to his personal observations of the respondent and the volatile initial encounter. When the officer in Adams asked the suspect to open the door and the suspect rolled down the window, the court found this sufficient justification to conduct the more intrusive search. In this case, the suspect was unresponsive, verbally abusive and tried to walk away on several occasions. Further, the suspect in this case physically prevented the officer by slapping his hand away following the initial pat-down. See United States v. Hall, 193 Fed. Appx. 125, 132 (3rd Cir. 2006)(court found search unreasonable when the totality of the circumstances show that officer did not possess reasonable cause to believe that suspect might be armed when she decided to do an officer safety search).

Unlike the police officers in Dickerson, Officer Calloway did not expand the scope of his search based solely on his initial suspicions, even though he suspected that the respondent may be armed and dangerous. Instead, he observed the respondent for a period of time and then tried to make reasonable inquiries to alleviate the suspicion. Dickerson is also distinguishable because the suspect in that case was not combative

upon encountering the police and was only suspected of drug possession. Here, the respondent was aggressive and verbally abusive from the very beginning of his encounter with Officer Calloway. In addition to the verbal abuse, the respondent moved away from the him on two occasions and slapped his hand away, making it difficult for Officer Calloway to perform an effective pat-down search. See State v. Heitzman, 632 N.W.2d 1,18 (N.D. 2001) (court held that a police officer may dispense with a pat-down and immediately commence a more intrusive pat-down search of a suspect's pockets where the suspect prevents the officer from conducting a pat-down by grabbing the officer's hands or backing away from the officer).

Further, Officer Calloway was acting on specific information about the respondent's involvement in illegal gun sales. By contrast, after the suspect in Dickerson was determined to not have weapons and any threat to the police was neutralized, the search was expanded to see the contents of a bag in the suspect's pocket, which the police knew did not contain a weapon. Here, Officer Calloway only expanded the search once the respondent was seen wearing something that was consistent with a gun strap and there was a threat to his safety. Some courts have determined that simply seeing the incriminating gun strap would have been enough to warrant Officer Calloway to search the suspect in the absence of a pat-down. See Commonwealth v. Houser, 243 Pa. Super. 80 (Pa. Super. Ct. 1974) (court reasoned that a search of a suspect should be limited, a police officer should not have to perform a useless pat-down of an individual when his senses have already disclosed that a weapon may be possessed).

The purposes of stops under Terry, and its progeny, are both to protect officers and allow law enforcement to investigate suspicious behavior, including studying the

individuals demeanor and gathering facts during the course of the investigatory stop. In light of these actions and the volatile situation with a combative and potentially armed suspect, Officer Calloway's decision to further inquire about the gun strap justified his minimal intrusion of the respondent by moving the open jacket to the side.

**B. OFFICER CALLOWAY, WHILE MAKING AN INVESTIGATORY STOP BASED ON REASONABLE SUSPICION, ACQUIRED THE REQUISITE PROBABLE CAUSE TO CONTINUE HIS SEARCH AND SEIZE THE WEAPON UNDER THE PLAIN-VIEW DOCTRINE BECAUSE THE INCRIMINATING NATURE OF THE STRAP, WHICH IS DISTINCTIVELY USED TO CONCEAL FIREARMS, WAS IMMEDIATELY APPARENT, AND HE SUSPECTED THE PRESENCE OF ILLEGAL GUN ACTIVITY, WHICH POSED A POTENTIALLY SERIOUS THREAT TO THE OFFICER AND INNOCENT BYSTANDERS.**

A warrantless exception to the Fourth Amendment is found in the plain-view doctrine. U.S. v. Coolidge, 403 U.S. 443, 465 (1971). The Supreme Court has established that there are certain circumstances when the police may seize evidence in plain-view. Id. Although this ruling has been clarified by subsequent rulings to include a probable cause requirement for certain searches of items observed in plain-view, the court has been reluctant to rule that all searches or seizures must be supported by a showing of probable cause. Arizona v. Hicks, 480 U.S. 321, 327 (1987). Instead, the court has held that a search and seizure, without probable cause, is justified if it is, "minimally intrusive and operational necessities render it the only practical means of detecting certain types of crimes". Id.

In Hicks, the court held that the expanded search and subsequent seizure of incriminating stereo equipment could not be justified by the plain-view doctrine because the incriminating nature of the stereo equipment was not immediately apparent and the officers were not relying on any operational necessities to justify the search. 480 U.S. at 338. The police were legally on the premises to respond to a call about a shooting in an apartment building. Id. at 324. While in the apartment, the police noticed that there was some expensive stereo equipment in the otherwise squalid dwelling. Id. Based on this fact alone, the officers physically manipulated and inspected the equipment to obtain serial numbers, which were subsequently used to prosecute the defendant for theft. Id. The court reasoned that stereo equipment, by itself, does not have an immediately apparent incriminating character, which is a requirement to the implication of the plain-view doctrine. Id. The court also noted that the officers could have done a further investigation and obtained a warrant to verify their suspicions. Id.

Unlike Hicks, the officer in this case saw a unique leather strap across the respondent's chest in the course of an investigation into his possible involvement in the selling of illegal firearms and concluded that, based on his extensive knowledge of the illegal firearms trade, it was consistent with those used to hold a concealed weapon. Since possession of a concealed firearm is a crime in Craven, the incriminating nature of the strap was immediately apparent to Officer Calloway as opposed to the stereo equipment in Hicks. In determining the incriminating nature of an item, the court in Hicks articulated that certainty wasn't required, and that the probable cause requirement under the plain-view doctrine is satisfied if the officer had cause to believe that the item viewed is either contraband or will be useful in establishing that a crime has been committed. See

United States v. Espinoza, 826 F.2d 317 (5<sup>th</sup> Cir. 1987)(court reasoned that it is not necessary "that the officer know that the viewed item is contraband or evidence of a crime, but only that there be a practical, nontechnical probability that incriminating evidence is involved.").

Further, this case involved a possibly armed suspect, and courts have demonstrated a greater willingness to allow officers to conduct searches when there is a threat to themselves or others. The officers in the Hicks case believed the stereo equipment looked too nice for the surroundings and, based on this stereotype alone, expanded their search when they picked up the equipment and brought the serial numbers into their view. A police officer is not required by his occupation or the Constitution of the United States to take unnecessary risks in the performance of his duties or to refrain from the taking of necessary measures to determine whether the person is in fact carrying a weapon or the neutralizing of a threat of physical harm.

**1. The substantial government and public safety interests secured by allowing an officer to act on suspicions based on detailed information, personal observations and items in plain-view regarding whether a suspect is armed and dangerous significantly outweigh the minimal intrusion upon liberty, privacy, and dignity occasioned by the slight movement of an open jacket.**

The proper test to be used to identify the proper bounds of intrusions that further investigations of ongoing crimes balances the quality of the intrusion on personal security against the governmental interests that justify the intrusion. U.S. v. Hensley, 469 U.S. 221, 230 (1985).

In Hensley, the court ruled that the law enforcement interests outweighed the

intrusion upon the privacy in permitting the investigatory stop of a suspected felon. Id. at 222. The defendant was suspected of committing an armed robbery six days prior and the court found the investigatory stop of his vehicle in another state within the purview of the Fourth Amendment. Id. The court noted that requiring police to obtain probable cause would restrain police action by hindering the investigation and enabling the suspect to flee and remain a danger to the public. Id. The court further reasoned that in the context of crimes involving a threat to public safety, it is in the public interest that the crime be solved as swiftly as possible. Id. at 229

As in Hensley, the officer in this case was responding to a considerable public threat that was based on detailed facts contained in the lead as well as his own observations of the unusual and belligerent behavior of the respondent. Officer Calloway was investigating a possible illegal gun sale in a very public town square, which was likely teeming with innocent bystanders. The very crime for which the respondent was suspected involved the use of deadly weapons. This is the very safety and law enforcement interest that the Hensley court was contemplating when it established the test to determine the actions of a police officer relative to an individual's Fourth Amendment rights.

Further, the privacy of Respondent, which is the core of Fourth Amendment protections and the justification for many of its requirements, was not infringed by operation of the plain-view doctrine. Officer Calloway did not make the decision to push the outer part of the jacket aside until the respondent moved in a manner that exposed the distinctive leather strap. The facts overwhelmingly suggest, and both the district and appellate courts agreed, that Officer Calloway was acting under a reasonable suspicion

when he first approached the respondent to investigate his suspicions, so he viewed the strap from a legal vantage point. The Supreme Court has declared plain-view searches and subsequent seizures to be consistent with the privacy protections afforded in the Fourth Amendment. See Horton v. California, 496 U.S. 128, 131 (1990) (reasoning that if an item is already in plain-view, neither its observation nor its seizure would involve any invasion of privacy).

Here, Officer Calloway developed the probable cause during the encounter with Respondent to make a further inquiry into the distinctive strap. The respondent was uncooperative and combative, which impaired the officer's ability to conduct an adequate inquiry to relieve his reasonable suspicions. In addition, the respondent exposed the suspicious strap when he turned away from Officer Calloway. To find that a subsequent search took place would have required Officer Calloway to ignore what he had seen and allow a potentially dangerous criminal to continue his illicit activity and elude capture. See State of Tennessee v. Blankenship, 757 S.W.2d 354, 356 (Tenn. 1988) (reasoning that forcing police to limit investigatory stops when it is minimally intrusive would hinder law enforcement efforts considerably).

**C. THE THIRTEENTH CIRCUIT COURT OF APPEALS ERRED IN APPLYING HEIGHTENED SCRUTINY REVIEW TO THE DUE PROCESS CLAIM BECAUSE LAWRENCE V. TEXAS DID NOT CREATE A FUNDAMENTAL RIGHT TO PRIVATE SEXUAL CONDUCT, AND INSTEAD USED RATIONAL BASIS REVIEW AS THE STANDARD.**

1. **Lawrence did not delineate a new fundamental right to all private sexual conduct.**

Nowhere in Lawrence is there a declaration that sodomy, or any kind of private sexual conduct, is a fundamental right. Only fundamental rights qualify for heightened scrutiny protection. The Court has delineated only a few paths to finding such rights not specifically enumerated in the Constitution. One method is to declare rights fundamental that are “deeply rooted in this Nation's history and tradition”. Moore v. East Cleveland, 431 U.S. 494, 503 (1977). As noted in County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998), and repeated in Lawrence, “[h]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.” 539 U.S. 558, 572. These rights can also be ones that are “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed.” Palko v. Connecticut, 302 U.S. 319, 325-326 (1937). The final path the Court has taken to find a previously undesignated fundamental right is to declare that the right is within the “penumbra” of a preexisting right. Roe v. Wade, 410 U.S. 113, 129 (1973); Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Regardless of the path taken, the Court has required substantive due process cases to contain a “careful description of the asserted fundamental liberty interest.” Wash. v. Glucksberg, 521 U.S. 702, 721 (1997). “[T]he doctrine of judicial self-restraint requires the Supreme Court to exercise the utmost care whenever it is asked to break new ground in such field.” Reno v. Flores, 507 U.S. 292, 302 (1993).

The Lawrence opinion did not engage in any of the Court created methodologies for finding such fundamental rights. While there is a negative treatment of the historical background used in Bowers v. Hardwick, 478 U.S. 186 (1986) to demonstrate a history of legal intolerance towards homosexuals (Lawrence, 539 U.S. at 568), there is no

affirmative treatment of the historical record used in Lawrence to find a fundamental right. Id. There is no mention in Lawrence of any right implicit in the concept of ordered liberty. There is no delineation of any right existing in the penumbras of pre-existing rights, and no description of any asserted fundamental “liberty interest”. The Court conspicuously stopped short of explicitly announcing a new fundamental right to private sexual conduct in Lawrence, and should now clarify that no such fundamental right currently exists.

**a. Historical analysis.**

The Lawrence Court stated that “we need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which Bowers placed such reliance.” Id. This sentence signals a reluctance to define a right, and that the “attempt” is *not* being made to find one rooted in history and tradition. As noted in Lewis, examining history to find a fundamental right is the first step. The Lawrence court did not take this step. It did point out the historical inaccuracy of the rationale behind the Bowers decision, but did not make any assertions that a right to engage in homosexual sodomy, or any private sexual conduct, is deeply rooted in our nation’s history and tradition.

The Lawrence decision highlights the fact that homosexual sex was not specifically targeted by early American sodomy laws and the precursors thereto (539 U.S. at 568), noting that such laws applied to conduct between men and women as well as to conduct between members of the same gender. The Court went on to point out that these laws existed in America from the very beginning of colonial times, and had existed in England going as far back as the Reformation in 1533. Id.

The fact that these laws were not specifically directed at curtailing homosexual behavior, but were intended to regulate sex between any people, is an illustration of the fact that a right to private sexual conduct has no roots in the history or tradition of America. In Lawrence, the focus is on differentiating the relatively recent laws targeting homosexuals from the ancient laws regulating sexual practices between anyone. While laws targeting same sex couples, which cropped up in America during the 1970s, are shown not to have the “ancient roots” claimed in Bowers (478 U.S. at 192), Lawrence shows that laws regulating sex between anyone do have such ancient roots. 539 U.S. at 570. As the Lawrence opinion demonstrates, there is no fundamental right to private sexual conduct that is deeply rooted in the history and tradition of America.

**b. Ordered liberty.**

A right to private sexual conduct is also not delineated in Lawrence as implicit in the concept of ordered liberty. When the Court found a right in this way in the past, it said so explicitly. Rochin v. California, 342 U.S. 165, 168 (1952) (finding a right to be free from coercive bodily intrusion); Napue v. Illinois, 360 U.S. 264, 269 (1959) (finding a right to be tried without knowing use of false evidence by the prosecution); Elkins v. United States, 364 U.S. 206, 213 (1960) (ruling illegally obtained evidence inadmissible in federal court); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the right of a criminal defendant to counsel applies to the states). Each of these cases, and many others, contain the operative phrase “implicit in the concept of ordered liberty”. Those words are nowhere to be found in the Lawrence majority opinion. They are found in the dissent highlighting that fundamental liberty interests must be both deeply rooted in history and tradition, and implicit in ordered liberty. 539 U.S. at 593. Only fundamental

liberty interests are protected by strict scrutiny, while all other liberty interests may be abridged by a showing of rational relation to a legitimate government interest. The Lawrence Court never clearly defined exactly what type of liberty was in contest. The excerpt quoted from Justice Stevens' dissent in Bowers states that intimacies of physical relationships are a "form of 'liberty'". Lawrence, 539 U.S. at 577. The Lawrence opinion goes on to state that the view expressed in that dissent "should control here". Id. In the excerpt, the word liberty is placed in quotes, and there is no language of fundamental rights. The only time the phrase "liberty interest" appears in the majority opinion is dicta in a brief discussion regarding overruling such interests. 539 U.S. at 577.

Later, the opinion mentions that the petitioners have a "right to liberty". Id. at 578. Then, it mentions that the Due Process clause affords petitioners the "full right to engage in their conduct without" government intervention. Id. Shortly thereafter, the Court mentions the lack of a "legitimate state interest". Id. This implies that if there were a "legitimate state interest", government intervention in the right would be justified. Again, this is the language of rational basis review, not the language of fundamental rights. The Court mentioned that "the right petitioner's seek...has been accepted as an *integral part of human freedom* in many other countries." Id. at 577 (italics added). This lofty language is closer to that of fundamental rights, but it was not applied to *this country* by the Court. The preceding is the sum of the descriptions of the right in question in Lawrence. None of them contain the language of fundamental rights.

### **c. Penumbra theory**

When the Court recognizes a right in the penumbra of a preexisting right, it is clearly stated. In Zablocki v. Redhail, the Court reaffirmed that "the right to marry is part

of the fundamental ‘right to privacy’ implicit in the Fourteenth Amendment’s Due Process Clause” 434 U.S. 374, 384 (1978). The Roe court found the qualified right for a woman to abort a pregnancy within the larger right of privacy. 410 U.S. at 154. There is no such wording in Lawrence. As previously noted here, not a single description of the right in question contained any wording indicating that a fundamental right to sexual privacy exists in the penumbra of any right already existing.

The Court should now clarify that Lawrence did not announce a fundamental right to private sexual conduct. Such a right would have a deleterious effect on prostitution and incest laws. See Muth v. Frank, 412 F.3d 808 (7th Cir. 2005).

**2. The Court should now clarify that the standard of review in Lawrence was rational basis.**

Few courts besides the Thirteenth Circuit have interpreted the standard of review in Lawrence as various species of intermediate scrutiny. United States v. Marcum, 60 M.J. 198, 205 (U.S. Armed Forces 2004) (using “as applied” analysis); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (creating a new intermediate scrutiny balancing test); Witt v. Department of Air Force, 527 F.3d 806, 821 (9th Cir. 2008) (applying traditional intermediate scrutiny). A few lower courts have interpreted the Lawrence standard as strict scrutiny. Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (including Lawrence in a list of cases establishing fundamental rights); Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004) reversed on other grounds, 405 F.3d 700 (8th Cir. 2005) (same); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004) (same). A majority of courts have interpreted the standard employed as

rational basis review.<sup>1</sup> The majority interpretation shown by lower courts reflects that the most logical interpretation of the standard used in Lawrence is rational basis review. This court now has the opportunity to clarify exactly what the Lawrence standard is, and should definitively declare it to be regular rational basis review.

In Lawrence, this court used the taxonomy and methodology of rational basis review, invalidating the Texas sodomy law because it “furthered no legitimate state interest.” 539 U.S. 558 at 578. In Romer v. Evans, 517 U.S. 620 (1996), the court focused on the impact of a Colorado law (Amendment 2) prohibiting state institutions from taking actions to protect homosexuals from discrimination. That law was conceived to be a result of “animosity toward the class of persons affected”. Id. at 634. The court declared that such a “desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” Id. (Emphasis in original). Romer was an Equal Protection case decided using rational basis review. Although Lawrence is a Substantive Due Process case, the impact of the Texas anti-sodomy law was discussed in much the same terms as the impact of the Colorado law was. In Romer, the Court focused on the “special disabilities” that Amendment 2 would impose on homosexuals. 517 U.S. at 631-632. In Lawrence, the Court likewise focuses on the particular disadvantages the Texas law could have on homosexuals, such as registration as sex offenders, or notations on job

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<sup>1</sup> Conaway v. Deane, 401 Md. 219, 310 (Md. 2007); State v. Lowe, 861 N.E.2d 512, 517 (Ohio 2007); Witt v. Department of Air Force, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006); Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005); States v. Extreme Associates Inc., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005); State v. Limon, 122 P.3d 22, 29 (Kan. 2005); Martin v. Zihlerl, 607 S.E.2d 367, 370 (Va. 2005); State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. App. 2005); Williams v. Attorney General of Alabama, 378 F.3d 1232, 1238 (11th Cir. 2004); Lofton v. Secretary of the Department of Children & Family Services, 358 F.3d 804 (11th Cir. 2004).

application forms. 539 U.S. at 524. As in Romer, these disabilities are the result of the government interest perceived to be behind the two laws: “animosity” towards homosexuals (in liberal parlance) or “opposition to homosexuality” (as conservatives would say). Romer, 517 U.S. at 636 (in Justice Scalia’s dissent). Whatever the terminology, in both cases, the Court ruled that it is not a legitimate government interest. That is the language of rational basis review. Romer expressed how rational basis review applies to homosexuality; Lawrence continues that expression. Lawrence overrules the decision of Bowers only as to whether a legitimate state interest is furthered by anti-sodomy laws. Bowers ruled that opposition to homosexuality can be a legitimate interest for prohibiting homosexual conduct; Lawrence ruled that such an interest is not legitimate.

There is no mention of narrow tailoring, necessity or compelling government interest: the language of strict scrutiny. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Schneider v. State, 308 U.S. 147 (1939); Jacobson v. Massachusetts, 197 U.S. 11 (1905). Neither does the Lawrence Court mention “important governmental objectives” or whether the statute is fairly and substantially related to such objectives. Craig v. Boren, 429 U.S. 190, 197, 211 (1976). Lawrence does not mention the concept of “exceedingly persuasive justification” (Mississippi University for Women v. Hogan, 458 U.S. 718, 724, 731 (1982)). Such is the nomenclature of intermediate scrutiny. The Lawrence Court did not discuss any interest being “asserted” by the state, or a stated objective sought to be advanced by the statute, which is a feature common to both heightened scrutiny standards of review. Roe, U.S. 113 at 169 (1973) (applied to

strict scrutiny); Poe v. Ullman, 367 U.S. 497, 543 (1961) (same); Craig, 429 U.S. at 211 (applied to intermediate scrutiny); Reed v. Reed, 404 U.S. 71, 76 (1971) (discussing a stated objective and applying intermediate scrutiny). Neither the Romer, nor the Lawrence opinions contain a discussion of objectives, or interests stated or asserted by the states involved.

Rather, both opinions engaged in sua-sponte formulations of what the rationale behind the questioned legislation could possibly be, rather than anything it was affirmatively stated to be. The process of the Court deciding whether a legitimate government interest exists by determining whether that interest is conceivable is the hallmark of rational basis review. The Court has stated, when employing rational basis review, that the actual purpose behind a law is irrelevant and the law must be upheld “if any state of facts reasonably may be conceived to justify” its discrimination. McGowan v. Maryland, 366 U.S. 420, 426 (1961). In both Romer and Lawrence, the Court is unable to conceive of a “legitimate” state interest to justify the prohibitions. In Romer, the Court deemed the state interest to be animosity towards homosexuals. The closest the Court came to defining the state interest in Lawrence is when it said, “[t]he state cannot demean their existence or control their destiny by making their private conduct a crime.” 539 U.S. at 578. Demeaning of existence and control of destiny are parallel to the animosity conceived of in Romer. This is the process of rational basis review, not strict or intermediate scrutiny. The court made clear that rational basis review was the standard employed in Romer. 517 U.S. at 632.

Because Lawrence uses language almost identical to that in Romer, contemplates nearly identical factors, and, like Romer, leaves out the distinctive characteristics of

heightened scrutiny, the Court should now clarify that the standard in Lawrence is rational basis review.

Rational basis review is highly deferential. Under this standard, the district court's rulings, that regulating officer conduct is a legitimate state interest, and that terminating officers who fail to conform to regulations is rationally related to that interest, should be reaffirmed. R. 7. More broadly, in a light most favorable to the state of Craven, it is conceivable that the legitimate state interest behind the adultery law is to protect the institution of marriage. This court has previously ruled that protecting the marital unit is a legitimate government interest. Michael H. v. Gerald D., 491 U.S. 110, 131 (1989); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (using the phrase "valid state interest"). Outlawing adultery is rationally related to the legitimate interest in protecting the marital union because adultery has long been grounds for divorce. Time, Inc. v. Firestone, 424 U.S. 448, 450 (1976). Respondent was not criminally prosecuted under Craven Statute section 11-198.01. He was terminated from the police force. Such termination was proper. This Court has made a similar ruling on a First Amendment case. See City of San Diego v. Roe, 543 U.S. 77 (2004) (holding that an officer could be terminated for off duty sexual conduct that brought the department into disrepute).

### **3. Lawrence v. Texas did not create a balancing test standard of review.**

The Thirteenth Circuit Court of Appeals adopted the First Circuit's interpretation of Lawrence in applying a balancing test. R. 11. The Thirteenth Circuit states that it "agree[s] with...Cook that Lawrence applied a level of intermediate scrutiny that balanced the state's interests against that of the individual. Such an approach should be applied in the instant case." Id. The exact test applied is quoted directly from Cook in the

Thirteenth Circuit’s opinion. Id. It reads thusly: “Lawrence applied a balancing test, ‘balanc[ing] the *strength* of the *state’s asserted interest* in prohibiting immoral conduct against the degree of intrusion into the into the petitioners’ private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied” R. 11. (quoting from Cook, 528 F.3d at 56) (emphasis added). The Thirteenth Circuit Court made an error here because The First Circuit Court got it wrong.

The key phrase is “state’s asserted interest”. This is a mistaken reading of Lawrence. As mentioned in the previous sections, Lawrence contains no mention of any interest *asserted* by the state, particularly not “prohibiting immoral conduct”. Even when Justice O’Connor directly discussed the argument made by Mr. Rosenthal, the Lawyer for Texas, she only spoke of his rational basis argument: that the law furthers a government interest that is legitimate. Lawrence, 539 U.S. at 582. Mr. Rosenthal expressed the interest Texas sought to assert in his argument before the Court. Lawrence v. Texas, 2003 U.S. Trans. LEXIS 30, 33. That interest was “the preservation of marriage, families and the procreation of children.” Id. Yet, the Court never mentioned this interest even once in its opinion. There is no doubt that the court was well aware of exactly the interest Texas *wanted* to assert. To create the balancing test mentioned in Cook, this Court could have discussed an asserted right. It did not. Instead, the statement that comes closest to mentioning any state interest is the sentence containing “demean their existence” and “control their destiny”. Lawrence, 539 U.S. at 578. This is not the interest Texas sought to assert. Justice Scalia, in his dissent, calls the standard of review “rational basis”. Id. at 586. If his interpretation was incorrect, surely the majority would have clarified this discrepancy. The Court now has the chance to emphasize and clarify that deliberate act.

The district court correctly applied the rational basis review justified by Lawrence.

The Thirteenth Circuit, adopting the erroneous interpretation of the First Circuit, applied a new level of intermediate scrutiny not justified by this court in Lawrence.

Because of this error, the ruling of the Thirteenth Circuit should be reversed and the district court's ruling re-affirmed.

**D. IF LAWRENCE CONTAINS ANY BALANCING TEST, IT IS NOT A FORM OF INTERMEDIATE SCRUTINY, BUT A NEW FORM OF RATIONAL BASIS REVIEW UNDER WHICH THIS COURT SHOULD REVERSE THE RULING OF THE THIRTEENTH CIRCUIT AND RE-AFFIRM THE DISTRICT COURT'S RULING.**

**1. If there is a balancing test in Lawrence, it is not any deviant form of intermediate scrutiny, but a new rational basis balancing test.**

The Thirteenth and First circuits focused inordinately on a singular sentence near the end of the Lawrence decision in devising their balancing test. The line that has drawn such misguided focus is this: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578. Lawrence contains none of the intermediate scrutiny balancing language relied upon by the First and Thirteenth circuits. Rather than mentioning the "strength" of an asserted state interest (which can be measured by degrees), Lawrence specifically mentioned the "legitimacy" of a state interest (which either exists, or does not). If any form of balancing test can be justified by the semantics of Lawrence, it is one that contains the crucial element of rational basis review mentioned in Lawrence: legitimate state interest.

Such a test would balance the degree of intrusion into an individual's private life against a legitimate government interest. Put another way, if there is any conceivable legitimate state interest, then the reviewing court would weigh the degree of intrusion to determine whether it is justified by that interest. If no legitimate state interest were conceivable, the inquiry would end. Weighing the degree of intrusion against a legitimate state interest is an *as applied* and fact specific analysis. While Petitioner continues to maintain that Lawrence employed normal rational basis review, the form of balancing most justifiable by the limited language of Lawrence is the rational basis balancing test outlined above.

This would be similar to the test from Board of Education v. Earls, 536 U.S. 822 (2002). That was a Fourth Amendment case where the Court determined the reasonableness of drug testing the urine of student athletes by conducting a “fact-specific” balancing of a “legitimate government interest” against the “degree of intrusion”. Id. at 822. The degree of intrusion was determined by evaluating the “method” used in gathering urine samples. Id. at 833. In that case, the Court found that the intrusion was minimal because the method of gathering the samples was much less invasive than other methods. Id. at 834. The Court then ruled that the nature and immediacy of the legitimate government interest justified the minimal degree of intrusion. Id. at 837.

**2. Under rational basis balancing, the legitimate interest in preventing release of covert information about an ongoing undercover investigation of illegal arms dealing justified the minimal intrusion of terminating the respondent.**

Rational basis balancing is an as applied, fact specific test. As such, it must be

applied on a case by case basis. If preventing the leaking of sensitive, clandestine information is a conceivably legitimate interest, then the only thing for the court to determine is whether that interest justified the degree of intrusion, which was firing Respondent.

When he was fired, Respondent was engaged in an illegal, extramarital affair with the daughter of the police chief. R. 4. This woman had made highly publicized false allegations of corruption against the department. R. 3, 4. At the time of Respondent's firing, Ms. Malone, his mistress, was in possession of sensitive information about an undercover investigation of illegal deadly weapons dealing, of which some other police officers, like Officer Calloway, were not yet aware. R. 4. Calloway was working the weapons case, but did not know that Respondent was as well. R. 2. There is no telling what other information Respondent had leaked, or would leak to his mistress. Given Ms. Malone's history of going to the press with false allegations about the Rushmore County Police department, it is reasonable to believe that her heretofore clandestine affair with a key undercover officer in an ongoing investigation may lead to her leaking more false or damaging information to the press; information that could endanger the lives of police officers, and perhaps her own. Such a leak could also reveal the identity of the department's undercover assets, and potentially spoil the entire investigation.

She had already exhibited leaking behavior that was misguided at best, and possibly malicious. Her false allegations may have stemmed from her well known estrangement with her father. R. 3. This is the type of potentially dangerous liability that is best dealt with in a preemptive manner, before someone gets hurt. Respondent's illicit affair with a woman known to leak false and damaging information to the press about the

police department demonstrates a serious lapse in judgment. The fact that the woman is the known estranged daughter of his police chief deepens the seriousness. Keeping the affair a secret from his chief, during a sensitive covert investigation, borders on the egregious. More disturbing is the fact that Respondent is the most likely person to have leaked his undercover activities to Ms. Malone. She obviously cannot keep a secret, as she spontaneously blurted the existence of the furtive affair and the undercover operation to Officer Calloway unnecessarily and unbidden. R. 4. The possibility of her attaining more secret information through her affair with Respondent is a risk that must not be taken. Ms. Malone is a proven falsifier and blatant divulger. Preventing such a potentially dangerous and deadly leak is as legitimate as a state interest can get.

The next part of the test is to determine if the firing of Respondent was justified by this legitimate interest. If it was, then Respondent's termination was constitutional. The leaking had to be stopped *before* any serious harm was done. Police Chief Malone could have admonished Respondent to end his affair with Ms. Malone. This is unlikely to have been effective, however, because Respondent had already kept the affair secret, signaling his intent to continue despite disapproval. Also, that alternative would actually be more intrusive than the firing because it would be an attempt by the state to coerce Respondent to restrict his personal romantic choices. Chief Malone could have removed Respondent from the case, but that would not prevent him from learning sensitive information, or relaying it to Ms. Malone. Chief Malone could command Respondent not to divulge information to Ms. Malone, but information had already been divulged. This would also be an attempt by the state to coerce Respondent to restrict his freedom of speech. On balance, the most effective and least intrusive remedy was to fire Respondent.

That was the only way to be certain that there would be no more leaks through Respondent and Ms. Malone. He would also be able to continue to exercise his romantic freedom and his freedom of speech. Because firing was the least intrusive, yet most effective, alternative available, it was justified by the legitimate state interest.

Terminating Respondent for his participation in this extramarital affair did not violate the Due Process Clause of the Fourteenth Amendment.

## **VII. CONCLUSION**

In sum, courts have gone to great lengths not to curtail personal securities, but are unwilling to seriously inhibit law enforcement when it comes to significant threats to both public and officer safety. Due to the difficulty that weapon verification often entails, it is essential, to preserve safety and neutralize a potentially explosive situation, that certainty not be required before an officer may continue a pat-down search of the inner clothing site where the item is located. The search that revealed Respondent's illegal, concealed weapon was a continuation of a search based on reasonable suspicion that developed into probable cause. Probable cause developed because the illegal nature of the strap was immediately apparent to Officer Calloway, and it was in plain-view. Therefore, the Fourth Amendment did not prohibit Officer Calloway, acting under reasonable suspicion, from moving aside Respondent's exterior garment.

No fundamental right to private sexual conduct was announced in Lawrence v. Texas. Accordingly, the standard of review in Lawrence was rational basis. Under rational basis review, regulating officer conduct is a legitimate state interest. Neither did Lawrence employ any form of intermediate scrutiny, or species of intermediate scrutiny balancing. However, if any form of balancing were justified by the language of

Lawrence, it would be the new form of rational basis balancing. In absence of a fundamental right to private sexual conduct, both standard rational basis review, and rational basis balancing, as applied to the particular facts of this case, demonstrate that Respondent's substantive Due Process right under the Fourteenth Amendment was not violated. The Due Process Clause of the Fourteenth Amendment did not prohibit the termination of Respondent for his participation in the extramarital affair.

Rushmore County Police Department's actions did not violate Respondent's Fourth Amendment rights, or his Substantive Due Process rights under the Fourteenth Amendment. Respondent's 42 U.S.C. 1983 claim is without merit because there is no triable issue of material fact. Therefore, Petitioner's motion for summary judgment was properly granted by the District Court, and the Thirteenth Circuit erred in remanding the case. This Court should invalidate the Thirteenth Circuit's ruling and re-affirm the ruling of the district court on these grounds.