

No. 08-31958

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In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 2008

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RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,

Petitioner

v.

WILLIAM R. TRACEY,

Respondent

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On Writ of Certiorari to the  
United States Court of Appeals for the Thirteenth Circuit

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**BRIEF FOR RESPONDENT**

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Team U,  
Counsel for Respondent

## **QUESTIONS PRESENTED**

1. Whether the Fourth Amendment prohibits a police officer, acting under a reasonable suspicion, from moving aside an exterior garment of a suspect after conducting a patdown search which does not reveal any weapons.
2. Whether the Due Process Clause of the Fourteenth Amendment prohibits the termination of a police officer for his participation in an extramarital affair.

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## **STATEMENT OF THE CASE**

### **I. STATEMENT OF FACTS**

Respondent William Tracey was working as an undercover police officer for the Rushmore County Police Department (“Department”) when a fellow officer searched him for weapons. (Record 2-3.) The other police officer did not know Mr. Tracey was an undercover officer, so he arrested Mr. Tracey for possession of a concealed weapon. (R. 3.) He then searched Mr. Tracey's cell phone and found the number of the police chief's daughter. (R. 3.) When the officer called her, she informed him that she was having an affair with Mr. Tracey. (R. 4.) When news of the affair was spread through the Department, Mr. Tracey was fired. (R. 4.) He then filed a civil suit against the Department alleging that the search violated the Fourth Amendment and the firing violated the Fourteenth Amendment. (R. 2.)

#### **A. The Search of Mr. Tracey**

##### **(1) Officer Calloway's initial observations**

William Tracey was a Rushmore County Police Officer for over seven years, from 1998-2005. (R. 2.) On June 7, 2005, he was involved in an undercover operation targeting the sale of illegal firearms in Rushmore County by the private military company, Red Tide (“R-T”). (R.2.) Mr. Tracey was seated on a park bench on the north side of McDonough Square when another officer from the Department, Maxwell Calloway, observed him. (R. 2.) At the time, Officer Calloway was part of a separate investigation into the same illegal firearms distribution network. (R. 2.) However, Officer Calloway was affiliated with a different precinct from Mr. Tracey and was unaware that Mr. Tracey was a fellow officer working undercover. (R. 2.)

Officer Calloway was in McDonough Square pursuing a lead that an R-T official was meeting with prospective buyers there. (R. 2.) Mr. Tracey did not match the description of the R-T official. (R. 2.) Officer Calloway observed that Mr. Tracey was wearing a black nylon bomber jacket when temperatures were in the low seventies. (R. 2.) Officer Calloway later testified that that in his experience, wearing such a jacket despite warm temperatures is consistent with an attempt to conceal a weapon. (R. 8.)

Based solely on the suspicions aroused by Mr. Tracey's jacket, Officer Calloway continued to observe Mr. Tracey for twenty minutes. (R. 2.) Officer Calloway saw that Mr. Tracey was looking around the square and at the rooftops of the surrounding buildings, and believed that Mr. Tracey appeared "agitated." (R. 2.) Officer Calloway later testified that Mr. Tracey's eye movements and perceived mood were consistent with that of an individual who was waiting to conduct a purchase or sale of illegal firearms or narcotics, (R. 8.) which prompted him to approach Mr. Tracey, (R. 2).

## **(2) First seizure & search of Mr. Tracey**

When Officer Calloway approached Mr. Tracey, he identified himself and asked Mr. Tracey his name. (R. 3.) Mr. Tracey glanced to his left and right a few times, and Officer Calloway perceived that Mr. Tracey "became visibly angry." (R. 3.) He responded to Officer Calloway by stating that his name was "Bill." (R. 3.) Mr. Tracey then stood and began to turn away. (R. 3.)

Without any warning, Officer Calloway "grabbed [Mr. Tracey] by the left wrist" and twisted him so that Mr. Tracey was facing him. (R. 3.) Officer Calloway then conducted a standard and complete patdown of Mr. Tracey's clothing to determine whether Mr. Tracey was armed. (R. 3.) Mr. Tracey allowed Officer Calloway to search

him and did not physically resist Officer Calloway in any way, though Mr. Tracey directed insults at the Officer. (R. 3.) During the patdown search of Mr. Tracey, Officer Calloway did not feel any object that was consistent with a weapon. (R. 3.)

### **(3) Second seizure & search of Mr. Tracey**

After Officer Calloway concluded his first search, he did not ask any further questions of Mr. Tracey, and Mr. Tracey attempted to walk away. (R. 3.) As Mr. Tracey turned, Officer Calloway noticed “what appeared to be a vertical leather strap underneath [Mr. Tracey’s] unzipped jacket, located around [Mr. Tracey’s] upper chest area.” (R. 3.) Officer Calloway did not get a close look at the strap and was “unsure of [its] purpose.” (R. 3.) He later testified that he believed the strap was consistent with those used to carry a concealed firearm. (R. 3.)

Officer Calloway asked Mr. Tracey to stop and turn around, and Mr. Tracey complied. (R. 3.) The Officer then reached towards Mr. Tracey’s chest “to move aside the left exterior portion of [Mr. Tracey’s] jacket,” and Mr. Tracey brushed the Officer’s hand aside. (R. 3.) Officer Calloway responded by “forcefully” reaching out toward Mr. Tracey and pushing aside the left exterior of Mr. Tracey’s jacket. (R. 3.) After exposing what lay under the exterior layer of Mr. Tracey’s clothing, the Officer saw a .45 caliber pistol, which he seized. (R. 3.) He then arrested Mr. Tracey for violation of Craven Statute 19-166.81, which prohibits the possession of a concealed firearm, and took him to the Charlestown precinct. (R. 3.)

### **B. The Termination of Mr. Tracey by Rushmore County Police Department**

Subsequent to the arrest of Mr. Tracey, Officer Calloway performed an inventory search of Mr. Tracey’s belongings and discovered a cellular phone containing contact

information for Jacqueline Malone, the daughter of Rushmore County Police Chief Patrick Malone. (R. 3.) Officer Calloway contacted Ms. Malone by telephone whereupon she voluntarily disclosed that she and Officer Tracey were romantically involved. (R. 3-4.)

After this conversation, Officer Calloway called the Department to confirm that Mr. Tracey was indeed an undercover officer. (R. 4.) During this conversation, Officer Calloway informed members of the Department that Mr. Tracey was having an affair with Ms. Malone. The following day, Mr. Tracey was terminated by the Department for "his involvement in an extramarital affair in violation of the state's adultery statute." (R. 4.)

At the time of his termination, Mr. Tracey was married, but had been separated from his wife for eighteen months and had been served with divorce papers. (R. 4.) Ms. Malone is unmarried. It is undisputed that all of the encounters between Mr. Tracey and Ms. Malone occurred off-duty, and that the Craven adultery statute 11-198.01 has fallen into desuetude, without a single prosecution under the statute in the last twenty years. (R. 4.)

## **II. PROCEDURAL POSTURE**

Mr. Tracey brought a claim in the United States District Court for the District of Craven pursuant to 42 U.S.C. § 1983 against the Department for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. (R. 2.) The Department filed a motion for summary judgment, (R. 2), which was granted by the District Court with regard to both issues, (R. 7.) Mr. Tracey appealed the District Court's grant of summary judgment in the United States Court of Appeals for the Thirteenth

Circuit. (R. 8.) The Thirteenth Circuit reversed the District Court's decision with regard to both the Fourth and Fourteenth Amendment issues.

#### **A. Fourth Amendment Analysis**

In deciding the Fourth Amendment issue, the District Court held that Officer Calloway's extended search underneath Mr. Tracey's jacket was justified to protect the Officer's safety under Terry v. Ohio, 392 U.S. 1 (1968). (R. 5.) The District Court based its decision on three legal conclusions: (1) it was unreasonable to require Officer Calloway to continue his investigative duties after he saw a leather strap on Mr. Tracey's chest; (2) searching underneath a person's outer clothing is not "significantly" more intrusive than conducting a patdown search limited to the exterior of the clothing; and (3) the extended search could be justified on a state court doctrine which allows a more intrusive search in extenuating circumstances. (R. 5, citing State v. Heitzmann, 2001 ND 136, ¶ 16, 632 N.W.2d 1, 9). Regarding the first two conclusions, the District Court merely restated the rationale of Terry v. Ohio, and held that if police safety justifies a patdown of the outer clothing, it must also justify searching underneath the outer clothing because such a search is not significantly more intrusive. (R. 5.) To support its third conclusion, that extenuating circumstances justified the more intrusive search, the court noted that Mr. Tracey was slow to give his name, insulted the Officer during the patdown, and pushed aside the Officer's hand when the Officer reached toward his chest to move aside his jacket. (R. 5-6.) In its analysis, the court did not distinguish between the first patdown search and the second extended search. (R. 5-6.)

The Thirteenth Circuit agreed with the District Court that it was proper for Officer Calloway to conduct a patdown of the outside of Mr. Tracey's clothing to determine

whether he was carrying a weapon. (R. 8-9.) However, the court pointed out that “the search for weapons approved in Terry consisted solely of a limited patting of the outer clothing,” and held that Officer Calloway needed probable cause to extend his search beyond the exterior of Mr. Tracey’s clothing. (R. 9.) Since the court found that he did not have probable cause, it held that the search violated the Fourth Amendment. (R. 9.)

## **B. Fourteenth Amendment Analysis**

When deciding the Fourteenth Amendment issue, the District Court began its analysis by stating that the interest at hand was whether the Constitution protected “private sexual activity.” (R. 6.) The court noted that the Supreme Court declined to establish a “fundamental right” to private sexual activity in Lawrence v. Texas, then refused to find such a right on its own. (R. 6.) Finding no fundamental right was at issue, the court applied a rational basis review to uphold the Craven statute. (R. 7.)

On appeal, the Thirteenth Circuit reversed the District Court. (R. 12.) The Circuit Court concluded that Lawrence recognized a liberty interest in the Fourteenth Amendment, and that the Lawrence Court required at least intermediate scrutiny be applied when that liberty interest is burdened. (R. 10.) Looking to recent decisions in the First and Ninth Circuit, the Circuit Court concluded that Lawrence recognized a right to privacy that encompasses extramarital behavior, and included Mr. Tracey’s right to engage in an off-duty affair. (R. 11.) The court reasoned that adultery statutes, like those prohibiting sodomy, are justified solely by a state’s “desire to prohibit immoral conduct,” and do not pass constitutional scrutiny after the decision in Lawrence. (R. 11.) The Department appealed this decision and certiorari was granted.

## SUMMARY OF ARGUMENT

When Officer Calloway moved aside Mr. Tracey's jacket to expose what was underneath, he conducted an unreasonable search in violation of the Fourth Amendment. Acting on the reasonable suspicion that Mr. Tracey was armed, Officer Calloway was only permitted to conduct a patdown search of Mr. Tracey's outer clothing. **(Part I.A.1.)** After Officer Calloway executed the patdown and did not detect any weapons, he exceeded the scope of his authority by expanding his search under Mr. Tracey's outer clothing because it was an intrusive search that was not necessary to detect a weapon. **(Part I.A.2.)** Further, Officer Calloway's actions were not justified by exigent circumstances because Officer Calloway was not in any heightened state of danger. **(Part I.B.)**

The Craven Police Department violated Mr. Tracey's Fourteenth Amendment right to engage in private intimate conduct because this Court has recognized: the existence of this right, **(Part II.A.1.)**; that the right to engage private intimate conduct exists contemporaneously with the functional purpose of the marital relationship, **(Part II.A.2.)**; and that this right extends to extramarital affairs, **(Part II.A.3.)**. The standard of review for infringement of these rights requires a balancing of the parties' interests, **(Part II.B.1.)**, and in this case, Mr. Tracey's interest in conducting his affairs free from governmental interference outweighs the state's interest in regulating his off-duty sexual conduct, **(Part II.B.2.)**. Finally, Mr. Tracey was not afforded his procedural due process rights because he was not given a pre-termination hearing. **(Part II.C)**

**I. THE FOURTH AMENDMENT PROHIBITS A POLICE OFFICER ACTING UNDER REASONABLE SUSPICION FROM SEARCHING UNDER A PERSON'S OUTER CLOTHING UNLESS THE OFFICER CONDUCTS A PATDOWN SEARCH AND FEELS A WEAPON, OR THE OFFICER IS IN A HEIGHTENED STATE OF DANGER.**

**A. When a Police Officer Reasonably Suspects that a Person is Armed and Dangerous, the Officer Must Limit the Search for Weapons to the Person's Outer Clothing Until After Detecting a Weapon.**

Officer Calloway violated Mr. Tracey's Fourth Amendment rights when he conducted an unreasonably intrusive search under Mr. Tracey's jacket after he did not detect any weapons during his initial patdown search. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." U.S. Const. amend. IV. As the Supreme Court "has always recognized, 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)). There is no doubt in this case that Officer Calloway restrained Mr. Tracey's liberty and violated his personal security, or that Mr. Tracey was entitled to the protection of the Fourth Amendment. Conceding that Officer Calloway had the authority to stop Mr. Tracey and pat him down, the only question is whether Officer Calloway had the authority to search under Mr. Tracey's jacket after his patdown did not reveal any weapons. Because any search conducted by Officer Calloway had to conform to the limits of Terry v. Ohio, 392 U.S. 1, and because the scope of a Terry stop does not include the power to search under exterior clothing after a patdown does not reveal any weapons, Officer Calloway

exceeded his authority under Terry and offended the Fourth Amendment.

In Terry, the Court created two exceptions to the Fourth Amendment's warrant requirement. Id. First, a police officer may conduct a brief investigatory stop upon a reasonable suspicion that criminal activity is afoot (the seizure). Id. at 30. See also Illinois v. Wardlow, 528 U.S. 119, 123 (2000). Second, during this investigatory stop a police officer may conduct a limited protective search for weapons when he has a reasonable suspicion that the person he is investigating is armed and dangerous (the search). Terry, 392 U.S. at 30. The reasonable suspicion required to conduct a stop and frisk under Terry is "an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court 'has been careful to maintain.'" Ybarra v. Illinois, 444 U.S. 85, 93 (1979) (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)). This Court, while recognizing the importance of police safety, has been reluctant to expand this warrantless search beyond a specifically circumscribed set of appropriate actions.

**(1) The only protective search of a person approved in Terry v. Ohio was a patdown search of the outer clothing.**

A police officer's authority to conduct protective searches during investigative stops derives from the Fourth Amendment's admonition that "reasonable" searches may be conducted without a warrant. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In Terry, the Court found patdown searches of the outer clothing "reasonable" only after carefully balancing the interest of police officers in neutralizing danger during investigations against the individual's right to be free from warrantless searches: the "inestimable right of personal security" protected by the Fourth Amendment. Terry, 392 U.S. at 8-9, 26. After considering these interests, the Court found that "the proper balance" was to grant "a narrowly drawn authority to permit a reasonable search for

weapons for the protection of the police officer.” Terry, U.S. 392 at 26-27. The Court defined that narrow authority as follows:

where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience . . . that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled . . . to conduct a carefully limited search of the *outer clothing* of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30 (emphasis added).

In granting police officers the limited authority to conduct a patdown search, the Court recognized that “[e]ven a limited search of the outer clothing for weapons constitutes a severe . . . intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.” Id. at 24-25. Nonetheless, the Court held that a patdown search which does not extend “beyond the outer surfaces of [a person’s] clothes” is strictly what is “minimally necessary to learn whether” a person is armed, making it a reasonable method of conducting a protective search. Id. at 29-30. Other than a patdown search of the exterior clothing, the Court did not endorse any other method of conducting a protective search of a person. Id.

Though the Court did not find the need to develop at length all “the limitations which the Fourth Amendment places upon a protective seizure and search for weapons,” it did limit the manner in which a police officer can invade a person during a protective search. Terry, 392 U.S. at 29-30. Subsequent courts have reinforced that “[t]he search for weapons approved in Terry consisted *solely* of a limited patting of the outer clothing.” Sibron v. New York, 392 U.S. 40, 65 (1968) (emphasis added) (search held unreasonable when officer thrust his hand into suspect’s pocket without first attempting limited exploration for arms); see also Maryland v. Buie, 494 U.S. 325, 332

(1990); Ybarra v. Illinois, 444 U.S. at 93. In its most recent case interpreting Terry, this Court again recognized that Terry endorsed “a limited search of outer clothing,” holding that a “patdown [was] reasonable under the Fourth Amendment.” Arizona v. Johnson, No. 07-1122, slip op. at 5 (U.S. Jan. 26, 2009). Importantly, every case cited above uses the limiting term “outer clothing” as the boundary between reasonable protective searches and unreasonable, overly intrusive and offensive searches.

Since Terry, this Court has not authorized police officers to conduct more invasive searches of the person, although it has expanded the right of officers to search cars and homes. See Michigan v. Long, 463 U.S. 1032 (1983) (search of car interior permissible when officer reasonably suspects dangerous suspect may gain immediate control of weapons); Maryland v. Buie, 494 U.S. 325 (protective sweep of home allowed when officers effecting arrest warrant have reasonable suspicion a dangerous individual is hiding in the house); cf. United States v. Place, 462 U.S. 696 (1983) (police may seize luggage based on reasonable suspicion it contains narcotics to allow exposure to trained narcotics detection dog). However, allowing extended searches of places or property based on reasonable suspicion does not justify an extended search of a person. Cf. Ybarra v. Illinois, 444 U.S. 85 (search warrant for tavern and bartender did not permit body searches of the bar’s patrons); United States v. Di Re, 332 U.S. 581 (1948) (probable cause to search car did not justify body search of passenger). The Court has recognized that the Fourth Amendment affords a “unique, significantly heightened protection . . . against searches of one’s person,” Wyoming v. Houghton, 526 U.S. 295, 303 (1999), and has cautioned that:

[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.

This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Coolidge v. New Hampshire, 403 U.S. 443, 454 (quoting Boyd v. United States, 116 U.S. 616 (1886)).

In this case, the District Court characterized Officer Calloway's actions as a "slight displacement of an outer garment," and found it "difficult to fathom" how that was more intrusive than patting down the exterior of Mr. Tracey's clothing. (R. 5.) That logic is precisely what the Coolidge Court warned against: slight deviations from legal procedures leading to stealthy encroachments on constitutional rights. Coolidge, 403 U.S. at 454. In reaching its decision to allow officers to conduct more invasive searches, the District Court balanced the same exact interests as the Terry Court (safety of law enforcement against personal security of individuals), yet it discarded this Court's conclusion on how those interests must be weighed. (R. 5.) The most important point in this case is that when Officer Calloway went beyond a patdown search, he "moved beyond the bounds of what is permissible under Terry." (R. 9, 13th Cir. opinion.) In doing so, he conducted an unreasonable search in violation of the Fourth Amendment.

**(2) After an officer conducts a patdown search and does not detect weapons, it is unreasonable to extend the search underneath the clothing because it is more intrusive than a patdown search and is not necessary to detect weapons.**

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing . . . the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed to promote legitimate governmental interests.'" United States v. Knights, 534 U.S. 112,

118-19 (2001). The search in this case was unreasonable because when Officer Calloway pushed Mr. Tracey's jacket aside to expose what was underneath, he intruded upon Mr. Tracey's privacy to a greater extent than merely patting the exterior of his outer garments, and that increased intrusion was not necessary to detect weapons which could have been felt through a patdown.

**a. Searching underneath the clothing is more intrusive than a patdown search.**

When the Terry Court created a narrow exception for police officers to conduct a "reasonable search for weapons," it did not abdicate the determination of what constitutes a "reasonable" search to the executive. 392 U.S. at 27. Instead, the Court specifically defined a reasonable search for weapons as "a limited search of the outer clothing," recognizing that a search underneath the outer clothing was more invasive. Id. at 30. The Court emphasized that the police officer's search of one suspect was reasonable only because he did not "invade [the] person *beyond the outer surfaces* of his clothes, since he discovered nothing in his patdown which might have been a weapon." Id. at 29-30 (emphasis added). Further, when the officer placed his hands "under the outer surface of [another suspect's] garments," the search was reasonable only because he did so after "he had felt weapons." Id. Clearly, the Court found a legally significant distinction between a search of the outer surface of clothing and a search underneath the outer garments, a distinction which should not be abruptly discarded. Id. In Sibron v. New York, the Court held that a search "was not reasonably limited in scope" to the goal of locating weapons when the officer thrust his hand into the suspect's pocket without first conducting a patdown search. 392 U.S. at 65-6; see also Minnesota v. Dickerson, 508 U.S. 366 (1993) (search of suspect's pocket unreasonable

after patdown search did not reveal any weapons). In finding the search of the pocket unreasonable, the Sibron Court emphasized that the search authorized in Terry did not expand into the pockets until *after* the officer had felt weapons. Sibron, 392 U.S. at 65.

Circuit and state courts have also adhered to the distinction in Terry and found that searches which extend beyond the outer surface of a person's clothing are unreasonably intrusive. See, e.g., United States v. Casado, 303 F.3d 440 (2d Cir. 2002) (search held unreasonable because officer did not conduct a patdown search and instead reached directly into person's pocket); State v. Smith, 693 A.2d 749 (Md. 1997) (after patdown did not reveal weapons, improper for officer to lift suspect's shirt to reveal the waistband of his pants); United States v. Askew, 529 F.3d 1119 (D.C. Cir. 2008) (unzipping jacket was unreasonable after patdown search did not reveal weapons); cf. United States v. Harris, 313 F.3d 1228 (10th Cir. 2002) (reaching into defendant's boot permissible only because officer felt object consistent with a weapon). In Smith, the officer conducted a patdown search but did not detect any weapons, yet he lifted up the suspect's shirt to reveal his waistband in order to "double check" that the suspect was not armed. Smith, 693 A.2d at 750. Although the Smith court found the patdown search was reasonable, it held that after the patdown did not reveal any weapon-like objects, the further intrusion was unreasonable because "the risk of harm to the officer [was] no longer of sufficient magnitude to outweigh the individual's competing interest in personal security." Id. at 753. In a similar case, the D.C. Circuit found that an officer exceeded his authority under the Fourth Amendment when he unzipped and opened a suspect's outer jacket after conducting a patdown search of a suspect which did not reveal any weapons. Askew, 529 F.3d at 1133. In holding the

search unreasonable, the Askew court noted that the officer's actions "exposed what lay under the outer layer to the public at large," making it a "greater invasion of the person than the manipulation of the outer surface of [a person's] jacket pocket." Id. at 1133-34 (comparing the unreasonable search in Minnesota v. Dickerson where the officer manipulated a suspect's jacket pocket to determine whether the objects were crack cocaine, 508 U.S. 366). So, while the District Court in this case may have believed that searching under the outer clothing was not "the tipping point between proper conduct and a constitutional violation," (R. 5), the Supreme Court and many lower courts disagree. See, e.g., Terry, 392 U.S. at 29-30; Sibron, 392 U.S. at 65-6; Dickerson, 508 U.S. 366; Casado, 303 F.3d 440; Harris, 313 F.3d 1228; Smith, 693 A.2d 749; Askew, 529 F.3d 1119.

The Smith and Askew cases highlight two very important aspects of this case: (1) after Officer Calloway did not detect any weapons during his patdown search, his risk of harm no longer outweighed Mr. Tracey's privacy interest, and (2) Officer Calloway's search was unreasonably intrusive because it exposed to the public what Mr. Tracey had chosen to keep private. (R. 3.) Officer Calloway admitted he did not know what the purpose of the leather strap on Mr. Tracey's chest was, and since he had already conducted a patdown in which he did not feel any weapons, he was acting on nothing more than reasonable suspicion when he moved Mr. Tracey's jacket aside. (R. 3.) This Court has not endorsed visual exposure as a method of dispelling reasonable suspicions, and Officer Calloway did not have the authority to expose Mr. Tracey's personal items to the public. Had Officer Calloway simply patted Mr. Tracey down as the Terry doctrine requires, he could have determined if Mr. Tracey was armed without

making such an intrusive violation of Mr. Tracey's person. As in Smith and Askew, Officer Calloway's search penetrated the outer garments of Mr. Tracey and exceeded the bright line between reasonable and unreasonable searches permitted under the Fourth Amendment.

**b. Looking under a person's outer clothing is not necessary to determine if a person is armed.**

In addition to being more intrusive, a search under the exterior layer of clothing is not necessary to detect weapons and is therefore not reasonable under Terry. Terry, 392 U.S. at 26. In Terry, this Court fully considered the threat police officers face when investigating people who are potentially armed, and held that a limited patdown of the outer clothing is justified because it amounts to a necessary intrusion into the privacy of citizens. Id. at 26. In this case, the officer faced the same risk considered in Terry, a potentially armed person, yet he conducted a more expansive search than what this Court approved under those circumstances. (R. 5.) In doing so, the officer ignored this Court's mandate that protective searches based on reasonable suspicion must be "limited to that which is *necessary* for the discovery of weapons which might be used to harm the officer or others nearby." Id. at 26 (emphasis added). When a police procedure further erodes personal privacy, as it did in this case, courts must ask if that erosion is absolutely necessary.

Protective searches which go beyond what is necessary to determine if the suspect is armed are not valid under Terry. See, e.g., Sibron, 392 U.S. at 65-6; Dickerson, 508 U.S. at 373. In Terry, the police officer's actions were reasonable only because he "confined his search strictly to what was *minimally necessary*" to detect weapons, a patdown search. 392 U.S. at 30 (emphasis added). When discussing

patdown searches, this Court has noted that the premise of Terry is “that officers will be able to detect the presence of weapons through the sense of touch.” Dickerson, 508 U.S. at 375-76. Nothing in the record of this case indicates that Officer Calloway could not have detected a weapon through a patdown, or that moving Mr. Tracey’s jacket aside was otherwise necessary. (R. 3.) Officer Calloway did not testify that his sense of touch was impaired, that Mr. Tracey’s jacket was unusually stiff or thick, or that he believed moving the jacket aside was necessary for some other reason which is not apparent on the face of the record. (R. 3.) See State v. Vasquez, 807 P.2d 520 (Ariz. 1991) (search of pockets allowed when suspect’s jacket, which was in officer’s hand, was so bulky officer could not tell if it contained weapons); State v. Kearney, 443 A.2d 214 (N.J. Super. Ct. App. Div. 1981), cert. denied, 89 N.J. 449, 446 A.2d 169 (1982) (after officer felt bulge in pocket but could not tactilely identify object because suspect kept backing away, permissible for officer to reach into pocket to identify object). Thus, the only inference that can be made from the record is that Officer Calloway chose to do what was most convenient, not what was minimally necessary. (R. 3.)

When Officer Calloway chose to conduct a more invasive search than what is permitted in Terry, he needed to have greater justification: probable cause. From Terry onwards, this Court has retained the authority to strike a balance between the needs of law enforcement and the right of citizens to be left alone, free from government interference. Allowing officers to do what is convenient or expeditious without regard to what is constitutionally permissible invites abuse and abdicates this Court’s role as guardian of Americans’ civil liberties.

**B. A Police Officer May Forgo A Full Patdown Search Only When He Faces A Heightened Threat to His Safety.**

Officer Calloway's search was not permissible under the doctrine of exigency because the officer did not have any reliable information that Mr. Tracey was armed or dangerous, the search took place in a park that was not in a high crime area, the officer observed Mr. Tracey's movements without any difficulty, Mr. Tracey did not physically resist the officer's patdown search, and the extended search took place after the officer had already conducted a full patdown. This Court has not retracted from the position that a police officer may not extend a patdown search beyond the exterior of the clothing unless he feels weapons, though it has recognized it may be reasonable for the officer to forego a full patdown search and reach directly for the place he suspects a weapon is located if the officer faces exigent circumstances. Adams v. Williams, 407 U.S. 143, 148 (1972). However, the exigent circumstances which may justify reaching directly for a weapon, such as the officer's inability to observe the suspect's movements in a high crime area and the suspect's refusal to comply with the officer's request, were simply not present in this case.

In Adams, the police officer was seated in his cruiser when an informant he personally knew approached him and informed him that the suspect seated in a nearby vehicle was carrying narcotics and had a gun at his waist. Id. at 145. When the officer approached the suspect's vehicle, he asked the occupant to open the door. Id. Instead of opening the door as the officer requested, the suspect rolled down the window. Id. The officer then reached into the car and removed a fully loaded revolver from the man's waistband. Id. The Court held the search was reasonable because "[u]nder

these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety . . ." Id. at 148. In upholding the search as reasonable, the Court relied on four factors: (1) the informant's tip was reliable; (2) the officer had specific information that the suspect was carrying a concealed weapon at his waist; (3) the suspect was sitting alone in a car in a high-crime area at 2:15 in the morning; and, most importantly, (4) the suspect did not comply with the officer's request to step out of the car. Adams, 407 U.S. at 146-48.

When interpreting Adams, courts have emphasized that Adams does not authorize police officers to "dispense with a pat-down merely because they have reason to believe that a weapon is concealed at a particular location on a suspect's person," noting that "the more intrusive search in Adams was justified by the suspect's failure to comply with the officer's directive and the resulting inability of the officer to conduct an effective pat-down." State v. Smith, 693 A.2d at 753.

In finding the Adams search reasonable, this Court first emphasized that the tip the officer acted on was reliable because it was from an informant who the officer knew personally and who had provided him with information in the past, which was "a stronger case than . . . an anonymous telephone tip." Adams, 407 U.S. at 146. Further, the informant "came forward personally to give information that was immediately verifiable at the scene," subjecting himself to immediate arrest under state law if the complaint had proved false. Id. at 147. The facts of the case at bar are completely different. In contrast to Adams, the record in this case indicates only that Officer Calloway was investigating a "lead" and does not provide any evidence whatsoever that the source of the lead was reliable. (R. 2.) Indeed, the "lead" that brought Officer

Calloway to the park that day included the description of a suspect who looked completely different from Mr. Tracey. (R. 2.) Next, the Adams Court found that the officer “had ample reason to fear for his safety” because he was “investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning.” Adams, 407 U.S. at 147-48. The officer’s fear was heightened when the suspect did not comply with his request to step out of the car “so that his movements could more easily be seen,” making the revolver allegedly at his waist “an even greater threat.” Id. at 148.

Unlike the officer in Adams who was investigating a specific, reliable tip that a suspect was carrying a weapon at his waist, Officer Calloway was investigating an unreliable lead that an official of a private military company suspected of dealing illegal firearms “was meeting with prospective buyers.” (R. 2.) He had no information that an actual sale would take place or that either the seller or potential buyers would be armed, and Mr. Tracey did not match the description of the official suspected of selling the illegal firearms. (R. 2.) Further, Officer Calloway was not under any heightened threat. Mr. Tracey was seated on a park bench in a public square where Officer Calloway easily observed his movements, (R. 2), in contrast to the suspect in Adams who was seated in a car where the officer could not see his hands, Adams, 407 U.S. at 147-48. In addition, Mr. Tracey allowed Officer Calloway to pat him down without any physical resistance and complied with Officer Calloway’s command to stop and turn around for a second search, (R. 2), unlike the Adams suspect who disobeyed the officer’s request to open the car door, Adams, 407 U.S. at 147-48. Even though Officer Calloway had reason to suspect that Mr. Tracey may have been armed, he faced none of the factors

which created the heightened threat to the officer's personal safety in the Adams case, and could not justify his actions as a "limited intrusion designed to insure his safety." Adams, 407 U.S. at 148.

In addition to the differences between the circumstances leading up to the Adams search and those leading to the search in this case, there are two important distinctions between the scopes of the searches. First, the directed search in Adams took place in lieu of a patdown search, not after a patdown search had already taken place. Id. at 145. Though it was reasonable for the officer under a heightened threat to go directly to the spot he believed the weapon was located instead of first conducting a full patdown search, nothing in the Court's decision indicates that he would have been justified after he conducted a patdown search and found no weapons. Id. The issue in Adams was a preliminary search; the issue in this case is an extended search. Second, the officer in Adams did not move aside the outer clothing to expose what lay beneath. Id. The decision in Adams indicates merely that the officer reached directly for the suspect's waistband while the suspect sat in a car, not that he moved aside any outer garments while the suspect was in a public place. Id.

Despite the obvious factual distinctions from Adams, the District Court relied on a similar theory to hold Officer Calloway's search was reasonable. (R. 5-6.) The District Court relied on a case from North Dakota in which an officer removed a wallet and wad of money from a suspect's pockets because he believed the objects could have contained a weapon and they prevented him from determining if the suspect had other objects in his pockets. State v. Heitzmann, 2001 ND 136, ¶ 15, 632 N.W.2d 1, 9. Reliance on that case was improper for several reasons.

First, the court in Heitzmann recognized that an officer is “entitled to continue a search to the inner garments” only “when an outside clothing patdown search reveals the presence of an object of a size and density that reasonably suggests the object might be a weapon.” Id. at 8. The officer in Heitzmann felt objects he thought may contain weapons, but Officer Calloway did not. Second, the court found that there were “extenuating circumstances” which made it reasonable for the officer to remove the items from the suspect’s pockets. Id. at 10. Those circumstances were: (1) the suspect was on probation and a fellow officer warned the searching officer that the suspect was combative; (2) while the suspect was sitting in the car alone, the suspect’s companion who was outside the vehicle informed the officer that there was a gun in the back of the truck; (3) the officer informed the suspect he was going to conduct a patdown and after the officer commenced the patdown, the suspect made quick evasive movements as though he was going to run away; (4) when the officer grabbed the suspect’s sleeve to keep him from fleeing, the suspect told the officer he wanted to show him something in the back of the pickup (where the gun was located); (5) the suspect acted very nervous when asked to step out of the vehicle and became increasingly nervous as the officer conducted the patdown; and (6) the suspect pulled his arm out of his jacket, forcing the officer to complete the patdown search while holding on to his pants. Id. at 4-5. No such extenuating circumstances existed in this case.

The District Court noted three facts to support its reliance on the Heitzmann case. First, Mr. Tracey was slow to respond when Officer Calloway asked him to identify himself. (R. 5.) That fact bears no possible relation to Officer Calloway’s ability to conduct a patdown, and does not resemble any of the factors the courts considered in

Adams or Heitzmann. It merely relates to Officer Calloway's suspicions. Second, Mr. Tracey cursed at Officer Calloway during the patdown. (R. 5-6.) Though the District Court found that it was "difficult to imagine that Officer Calloway was able to perform an effective patdown," (R. 6.), it seems even more difficult to imagine how verbal insults which were not accompanied by any physical resistance prevented Officer Calloway from conducting an effective patdown. Finally, the District Court noted that when Officer Calloway reached toward Mr. Tracey's chest, Mr. Tracey pushed his hand away. (R. 6.) Interestingly, the District Court did not acknowledge that this occurred after Officer Calloway had already conducted a full patdown, and instead considered it together with the other two factors as if they had all occurred simultaneously during the same search. (R. 5-6.) Further, the District Court completely ignored that when Mr. Tracey pushed Officer Calloway's hand away, Officer Calloway was not attempting to conduct a patdown but was reaching toward Mr. Tracey to push his jacket aside. (R. 3.) Even if this factor were relevant, without the presence of any of the other factors of increased danger, it simply does not rise to the level of extenuating circumstances or heightened threat contemplated by the courts in Adams and Heitzmann.<sup>1</sup> Other than convenience,

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<sup>1</sup> Even if Officer Calloway reasonably believed he could not safely conduct an effective patdown, the appropriate response was not to conduct a more invasive search, but to elevate the level of seizure. The majority of circuits have allowed police officers, as a precautionary measure, to use handcuffs or place suspects on the ground during a Terry stop, holding that does not turn the stop into an arrest. United States v. Bennet, 329 F.3d 769, 774 (10th Cir. 2003) (display of firearms and use of handcuffs); United States v. Smith, 3 F.3d 1088 (7th Cir. 1993) (handcuffs); United States v. Saffeels, 982 F.2d 1199, 1206 (8th Cir. 1992) (handcuffs), cert. granted, judgment vacated, 510 U.S. 801 (1993) (vacated on other grounds); United States v. Williams, 1992 WL 308594 at \*2 (D.C. Cir. Oct. 6, 1992) (unpublished opinion); United States v. Esieke, 940 F.2d 29, 36 (2d Cir.) (handcuffs and leg irons), cert. denied, 502 U.S. 992 (1991); United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989) (handcuffs); United States v. Hemphill, 767 F.2d 922 (6th Cir.) (requiring suspects to lie on ground in handcuffs), cert. denied,

Officer Calloway simply did not have any justification for conducting a more intrusive search than what is permitted by Terry, and he violated Mr. Tracey's Fourth Amendment rights when he searched under Mr. Tracey's jacket.

**II. THE POLICE DEPARTMENT VIOLATED MR. TRACEY'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WHEN IT TERMINATED HIM FOR ENGAGING IN AN EXTRAMARITAL AFFAIR**

**A. The Fourteenth Amendment Protects An Adult's Right to Engage in Private Intimate Conduct**

The termination of Mr. Tracey for alleged adulterous conduct occurring entirely off-duty violated the protections of the Fourteenth Amendment by unconstitutionally burdening his right to engage in private intimate conduct with another consenting adult. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. More than four decades ago, this Court recognized that the liberty interest enumerated in the Fourteenth Amendment includes a right to privacy that is perhaps "the most comprehensive of rights and the right most valued by civilized men," it is simply the "right to be left alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("various guarantees [of the bill of rights] create zones of privacy"). Subsequent Courts have further articulated the scope of this liberty interest, expanding it beyond marriage, and eventually recognizing the right of consenting adults to engage in private intimate conduct free from unnecessary governmental intrusion. Lawrence v. Texas, 539 U.S. 558, 562 (2003) (finding that "liberty presumes an autonomy of thought, belief,

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474 U.S. 982 (1985); United States v. Kapperman, 764 F.2d 786, 790 n. 4 (11th Cir. 1985) (placing suspect in police car in handcuffs); United States v. Taylor, 716 F.2d 701, 709 (9th Cir. 1983) (making suspect lie on ground in handcuffs).

expression, and certain intimate conduct”); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (matters “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”). The scope of the Fourteenth Amendment’s liberty interest encompasses all the intimate conduct necessary for free expression of sexual intimacy, and includes the right of consenting adults to engage in adulterous conduct. Because Mr. Tracey was engaged in private, intimate conduct with another consenting adult, while off-duty, the Rushmore County Police Department and Craven did not have a right to regulate the personal choices made by Mr. Tracey.

**1. Lawrence intended to recognize a protected liberty interest in private intimate conduct between consenting adults**

This Court’s decision in Lawrence v. Texas recognized an individual’s right to engage in private intimate conduct. 539 U.S. 558 (2003). Examining this Court’s decision in Lawrence reveals that this Court meant to recognize a protected liberty interest in consensual intimate conduct because (a) the Court relied on a line of substantive due process cases for its holding, (b) the Court used language throughout the opinion that supports the recognition of a protected liberty interest, (c) the Court overruled its prior decision in Bowers v. Hardwick, and (d) the Court applied a more searching review than would be required under rationale basis review. Given the foundation upon which Lawrence was built, the language used in the opinion, the Court’s specific rejection of its prior holding in Bowers, and the more searching standard applied, it is clear that this Court’s decision in Lawrence recognized a protected liberty interest in private intimate conduct “pertaining to sex.” 539 U.S. at 572.

a. **The Court's reliance on Griswold, Eisenstad, Casey, Carey and Roe signal its intention to recognize a protected liberty interest**

Beginning with this Court's seminal decision in Griswold v. Connecticut, this Court has recognized that the Fourteenth Amendment and the Bill of Rights protect more than a handful of discrete and independent enumerated rights. 381 U.S. 479, 484 (1965). Rather, the Constitution protects a range of conduct necessary to give "life and substance" to the specific guarantees contained therein. Id. The Lawrence Court's reliance on cases that expanded and recognized substantive due process rights indicates the Court's intent to recognize a similar liberty interest in private intimate conduct.

Griswold first recognized a "zone of privacy" based in the marital relationship, but attaching to the individual. Id., at 521 ("the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live' (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting))). This protected liberty interest was expanded in this Court's ruling in Eisenstad v. Baird when the Court struck down a Massachusetts law that prevented distribution of contraceptives to a non-married individual. 405 U.S. 438, 440 (1972). Although the Court recognized that its prior decision in Griswold applied the privacy right in the marital relationship, the majority explained that "the marital couple is ... but an association of two individuals each with a separate intellectual and emotional makeup," and that what matters is the "*individual*, married or single, to be free from governmental intrusion." Id. at 453. In Eisenstad, as in Griswold, this Court recognized the fundamental nature of this right. 405 U.S. at 447 n.7 (noting that Griswold dealt with

“fundamental freedoms”). Again in Roe v. Wade, 410 U.S. 113 (1973) (right to abortion), and Carey v. Population Services Int’l, 431 U.S. 678 (1977) (barring state law prohibiting sale of contraceptives to minors), the Court recognized important liberty interests relating to intimate sexual choices.

Because these cases created the backdrop for the discussion of the liberty interest at stake in Lawrence, 539 U.S. at 565-66, and given that each of these cases enumerated a fundamental or protected liberty interest, it is manifest that this Court intended Lawrence to recognize another constitutionally protected right: the right to private intimate conduct.

**b. The language utilized by the Court throughout Lawrence supports the recognition of a protected liberty interest**

In addition to grounding its analysis in a line of substantive due process cases, Lawrence used language throughout the opinion that indicated its intent to recognize a protected liberty interest. Repeatedly, the Lawrence majority likened the right of intimate expression to other critical constitutional rights such as “freedom of thought, belief, and expression.” 539 U.S. at 562. The Court noted that “when sexuality finds overt expression in intimate conduct with another person,” the “*liberty* protected by the Constitution” demands recognition of this right. Id. at 567 (emphasis added). The Court repeatedly cited the “right to liberty under the Due Process Clause” as the basis for its decision, finally noting that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter” Id. at 578 (quoting Casey, 505 U.S. at 847). Given the extent of the references to liberty, it is unlikely that the Court did not intend to recognize a protected liberty interest in private intimate conduct.

c. **The Court used Lawrence to specifically overrule Bowers v. Hardwick, a contrary opinion that did *not* recognize a protected liberty interest in private intimate conduct between adults**

In overruling Bowers v. Hardwick, this Court specifically adopted Justice Stevens' dissent and endorsed a broader conception of liberty, recognizing a protected liberty interest in private intimate conduct. Lawrence, 539 U.S. at 578. In Bowers v. Hardwick, respondents sought to declare a Georgia sodomy law unconstitutional. 478 U.S. 186 (1986). Mistakenly, the Bowers Court described the question presented as whether the Constitution created a fundamental right for homosexuals to engage in sodomy. Id. at 190. Lawrence made clear that the Bowers' opinion failed to "appreciate the extent of the liberty interest at stake". Lawrence, 539 U.S. at 567. While Bowers failed to see "any resemblance" between homosexual sodomy and "family, marriage, or procreation," 478 U.S. at 190-91, Lawrence recognized that the Fourteenth Amendment protects a broad range of rights, including the right to private sexual expression. 539 U.S. at 562.

Lawrence overturned Bowers and endorsed Justice Stevens' Bowers dissent as controlling, 539 U.S. at 578. Lawrence finally recognized that Bowers was no more about a "right to engage in homosexual sodomy" than Katz v. United States, 389 U.S. 347 (1976) was about the right to "place bets from a telephone booth." Bowers, 478 U.S. at 199 (Stevens, J., dissenting). Justice Stevens' dissent and the Lawrence majority acknowledged that what the Court in Bowers really "refused to recognize [was] the fundamental interest all individuals have in controlling the nature of their intimate associations with others." Id. at 206. By wholeheartedly adopting the reasoning of Justice Stevens' dissent, Lawrence clearly repudiated Bowers and its stubborn refusal to recognize a protected liberty interest in private intimate conduct.

**d. The Court's use of a more searching review indicated their intent to create a protected liberty interest**

Finally, evidence of this Court's intent to recognize a protected liberty interest in private intimate conduct comes from Lawrence's refusal to apply a rationale basis review to the Texas law. Had the Court not been recognizing a protected liberty interest, it would have been appropriate to apply a rationale basis review. See Cook v. Gates, 528 F.3d 42, 52-53 (1st Cir. 2008) (concluding that Lawrence must have announced a protected liberty interest since the Court did not apply a rationale basis review). In Lawrence, Texas articulated a single governmental interest in preserving the sodomy statute: the "promotion of morality." 539 U.S. at 582. As the Cook court notes, had Lawrence applied a rationale basis review, the Texas statute would have been constitutional. 528 F.3d at 52-53. However, Lawrence noted 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, at 578 (emphasis added). The fact that a rationale basis review (like that used in Bowers) would have upheld the Texas law, coupled with the above language regarding the requisite balancing that must occur clearly indicates that this Court intended to recognize a protected liberty interest in private intimate conduct.

**2. The scope of the Fourteenth Amendment's privacy protection is contemporaneous with marriage's functional purpose**

To define the scope of the right to engage in private intimate conduct announced in Lawrence, this Court should examine the underlying purpose of that right and the function of the institution of marriage. Long before this Court's decision in Griswold, the institution of marriage enshrined a "right of privacy older than the Bill of Rights – older

than our political parties, older than our school system.” Griswold at 486. The marital relationship has long been our society’s mechanism for protecting and codifying intimate expression between consenting adults. However, as this Court recognized in Eisenstad and confirmed in Lawrence, the Constitution protects an *individual’s right* to this intimate expression. Lawrence, 539 U.S. at 577-78 (holding that “intimate choices by married as well as unmarried persons” are protected) (quoting Bowers at 216 (Stevens, J., dissenting)). Viewing privacy as an individual right recognizes that we protect those rights “not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.” Bowers at 204 (Stevens, J., dissenting). What subsequent Courts recognized was that Griswold was protecting the underlying rights that accompany marriage, not marriage itself.

Bowers and Lawrence provide a perfect example of how the Court’s view of the privacy right has changed. While Bowers endorsed a formalistic view of intimacy and privacy, and mistakenly viewed the issue as whether there is a Constitutional right to engage in homosexual sodomy, Lawrence understood the privacy right as a broader construct. In Lawrence, the Court examined the function of the individual’s right to be free from government intrusion in his private intimate choices, and found that liberty protects private intimate conduct. See Lawrence, 539 U.S. at 562. To understand the bounds of this right, courts have looked to the functions of marriage. Briggs v. N. Muskegon Police Dep’t, 563 F. Supp. 585 (1983). Under this functional analysis, we see that the marital relationship has existed to *facilitate* “intimacy, voluntary commitment, stability, [and] psychological involvement.” Briggs, 563 F. Supp. at 589. We have protected the family “because it contributes so powerfully to the happiness of

individuals, not because of a preference for stereotypical households” Bowers at 205 (Stevens, J., dissenting). The foundational difference between Bowers and Lawrence was their respective views of the extent and purpose of this privacy right. When examining extramarital intimate activity, like adultery, the functional analysis asks whether that activity is private, intimate, and personal. Under this analysis, adultery, like sodomy, is a protected activity because of its intimate nature, despite its moral questionability.

In contrast to the functional analysis, the Bowers’ Court saw privacy rights as discrete legal islands: marriage, procreation, abortion, and child rearing. Under this view, Texas’ prohibition against adult homosexual sodomy appears unconnected to the previously recognized set of rights, but Lawrence changed that view. Today, this Court views the Fourteenth Amendment as protecting a unified and endearing vision of privacy embedded in the framework of the Constitution itself. Justice Harlan’s eloquent dissent in Poe v. Ullman put it best:

“[L]iberty is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion, the right to keep and bear arm; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...”

367 U.S. at 542-43 (Harlan, J., dissenting) This court’s post-Lawrence view of liberty discards the outdated yardstick of formal marriage in favor of a practical and malleable view of the underlying right, inherent in all men to be free in “intimate and personal choices . . . central to personal dignity and autonomy.” Lawrence, 539 U.S. at 574 (quoting Casey, 505 U.S. at 851).

The scope of the privacy right under Lawrence is best understood as a pragmatic recognition of the important personal relationships and intimacies that were once protected by marriage, but today exist in extramarital relationships that are but one of a myriad of personal intimate choices an individual may make in a lifetime. The choice of Mr. Tracey to begin a romantic relationship after separation from his wife was testament to “the fact that different individuals will make different choices,” Bowers, 478 U.S. at 206 (Stevens, J. dissenting), and that the Fourteenth Amendment protects that right.

### **3. Consensual adulterous conduct, however immoral, is protected by the Fourteenth Amendment**

The Fourteenth Amendment protects Mr. Tracey’s right to engage in an extramarital affair. This Court has recognized two distinct but important truths about the Fourteenth Amendment: (1) the right to privacy inherent in the Fourteenth Amendment extends beyond the marital relationship to encompass extramarital sexual expression, and (2) that the majority may no longer enforce sexual morality through the operation of the law. See Eisenstad, 405 U.S. at 453 (commenting that “it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion”); Lawrence, 539 U.S. at 571 (declaring an end to “the power of the State to enforce [ethical and moral] views on the whole society through operation of the criminal law.”). Because Mr. Tracey was engaged in intimate private conduct in the privacy of his home, and because the Craven statute seeks to promote a pejorative restraint on Mr. Tracey’s private intimate conduct, the Craven statute is unconstitutional.

Courts and commentators have noted that the privacy rights and the important psychological and emotional needs that inure to married couples are no less important to individuals outside the marital context. See Briggs, 563 F. Supp 585. Sexual intimacy

is “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,” Paris Adult Theater I v. Slaton, 413 U.S. 49, 63 (1973), which is no less important as it relates to extramarital affairs. Because the right to privacy inures to the individual, and because that right is designed to protect intimate expression, it is manifest that the privacy right extends to private intimate conduct outside of the marital relationship and to extramarital affairs like the one at issue.

In Lawrence, this Court declared that the majority may not use “the power of the State to enforce [majority views regarding intimate conduct] on the whole society through operation of the criminal law.” 539 U.S. at 571. The Craven statute, without a single prosecution in two decades, represents the exact type of moribund legislation that the Lawrence court had in mind when it declared an end to moralizing in the field of private intimate conduct. Indeed, the law at issue in the present case is remarkably similar to the tenuous legislative goals of the statute rejected in Griswold. There, as here, the statute sought to criminalize conduct for moralities sake, and as the Court noted in Griswold, the policing of such laws “is repulsive to the notions of privacy surrounding the marriage relationship.” 381 U.S. at 486. Indeed, adultery statutes like the one at bar encourage the very conduct which the Griswold Court feared. For example, in Mercure v. Van Buren Township, officers suspected the plaintiff was engaged in an affair with a fellow policeman’s wife, Ms. Yono. 81 F. Supp. 2d 814, 817 (E.D. Mich. 2000). In response, one defendant police officer drove his squad car to Ms. Yono’s home and parked outside. Id. Eventually, all four police cars on duty that night arrived outside the home of Ms. Yono. Id. Observing plaintiff’s car there, the officer

conducted surveillance and took photographs of the plaintiff's car which were posted on a common bulletin board at the police station the next day. Id.

If, as the Griswold court noted: policing the "sacred precincts of the marital bedrooms... is repulsive to the very notions of privacy surrounding the marriage relationship," 381 U.S. at 485-86, then cases like Mercure illustrate the very invasion of privacy Griswold meant to protect. Because the liberty protected by the Fourteenth Amendment is essential to our constitutionally protected way of life, and allowing "arbitrary impositions and purposeless restraints" on that liberty demeans both the letter and spirit of the law, the Fourteenth Amendment protected Mr. Tracey's right to engage in an affair, and prohibited the state of Craven from denying him that right.

**B. The Court Must Balance the State's Interest and the Interest of the Individual, and Here, the State Did Not Have A Sufficiently Compelling Interest In Regulating Mr. Tracey's Off-Duty Sexual Conduct**

The state of Craven does not have a sufficient state interest in regulating the private, consensual affairs of its off-duty police officers to outweigh Mr. Tracey's interest in expressing himself in private intimate conduct. Although the Fourteenth Amendment does not guarantee absolute freedom of sexual expression, intimate conduct can be regulated only when the state demonstrates a compelling interest that "justifies its intrusion into the personal and private life of the individual." Lawrence, 539 U.S. at 578. Here, Craven's minimal interest in policing the morality of its officer's off-duty conduct does not outweigh Mr. Tracey's interest in conducting his private intimate choices free from government intrusion, especially when the alleged violation of the unused statute is completely technical.

**1. The standard of review for cases involving private sexual conduct is intermediate review**

The Lawrence decision announced a new standard for viewing the validity of regulations on private intimate conduct, and the Appellate Court correctly determined that the state of Craven does not have a sufficient interest in regulating Mr. Tracey's off-duty sexual activity. This Court's decision is Lawrence requires a balancing of state and individual interests before regulating or restricting an individual's right to engage in consensual private conduct. Lawrence, 539 U.S. at 578; Briggs, 563 F. Supp 585; Fabio v. Civil Serv. Comm'n of City of Philadelphia, 414 A.2d 82 (Pa. 1979) (Finding a right to sexual privacy outside of marriage and requiring the state find a "compelling interest"). In the case at bar, the state's interest in controlling an officer's off-duty sexual activity is subject to an intermediate level of review because the activity being regulated is off-duty private intimate conduct, a protected liberty interest under the Fourteenth Amendment. Lawrence, 539 U.S. 558.

An intermediate standard that balances both the state's need to protect its citizens and the individual's right to be free from government intrusion has two requirements. First, the test must appropriately gauge the interests of the state, and second, the test must accurately consider the rights of the individual. Lawrence, 539 U.S. 558. Therefore, in the case at bar, this Court must first examine the purported state interest in regulating Mr. Tracey's off-duty sexual activity, and then determine whether this interest outweighs Mr. Tracey's protected liberty interest in engaging in private intimate conduct.

## **2. Mr. Tracey's interest in conducting his private affairs outweighs the state's de minimis interest in policing moral conduct**

The state of Craven had a *de minimis* interest in regulating the off-duty sexual activity of Mr. Tracey because the conduct had no impact on his job performance. The first prong of the balancing test requires a consideration of the state's interest in regulating an officer's off-duty private sexual activity. See *Shuman v. Philadelphia*, 450 F. Supp. 449 (E.D. Pa. 1979). In *Shuman*, the court faced a similar set of facts. A married Philadelphia police officer began cohabitating with an unmarried eighteen year old girl after separating from his wife. 450 F. Supp. at 452. After numerous complaints from the girl's mother, the police instigated an investigation into the alleged affair and eventually charged the officer with conduct unbecoming an officer. *Id.* There, the court concluded that "there are many areas of a police officer's private life and sexual behavior which are simply beyond the scope of any reasonable investigation . . . because of the tenuous relationship between such activity and the officer's job performance." *Id.* at 459. There, as here, the state has not provided any evidence that Mr. Tracey's job performance was impacted by his conduct. There, as here, the connection between the state's interest in maintaining an efficient and effective police force is tenuous.

Another arguable state interest is the need to regulate the activity of officers to uphold the reputation of the police force. See *Fabio*, 414 A.2d 82 (finding that the state was justified in terminating an officer who encouraged and facilitated numerous ongoing affairs and trysts while married). In *Fabio*, a police officer and his wife began having marital problems. 414 A.2d at 84. In an apparent attempt to solve his marital problems,

Fabio encouraged his wife to engage in extramarital affairs with other officers on the force, Fabio himself engaged in sexual intercourse with his wife's eighteen year old sister, and he engaged in sexual intercourse with another officer's wife. Id. at 84. These activities were described by the Pennsylvania Supreme Court as far exceeding the bounds of mere adultery. Id. at 88. As a result of this conduct, the court found that Fabio's job performance had suffered, and that "a great number of our citizenry would recognize that the appellant's course of conduct was morally offensive." Id. at 90.

The right to engage in sexual behavior is clearly not limitless. However, the facts of this case demonstrate that Mr. Tracey's affair with Ms. Malone was innocuous and had no effect on either his performance or the police department's reputation. Unlike the conduct in Fabio, Officer Tracey was engaged in intimate activity with a single partner. Unlike Fabio, Mr. Tracey was separated from his wife and had been served with divorce papers. (R. 4.) Under these circumstances, it is clear that Mr. Tracey's actions comport with the norm of acceptable conduct, and would not have shocked or outraged the community at large, as did the conduct in Fabio. The case at bar is far more similar to the facts of Shuman, where the plaintiff had been separated from his wife prior to beginning his affair. 470 F. Supp. at 452. The importance of these distinctions is that the state's interest regulating off-duty private sexual conduct declines in proportion to the state's asserted interest in maintaining the image of the police force. When the conduct complained of has a *de minimis* impact on the reputation of the police force, the state's interest is weakest. Here, the technical violation of the state's adultery statute is a far cry from the garish activity complained of in Fabio, and does not justify an invasion of Mr. Tracey's privacy.

Finally, it should be noted that the Craven statute at issue has fallen into disuse. Court records indicate that the statute has not been enforced in more than 20 years. (R. 4.) The Fabio court, even when upholding the police department's firing of the officer, noted that "the government must tread lightly when it investigates and regulates the private activities of its employees. Public employees must be careful not to transform anachronistic notions of unacceptable social conduct into law." Fabio, 414 A.2d at 90. In the instant case, the state's claim that they are regulating for the public good is weak when considering the moribund character of the adultery statute.

The second prong of the test requires an examination of the individual's interest. As discussed in Part II.A., Mr. Tracey has a constitutionally protected right to engage in private intimate conduct. In this case, the activity was consenting. It was between adults, and it was in private. The alleged affair occurred in the home and off-duty. Under these circumstances, Mr. Tracey's privacy right was strong indeed. Balancing these interests it is clear that the minimal interests of the Department and the state are outweighed by Mr. Tracey's right to be left alone.

### **C. Mr. Tracey Was Not Afforded His Procedural Due Process Rights Under the Fourteenth Amendment**

Even when the state regulates under the auspice of a compelling state interest, the Constitution guarantees that the deprivation of a constitutionally protected right shall not be without at minimum "notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In this case, there was no procedure. There was no process. Therefore, even if the above balancing of rights was closer, and even if the state had a legitimate interest in regulating the conduct of Mr. Tracey, the state violated Mr. Tracey's right to a pre-

deprivation hearing. When the termination of an employee appears to be based upon grounds that would violate the Constitution, the individual is entitled to a pre-deprivation hearing. Cleveland Bd. of Ed. v. Donnelly, 470 U.S. 532, 542 (1985).

Here, Mr. Tracey was given no hearing. Officers from the arresting division contacted Mr. Tracey's supervisors to inform them that Mr. Tracey may have been engaged in an affair with the police chief's daughter, Ms. Malone, and Mr. Tracey was immediately discharged. (R. 4.) Under the standards of procedural due process in the shadow of a constitutionally protected right, the police department was required to have a hearing on the merits of the claim prior to termination. Donnelly, 470 U.S. at 542. Absent such procedural safeguards, it is clear that the Police department violated Mr. Tracey's procedural due process rights under the Fourteenth Amendment.

### **CONCLUSION**

For the foregoing reasons, the judgment of the Thirteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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