

No. 08-31958

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,
Petitioner,

v.

WILLIAM R. TRACEY
Respondent,

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

BRIEF FOR RESPONDENT

TEAM CODE: W

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

QUESTIONS PRESENTED FOR REVIEW viii

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS..... xi

STATEMENT OF THE CASE.....x

SUMMARY OF THE ARGUMENT xiii

ARGUMENT 1

I. THE FOURTH AMENDMENT’S PROTECTION AGAINST ILLEGAL SEARCHES AND SEIZURES PROHIBITS A POLICE OFFICER ACTING UNDER A REASONABLE SUSPICION FROM MOVING ASIDE THE EXTERIOR GARMENT OF A SUSPECT1

 A. Probable Cause is Required to Search an Individual Unless the Officer is Performing a Protective Search Pursuant to the Guidelines Set Forth in Terry v. Ohio.....2

 B. Moving Aside a Suspect’s Exterior Garment is a Highly Intrusive Search That Goes Beyond the Limits of Terry v. Ohio and Requires the Stricter Necessity of Probable Cause.....4

 1. An officer acting under reasonable suspicion is not permitted to move aside the exterior garment of a suspect during a Terry stop4

 2. Moving aside the exterior garment was a search separate from the initial pat down and cannot be viewed as a continuation of the Terry protective search5

 3. Reasonableness may be a proper tool to measure the legality of a Terry protective search but it does not supplant probable cause as the necessary predicate for intrusive searches7

 C. The Police Officer May Not Rely on the Plain-View Doctrine as a Reason to Search Because the Officer Did Not Have Probable Cause to Believe the Strap Was Associated With a Weapon.....8

 1. The plain-view doctrine does not allow a police officer to search for evidence without probable cause9

2. An item spotted by an officer under the plain-view doctrine must be “immediately apparent” as contraband for the officer to have the requisite probable cause to search	10
II. THE RUSHMORE COUNTY POLICE DEPARTMENT VIOLATED TRACEY’S CONSTITUTIONALLY-PROTECTED LIBERTY RIGHT TO PRIVATE CONSENSUAL SEXUAL INTIMACY WHEN HE WAS TERMINATED FOR MAINTAINING A PRIVATE RELATIONSHIP	12
III. THE GLUCKSBERG SUBSTANTIVE DUE PROCESS TEST SHOULD NOT BE APPLIED IN THIS CASE, BUT EVEN IF IT IS APPLIED, RUSHMORE POLICE DEPARTMENT STILL FAILS TO PROVIDE A LEGITIMATE REASON FOR TERMINATING TRACEY	17
A. <u>The Glucksberg Two-Step Is Inapplicable to the Specific Case At Hand</u>	17
B. <u>Even If the Court Does Apply Glucksberg, Rushmore Still Fails To Provide a Legitimate Reason for Infringing on Tracey’s Constitutionally-Protected Liberty Right Because the Craven Statute is Unconstitutional Both Facially and As Applied</u>	19
1. The adultery statute is facially unconstitutional	19
2. The adultery statute is unconstitutional as applied to Tracey	21
IV. A VIOLATION UNDER THE CRAVEN ADULTERY STATUTE SHOULD NOT BE AN ADEQUATE BASIS FOR TRACEY’S DISMISSAL BECAUSE HIS PRIVATE LIFE HAS HAD NO IMPACT ON HIS ABILITY TO PERFORM HIS DUTIES AS A POLICE OFFICER	22

TABLE OF AUTHORITIES

United States Supreme Court Cases

<u>Arizona v. Hicks,</u> 480 U.S. 321 (1987).....	2, 3, 8, 9, 11
<u>Beck v. Ohio,</u> 379 U.S. 89 (1964).....	4
<u>Bowers v. Hardwick,</u> 478 U.S. 186 (1986).....	13
<u>Carey v. Population Services International,</u> 431 U.S. 678 (1977).....	13
<u>Casey v. Planned Parenthood of Southeastern Pennsylvania,</u> 112 S.Ct. 2791 (1992).....	14, 19
<u>Chavez v. Martinez,</u> 538 U.S. 760 (2003).....	17, 18
<u>Coolidge v. New Hampshire,</u> 403 U.S. 443 (1971).....	1, 8, 9, 10
<u>County of Sacramento v. Lewis,</u> 523 U.S. 833 (1998).....	18
<u>Davis v. Mississippi,</u> 394 U.S. 721 (1969).....	6
<u>Eisenstadt v. Baird,</u> 405 U.S. 438 (1972).....	13
<u>F.C.C. v. Beach Communications, Incorporated,</u> 508 U.S. 307 (1993).....	19
<u>Florida v. Jimeno,</u> 500 U.S. 248 (1991).....	9
<u>Glucksberg v. Washington,</u> 521 U.S. 702 (1997).....	14, 17, 18, 19
<u>Griswold v. Connecticut,</u> 381 U.S. 479 (1965).....	13

<u>Heller v. Doe by Doe,</u> 509 U.S. 312 (1990).....	19
<u>Horton v. California,</u> 496 U.S. 128 (1990).....	10
<u>Lawrence v. Texas,</u> 539 U.S. 558 (2003).....	12, 13, 14, 15, 16, 17, 18, 19, 20
<u>Loving v. Virginia,</u> 388 U.S. 1 (1967).....	13
<u>Maryland v. Bouie,</u> 494 U.S. 325 (1990).....	5
<u>Michigan v. Long,</u> 463 U.S. 1032 (1983).....	7
<u>Minnesota v. Dickerson,</u> 508 U.S. 366 (1993).....	2, 3, 9, 10, 11
<u>Ohio v. Robinette,</u> 519 U.S. 33 (1996).....	7
<u>Roe v. Wade,</u> 410 U.S. 113 (1973).....	14
<u>Sibron v. New York,</u> 392 U.S. 40 (1968).....	1, 3, 4
<u>Terry v. Ohio,</u> 392 U.S. 1 (1968).....	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11
<u>Union Pacific Railway Company v. Botsford,</u> 141 U.S. 250 (1891).....	3
<u>United States v. Dionisio,</u> 410 U.S. 1 (1973).....	6
<u>United States v. Hensley,</u> 469 U.S. 221 (1985).....	7
<u>United States v. Knights,</u> 534 U.S. 33 (1996).....	7

United States Circuit Courts of Appeals Cases

<u>Cook v. Gates,</u> 528 F.3d 42 (1st Cir. 2008).....	12, 14, 15
<u>Lofton v. Secretary of Department of Children and Family Services,</u> 358 F.3d 804 (11th Cir. 2004)	14
<u>Reliable Consultants, Incorporated v. Earle,</u> 517 F.3d 738 (5th Cir. 2008)	15
<u>Shawgo v. Spradlin,</u> 701 F.2d 470 (5th Cir. 1983)	22
<u>Thorne v. City of El Segundo,</u> 802 F.2d 1132 (9th Cir. 1986)	22
<u>United States v. Askew,</u> 381 U.S. App. D.C. 415 (D.C. Cir. 2008).....	1, 4, 5
<u>United States v. Bishop,</u> 338 F.3d 623 (6th Cir. 2003)	9
<u>Williams v. Attorney Gen. of Alaska,</u> 378 F.3d 1232 (11th Cir. 2004)	14
<u>Witt v. Department of Air Force,</u> 539 F.3d 806 (9th Cir. 2008)	15

United States District Court Cases

<u>Briggs v. N. Muskegon Police Department,</u> 563 F.Supp. 585 (E.D.Mich. 1983).....	23, 24
<u>Shuman v. City of Philadelphia,</u> 470 F.Supp. 449 (E.D.Pa. 1979)	22, 24

State Court Cases

<u>Hobbs v. Smith,</u> 2006 WL 3103008 (N.C. Super. 2006).....	20
<u>State v. Heitzmann,</u> 632 N.W. 2d 1 (N.D. 2001)	6

Constitutional Provisions

U.S. Const. amend. IV3

U.S. Const. amend. XIV12

Federal Statutes

42 U.S.C. § 1983.....25

Other Authorities

Randy Barnett, Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas,
2003 Cato Sup. Ct. Rev. 21 (2002-2003).....12

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Fourth Amendment prohibits a police officer, acting under only a reasonable suspicion, from moving aside a suspect's exterior garment upon seeing a vertical strap underneath the suspect's jacket after the officer had already performed a fruitless Terry protective search for weapons.

- II. Whether, under 42 U.S.C. §1983 and the Fourteenth Amendment of the United States Constitution, a police officer may be terminated for private consensual sexual activity conducted off duty merely because of a violation of a statute under which the officer was not criminally convicted.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

U.S. Const. amend. XIV.

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .”

42 U.S.C. § 1983 (2003).

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

STATEMENT OF THE CASE

William Tracey, the plaintiff in this matter, was a police officer with the Rushmore County Police Department working as an undercover for 8 months investigating the sale of illegal firearms in Rushmore County. R. at 2. Maxwell Calloway was also an officer with the Rushmore County Police Department, however he was located in a different precinct and was investigating an illegal firearm distribution network tied to a military contractor. Id. On June 7, 2005, Office Calloway, who was unaware of Tracey's identity, spotted Tracey sitting on a park bench in McDonough Square in Craven, Rushmore. Id.

Office Calloway was pursuing a lead that a military contactor official was meeting with prospective buyers in McDonough Square. Id. Tracey did not in any way meet the description of the suspect, but Officer Calloway was suspicious about plaintiff's closely cropped hair and leather jacket despite the weather being in the low seventies. Id. Officer Calloway observed the plaintiff for twenty minutes and noted his continued suspicious behavior; Calloway believed plaintiff to be scanning rooftops and surveying the Square. Id.

Officer Calloway decided to approach Tracey and identified himself as a police officer. R. at 3. Tracey responded by giving his name, and became visibly upset and began to turn away. This encounter did not erase the Officer's suspicions and Calloway seized the plaintiff by his wrists and performed a pat down of the exterior surface of plaintiff's clothing. Id. Tracey did not resist the search, although he verbally displayed his agitation. Id. Officer Calloway failed to feel anything consistent with a weapon during his search. Id.

After Calloway had concluded the search, Tracey turned to continue on his way. Id. As Tracey turned, Calloway noticed a leather strap underneath Tracey's unzipped jacket. Id. Officer Calloway did not know the strap's purpose and could not get a close look at it. Id.

However, Officer Calloway thought such a strap could be used to carry a weapon. Id. Plaintiff stopped and turned around upon Calloway's request. Id. When Officer Calloway began to reach towards plaintiff to move aside the left exterior portion of his jacket, plaintiff brushed his hand aside. Id. Officer Calloway tried again with more force and successfully moved the left exterior of the plaintiff's jacket, revealing a Glock 21 .45 caliber pistol. Id.

Officer Calloway seized the pistol and placed Tracey under arrest. Id. Tracey attempted to explain that he was an undercover police officer and that Calloway was putting his investigation in serious jeopardy, as well as exposing Tracey to potential physical danger. Id. Officer Calloway did not believe plaintiff's story, and continued to detain him as he was in possession of a concealed firearm and thus in violation of Craven Statute 19-166.81. Id.

Tracey was then taken to a nearby precinct where he was thoroughly searched. R. at 3. Among other possessions, his cellular phone was confiscated. Id. Officer Calloway scrolled through the contact information saved on Tracey's phone, and noted that one listing was the contact information for Jacqueline Malone. Id. Ms. Malone is the estranged daughter of Rushmore County Police Chief Patrick Malone, who had reported corruption within the Rushmore County Police Department to the local papers. Id.

Officer Calloway called Ms. Malone to ask her questions about Officer Tracey. Startled from receiving a call from the police about Tracey, Ms. Malone immediately disclosed the affair she was having with Officer Tracey. R. at 4. She also confirmed that Tracey was, in fact, an undercover police officer. Id. After extracting the private information from Ms. Malone, Officer Calloway released Officer Tracey and informed him that he had learned of his relationship with Ms. Malone. Id.

The following day, Tracey was fired from the Rushmore County Police Department because of his “behavior unbecoming of an officer.” Id. Police Chief Malone admitted that the reason for terminating Tracey was because he violated an archaic state adultery statute when he shared an extramarital relationship with Ms. Malone, despite the facts that Tracey was never on duty when he visited Ms. Malone, nor was Tracey performing any official duties as a police officer when he was with Ms. Malone. Id. Further, there is no evidence of record that Tracey’s relationship with Ms. Malone impaired his ability to serve and protect in even the slightest way.

Although Tracey was still legally married at the time of his relationship with Ms. Malone, he had been separated from his wife for the past eighteen months and had initiated divorce proceedings. Id. Ms. Malone is not married, and the record mentions nothing about either Tracey or Ms. Malone having any children. Moreover, the Craven adultery law, statute 11-198.01, has not had any recorded convictions in over twenty years. Id.

The United States District Court for the District of Craven found that neither Petitioner Tracey’s Fourth Amendment nor his Fourteenth Amendment protections were violated by Rushmore County Police Department, and granted Rushmore summary judgment because “there is no genuine issue of material fact. . .” R. at 7. The United States Court of Appeals for the Thirteenth Circuit reversed the lower court’s decision, however, and found that (1) Tracey was illegally searched in violation of the Fourth Amendment, and (2) terminating Tracey for “his participation in an extra marital affair conducted off duty and in private is unconstitutional under the Due Process Clause of the Fourteenth Amendment.” R. at 11-12.

Petitioner Tracey requests that this Court affirm the Thirteenth Circuit’s finding that Tracey’s Fourth Amendment and Fourteenth Amendment protections were violated, and further, that he is entitled to judgment in his favor.

SUMMARY OF THE ARGUMENT

The Rushmore County Police Department violated Respondent Tracey's Fourth Amendment right to be free from an illegal search when Officer Calloway pushed aside Respondent's exterior garment to reveal exactly what Respondent had intended to keep private. The Fourth Amendment requires that a police officer have probable cause before performing such an intrusive search on an individual. The exception to the probable cause requirement was enacted in Terry v. Ohio, where the Court allowed police officers to perform a protective search for weapons if they have a reasonable suspicion that a suspect is armed, or engaging in criminal activity.

A Terry search is limited to a frisk and patting of the outer clothing of the suspect, and Officer Calloway's pat down and frisk on the Respondent proved fruitless. When Officer Calloway performed a second, more intrusive, search on the Respondent, he violated the Fourth Amendment by acting without probable cause and clearly outside the confines of the Terry doctrine. A police officer may not forcefully move aside the exterior garment of a suspect merely on a reasonable suspicion that the suspect may be concealing contraband underneath his jacket.

Officer Calloway was also not entitled to further search the Respondent pursuant to the plain-view doctrine. The plain-view doctrine allows law enforcement officials to seize evidence of contraband that comes within their plain view during a lawful search. However, the officer must have probable cause to believe that the item is contraband. Officer Calloway merely caught a far-away glance at a vertical strap on Respondent's chest when Respondent turned to leave. Here, there was no probable cause because the nature of the strap was not immediately apparent to the officer. Officer Calloway admitted that he was unaware of the strap's purpose, and thus

could not establish probable cause to believe that the strap contained a weapon. Consequently, Officer Calloway lacked probable cause to believe Respondent was armed and he performed a highly intrusive and illegal search based solely off of the inadequate benchmark of reasonable suspicion.

Furthermore, the Rushmore County Police Department violated Respondent Tracey's constitutionally-protected liberty right to private consensual sexual intimacy when he was terminated solely for sharing a private relationship with Ms. Jacqueline Malone. This Court held that the Fourteenth Amendment protects the private consensual sexual intimacy shared between two adults. Lawrence v. Texas, 539 U.S. 558, 564 (2003). In applying Lawrence, a balancing test must be conducted to weigh the need for governmental intrusion into the privacy of a citizen against the presumed right to privacy that the Fourteenth Amendment guarantees to all United States citizens.

In this case, Rushmore's interest in terminating Respondent Tracey for the innocuous relationship he shared with Ms. Malone does not outweigh Tracey's guaranteed protected right to privacy under the Constitution. Rushmore's sole reason for terminating Tracey is because he violated an archaic Craven adultery statute. After Lawrence, however, statutes that criminalize private consensual sexual behavior are unconstitutional under the Fourteenth Amendment. Therefore, because the statute is unconstitutional, Rushmore's official action in firing a public employee based on an invalid statute is also unconstitutional under 42 U.S.C. § 1984.

Even if this Court finds that Lawrence's substantive due process balancing test is inapplicable to this case and decides to apply the test used in Glucksberg v. Washington, Tracey should still prevail on his claims. Under the Glucksberg test, only fundamental rights warrant strict scrutiny analysis, while all non-fundamental rights will be reviewed under a rational basis

review. In this case, Rushmore fails even the lowest standard of review- rational basis review- because it cannot provide even one legitimate state interest for firing Tracey. The sole reason for terminating Tracey was because of his violation of the adultery statute. Because the adultery statute is unconstitutional both facially and as applied to Tracey, the reason for firing Tracey is also illegitimate and in violation of his constitutional right to privacy.

Moreover, concerning Tracey's role as a public servant, his conviction-less violation of an archaic adultery statute has no impact on his ability to fulfill his professional duties as a police officer. Although this Court has never addressed the issue, some lower courts have held that the Constitution shields police officers from probing employers into personal matters that have no bearing on job performance. These courts have also held that majority disapproval of particular conduct is not a sufficient reason to infringe on the protected individual right to privacy held by all citizens, including police officers. Because Tracey's relationship has had no impact on his ability to serve and protect the citizens of Rushmore, his termination from the force by Rushmore Police Department was illegitimate.

Therefore, this Court should uphold the decision of the Thirteenth Circuit and not grant Rushmore a summary judgment, but instead, grant Respondent Tracey the relief he seeks under the Fourteenth Amendment and § 1983.

ARGUMENT

I. THE FOURTH AMENDMENT'S PROTECTION AGAINST ILLEGAL SEARCHES AND SEIZURES PROHIBITS A POLICE OFFICER ACTING UNDER A REASONABLE SUSPICION FROM MOVING ASIDE THE EXTERIOR GARMENT OF A SUSPECT.

The Fourth Amendment of the Constitution requires law enforcement officials to have probable cause before searching an individual. The Supreme Court created the Terry exception to probable cause which allows police officers, acting on merely a reasonable suspicion, to perform a protective search for weapons by frisking or patting down a suspect. See Terry v. Ohio, 392 U.S. 1 (1968). Probable cause summons an officer to possess a higher degree of certainty than merely the reasonable suspicion that was present in this case.

A Terry search is specifically limited to a patting of the outer clothing of the suspect for concealed weapons. See Sibron v. New York, 392 U.S. 40 (1968). Officer Calloway went beyond this protocol when he moved aside the exterior flap of respondent's jacket without any probable cause to believe that he was concealing a weapon. Moving aside the jacket flap is a separate search and cannot be deemed a continuation of the initial and valid Terry search. See U.S. v. Askew, 381 U.S. App. D.C. 415 (2008). A reasonable action in light of the circumstances is not sufficient evidence to establish the probable cause required to conduct this highly intrusive search.

Officer Calloway claims that he saw a leather strap on respondent's person as respondent turned to walk away. The plain-view doctrine allows law enforcement officials to seize evidence of contraband that is in an officer's plain view during a legitimate search. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). However, an officer must have probable cause to believe that the item in plain view is definitely contraband. See Arizona v. Hicks, 480 U.S. 321 (1987). Here, the police officer could not readily identify the strap that he saw on respondent's person.

This Court has observed that a good indicator of whether there was probable cause in a given situation is if the nature of the contraband was immediately apparent to the officer. See Minnesota v. Dickerson, 508 U.S. 366 (1993). The nature of the strap was not immediately apparent to Officer Calloway and consequently he had no probable cause to believe that the respondent was concealing a weapon.

A. Probable Cause is Required to Search an Individual Unless the Officer is Performing a Protective Search Pursuant to the Guidelines Set Forth in Terry v. Ohio.

The Fourth Amendment of the Constitution requires law enforcement officials to have probable cause before conducting a search of an individual. Probable cause summons a higher degree of certainty than reasonable suspicion. The Supreme Court created the Terry exception to probable cause which allows police officers, acting on merely a reasonable suspicion, to perform a protective search for weapons by frisking or patting down a suspect. See Terry, 392 U.S. 1.

A police officer must have probable cause to perform a search that is consistent with the protections provided by the Fourth Amendment. “The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .” U.S. Const. amend. IV. The Fourth Amendment is focused on protecting an individual’s privacy rights against any governmental intrusion.

The inestimable right of personal security embodied in the Fourth Amendment belongs as much to the citizens on the streets . . . as to the homeowner closeted in his study . . . For, as this 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, 392 U.S. at 8-9 (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

Although this Court has carved out situations in which an officer can conduct a minimally

intrusive search based on a reasonable suspicion, this Court has continued to defend and implement the probable cause requirement for intrusive searches such as the one involved here. The reasonable suspicion standard is only applicable in less intrusive situations, such as the Terry pat down and frisk.

In Terry v. Ohio, the Supreme Court allowed a police officer to approach a suspect and conduct a protective search for weapons provided that the officer had a reasonable suspicion the suspect was involved in criminal activity. “Employing the reasonableness test to which the government refers, the court in Terry authorized a strictly circumscribed search for weapons when an officer has a reasonable articulable suspicion to believe that a properly stopped individual is armed and dangerous to the officers or others nearby.” Sibron, 392 U.S. at 30-31. Pursuant to this belief, the officer may conduct a limited protective search “to determine whether the person is in fact carrying a weapon.” Terry, 392 U.S. at 24. The search tactics allotted to police officers during a Terry stop are severely limited so that the officers can ensure their own safety without excessively intruding upon a suspect’s privacy rights.

There is a clear distinction between the reasonable suspicion standard and the probable cause standard. Reasonable suspicion can only be relied upon when one of the few “delineated exceptions” to a situation requiring probable cause is applicable. See Dickerson, 508 U.S. 366; Hicks, 480 U.S. at 326 (reasonable suspicion means something *less* than probable cause) (emphasis added). A reasonable suspicion standard is acceptable for Terry frisks because the officer is only patting and feeling an individual’s exterior garbs to be certain that there is nothing under the clothing that could potentially harm him.

Terry did not intend for officers to go beyond the exterior level of clothing with anything less than probable cause to believe a weapon was being concealed. An individual’s body and

clothing are constitutionally protected areas within which the individual has clearly manifested an expectation of privacy. See Beck v. Ohio, 379 U.S. 89 (1964). Here, Officer Calloway broke that exterior barrier without any indication of probable cause.

B. Moving Aside a Suspect's Exterior Garment is a Highly Intrusive Search That Goes Beyond the Limits of Terry v. Ohio and Requires the Stricter Necessity of Probable Cause.

A Terry search is specifically limited to a patting of the outer clothing of the suspect for concealed weapons. Sibron, 392 U.S. at 30. Officer Calloway exceeded this protocol when he moved aside the exterior flap of respondent's jacket without any probable cause to believe that he was concealing a weapon. The moving aside of the jacket flap is a separate search and cannot be deemed a continuation of the Terry search. See Askew, 381 U.S. App. D.C. 415. A reasonable action in light of the circumstances is not sufficient evidence to establish the probable cause required to perform this highly intrusive search.

1. An officer acting under reasonable suspicion is not permitted to move aside the exterior garment of a suspect during a Terry stop.

Probable cause is required to push aside the exterior garment of a suspect because such an act is undoubtedly its own search and does not fall within the boundaries of the Terry protective search. The search for weapons in Terry consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Sibron, 392 U.S. at 30. The D.C. Circuit Court of Appeals deemed the almost identical action of "unzipping an individual's jacket" to unquestionably be a search. See Askew, 381 U.S. App. D.C. 415. Any manipulation of a suspect's clothing beyond the standard frisk and pat down procedure requires more than a reasonable suspicion; such an intrusive act requires probable cause.

Shedding the exterior garment of a suspect requires a degree of belief higher than suspicion because such an act reveals to the public that which the individual chose to have kept hidden. By zipping up his jacket, the individual evidences intent to keep private whatever lay under it. Id. at 423. This fear of an involuntary revelation is similar to why an officer must have probable cause before he enters a suspect's home. "The undoing of clothing to reveal whatever is underneath to whoever happens to be on the street necessarily involves an even greater intrusion upon the sanctity of the person." Id. at 424. The involuntary opening of someone's clothing reveals to the world at large what an individual obviously intends to keep private. See Id.

The reasonable suspicion and probable cause dynamic is integral in other significant Fourth Amendment privacy situations as well. For instance, police are required to have probable cause to enter a suspect's home, but have a broader authority to act under a reasonable suspicion standard once they are inside the home. See Maryland v. Bouie, 494 U.S. 325 (1990) (examining the applications of the protective sweep doctrine).

2. Moving aside the exterior garment was a search separate from the initial pat down and cannot be viewed as a continuation of the Terry protective search.

After the officer failed to find any contraband during the pat down, the officer's once reasonable suspicion that the respondent was involved in a crime had dissipated. The pushing aside of the jacket was a separate and distinct search from the original Terry pat down and frisk. The D.C. Circuit Court of Appeals deemed the police action of "unzipping an individual's jacket" to unquestionably be a search. See Askew, 381 U.S. App. D.C. 415. Therefore, the protective search and the pushing aside of the jacket were two distinct searches. "When a government agent unfastens, pulls down, pats, or otherwise manipulates clothing to reveal or

determine what lies underneath, the manipulation necessarily involves the sort of ‘probing into an individual’s private life’ that this Court, in Davis v. Mississippi, characterized as the mark of a search or interrogation.” U.S. v. Dionisio, 410 US 1, 15 (1973) (citing 394 U.S. 721 (1969)). The “manipulation” language used by the Dionisio court is an accurate parallel to the respondent’s maneuver of pushing aside the exterior flap of respondent’s jacket.

This act on behalf of the respondent makes the jacket manipulation a new search separate from the previous Terry protective search. Once the officer conducted a fruitless protective search, the officer’s basic suspicions should have been reduced, if not completely eradicated. The officer had conducted a weapons search and found nothing. At the very most, the officer could have harbored a reasonable suspicion that the strap was contraband which still would not have amounted to probable cause.

The District Court wrongly used respondent’s alleged “uncooperative” demeanor as justification for a second, more intrusive, search. “Courts have recognized that a more intrusive Terry search may be constitutionally permissible when the detainee attempts to prevent an officer from performing an effective pat down.” State v. Heitzmann, 632 N.W.2d 1, 9 (N.D. 2001). However, Officer Calloway never stated that any of the respondent’s actions were reason for him to conduct a more intrusive search. While the respondent may have been verbally dismissive, he did not interrupt the officer’s protective search for weapons. R. at 3. Consequently, Officer Calloway’s second search was not related to any disruptive actions by the respondent; but instead, the second search depended solely on the sighting of the strap. Id.

3. Reasonableness may be a proper tool to measure the legality of a Terry protective search but it does not supplant probable cause as the necessary predicate for intrusive searches.

Reasonableness may be enough to validate action pursuant to a reasonable suspicion but is not sufficient to establish probable cause. Determining the reasonableness of a protective search involves balancing the officer's interest in self-protection against the intrusion on individual rights necessitated by the search. Michigan v. Long, 463 U.S. 1032, 1046 (1983); see also U.S. v. Hensley, 469 U.S. 221 (1985) (examining necessity of probable cause when suspect is believed to have already committed a crime). During a Terry frisk and pat down, an individual suffers an intrusion in the name of police safety. To determine whether the intrusion was reasonable under the Fourth Amendment, a court must analyze the competing interests of the officer and the individual. Long, 463 U.S. at 1046-47. Petitioner cannot credibly assert that the officer's "suspicion" that the strap was contraband was enough evidence to establish probable cause. The significant difference between reasonable suspicion and probable cause is that probable cause requires a degree of certainty; consequently, mere speculation will not cut it. Here, there is no probable cause. The officer admitted that his belief that the strap was associated with a pistol was simply a suspicion based on past occupational observances.

Reasonableness is measured in objective terms by examining the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33, 39 (1996); See also U.S. v. Knights, 534 U.S. 33 (1996) (stating the touchstone of the Fourth Amendment is reasonableness). The surrounding circumstances include: Officer Calloway approached the respondent because of a reasonable suspicion that resulted from the respondent's uneasy demeanor in a location known primarily for drug trafficking; Officer Calloway performed a fruitless pat down and frisk; Officer Calloway spotted a leather strap underneath respondent's jacket; and Officer Calloway reached inside

respondent's jacket to learn more about the strap. R. at 3. The Fourth Amendment does not proscribe all warrantless searches, but only unreasonable searches. See Florida v. Jimeno, 500 U.S. 248 (1991). The reasonableness of a search depends on the likelihood, given the circumstances, that the suspect was armed. Here, the officer does not have a sufficient basis to believe that the suspect had a gun strapped across his chest after patting down that same area during the Terry search.

The framers of the Constitution demanded that searches be predicated on probable cause so that individuals could not be subjected to frivolous intrusions unless weapon possession was obvious. Without a strong indication that the suspect is armed, police officers must err on the side of preserving the individual's Fourth Amendment rights. It may appear reasonable for an officer to be permitted to search whenever, wherever, and whoever if there is even a hint of possibility that the suspect is armed. However, the Constitutional framers were well aware that allowing police officers too much discretion could result in abuse at the individual's expense. Consequently, reasonableness is relevant in the less intrusive Terry stops, but irrelevant in determining probable cause.

C. The Police Officer May Not Rely on the Plain-View Doctrine as a Reason to Search Because the Officer Did Not Have Probable Cause to Believe the Strap Was Associated With a Weapon.

The plain-view doctrine allows law enforcement officials to seize evidence of contraband that is in plain view of the officers during a legitimate search. See Coolidge, 403 U.S. 443. However, an officer must have probable cause to believe that the item in plain view is definitely contraband. See Hicks, 480 U.S. 321. Here, the police officer could not readily identify the strap that he saw on respondent's person. This Court has observed that a good

indicator of whether there was probable cause in a given situation is if the nature of the contraband was immediately apparent to the officer. See Dickerson, 508 U.S. 366.

1. The plain-view doctrine does not allow a police officer to search for evidence without probable cause.

The plain-view doctrine allows law enforcement officials to seize evidence of contraband that is in plain view of the officers during a legitimate search. It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. See Coolidge, 403 U.S. 443. See also Hicks, 480 U.S. 321; U.S. v. Bishop, 338 F.3d 623 (6th Cir. 2003) (weapon may be seized if weapon is in plain view of lawfully positioned officer) . However, the plain-view doctrine limits the search or seizure to situations in which an officer has established probable cause to believe that the item is contraband.

The plain-view doctrine is not applicable because Officer Calloway never had probable cause to conduct a more probative, intrusive search on the respondent. The Supreme Court holds that probable cause is required to invoke the plain-view doctrine. Hicks, 480 U.S. at 326. In Hicks, the Supreme Court affirmed the appellate court's decision to suppress evidence of stolen stereo equipment found by police during a permissible entry of an apartment. Id. During the inspection of the apartment, the police saw stereo equipment they believed to be stolen. The officers moved the stereo equipment to identify the serial number, which they later used to determine that the equipment had in fact been stolen. Id. It was the physical act of moving the stereo equipment to view the serial number that the Court determined required probable cause.

Similar to Hicks, here it was the officer's physical act of moving aside the respondent's jacket flap that required, and lacked, probable cause. Hicks focused on a further search predicated upon an initially legitimate search, not an actual seizure. This Court explained that there is no difference in the degree of probable cause required for a plain-view search or seizure.

Id. at 328. Probable cause is a necessary predicate for both searches and seizures of items spotted in plain-view.

“Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable searches, neither the one nor the other is of inferior worth or necessarily requires only lesser protection. We have not elsewhere drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action, and we see no reason for a distinction in the particular circumstances before us here.”

Id. at 328-29. The Court enforced these restrictions on the plain-view doctrine so police could not have free range to search anything that they deemed suspicious. To treat searches more liberally would especially erode the plurality’s warning in Coolidge that “the plain-view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.” See Id. (quoting Coolidge, 403 U.S. at 466). The police officer cannot use the plain-view doctrine to extend what was a Terry frisk and pat down to an intrusive and prohibited search for weapons or contraband.

2. An item spotted by an officer under the plain-view doctrine must be “immediately apparent” as contraband for the officer to have the requisite probable cause to search.

Probable cause to expand a search is often determined by whether the officer was immediately certain that the item in question was contraband. Under the plain-view doctrine, if police are lawfully in a position from which they view an object, *if its incriminating character is immediately apparent*, and if the officers have a lawful right of access to the object, they may seize it without a warrant. Dickerson, 508 U.S. at 375 (emphasis added); see also Horton v. California, 496 U.S. 128 (1990). In Dickerson, this Court extended the plain-view doctrine’s

requirement of an “immediately apparent” recognition to be applicable in plain-view circumstances as well.

The incriminating nature of the strap on the respondent was not immediately apparent to the officer and thus there was no foundation for probable cause. In Dickerson, the lump felt by the police officer in the suspect’s jacket was not immediately apparent as cocaine. See Dickerson, 508 U.S. 366. The same logic applies in this situation where the police officer could not readily identify anything incriminating about the strap on the respondent. Here, “Officer Calloway was unsure of the strap’s purpose and did not have the opportunity to get a close look at it.” R. at 3. “If the police lack probable cause to believe that an object in plain view is contraband without conducting some further research of the object – i.e., if ‘its incriminating character is not immediately apparent,’ the plain-view doctrine cannot justify its seizure.” Dickerson, 508 U.S. at 375 (quoting Hicks, 480 U.S. 321). The police officer did not realize that the strap was a gun holster until after pushing aside the respondent’s jacket. The mere suspicion that the strap may have somehow been linked to contraband is not sufficient probable cause to remove or manipulate a suspect’s exterior garment.

When Officer Calloway pushed aside the exterior flap of the respondent’s jacket, he commenced a search separate from the initial Terry protective search. Additionally, the maneuver went beyond the accepted protocol for Terry protective searches and thus required probable cause. Finally, pursuant to the plain-view doctrine, Officer Calloway could not immediately identify the strap he spotted underneath respondent’s jacket and thus did not establish the probable cause necessary to further encroach upon the respondent’s Fourth Amendment right to be free from unlawful searches.

II. THE RUSHMORE COUNTY POLICE DEPARTMENT VIOLATED TRACEY'S CONSTITUTIONALLY PROTECTED LIBERTY RIGHT TO PRIVATE CONSENSUAL SEXUAL INTIMACY WHEN HE WAS TERMINATED FOR MAINTAINING A PRIVATE RELATIONSHIP.

This Court should affirm the United States Court of Appeals for the Thirteenth Circuit, reversing the District Court's grant of summary judgment because his constitutionally protected liberty right to engage in private consensual sexual conduct with another adult was violated. Tracey's employer, Rushmore County Police Department, violated this right when Police Chief Patrick Malone fired Tracey because of his private, consensual relationship with Ms. Jacqueline Malone. In 2003, this Court held that governmental intrusion into "adult consensual sexual intimacy in the home" violates individuals' "liberty and privacy [rights] protected by the Due Process Clause of the Fourteenth Amendment." Lawrence v. Texas, 539 U.S. 558, 564 (2003).

Lawrence revolutionized substantive due process under the Fourteenth Amendment of the Constitution in two distinct ways. See U.S. Const. amend. XIV. First, this Court declined to apply the common rigid and formalistic scrutiny test that has been typically applied in almost all substantive due process cases; instead, it "applied a balancing of constitutional interests that defies either strict scrutiny or rational basis label." Cook v. Gates, 528 F.3d 42, 52 (1st Cir. 2008). This balancing test "defies" typical substantive due process analysis because it presumes the *liberty* of the individual. This presumption shifts the burden of proof to the government to give a substantial reason for intruding into an individual's protected privacy. See Randy Barnett, Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2003 Cato Sup. Ct. Rev. 21, 35 (2002-2003) ("presumption of liberty" . . . requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow 'fundamental.'"); Lawrence, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.").

The second way this Court revolutionized substantive due process analysis in Lawrence was by eliminating morality as a legitimate source of state interest. Lawrence, 539 U.S. at 579. In order to do so, the Court overturned Bowers v. Hardwick, 478 U.S. 186, 216 (1986), in holding,

“the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack”. . .Bowers was not correct when it was decided, and it is not correct today.

Id. at 577-78 (quoting Bowers, 478 U.S. 186, 216 (1986)) (Stevens, J., dissenting). Therefore, because the Texas homosexual sodomy statute primarily relied on public morality as justification for the law’s intrusiveness, this Court nevertheless held that the “Texas statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” Lawrence, 539 U.S. at 579.

Although Lawrence was the first case to explicitly identify a protected constitutional liberty right to private consensual sexual intimacy, several Supreme Court cases paved the way for the groundbreaking decision in Lawrence. For example, in 1965, the Court held that the Constitution guarantees the right of privacy and protects rights of married couples to use contraception. Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Just two years later, this Court abolished a law that legally prevented two members of different races from marrying, holding that the private decision of a man and woman to unite in marriage is a private liberty interest that may not be denied because of race. Loving v. Virginia, 388 U.S. 1, 12 (1967).

Furthermore, in Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972), the Court again extended the right of privacy to protect the use of contraceptives that was first identified in Griswold to unmarried persons. See also Carey v. Population Services Int’l, 431 U.S. 678 (1977)

(holding that a state statute that proscribed the sale and distribution of contraceptives to children under the age of sixteen was unconstitutional). Finally, Roe v. Wade, 410 U.S. 113, 167 (1973), protected women’s privacy and liberty rights to determine their own fate through the decision to bear a child. See also Casey v. Planned Parenthood of Se. Pa., 112 S.Ct. 2791 (1992) (upholding legalized abortion). Collectively, each of these cases contributed to forming this Court’s privacy jurisprudence over the last fifty years which ultimately provided the necessary foundation to sustain the Lawrence decision.

Since Lawrence was handed down, some circuit courts have accurately acknowledged that Lawrence broke free from the traditional substantive due process test that enshrined the fundamental/non-fundamental framework of Glucksberg v Washington, 521 U.S. 702 (1997) (rejecting constitutional protection of a right to physician-assisted suicide because it is not rooted in the history and traditions of this nation). However, these courts essentially misunderstood the fact that despite working outside this framework, Lawrence nonetheless identified a constitutionally protected liberty right to private intimate conduct among consenting adults without labeling it “fundamental.” Lofton v. Sec’y of Dept. of Children and Family Svcs., 358 F.3d 804, 817 (11th Cir. 2004) (holding “it is a strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right.”); Williams v. Att’y Gen. of Ala., 378 F.3d 1232, 1235 (11th Cir. 2004) (recognizing that the Court never identified a fundamental right to sexual privacy in Lawrence.)

Other lower courts, on the other hand, have accurately recognized that Lawrence identified a heightened constitutional protection to private intimate sexual conduct among consenting adults. For example, in Cook, the United States Court of Appeals for First Circuit acknowledged that “Lawrence balanced the strength of the states’ asserted interest in prohibiting

immoral conduct against the degree of intrusion into the plaintiff's private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied." 528 F.3d at 52.

Applying this test to the Congressional "Don't Ask, Don't Tell" military policy at issue in Cook, the First Circuit held that while "Lawrence recognized a . . .liberty interest in adult consensual sexual intimacy," this interest is "narrowly defined" and primarily applies "in the confines of one's own home and one's own private life." Ultimately, the First Circuit held that the military members' broad facial challenge must fail because of the public nature of the military, and the "special deference" that is specifically afforded to Congress. Id. at 65; But see Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008) (holding that because Lawrence identified a "substantive due process right to engage in consensual intimate conduct in the home free from government intrusion," the Texas statute banning the sale and use of stimulating devices impermissibly burdens individuals' right to engage in private intimate conduct).

Also reviewing the constitutionality of the "Don't Ask, Don't Tell" congressional statute, the Ninth Circuit similarly recognized in Witt v. Department of Air Force, 539 F.3d 806, 817 (9th Cir. 2008), that Lawrence applied a non-traditional substantive due process test to the asserted liberty right at issue, ultimately deciding that the Court applied "something more than rational basis review." Similar to the plaintiffs in Cook, the plaintiff in Witt also failed to successfully establish that the "Don't Ask, Don't Tell" policy of the military is unconstitutional under Lawrence because the governmental interest in maintaining cohesion and uniformity among the ranks outweighed the disruptive private action of the particular plaintiffs in Witt. Id. at 821.

Applying the facts of the case at hand to the standard issued by this Court in Lawrence, Tracey has a constitutional liberty right to consensual sexual privacy free from governmental intrusion. In order to validly limit the exercise of this right, Rushmore must provide clear competing interests that outweigh the constitutional protection that Tracey is afforded under the Fourteenth Amendment. Rushmore fails to provide any compelling reason for encroaching on Tracey's liberty right.

Rushmore's sole rationale for firing Tracey was because of his alleged "behavior unbecoming of a police officer." R. at 4. Police Chief Patrick Malone admitted that the reason for Tracey's termination was because he violated Craven Statute 11-198.01, which criminalizes adultery. Id. In order for Craven's archaic adultery statute to survive under Lawrence, however, Craven's interest in redressing the purported harm must be weighed against the intrusion into Tracey's personal, private relationship with Jacqueline Malone. In weighing the specific facts of this case, it is clear that Craven's intrusion into Tracey's personal life was unwarranted: Tracey was not criminally charged, the Craven statute has had no recorded convictions in over 20 years, and Tracey was estranged from his wife and was in the midst of a divorce proceeding. Id. Moreover, the private and consensual conduct occurred off-duty and during Tracey's personal time. Id.

Therefore, this Court should affirm the Thirteenth Circuit because Craven fails to provide even one sufficient reason for intruding on Tracey's constitutionally-protected liberty interest under the Fourteenth Amendment and Lawrence. Because Rushmore does not have a legitimate interest that outweighs Tracey's constitutional protection to a private intimate life that is free from governmental intrusion, Tracey's constitutional violation should be remedied.

III. THE GLUCKSBERG SUBSTANTIVE DUE PROCESS TEST SHOULD NOT BE APPLIED IN THIS CASE, BUT EVEN IF IT IS APPLIED, RUSHMORE POLICE DEPARTMENT STILL FAILS TO PROVIDE A LEGITIMATE REASON FOR TERMINATING TRACEY.

Rushmore asserts that the history-and-tradition two-step test established in Glucksberg is the proper substantive due process framework that should apply to Tracey's claim. This argument, however, is flawed because Lawrence provides an alternative substantive due process test to be used in cases specifically dealing with private consensual sexual conduct. Because the matter at issue in this case concerns Rushmore's unwarranted intrusion into the private consensual sexual relationship between Tracey and Jacqueline, Lawrence clearly applies. Furthermore, even if rational basis is applied to Tracey's claim, Craven's adultery statute- a violation of which led to Tracey's termination- must be deemed unconstitutional under Lawrence.

A. The Glucksberg Two-Step Is Inapplicable to the Specific Case At Hand.

Despite the United States District Court for the District of Craven's reliance on Glucksberg in analyzing Tracey's substantive due process claim, the use of the rooted history-and-tradition two-step test was a misapplication of law. While Glucksberg technically remains good law, its role as the sole substantive due process test was substantially undermined when this Court ignored Glucksberg entirely in recognizing a constitutionally protected privacy right in Lawrence. See generally Lawrence, 539 U.S. at 558.

In Glucksberg, a plaintiff challenged a Washington state law that prohibited physician-assisted suicide, claiming the law violated the plaintiff's substantive due process right under the Fourteenth Amendment. 521 U.S. at 708. In light of the challenge, the Court determined that "[o]nly fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicitly in the concept of ordered liberty qualify for such protection." Chavez v.

Martinez, 538 U.S. 760, 775 (2003) (referencing Glucksberg). To determine whether the right asserted by the plaintiff is fundamental, the Court must first identify a “careful description of the asserted fundamental liberty interest.” Glucksberg, 521 U.S. at 721. Second, this liberty interest must be rooted in “[o]ur nation’s history, legal traditions, and practices” in order for it to qualify as a fundamental liberty interest. Id.

If the Court finds that the carefully described right is a fundamental liberty interest, then any law infringing upon that interest is subject to strict scrutiny. Id. at 721. On the other hand, if the Court decides that the right is not a historically protected liberty right, then any law infringing upon the right will only be subject to rational basis review. Id. Applying this test in Glucksberg, the Court first carefully defined the right at issue as “causing’ or ‘aiding’ a suicide.” Id. Next, the Court held that “for 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide,” and therefore, such a right was not rooted in the traditions of the nation. Id. at 711. Ultimately, the Court held that the Washington statute passed a rational basis review because the law serves to protect an unqualified interest in the preservation of human life and an interest in protecting vulnerable groups from abuse, neglect and mistakes. Id. at 728, 731.

Six years later, this Court shed doubt on the rigid criteria espoused in Glucksberg when it held in Lawrence that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” Lawrence, 539 U.S. at 572. (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)). Further, the Court recognized that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

personhood they formed under compulsion of the State.” Id. at 574 (quoting Casey, 112 S.Ct. at 2807).

Although Lawrence did not overturn Glucksberg, it implicitly suggested that Glucksberg is not applicable to every substantive due process case, especially those concerning private consensual sexual conduct. Because the matter at issue here is Tracey’s personal relationship with Jacqueline, and their private intimate sexual conduct, Lawrence should be the controlling law, not Glucksberg.

B. Even If the Court Does Apply Glucksberg, Rushmore Still Fails To Provide a Legitimate Reason for Infringing on Tracey’s Constitutionally Protected Liberty Right Because the Craven Statute is Unconstitutional Both Facially and As Applied.

Even if this Court determines that Glucksberg should be the controlling law in this case, Rushmore Police Department still fails to produce even a legitimate reason for violating Tracey’s constitutionally protected right. As mentioned above, a Glucksberg analysis requires the careful identification of a right, and that right must be rooted in the history and traditions of this nation; if this criteria is met, any law infringing on that right will be subject to strict scrutiny.

Glucksberg, 521 U.S. at 721. If the right is not rooted in the history and tradition of the nation, then the statute will only be held to a rational basis review. Id. at 728.

To satisfy a rational basis review, a state must provide a legitimate state interest for sustaining the law. Heller v. Doe by Doe, 509 U.S. 312, 320 (1990); F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314 (1993). The Craven adultery statute, however, fails to pass a rational basis standard of judicial review both facially and as applied to Tracey.

1. The adultery statute is facially unconstitutional.

The Craven adultery statute is facially unconstitutional for several reasons. First, adultery statutes are nearly identical to the sodomy statute struck down in Lawrence. Like the

Texas sodomy statute, the only justification for Craven's adultery law is to uphold public morality. Lawrence, however, was quite clear in holding that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Lawrence, 539 U.S. 577-78.

It is precisely a realization of this principle that has led over half of the States to repeal their criminal adultery statutes; those that have retained their adultery laws rarely enforce them. Since Lawrence, a surge of states have either repealed their laws or the highest court of the state has deemed the statute unconstitutional. See, i.e., Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008 (N.C. Super. August 25, 2006) (overturning the North Carolina adultery statute because private sexual conduct among adults is protected from governmental intrusion under the Fourteenth Amendment as interpreted by Lawrence); DC ST § 22-201(2004) (District of Columbia adultery statute repealed in 2004).

Moreover, enforcement techniques by the police concerning adultery are often more invasive into personal privacy than the criminal act itself. Further, the fact that there have been no convictions under the Craven statute for the past twenty years suggests that police resources could be better spent elsewhere than invading the privacy of the marital bedroom to investigate illicit sexual behavior. When prosecution does occur, harm to an innocent spouse and family is undoubtedly exacerbated when a public officer obtrusively interferes with delicate family matters. The overwhelming prevalence of adultery in society proves that criminal sanction is not a deterrent. In fact, at least one popular online company openly advertises its service that arranges extra-marital affairs between consenting adults with the click of a button. See The Ashley Madison Agency, <http://ashleymadison.com> (boasting a membership of 3,220,000 people and explaining that over 75% of married people have had at least one extramarital affair).

Extramarital affairs, like acts of sodomy, are no longer worthy of criminalization; engaging in consensual private adult intimacy is a natural part of life that should not be constrained by the government.

Despite the original reason for the enactment of the Craven statute, it is clear that there is no longer any legitimate state interest in support of the law. Therefore, because the statute fails a facial challenge under a rational basis review, it should be deemed unconstitutional by this Court. If the statute is deemed unconstitutional, the Rushmore Police Department had no valid reason for terminating Tracey, and thus, violated his substantive due process protection under the Fourteenth Amendment.

2. The adultery statute is unconstitutional as applied to Tracey.

Even if this Court finds that Craven has a legitimate reason for retaining and enforcing its adultery statute, Rushmore's basis for terminating Tracey because of his personal violation of the statute is without merit. Aside from the illegitimate state interest of morality, the only other remotely (and barely) tenable argument Craven could make for retaining the adultery statute is to protect the innocent spouse and family from harm because of the potential detrimental results of an extra marital affair in select situations. These interests, however, do not serve any purpose as applied to Tracey.

According to the record, Tracey was in the midst of a divorce, papers were served to his estranged wife, and he has no children. Therefore, Craven's interest in preventing harm through enforcing its adultery law has no effect in Tracey's situation. Furthermore, Jacqueline is single, and has never been married. She, too, has no children that would have potentially suffered from an extra-marital affair.

Therefore, even if a Glucksberg test is applied instead of a Lawrence balancing test, Rushmore Police Department still fails to produce even a legitimate state interest for terminating Tracey for alleged “unbecoming behavior of an officer.” Relying on Craven’s adultery statute is not a valid justification for termination because the statute itself is unconstitutional both facially and as applied to Tracey.

IV. A VIOLATION UNDER THE CRAVEN ADULTERY STATUTE SHOULD NOT BE AN ADEQUATE BASIS FOR TRACEY’S DISMISSAL BECAUSE HIS PRIVATE LIFE HAS HAD NO IMPACT ON HIS ABILITY TO PERFORM HIS DUTIES AS A POLICE OFFICER.

Besides the fact that the adultery statute unconstitutionally infringes on Tracey’s substantive due process right as a citizen, it also is an illegitimate basis for terminating him because his private activities, conducted off-duty, have no impact on his ability to fulfill his responsibilities as a police officer. Although this Court has never addressed the issue directly, many lower courts have suggested 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 by the Department because of the tenuous relationship between such activity and the officer’s performance on the job.” Shuman v. City of Philadelphia, 470 F.Supp. 449, 459 (E.D. Pa. 1979); see also Thorne v. City of El Segundo, 802 F.2 1132, 1138-40 (9th Cir. 1986) (“The Constitution prohibits unregulated, unrestrained employer inquires into personal matters that have no bearing on job performance.”); c.f. Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983) (holding under rational basis review that a police department’s policy of prohibiting off-duty dating and cohabitation was not in violation of the police officer’s right).

In Shuman, a police officer was fired from the Philadelphia Police Department for refusing to answer questions by an internal affairs investigator regarding his private relationship with a woman while he was separated from his wife. Shuman, 470 F.Supp. at 453. The Police

Department's policy required all officers under investigation for unbecoming conduct to answer any and each question asked of the officer. Id. at 454. Because the officer refused to answer a question that probed into his personal relationship with his adulterous partner, and because the officer committed a "crime of moral turpitude," the officer was terminated. Id. The Eastern District of Pennsylvania held that "in the absence of a showing that a policeman's private, off-duty personal activities have an impact upon his on-the-job performance, we believe that inquiry into those activities violates the constitutionally protected right to privacy." Id. at 459.

Similarly, the Western District of Michigan has also held that "off-duty private sexual conduct of public employees is protected by the constitutional right of privacy." Briggs v. North Muskegon Police Department, 563 F.Supp. 585, 588 (E.D. Mich. 1983). In Briggs, a police officer was terminated from the City of North Muskegon Police Force because he was cohabitating with a woman and "sharing [in] sexual intimacies" with her despite the fact he was still legally married. Id. at 587. Even though the officer was separated from his wife and in the midst of a divorce from her, the Police Chief placed the officer on suspension for conduct unbecoming because his affair resulted in a violation of a barely-enforced cohabitation state law. Id.

The officer in Briggs argued that the Police Department's "intrusion [was] unjustified because [the police department]. . . failed to demonstrate even a rational relationship between plaintiff's private, off-duty living arrangements and the performance of his duties." Id. The court in Briggs ultimately held that "the privacy and associational interests implicated [in the case were] sufficiently fundamental to warrant scrutiny of the defendants acts on more than a minimal rationality basis." Id. at 590. The court also held that when the state acts as an employer, it may not infringe on the constitutionally protected rights of its employees without

substantial justification. Id. at 587. Further, the court reasoned that “an infringement of an important constitutionally protected right is [not] justified simply because of general community disapproval of the protected conduct” and that “[t]he very purpose of constitutional protection of individual liberties is to prevent such majoritarian coercion.” Id. at 590.

In applying Shuman and Briggs to the facts of the case at hand, this Court should find in favor of Tracey because Rushmore Police Department has failed to show a substantial interest for intruding into Tracey’s private life and into matters that have had no effect on his performance as a police officer. Similar to the plaintiff officers in Shuman and Briggs, Tracey was separated from his wife when he was involved with Jacqueline, and was in the midst of a divorce. R. at 4. Moreover, Tracey was not on duty when he engaged in sexual activities with Jacqueline. Id.

Furthermore, Tracey had no prior notice that an extramarital affair would compromise his otherwise pristine record in the police force. Prior to that violation, Tracey had an exemplary record: there is no indication that he had been disciplined before, and he held the esteemed and trusted position as an undercover officer for the department. R. at 2. In the aggregate, the facts suggest that a violation of the archaic Craven adultery statute was merely a pretense for Tracey’s termination. More realistically, Police Chief Patrick Malone was merely retaliating against his estranged daughter Jacqueline for slandering the department and her father in the local newspapers. R. at 3. Because Chief Malone could not fire Tracey merely because he was sleeping with his daughter, he used the statute violation as a pretense to fire Tracey.

However, because Tracey’s relationship with Jacqueline was purely private and had no impact on the performance of his job- and further, that Rushmore has failed to provide a substantial interest in intruding into Tracey’s private life- the termination was unwarranted, and

Tracey must be redressed of the harm he suffered at the hands of his employer. Therefore, this Court should affirm the Thirteenth Circuit's decision in overturning the District Court's summary judgment, and further grant Respondent Tracey the redress he seeks under § 1983.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that this Court affirm the judgment of the Thirteenth Circuit Court of Appeals.

Respectfully Submitted,

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