No. ____

In the Supreme Court of the United States

JONATHAN CHIN AND THE CITY OF SEATTLE,

Petitioners,

v.

ANDREW RUTHERFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Seattle Police Officer Jonathan Chin lawfully detained the recent occupants of a vehicle at about 2 a.m. in the morning on a dark, dead-end street to investigate suspected reckless driving and driving-under-the-influence violations that he had just observed. A dynamic and unfolding situation ensued as Officer Chin—who was alone—waited for "fast back up" to arrive. During that time frame, the suspects advanced toward Officer Chin at different times, and Officer Chin displayed his firearm and told the men to sit to stabilize the situation until backup arrived. Following a trial, Officer Chin was held to have violated respondent's Fourth Amendment rights by exceeding the limits of an investigative stop permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), and the district court awarded nominal damages and $90,000 in attorneys' fees. The Ninth Circuit upheld the denial of petitioners' motion for judgment as a matter of law, and rejected Officer Chin's claim that he was entitled to qualified immunity. The questions presented are:

1. Whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other circuits—that the Fourth Amendment imposes a mechanistic rule that police officers are forbidden from drawing their firearm during a *Terry* stop absent certain, predetermined "special circumstances."

2. Whether the Ninth Circuit correctly held—in conflict with the decisions of this Court—that the Fourth Amendment rule at issue was "clearly established," such that it would have been clear to every reasonable officer in the situation that Officer Chin faced that his conduct was unlawful.

PARTIES TO THE PROCEEDING

Petitioners are Jonathan Chin, an officer with the Seattle Police Department, and the City of Seattle, a municipal corporation of the State of Washington. Respondent is Andrew Rutherford. Although the sole remaining claim at issue in the case is against Officer Chin in his individual capacity, the district court ordered "[d]efendants" to pay attorneys' fees. App. 52a. The City—which by policy indemnifies its officers in legal proceedings such as this, Seattle Municipal Code 4.64.010—thus petitions along with Officer Chin in seeking reversal of the judgment below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jonathan Chin, an officer with the Seattle Police Department, and the City of Seattle respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-3a) is available at 2013 WL 226992. The order of the court of appeals denying rehearing (*id.* at 53a-54a) is not reported. The orders of the district court denying summary judgment in part (*id.* at 4a-23a), denying petitioners' motion for judgment as a matter of law (*id.* at 26a-36a), granting nominal damages notwithstanding the verdict (*id.* at 24a-25a), and granting attorneys' fees (*id.* at 37a-52a), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2013. App. 1a. A timely petition for rehearing was denied on March 4, 2013. *Id.* at 53a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

INTRODUCTION

This case presents questions of exceptional importance to law enforcement and citizens alike. The overriding question—which is frequently recurring and of undeniable public importance—is when does an officer's decision to draw his firearm during a lawful stop under *Terry v. Ohio*, 392 U.S. 1 (1968), convert the stop into an unconstitutional encounter? The Ninth Circuit holds that "officers cannot use firearms during a *Terry* stop absent special circumstances" described in *Washington v. Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996). App. 3a; *see infra* n.3 (quoting *Lambert* "special circumstances"). That kind of a rigid formula for reviewing the lawfulness of police conduct is the antithesis of the flexible, common-sense approach this Court and other courts of appeals have required for this and related Fourth Amendment inquiries. It reverses the customary Fourth Amendment inquiry. Instead of considering whether an officer's decision to display his firearm was reasonable under all the circumstances, the Ninth Circuit rule holds that an officer's use of a gun during a *Terry* stop is *unreasonable* unless certain, predetermined "special circumstances" are present. And it invites a "divide-and-conquer analysis" for invalidating police conduct by separately considering a discrete set of factors.

Certiorari is warranted to consider the Ninth Circuit's outlier, "special circumstances" rule. That rule directly limits an officer's on-the-scene judgment based on unfolding circumstances that drawing a firearm is appropriate and necessary to control the situation and protect himself or others. Indeed, here, the officer was alone when he approached three men including respondent at 2 a.m. on a dark, secluded,

dead-end street; the men had just exited a vehicle that the officer had observed being driven recklessly, leading the officer to believe that the driver (at least) was under the influence of alcohol or drugs; the officer became concerned enough shortly after the outset of the encounter that he called for "fast back up"; and the officer did not draw his firearm until one of the men advanced toward him. Instead of analyzing the situation holistically from the standpoint of an officer confronting an unfolding situation, the courts below exercised 20/20 hindsight and held the officer's decision to display his firearm rendered the *Terry* stop unconstitutional because the situation did not fit the Ninth Circuit's preordained, cookie-cutter set of "special circumstances" for when the use of a firearm is permissible during a *Terry* stop. That rule improperly limits a vital and long-used police tactic to protect officer safety and control tense and volatile situations.

This case also presents the critically important and recurring question of when an officer's qualified immunity may be pierced. As this Court has held, "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Just as in the context of Fourth Amendment excessive force claims, the question of when an encounter exceeds the permissible scope of a *Terry* stop—whether because of an officer's use of his firearm or other factors—"is one in which the result depends very much on the facts of each case." *Id.* at 201. Because the Ninth Circuit considered whether Officer Chin was entitled to qualified immunity based only on the "high level of

generality" (*id.* at 199*)* of the "special circumstances" characterized in its decision in *Lambert*, the court never engaged in the proper analysis to determine whether the officer violated a clearly established right.

Even assuming Officer Chin crossed the hazy line at which a *Terry* stop becomes too intrusive, the record—even when viewed in the light most favorable to respondent—does not support the conclusion that the violation was so obvious in the particular circumstances that Officer Chin confronted that he contravened a "clearly established" right. App. 3a. If the facts here do not support qualified immunity, then law enforcement officers in the Ninth Circuit—by far the largest geographic Circuit in the country—will be able to draw their weapons only at their own legal peril in any situation that does not fit neatly into the predetermined, *Lambert* "special circumstances." Such a potentially disruptive and dangerous rule for law enforcement warrants this Court's review.

STATEMENT OF THE CASE

A. *Terry* Stop At Issue

At 2:00 a.m. on Sunday, September 9, 2007, Seattle Police Officer Chin—after leaving his precinct—was driving home in his own car, while off duty and in plain clothes. CA9 ER 1627. Although he was off-duty, it is undisputed that Officer Chin was acting within the course and scope of his duties at all times. Pls' Mot. for Partial Summ. Judgment (Dkt. 59), at 2. It is also undisputed that Officer Chin was authorized to stop respondent (and the two other men who had occupied the vehicle) to investigate violations of reckless driving and driving-under-the-influence laws that Officer Chin observed on his way home that night. App. 56a.

While in his vehicle, Officer Chin observed a Jeep that was stopped at a cross-street suddenly gun its engine and take off through an intersection, cutting off Officer Chin. Concerned about this reckless behavior, Officer Chin called 911 and followed the Jeep while coordinating with dispatch for a patrol car to intercept the Jeep. He described what he saw in real time to the 911 operator in an audio recording that is part of the record in this case: "He's throwing stuff out the window … He's weaving all over the place … Now he's driving on the wrong side of the road." CA9 ER 1796 (0:29-34, 0:55-57, 2:22-24); *see also id.* at 1384, 1630-31. This led Officer Chin to believe that the driver of the Jeep was under the influence and that the vehicle might be stolen. *Id.* at 935-36. Respondent has himself acknowledged that the driver was speeding, was "aggressive," and was driving unsafely, and that debris was thrown out the window of the Jeep. *Id.* at 1191-93, 1495-97. And the driver of the vehicle later pleaded guilty to reckless driving. *Id.* at 1093.[1]

After briefly losing sight of the Jeep, Officer Chin spotted the vehicle parked near the end of a dark, dead-end street in a secluded residential area. *Id.* at 1057, 1264. He parked his vehicle near the Jeep, whose engine was still running. Three men—respondent, Myo Thant, and Jared Alfonzo—were standing outside the Jeep. Officer Chin exited his car and promptly

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[1] Officer Chin was on the phone with a 911 operator on this call—and a follow-up 911 call—for most of the encounter described below. The audio recordings of the 911 calls are available at http://www.seattle.gov/law/audio/ER1796_473326.wav (CA9 ER 1796) and http://www.seattle.gov/law/ audio/ER1797_473328.wav (CA9 ER 1797).

identified himself as a Seattle police officer. He sought to "freeze the situation" while waiting for the patrol car already en route to arrive. *Id.* at 937-38, 949, 1662.

Officer Chin believed that the driver of the vehicle (at least) was under the influence. *Id.* at 1311, 1644-45, 1658. The reckless driving he had just observed alone supported that suspicion. And later testimony bore it out. Respondent acknowledged that Alfonzo (who had been driving the car) and Thant had been drinking that evening—and that Thant had actually been drinking in the car shortly before the incident—but stated that Alfonzo "did not seem *overly* intoxicated" and that Thant was "not *that* intoxicated." *Id.* at 1184, 1490, 1494 (emphases added). Thant himself admitted he had been drinking that evening. *Id.* at 1281. Alfonzo described Thant as "slurring and stumbling" before leaving a restaurant shortly before the incident, and admitted that he himself had had at least five beers throughout the day. *Id.* at 1104-05. Respondent testified that he was not drinking that evening, though a paramedic on the scene testified that he believed that respondent was intoxicated. *Id.* at 713-14.

One of the men—later identified as Thant—appeared to Officer Chin to be walking away toward a nearby house. Officer Chin asked him to "come here," and perceived Thant's behavior as aggressive as Thant came back toward him. *Id.* at 948. Officer Chin immediately requested "fast back"—a high-priority backup from the 911 dispatcher—and then hung up to focus on the three men. He later explained that he made the request for "fast back" because Thant had surprised him by advancing toward him "so quickly" and so "close," he was "outnumbered," the situation had become "very dynamic very quickly," and things

had "quickly spiraled out of control." *Id.* at 948, 957, 1382-83, 1678-79. Respondent admitted that Officer Chin "took out his handgun when the first person who had been in the Jeep [*i.e.*, Thant] began to approach him," Pls' Mot. for Partial Summ. Judgment (Dkt 59), at 8, but disputed that Thant was aggressive.

As Thant continued toward him, Officer Chin perceived his approach as threatening, explaining that he had "no idea what [Thant] was thinking" but "he appeared really agitated," CA9 ER 1670, and that he (Officer Chin) "thought [Thant] was about to fight," *id.* at 1318-19. At that point, Officer Chin drew his firearm—"for [his] officer safety," *id.* at 1665; *id.* at 950-51, 1320—and told Thant to put his hands on the hood of his car. But then, as respondent admitted, Alfonzo and respondent moved toward Officer Chin. *Id.* at 1200-01. Officer Chin perceived their actions as threatening; Alfonzo testified that they wanted to help their friend. *Id.* at 1122, 1500. With his gun still in hand, Officer Chin told them, "Just sit," and then did a brief pat-down of Thant for weapons. *Id.* at 952-54.

When the three men were (for the moment) under control, Officer Chin called 911 again. While on the phone, the three men shouted at him. Alfonzo testified that "we were screaming at him," and that he "used quite a bit of profanity that night." *Id.* at 1059, 1132-33. Respondent also admitted that Alonzo was "very vocal," and that Thant had some "words" too. *Id.* at 1503. The men also testified that they questioned whether Officer Chin was in fact a police officer, but that could only enhance, not defuse, the potential threat perceived *by Officer Chin*. To maintain control, Officer Chin instructed the men to remain seated:

> Have a seat with your buddies. Okay. Are you going to have a seat with your buddies? Okay. Have a seat, have a seat with your buddies. On your butt please. Okay. Sir, on your butt, please. Have a seat. Thank you.

Id. at 1797 (01:07-1:22).

When backup arrived minutes later, respondent got up and advanced quickly in Officer Chin's direction. Officer Chin was alarmed by respondent's unexpected advance; respondent admitted that he moved "swift[ly]" toward Officer Chin, though said he was trying to get out of the way of the arriving patrol car. *Id.* at 956-57, 1222, 1505, 1509. At that point, Officer Chin repeatedly told respondent to "sit down," but respondent continued to approach. *Id.* at 1520. Officer Chin perceived respondent's actions as either an attack or attempt to flee. He subdued respondent when he reached him with the help of the backup officers. Respondent was placed under arrest. *Id.* at 1346. Subsequent charges against respondent for obstructing a public servant were dismissed. *Id.* at 41.[2]

B. Proceedings Below

1. Respondent filed a personal damages action under 42 U.S.C. § 1983 against Officer Chin, the back-

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[2] The sole claim on which the jury returned a verdict for respondent—which was limited to Officer Chin's conduct during the *Terry* stop—is based "only on the time from when [respondent] exited [the Jeep] up to the point [respondent] got up from being seated on the roadway." App. 56a. After that point, respondent was involved in an altercation with the officers on the scene, during which he suffered cuts and abrasions for which he was later treated. The jury, however, rejected respondent's excessive force claim and all other claims. *Id.* at 60a-62a.

up patrol officers who arrived on the scene, and the City of Seattle in Washington state court, seeking up to $3 million in damages for alleged violations of the Fourth Amendment and various state laws. Respondent asserted claims based on unlawful arrest, excessive force, false imprisonment, and assault. Officer Chin and the other defendants removed to the United States District Court for the Western District of Washington under 28 U.S.C. §§ 1331 and 1441.

Defendants moved for summary judgment, asserting, *inter alia*, Officer Chin's qualified immunity from suit. The district court denied that motion in relevant part. As to the sole claim at issue here concerning the scope of the *Terry* stop, the court held that summary judgment was inappropriate, because, "[a]ccording to [respondent], Officer [Chin] lacked the 'special circumstances' allowing the 'especially intrusive means of effecting a stop,'" *i.e.*, drawing his firearm. App. 11a (quoting *Lambert*, 98 F.3d at 1189).

After a trial, the jury returned verdicts for petitioners on all of respondent's claims (unlawful arrest, excessive force, false imprisonment, and assault) except for the claim that Officer Chin exceeded the scope of a permissible *Terry* stop, on which the jury returned a verdict for respondent. *Id.* at 59a-62a. The jury declined to award respondent any damages. *Id.* at 62a-63a. But the district court modified the verdict to award respondent $1 in nominal damages. *Id.* at 25a.

In denying petitioners' motion for judgment as a matter of law, the court reasoned that qualified immunity should be denied because the jury verdict was supported by the evidence. As to Officer Chin's use of his firearm, the court explained that "none of the exceptional circumstances set out in *Washington* [*v.*

Lambert] that allow the use of a gun is met." App. 34a; *see also id.* at 33a (stating that the "exceptional circumstances" set out in *Lambert* "are four-fold").[3] The court then ticked off each of the preset *Lambert* factors, and concluded that none was met. *Id.* at 34a.

The district court also awarded respondent $90,042.12 in attorneys' fees. *Id.* at 52a.

2. The Ninth Circuit affirmed in a summary opinion. *Id.* at 3a. Citing *Lambert*, the court stated that "Officer Chin's decision to draw his gun on [respondent] was … unreasonable under the circumstances." *Id.* The court further held that "it was clearly established that officers cannot use firearms during a *Terry* stop absent special circumstances that were not present here." *Id.* (citing *Lambert*, 98 F.3d at 1192-93). That ruling was consistent with the position taken by respondent, who stressed the four factors enumerated in *Lambert* and argued that use of a gun is forbidden absent such "special circumstances." Resp. CA9 Br. at 13 (quoting *Lambert*, 98 F.3d at 1189); *see id.* at 17 ("[E]ven though Officer Chin was outnumbered when he detained [respondent], that is

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[3] The district court stated, "The extraordinary circumstances are four-fold:

> our cases make clear that we have only allowed the use of especially intrusive means of effecting a stop in special circumstances, such as 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur.

App. 34a (quoting *Lambert*, 98 F.3d at 1189).

not a special circumstance justifying Chin's aggressive tactics.") (citing *Lambert*, 98 F.3d at 1190). The court also affirmed the attorneys' fee award. App. 3a

REASONS FOR GRANTING THE WRIT

Three reasons compel certiorari in this case:

First, the Ninth Circuit decision below—which explicitly relies on that court's prior decision in *Washington v. Lambert*—directly conflicts with the decisions of other circuits and this Court on how to evaluate the constitutionality of a police officer's decision to display his firearm during a *Terry* stop. The Ninth Circuit has adopted a formulaic rule that "officers cannot use firearms during a *Terry* stop absent special circumstances." App. 3a (citing *Lambert*, 98 F.3d at 1192-93). That approach leads to the preordained conclusion that the use of a firearm renders a *Terry* stop unconstitutional, *except* in the predetermined "special circumstances" covered by *Lambert*. By contrast, other circuits—consistent with this Court's own precedents—have rejected mechanistic factors or effective presumptions of unconstitutionality and instead looked in a holistic fashion to whether the officer's decision to display his firearm is reasonable under the "constellation of facts" that the officer faced. *United States v. Serna-Barreto*, 842 F.2d 965, 968 (7th Cir. 1988) (Posner, J.).

Second, in this case, the Ninth Circuit doubled down on this mechanistic approach by holding that the officer's use of his firearm not only violated the Fourth Amendment but violated "clearly established" rights—and thus pierced the veil of qualified immunity to which Officer Chin would have been entitled even assuming he crossed the hazy constitutional line of when a *Terry*

stop exceeds its permissible scope. That ruling conflicts with this Court's precedents, which hold that—especially in highly fact-dependent areas like Fourth Amendment questions of reasonableness—the qualified immunity analysis "must be undertaken in light of the specific situation that the officer confronted, not as "a broad general proposition." *Brosseau v. Haugen*, 543 U.S. at 198 (citation omitted).

Third, the questions presented are undeniably important. The nation's most expansive geographic Circuit has issued a categorical pronouncement that officers will be deprived of qualified immunity whenever they draw their weapons during a *Terry* stop—outside of the predetermined "special circumstances" characterized in *Lambert*. From now on, officers who confront unfolding situations that do not fit cleanly into the Ninth Circuit's preconceived mold of when it is appropriate to draw a gun during a *Terry* stop will have to choose between taking action that they believe is necessary to protect themselves and stabilize a tense and volatile situation, and between exposing themselves to personal damages awards and the payment of large attorneys' fees. This Court's review is warranted to ensure that the tens of thousands of law enforcement officers in the Ninth Circuit are not improperly placed in that bind.

I. THE NINTH CIRCUIT'S MECHANISTIC "SPECIAL CIRCUMSTANCES" RULE FOR WHEN AN OFFICER MAY DISPLAY A FIREARM DURING A *TERRY* STOP WARRANTS THIS COURT'S REVIEW

A. The Ninth Circuit's "Special Circumstances" Rule Directly Conflicts With The Decisions Of Other Circuits

This Court long ago rejected the notion that the Fourth Amendment requires a police officer who does not yet have probable cause to arrest a suspect "simply [to] shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). Instead, an officer's reasonable suspicion of criminal activity permits an officer to stop a suspect and take additional steps to investigate. *Terry v. Ohio*, 392 U.S. 1 (1968). This power is not a blank check. At some point on a continuum, the features of a *Terry* stop may become "be so intrusive with respect to a suspect's freedom of movement and privacy interests" that it can no longer be justified by a reasonable suspicion. *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985); *accord Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186 (2004). While "difficult line-drawing problems" may arise, *United States v. Sharpe*, 470 U.S. 675, 685 (1985), the hallmark of a valid *Terry* stop always has been reasonableness under the totality of the circumstances.

1. The overriding question presented here is how to analyze a *Terry* stop when an officer has displayed his firearm during the stop. The decision below applied Ninth Circuit precedent—*Washington v. Lambert*—holding that "officers cannot use firearms during a *Terry* stop absent special circumstances." App. 3a. In *Lambert*, the court recognized—as a general matter—

that courts should apply a "'totality of the circumstances'" test in determining when a *Terry* stop "becomes an arrest." 98 F.3d at 1185 (citation omitted). But the court went on to hold that the use of a firearm (or other "intrusive means of effecting a stop") during a *Terry* stop is a disqualifying factor absent certain "special circumstances." *Id.* at 1189.

As the Ninth Circuit put it in *Lambert*:

> [W]e have only allowed the use of especially intrusive means of effecting a stop in special circumstances, such as 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed; 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur.

Id. (footnotes omitted); *see also id.* at 1189-90 (referring to "specificity" of the information about the suspect and "the number of police officers present").

The Ninth Circuit rule flips the proper constitutional inquiry under *Terry*, which examines whether the officer's actions are reasonable under all the circumstances, into a rule that the stop *is* unreasonable whenever an officer draws his weapon absent the predetermined, "special circumstances." And instead of gauging the reasonableness of the officer's conduct from standpoint of all the circumstances he confronted, the Ninth Circuit rule preordains what circumstances are "special" enough warrant use of a gun during a *Terry* stop and then invites a "divide-and-conquer analysis" (*United States*

v. Arvizu, 534 U.S. 266, 274 (2002)) to rule out factors one-by-one and thus invalidate the *Terry* stop.[4]

This case is the proof in the pudding. Without holistically addressing the array of circumstances that Officer Chin confronted (*see infra* at 24-29), the Ninth Circuit held that Officer Chin's actions violated the Fourth Amendment, because none of the preset "special circumstances" in *Lambert* were present. App. 3a. In denying petitioners' judgment as a matter of law, the district court likewise separately addressed each of the "four-fold" *Lambert* factors, and then held that the *Terry* stop was invalid because "none of the exceptional circumstances set out in *Washington* that allow the use of a gun is met." *Id.* at 33a-34a; *see id.* at 34a (addressing *Lambert* factors as an exclusive list). And this result squares with respondent's own position that use of a firearm during a *Terry* stop is only permissible when the "special circumstances" summarized in *Lambert* are present. *See supra* at 10.

2. No other circuit has adopted such a formulaic rule for considering when use of a firearm renders a *Terry* stop invalid. None attempts to predetermine the "special circumstances" in which a gun may be displayed during a *Terry* stop. And none turns the

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[4] The Ninth Circuit's reluctance to review the totality of the circumstances in this area is not new. An earlier case, *United States v. Strickler*, offered a *per se* rule that the display of a weapon results in an arrest. 490 F.2d 378, 380 (9th Cir. 1974) ("The restriction of Strickler's 'liberty of movement' was complete when he was encircled by police and confronted with official orders made at gunpoint."); *see also United States v. Merritt*, 695 F.2d 1263, 1273 (10th Cir. 1982) ("[*Strickler*] ha[s] taken the view that the use of guns automatically turns the stop into an arrest"). Not even respondent has argued for such a *per se* rule.

conventional "Is it reasonable under all the circumstances?" inquiry around and hold that drawing a gun during a *Terry* stop *is* unconstitutional absent "special circumstances." Instead, other circuits evaluate an officer's use of a firearm during a *Terry* stop by asking whether the officer's conduct was reasonable under all the circumstances. This includes the First[5], Second[6], Fifth[7], Sixth[8], Seventh[9], Eighth[10],

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[5] *United States v. Pontoo*, 666 F.3d 20, 30 (1st Cir. 2011) (The lawfulness of use of gun during a *Terry* stop "demands careful consideration of the totality of the circumstances. … Above all, an inquiring court must bear in mind that 'it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.'" (citation omitted)); *Flowers v. Fiore*, 359 F.3d 24, 30, 31-32 (1st Cir. 2004) (concluding that use of gun was reasonable during *Terry* stop after considering "the total factual context of the stop").

[6] *United States v. Garcia*, 339 F.3d 116, 119 (2d Cir. 2003) (An "encounter between the police and the defendants was a *Terry* stop, not an arrest, because the officers' [display of their firearms was] 'reasonably related in scope to the circumstances which justified the interference in the first place.'"); *see also United States v. Vargas*, 369 F.3d 98, 102 (2d Cir. 2004) (use of "greater degree of force than is typical of a *Terry* stop" was "reasonable under the circumstances").

[7] *United States v. Sanders*, 994 F.2d 200, 206 (5th Cir. 1993) ("pointing a weapon at a suspect … do[es] not automatically convert an investigatory detention into an arrest requiring probable cause. … The relevant inquiry is always one of reasonableness under the circumstances.").

[8] *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 309 (6th Cir. 2005) ("During a *Terry* stop, officers may draw their weapons or use handcuffs 'so long as circumstances warrant that precaution.'" (citation omitted)).

[9] *United States v. Shoals*, 478 F.3d 850, 853 (7th Cir. 2007) ("[P]olice officers do not convert a *Terry* stop into a full custodial arrest just by drawing their weapons. … The tactics used here

Tenth[11], Eleventh[12], and D.C. Circuits.[13] State courts have followed the same common-sense approach.[14]

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were warranted given the inherent danger of the encounter ...." (citations omitted)); *see also United States v. Ocampo*, 890 F.2d 1363, 1369 (7th Cir. 1989) (use of gun reasonable under all circumstances, including "[t]he nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the approach of the police.").

[10] *United States v. Smith*, 648 F.3d 654, 659 (8th Cir. 2011) ("under the totality of the circumstances," investigative stop and "reasonable safety measures officers took in effecting" it (including an approach with weapons drawn) were reasonable), *cert. denied*, 132 S. Ct. 1069 (2012).

[11] *United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993) ("[T]he intrusiveness of a search or seizure will be upheld if it was reasonable under the totality of the circumstances."); *see also id.* ("It was not unreasonable under the circumstances for the officers to execute the *Terry* stop with their weapons drawn.").

[12] *United States v. Blackman*, 66 F.3d 1572, 1576 (11th Cir. 1995) ("[W]hether a seizure has become too intrusive to be an investigatory stop and must be considered an arrest depends on the degree of intrusion, considering all the circumstances."); *see also id.* ("[T]he fact that police handcuff the person or draw their weapons does not, as a matter of course, transform an investigatory stop into an arrest.").

[13] *United States v. White*, 648 F.2d 29, 34 (D.C. Cir. 1981) ("The lines drawn are not always sharp ones. Each situation is unique, involving the weighing and measuring of contrary indicators.") (concluding that the display of a gun did not transform a *Terry* stop into an arrest).

[14] *See, e.g.*, *In re Roy L.*, 4 P.3d 984, 988 (Ariz. Ct. App. 2000) (officer may draw firearm where "'a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger'" (alteration in original) (citation omitted)); *State v. Belieu*, 773 P.2d 46, 54 (Wash. 1989) (same); *State v. Rawlings*, 829 P.2d 520, 523 (Idaho 1992) (reviewing circumstances underlying officer's "reasonable

Judge Posner's decision for the Seventh Circuit in *United States v. Serna-Barreto* illustrates the stark analytical divide between the Ninth Circuit rule and the approach followed in other circuits. In *Serna-Barreto*, the court held that the use of a firearm during a *Terry* stop conducted by a police officer in plain clothes at the outset of the stop did not violate the Fourth Amendment. In making that determination, the court declined to adopt a mechanical test or "exhaustive" set of factors. 842 F.2d at 967. Instead, the court considered the lawfulness of the officer's conduct under the "constellation of facts," relying in particular on the fact that the officer was outnumbered two-to-one when he approached the suspects and admonishing that "we are not equipped to supervise police tactics minutely." *Id.* at 968. The Seventh Circuit's "constellation of facts" approach is worlds apart from the "special circumstances" rule invoked by the Ninth Circuit below in holding that Officer Chin violated respondent's Fourth Amendment rights.

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precaution of drawing weapons for their own safety"); *State v. Dickerson*, 65 So. 3d 172, 178-79 (La. Ct. App. 2011) (drawing weapon permissible where officers able to "'show some specific fact or circumstance that could have supported a reasonable belief that the use of restraints was necessary to carry out the legitimate purpose of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm'" (citation omitted)); *Reid v. State*, 51 A.3d 597, 602 (Md. Ct. Spec. App. 2012) (considering "the totality of the circumstances" to determine whether "the use of drawn weapons or handcuffs … convert[s] a *Terry* stop into an arrest"); *Harris v. Commonwealth*, 500 S.E.2d 257, 261 (Va. Ct. App. 1998) ("display of a drawn weapon" during a *Terry* stop was "reasonable under the circumstances").

B. The Ninth Circuit's "Special Circumstances" Rule Directly Conflicts With The Decisions Of This Court As Well

The Ninth Circuit's "special circumstances" rule also conflicts with the decisions of this Court—which repeatedly hold that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in *all* the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry*, 392 U.S. at 19)) (emphasis added). The ultimate question is whether police action is "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235 (1985). The totality-of-the-circumstances approach recognizes that "[s]treet encounters between citizens and police officers are incredibly rich in diversity." *Terry*, 392 U.S. at 13. In the face of such endlessly variable facts and circumstances, there can be no "litmus-paper test for … determining when a seizure exceeds the bounds of an investigative stop." *Florida v. Royer*, 460 U.S. 491, 506 (1983).

Consistent with this pole star of the Court's Fourth Amendment jurisprudence, the Court has rejected requests to impose rigid rules on investigative stops in particular. In *United States v. Place*, for example, the Court rejected a strict time limitation for *Terry* stops. 462 U.S. 696, 709-10 (1983). While the 90-minute detention of luggage was found to be unreasonable "on the facts presented by th[at] case," *id.* at 710, the Court observed that a "rigid time limitation" would undermine the "need to allow authorities to graduate their responses to the demands of any particular

situation," *id.* at 709 n.10. So too for an officer's decision to display his weapon during a *Terry* stop: there can be no rigid rules or *de facto* presumptions of unlawfulness based on the absence of factors. A court must consider all the circumstances he confronted—from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

The Court has followed this flexible approach in the many Fourth Amendment contexts that must deal with "endless variations in the facts and circumstances." *Royer*, 460 U.S. at 506. Whether a person has been "seized" by submission to an officer's "show of authority" depends on whether, "'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). The need to "knock and announce" before entering a house requires "case-by-case evaluation" for reasonableness under the circumstances. *Richards v. Wisconsin*, 520 U.S. 385, 391-95 (1997). The existence of probable cause to search depends not on "rigid rules, bright-line tests, and mechanistic inquiries," but instead on "a more flexible, all-things-considered approach." *Florida v. Harris*, No. 11-817, 568 U.S. ___, slip op. at 5 (2013). And in *Florida v. J.L.*, the Court rejected a bright-line "firearm exception" to the rule that reasonable suspicion under the circumstances must precede a *Terry* stop. 529 U.S. 266, 272-74 (2000); *see also United States v. Arvizu*, 534 U.S. 266, 274 (2002) (rejecting "divide-and-conquer analysis" for determining existence of reasonable suspicion which considers

"factors in isolation from each other [and] does not take into account the 'totality of the circumstances'").

The Ninth Circuit's mechanistic rule that "officers cannot use firearms during a *Terry* stop absent special circumstances" (App. 3a (citing *Lambert*, 98 F.3d at 1192-93)) is at direct odds with these precedents.[15]

II. THE VALIDITY OF THE NINTH CIRCUIT'S RULE GOVERNING THE DISPLAY OF A FIREARM DURING A *TERRY* STOP IS A MATTER OF EXCEPTIONAL IMPORTANCE

A. The Ninth Circuit's "Special Circumstances" Rule Threatens Officer Safety

It is "too plain for argument" that officer safety—as well as the safety of those protected by officers—is a "legitimate and weighty" concern. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam); *see also Muehler v. Mena*, 544 U.S. 93, 102 (2005) (Kennedy, J., concurring) ("The safety of the officers … [is a] matter[] of first concern …."). The Ninth Circuit rule

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[15] Respondent has emphasized that the jury was generally instructed to consider the lawfulness of the *Terry* stop under the "totality of the circumstances." App. 58a. That is true, but misses the point. Petitioners were entitled to seek judgment as a matter of law on respondent's Fourth Amendment claim. *See Muehler v. Mena*, 544 U.S. 93, 98 n.1 (2005) ("In determining whether a Fourth Amendment violation occurred [the Court must] draw all reasonable factual inferences in favor of the jury verdict," but the Court does "not defer to the jury's legal conclusion that th[e] facts violate the Constitution."). Neither the Ninth Circuit nor the district court properly reviewed petitioners' JMOL motion because they both incorrectly believed that an officer's use of a firearm is never constitutional absent the Ninth Circuit's predetermined "special circumstances." Under the correct analysis, the judgment below must be set aside.

that an officer may not draw his firearm during a *Terry* stop "absent special circumstances" (App. 3a) directly compromises that compelling interest by telling officers that they can *never* constitutionally draw their firearm during a *Terry* stop in other circumstances, no matter how a particular situation may unfold. That effectively takes a potentially vital police tactic—displaying a firearm—off the table except in the preset scenarios identified in *Lambert*. Of course, an officer is invariably justified in drawing his firearm in the set of circumstances outlined in *Lambert*. But the Ninth Circuit's cookie-cutter factors are better suited for a Hollywood cop show like "Adam 12" than the unscripted world in which real officers hit the streets.

As this Court has observed in *Terry*, "encounters between citizens and police officers are incredibly rich in diversity." *Terry*, 392 U.S. at 13. The Fourth Amendment leaves flexibility for officers to adapt to dynamic and unfolding situations of *all* kinds, and "to graduate their responses to the demands of any particular situation." *Place*, 462 U.S. at 710 n.10. Officers therefore must be able to use all reasonably warranted police tactics and tools to protect themselves—and the public—on the job. As this Court has held, an officer is "authorized to take such steps as [are] reasonably necessary to protect [his] personal safety and to maintain the status quo during the course of [a] stop." *Hensley*, 469 U.S. at 235; *cf. Terry*, 392 U.S. at 33 (Harlan, J., concurring) (The Constitution does not demand that an investigating officer "ask one question and take the risk that the answer might be a bullet."). That includes the use of a firearm, when reasonable in light of all the circumstances at hand.

Like the execution of a search warrant, a *Terry* stop "'is the kind of transaction that may give rise to sudden violence.'" *Maryland v. Wilson*, 519 U.S. 408, 414 (1997) (quoting *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981)). Because "'[t]he risk of harm to both the police and [others] is minimized if the officers routinely exercise unquestioned command of the situation,'" *id.*, a developing threat of violence may trigger the need to draw a firearm in order to freeze the situation. When reviewing the reasonableness of that decision, courts "should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). The Ninth Circuit approach fails to evaluate the situation holistically from the officer's perspective.

The Ninth Circuit is home to tens of thousands of law enforcement officers. Those men and women should not be required to hit the streets under the formulaic restrictions that the Ninth Circuit has erected on when an officer may display his firearm during a *Terry* stop. The decision below exacerbates the problem by holding not just that Officer Chin violated the Fourth Amendment, but that he violated clearly established rights. App. 3a. Officers now the face the prospect of Section 1983 litigation, personal damages awards, and attorneys' fees anytime they draw their firearm during a *Terry* stop because of a concern for their safety in an unfolding situation—whenever they cannot prove that the predetermined "special circumstances" were present. *See, e.g.*, Mike Carter, *$1 Verdict Could Cost City of Seattle $700,000*, Seattle Times, June 30, 2011, *available at* http://www.seattletimes.com/html/localnews/201547658

0_lawyerfees01m.html. That kind of a Hobson's choice creates a perverse incentive for law enforcement.

B. This Case Illustrates The Problems With The Ninth Circuit's "Special Circumstances" Rule

This case shows why the Ninth Circuit's rule is artificially restrictive and problematic for law enforcement officers who confront an endlessly diverse set of situations in the real world. The "special circumstances" rule gave the Ninth Circuit tunnel vision for its predetermined list of *Lambert* factors. Even assuming that the court of appeals properly considered those factors, it ignored other facets of the fluid and alarming situation that Officer Chin faced when he drew his firearm, including the risk of allowing a reckless or impaired driver to leave the scene, suspects' apparent intoxication, and the fact that the stop took place in a dark, secluded dead-end street. And critically, the court never considered the situation that Officer Chin faced from the standpoint of all these factors unfolding in real time—including the fact that Officer Chin was outnumbered three-to-one—and, instead, simply focused on the discrete factors, which invite precisely the sort of "divide-and-conquer analysis" performed by the district court. App. 34a.

The failure to review for reasonableness—under all the circumstances Officer Chin faced—was a crucial error that led to the improper denial of petitioner's motion for judgment as a matter of law. First there was the nature of the offenses Officer Chin was investigating. Driving under the influence is an "extremely dangerous crime." *Begay v. United States*, 553 U.S. 137, 141 (2008) ("In the United States in 2006, alcohol-related motor vehicle crashes claimed the lives of more than 17,000 individuals and harmed untold

amounts of property."); *see also State v. Boyea*, 765 A.2d 862, 867 (Vt. 2000) ("[A] drunk driver is not at all unlike a 'bomb,' and a mobile one at that."). The same goes for reckless driving—to which Alfonzo pled guilty. *See, e.g., District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) ("An automobile is, potentially, a dangerous instrumentality"; driving vehicle 22 miles over speed limit "through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such depravity that to characterize it as a petty offense would be to shock the general moral sense." (citation omitted)).

Failing to detain the driver of the Jeep (whose identity was unknown at the time) until backup arrived could have allowed an impaired driver to leave the scene and evade prosecution.[16] Worse, the driver could have re-entered the Jeep (which was still running) and continued down the roadway, potentially injuring or even killing others. *See Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (reasonable belief that intoxicated suspect "posed a danger if he were permitted to reenter his vehicle" where "[t]he hour was late," and he had been driving his vehicle in a reckless fashion). There can be no serious doubt that Officer Chin did the right thing by preventing the three men from leaving the scene—or possibly getting back behind the wheel of the Jeep. *Cf. Virginia v. Harris*, 130 S. Ct. 10 (2009) (Roberts, C.J., dissenting from denial of cert.) ("[T]he

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[16] Alfonzo eventually admitted to being the driver, CA9 ER 1336-37, but the district court correctly concluded that the admission did not dispel Officer Chin's reasonable suspicion to detain all three men "because people sometimes lie to cover for drunken drivers." App. 9a.

police should have every legitimate tool at their disposal for getting drunk drivers off the road.").

Officer Chin also did not draw his weapon until the encounter changed. Not until Thant approached him did Officer Chin draw his firearm to protect himself. *See United States v. Acosta-Colon*, 157 F.3d 9, 15 (1st Cir. 1998) (asking "whether the measures used were reasonable in light of the circumstances that prompted the stop *or that developed during its course*." (emphasis added)). Officer Chin's "belief that his safety … was in danger" did not require him to read Thant's mind; it was enough that a "reasonably prudent man in the circumstances would be warranted" in that belief. *Terry*, 392 U.S. at 27. And "in determining whether the officer acted reasonably in such circumstances, due weight must be given … to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* Whatever Thant's intentions, Officer Chin perceived his advance as aggressive. *Infra* at 6-7. Particularly where he lacked other standard police tools such as handcuffs or a baton, the officer reasonably drew his firearm to stabilize a situation that—from his perspective—"became very dynamic very quickly." CA9 ER 1679.[17]

Moreover, the aggressive, unsafe driving Officer Chin observed gave him ample reason to believe that one or more of the Jeep's occupants were impaired.

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[17] During the second 911 call the men can be heard questioning whether Officer Chin was in fact a police officer. CA9 ER 1797 (2:10-23). Even assuming they reasonably harbored such doubts after Officer Chin indisputably identified himself as a police officer, these statements only could have heightened the concern *from Officer Chin's standpoint* that the ordinary display of authority would not be sufficient to stabilize the situation at hand.

His observation of Thant, Alfonzo, and respondent outside of the Jeep did nothing to dispel the notion that they may have been intoxicated. His reasonable suspicion that one or more of the men were intoxicated was relevant (and potentially deadly) should one of them have attempted to drive off. In addition, intoxication raised the risk of personal violence—exactly the sort of risk raised by Thant's approach, and by Alfonzo and respondent's approach.[18]

All this was further exacerbated by the fact that Officer Chin was outnumbered three-to-one. The district court acknowledged that Officer Chin was outnumbered but refused to give that factor any weight. App. 35a-36a. The Ninth Circuit ignored it entirely. *See id.* at 3a. But a traffic stop is one of the most dangerous encounters police officers routinely face. The "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Maryland v. Wilson*, 519 U.S. at 414; *see also*, *e.g.*, *United States v. Fornia-Castillo*, 408 F.3d 52, 65 (1st Cir. 2005) (being "the only officer on the scene" weighs against *de facto* arrest); *United States v. White*, 648 F.2d at 36 (finding the officer's display of a weapon was justified but noting that "this case would be easier if it involved …

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[18] *See, e.g.*, *Courson v. McMillian*, 939 F.2d 1479, 1496 (11th Cir. 1991) (suspects' intoxication supported display of weapon during *Terry* stop); *see also* Brad J. Bushman & Harris M. Cooper, *Effects of Alcohol on Human Aggression: An Integrative Research Review*, 107 Psychol. Bull. 341 (1990); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 588 (2001) (Thomas, J., concurring in part and concurring in the judgment) ("Each year, alcohol is involved in several million violent crimes ....").

one lone officer facing a carful of suspects"); *Serna-Barreto*, 842 F.2d at 967-68 (the fact "that there were two suspects and (at first) only one officer" supported decision to draw gun during *Terry* stop).

The fact that the encounter unfolded on a dark, dead-end, secluded street in the middle of the night made the situation even more dangerous—by, for example, limiting the tactical options for dealing with the situation and greatly decreasing the likelihood that a passerby could assist if a three-on-one altercation ensued. *See Michigan v. Long*, 463 U.S. at 1050 (that noting as a dangerous factor that "[t]he hour was late and the area rural"); *United States v. White*, 648 F.2d at 36 ("this case would be easier if it involved a dark and deserted spot"); *Serna-Barreto*, 842 F.2d at 967 ("that the encounter occurred at night" is a factor supporting the reasonableness of a stop).

Furthermore, Officer Chin sought simply to freeze the situation until "fast back up" arrived and did nothing to prolong the stop until backup did arrive. *See Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. at 185-86 ("the seizure cannot continue for an excessive period of time"). To the contrary, by calling for "fast back," the officer ensured that other officers would arrive as soon as possible to complete the investigation into the Jeep's reckless driving. *See Sharpe*, 470 U.S. at 685 ("[W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."); *see also id.* at 687-88 (20-minute investigatory stop reasonable where officer was waiting for additional officers to arrive).

It is true that "[i]n determining whether a Fourth Amendment violation occurred [the Court must] draw

all reasonable factual inferences in favor of the jury verdict," but the Court does "not defer to the jury's legal conclusion that th[e] facts violate the Constitution." *Muehler v. Mena*, 544 U.S. 93, 98 n.1 (2005). Here, petitioners moved for judgment as a matter of law. But petitioners have yet to receive a proper evaluation of that motion, because both the Ninth Circuit and the district court applied the *Lambert* rule and determined that none of the predetermined "special circumstances" were present. Under the proper inquiry, petitioners are entitled to judgment as a matter of law on the sole claim at issue.

III. THE NINTH CIRCUIT'S QUALIFIED-IMMUNITY RULING WARRANTS REVIEW

What is perhaps most surprising about the Ninth Circuit's decision is that it holds that Officer Chin is not even entitled to qualified immunity. The doctrine of qualified immunity "exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984). Qualified immunity thus provides "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986)). Qualified immunity principles are especially important when it comes to reviewing the decisions of law enforcement officers—like Officer Chin—who must make heat-of-the-moment judgments in response to dynamic and unfolding circumstances.

Here, the Ninth Circuit concluded not just that Officer Chin's conduct crossed the Fourth Amendment line, but that it violated *clearly established* rights. App. 3a. And it was so clear to the Ninth Circuit that

Officer Chin violated clearly established rights that the court disposed of this case in a summary fashion. "Whether an asserted federal right was clearly established at a particular time" is a question of law reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). The Ninth Circuit's conclusion that Officer Chin violated clearly established rights not only was so cursory that it sounds alarm bells, but was infected by errors that this Court has corrected in prior cases.

For example, this Court has made clear that the qualified immunity inquiry should not be undertaken "'as a broad general proposition,'" but rather "'in light of the specific context of the case.'" *Brosseau v. Haugen*, 543 U.S. at 198 (citation omitted). That is particularly true, the Court has admonished, where the application of a rule of law, and thus reasonableness of an officer's actions, "depends very much on the facts of each case." *Id.* at 201. Here, the Ninth Circuit disposed of petitioners' qualified-immunity argument based on the broad-brush assertion that "it was clearly established that officers cannot use firearms during a *Terry* stop absent special circumstances." App. 3a. It further stated that "there was no reasonable basis for Officer Chin to believe that the three men might be armed or dangerous." *Id.* But the court never examined the reasonableness of Officer Chin's actions in light of the specific situation he confronted and all the circumstances summarized above.

In fairness to the court, the Ninth Circuit's unfounded "special circumstances" rule short-circuited its qualified immunity inquiry and no doubt led it to the result it reached—in the summary fashion that it did. That alone speaks volumes about the touchstone importance of the "special circumstances" rule, and

need for review of it in this case. Under the proper approach dictated by this Court's precedents and the law in other circuits (*see* Part I, *supra*), however, a court would have to evaluate Officer Chin's decision to draw his firearm in light of all the circumstances that Officer Chin confronted. As discussed above, in petitioners' view as a matter of law Officer Chin did not violate respondent's Fourth Amendment rights when he did so. But at the very least, he did not violate any clearly established right. It is not possible to say that "*every* 'reasonable official would have understood that what he is doing violates th[e] right.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). Nor is it "beyond debate" that drawing a firearm in the situation that Officer Chin face was unconstitutional. *Id.* Here, as in prior cases this Court has reviewed from the Ninth Circuit, "[t]he constitutional question … falls far short of that threshold." *Id.*

As underscored by the frequency with which this Court has seen fit to review qualified immunity rulings, few areas of the law are as important in ensuring the proper functioning of government at all levels as qualified immunity. The Ninth Circuit's dismissive treatment of the qualified-immunity issue in this case once again warrants review by this Court.

* * * * *

In *Serna-Barreto*, Judge Posner aptly observed that "[i]t would be a sad day for the people of the United States if police had carte blanche to point a gun at each and every person of whom they had an 'articulable suspicion' of engaging in criminal activity." 842 F.2d at 967. All can agree on that. But the Ninth Circuit has taken the law to the opposite extreme. And

its decision in this case raises the stakes for law enforcement by holding that Officer Chin's decision to draw his firearm in the tense and volatile situation he faced in the early morning hours of September 9, 2007, not only violated the Fourth Amendment, but violated clearly established rights. Allowing the Ninth Circuit's decision in this case to stand would be a sad day in its own way by improperly limiting a potentially vital police tactic and thereby possibly jeopardizing law enforcement officers in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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FILED
JAN 22 2013
MOLLY C DWYER, CLERK
US COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW RUTHERFORD, Plaintiff – Appellee, v. JASON McKISSACK, Defendant and JONATHAN CHIN; CITY OF SEATTLE, a municipal corporation of the State of Washington, Defendants - Appellants.	No. 11-35740 D.C. No. 2:09-cv-01693-MJP MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, Chief District Judge, Presiding

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted November 6, 2012
Seattle, Washington

Before: W. FLETCHER and FISHER, Circuit Judges, and DEARIE, Senior District Judge.**

Defendants Officer Jonathan Chin and the City of Seattle appeal following a jury verdict in favor of plaintiff Andrew Rutherford under 42 U.S.C. § 1983. The jury held for Rutherford on his Fourth Amendment claim, finding that Officer Chin exceeded the reasonable scope or duration of a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). The district court denied defendants' renewed motion for judgment as a matter of law and awarded Rutherford one fifth of his requested attorneys' fees under 42 U.S.C. § 1988. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

We review de novo a district court's denial of a renewed motion for judgment as a matter of law. *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). We "must view the evidence in the light most favorable to the nonmoving party … and draw all reasonable inferences in that party's favor." *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2005). We "may not make credibility determinations or weigh the evidence," and we "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). We review an award of attorneys' fees for an abuse of

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** The Honorable Raymond J. Dearie, Senior United States District Judge for the Eastern District of New York, sitting by designation.

discretion. *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1058 (9th Cir. 2010).

The district court correctly denied defendants' renewed motion for judgment as a matter of law. Officer Chin was not entitled to qualified immunity because the trial testimony viewed in the light most favorable to Rutherford supported a conclusion that Officer Chin violated Rutherford's clearly established Fourth Amendment rights. Rutherford and his friends testified that they committed only minor traffic violations and that they were compliant and non-confrontational at the scene. Viewing this evidence in the light most favorable to Rutherford, there was no reasonable basis for Officer Chin to believe that the three men might be armed or dangerous. Officer Chin's decision to draw his gun on Rutherford was therefore unreasonable under the circumstances. *See Washington v. Lambert*, 98 F.3d 1181, 1192 (9th Cir. 1996). Further, it was clearly established that officers cannot use firearms during a *Terry* stop absent special circumstances that were not present here. *See id.* at 1192-93.

We affirm the award of attorneys' fees. The district court properly weighed the three applicable factors. *See Mahach-Watkins*, 593 F.3d at 1059. It did not abuse its discretion in determining that they justify a fee award. The court also did not abuse its discretion in awarding twenty percent of the requested fee amount after balancing the extent to which Rutherford had prevailed at trial, the level of overlap in preparing his different claims, and other pertinent factors.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. JASON McKISSACK, et. al., Defendants.	CASE NO. C09-1693 MJP ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This comes before the Court on Defendants' motion for summary judgment (Dkt. No. 65) and Plaintiff's motion for partial summary judgment (Dkt. No. 59). Having reviewed the motions, the responses (Dkt. No. 73 and 78), the replies (Dkt. No. 76 and 81), and all related filings, the Court DENIES Plaintiff's motion for partial summary judgment and GRANTS in part and DENIES in part Defendants' motion for summary judgment.

Background

After midnight on September 9, 2007, Plaintiff Andrew Rutherford and friends Myo Thant and Jared

Alfonzo were riding in a Jeep driven by Alfonzo. (Dkt. No 79-7 at 3.) Alfonzo ran a red light in front of Defendant Jonathan Chin's car, forcing Chin to brake suddenly. (Dkt. No. 61 at 9.) Chin, a Seattle Police Department officer, suspected the Jeep's driver of driving while intoxicated ("DUI") or driving recklessly, and followed the Jeep even though he was off-duty, out of uniform, and in his personal vehicle. (Id. at 8–9.)

Chin observed items discarded out of the Jeep's windows as he followed it to West Seattle, where he briefly lost sight of the Jeep. (Id. at 13–14.) Chin took this as evidence of possible theft. (Id. at 14.) When Chin regained sight of the Jeep, it was parked and Plaintiff, Alfonzo, and Thant were standing next to the Jeep. (Id.) Chin exited his car, confronted them and identified himself as a police officer. (Id. at 18.) Chin claims Thant approached aggressively, prompting Chin to draw his gun and ordered Thant to submit to a pat-down. (Id. at 18–19.) Chin then called for "fast backup"—a high priority request for assistance—and ordered Plaintiff and his companions sit on the street in front of Chin's car. (Id. at 20.) In response to Chin's questions, Alfonzo admitted to driving the Jeep. (Id. at 21.) Chin had not previously been able to identify the driver. (Id. at 17.)

Defendant Jason McKissack was the first officer responding to Chin's call for fast backup. (Dkt. No. 60-6 at 4.) Plaintiff believed McKissack's rapidly approaching car would hit him, and "jumped up and ran" to get out of its way. (Dkt. No 60-7 at 2.) When Plaintiff did not comply with Chin's orders to sit back down, Chin grabbed Plaintiff's head to force him to the ground. (Dkt. No. 61 at 24.) McKissack and Defendant Joshua Rurey, another responding officer, exited their

cars and assisted Chin in restraining Plaintiff. (Id. at 25; Dkt. No. 66-2 at 29.) McKissack pushed Plaintiff's face into the pavement with his hands and knee in the process of handcuffing him, wounding Plaintiff's forehead. (Dkt. No. 60-6 at 8–10.) Arresting officers photographed Plaintiff's injuries. (Dkt. No. 63.) Defendant City of Seattle ("City Defendant") charged Plaintiff with obstructing a public officer, but dismissed the charges without prejudice. (Dkt. No. 60-8 at 2.)

Plaintiff filed suit against Chin, McKissack, and Rurey (collectively, "Officer Defendants") in state court and Defendants removed to this Court based on federal question jurisdiction. Specifically, Plaintiff alleged the following Fourth Amendment violations: (1) unlawful detention, (2) unlawful arrest, and (3) use of excessive force. In addition, Defendants sued under state law for (4) assault and battery, (5) false imprisonment, and (6) malicious prosecution stemming from dismissed charges. (Dkt. No. 4 at 9-12.) Plaintiff also named the City of Seattle ("City Defendant") as a defendant based on Monell and vicarious liability. By stipulation, the state tort law claims against the Officer Defendants were dismissed. (Dkt. No. 27.)

Analysis

I. Motion for Summary Judgment

Defendants seek summary judgment with respect to all six of Plaintiff's remaining constitutional and state tort claims. Plaintiff seeks partial summary judgment on his constitutional claims for (1) detention without reasonable suspicion and (2) arrest without probable cause.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there are no genuine

issues of material fact for trial and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Material facts are those "that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Claims Against Officer Defendants

1. Unlawful Detention

Both parties seek summary judgment on Rutherford's Fourth Amendment claim for unlawful detention. Officer Defendants assert qualified immunity bars Plaintiff's claims. The Court agrees.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 129 S. Ct. 808, 815 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The protection of qualified immunity applies regardless of whether the

government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Id. (quotation omitted).

To determine whether qualified immunity applies, the Court has discretion in applying one or both steps of a two-step inquiry set out in Saucier v. Katz, 533 U.S. 194, 201 (2001). Pearson, 129 S. Ct. at 818. The two-step inquiry considers whether the plaintiff has alleged a violation of a constitutional right and/or whether the right at issue was "clearly established" at the time of the alleged misconduct. Id. at 815-16. To be considered "clearly established" for the purposes of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Rutherford's claim fails at the first-step of the inquiry—he fails to demonstrate a constitutional violation. The Fourth Amendment allows police to seize a suspect if there is reasonable suspicion that the suspect has been or is about to be involved in a crime. United States v. Hall, 974 F.2d 1201, 1204 (9th Cir. 1992). Reasonableness is determined looking at the totality of circumstances and the officers' collective knowledge, training, and experience. Id. Notably, in Maryland v. Wilson the Supreme Court held police may order passengers out of a car during a traffic stop without triggering a Fourth Amendment violation. 519 U.S. 408, 410 (1997). In addition, the Ninth Circuit allows police to "detain passengers during a traffic stop, whether it is by ordering the passenger to remain inside the automobile or by ordering the passenger to get back into an automobile that he or she voluntarily exited." United States v. Williams, 419 F.3d 1029, 1032

(9th Cir. 2005). Citing Wilson, the Ninth Circuit recognized the "value of giving officers control over the movements of people involved in a traffic stop as helpful in limiting the risk of danger." Id. at 1034.

Here, Chin had reasonable suspicion that Plaintiff was the Jeep's driver and possibly intoxicated when he detained Plaintiff. (Dkt. No. 61 at 15–16.) Chin observed Plaintiff standing next to a Jeep which he had observed being driven recklessly. While Plaintiff argues Chin's basis for reasonable suspicion ceased when Alfonzo admitted to being the Jeep's driver, the Court disagrees. As Chin states, it is often difficult to identify the driver when there are several vehicle occupants because people sometimes lie to cover for drunken drivers. (Dkt. No. 66, Ex. 4 at 71.) The situation faced by Chin presented the same concerns recognized in Wilson and Williams: the necessity of police to assert control when there are passengers in addition to the driver of a stopped car. Wilson, 519 U.S. at 414; see also Williams, 419 F.3d at 1034. Since Defendants had reasonable suspicion Plaintiff had been involved in a crime, the Court DISMISSES Plaintiff's claim for unlawful detention under the Fourth Amendment.

2. Unlawful Arrest

Both parties seek summary judgment on Rutherford's Fourth Amendment claim for unlawful arrest. Plaintiff claims he was unlawfully arrested (1) when Chin ordered him to sit on the ground at gunpoint, and (2) when Chin and the other Officer Defendants forced Plaintiff to the ground after Plaintiff stood and ran. Defendants dispute the first event amounted to an arrest, and argue that probable cause justified the arrest in either case. The Court finds a

factual dispute exists as to when the arrest occurred and qualified immunity does not apply.

First, a warrantless arrest without probable cause violates the Fourth Amendment. Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause is determined at the moment of arrest, looking at all circumstances known to the police. Id. When a detention becomes an arrest is a fact-specific determination made looking to the totality of the circumstances. Washington v. Lambert, 98 F.3d 1181 (9th Cir. 1996). Probable cause must be individualized to the specific person arrested. Maryland v. Pringle, 540 U.S. 366, 371 (2003). Unholstering guns and forcing suspects to the ground both suggest arrest. Id. at 1188-89. However, "where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight" aggressive police action may not convert detention into an arrest. Id. at 1189 (listing non-exclusive factors allowing intrusive police force). In Allen v. City of Los Angeles, the Ninth Circuit held no arrest had occurred even when police ordered a suspect at gunpoint to lie on the ground while being handcuffed. 66 F.3d 1052, 1057 (9th Cir. 1995). Because the suspect had led the police on a high-speed chase and was uncooperative and drunk when pulled over, the force used was reasonable and did not convert the stop into an arrest. Id.

Here, a factual dispute exists as to when the arrest occurred. Defendants argue the gun pointed at Plaintiff did not convert the investigatory stop into an arrest. They argue Chin acted reasonably when he drew his gun because of the reckless driving he observed while following the Jeep, and Plaintiff and his companions' drunken aggressiveness when approached.

Chin testifies after he identified himself as police, Thant approached him yelling "Oh SPD?" with his arms raised "as if he were going to fight." (Dkt. No. 70 at 4.) According to Chin, when he drew his gun Alfonzo and Plaintiff also advanced on him, yelling. (Id.) This version of events—both Plaintiff's alleged behavior and Defendants' response—is similar to the facts in Allen. It supports finding no arrest occurred when Chin initially detained Plaintiff because the "possibility of danger or flight" justified the force used. Lambert, 98 F.3d at 1189.

Plaintiff's version, however, suggests he and his companions were cooperative and non-violent during the encounter, and that Plaintiff was not drunk. (Dkt. No. 60-3 at 3, 5-6; Dkt. 79-7 at 3.) According to Plaintiff, Officer Defendants lacked the "special circumstances" allowing the "especially intrusive means of effecting a stop" they employed. Lambert, 98 F.3d at 1189. Under this interpretation, Chin arrested Plaintiff when he first ordered Plaintiff to sit at gunpoint. While Defendants argue that, even if an arrest was found at this time, probable cause existed as to DUI or reckless driving, Defendants' argument fails to establish individualized probable cause. See Pringle, 540 U.S. at 371. At that time, Alonzo had admitted to being the driver of the Jeep. While Chin may have had reasonable suspicion sufficient to initially detain Plaintiff, Chin did not have individualized probable cause to believe Plaintiff was the driver of the Jeep. Since Plaintiff's version of the facts demonstrates a violation of the Fourth Amendment and a factual dispute exists, the Court finds summary judgment inappropriate.

Second, qualified immunity does not shield Defendants from liability. As discussed, Plaintiff demonstrated a constitutional violation satisfying the first step of the qualified immunity analysis. The Court finds Plaintiff also satisfies the second step because a reasonable officer would have known arresting Plaintiff violated a clearly established right. Even when there is probable cause to believe a driver has committed a vehicular offense, "there is no such reason to stop or detain the passengers." Wilson, 519 U.S. at 413. "Mere presence" near a suspected crime does not create probable cause. United States v. Soyland, 3 F.3d 1312, 1314 (9th Cir. 1993). Probable cause must be particularized to the specific person arrested. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

Here, Plaintiff and his companions were standing outside the Jeep as Chin initially approached. Chin drew his gun when Thant approached Chin and arrested Thant along with Plaintiff and Alfonzo. A reasonable officer would not think Thant's approach created individualized probable cause to arrest Plaintiff for a DUI or reckless driving. There is not a "sufficient link" between Plaintiff, who was standing outside the Jeep and maintains he was not intoxicated, and the suspected criminal activity. Soyland, 3 F.3d at 1314. Chin admits he did not have probable cause without further investigation at the time he approached. (Dkt. No. 61 at 15.) The Office of Professional Accountability ("OPA") review of the Officer Defendants' conduct recommended supervisory intervention for Chin, noting concern with "the legal justification Officer Chin had to require all three occupants to sit down on the ground." (Dkt. No. 60-9 at 2-3.) The requirement of individualized probable cause was not met with regards

to Plaintiff. Since Plaintiff's constitutional right was clearly established, the Court finds qualified immunity does not apply. The Court DENIES both parties' motions for summary judgment because a factual dispute exists as to when the arrest occurred.

3. Excessive Force

Defendants seek summary judgment on Plaintiff's Fourth Amendment claim of excessive force, arguing the Officer Defendants' actions were reasonable under the circumstances and asserting qualified immunity bars the claim. The Court disagrees.

"Summary judgment in excessive force cases should be granted sparingly even with respect to the issue of qualified immunity." Luchtel, 623 F.3d at 980 (quotes omitted). Whether police force during an arrest violates the Fourth Amendment is a question of objective reasonableness, looking at the totality of circumstances. Luchtel v. Hagemann, 623 F.3d 975, 989 (9th Cir. 2010). Reasonableness is determined balancing the plaintiff's Fourth Amendment interest against the countervailing government interest, looking to (1) the severity of the crime at issue, (2) whether the plaintiff posed an immediate threat to the safety of the officers or others, and (3) whether the plaintiff actively resisted arrest or attempted to evade arrest by flight. Id. (citing Graham v. Connor, 490 U.S. 386, 396 (1989). Also relevant is (4) the quantum of force used against plaintiff. Id. The second factor, the threat posed by the suspect, is the most important. Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005).

Here, the first, second, and fourth factors weigh against summary judgment. Under the first factor, the only crimes suspected were DUI, reckless driving, and obstructing a public servant. All three crimes are

generally gross misdemeanors under Washington law, and thus not severe. RCW 46.61.502(5); 46.61.500(1); RCW 9A.76.020(3); see also Luchtel, 623 F.3d at 981 (obstruction not a severe crime absent violent resistance). Under the second factor, Plaintiff testifies he did not resist the Officer Defendants as they subdued him and Defendants assert no basis for believing him to be armed. (Dkt. No. 66-1 at 13.) Thus, the immediate threat he posed to the safety of police officers and bystanders was minimal as Plaintiff was unarmed and noncombative. See Davis v. City of Las Vegas, 478 F.3d 1048, 1054 (9th Cir. 2007). As to the fourth factor, the Officer Defendants allegedly pointed a gun at Plaintiff, grabbed Plaintiff's neck, forced him face-first onto the pavement, and proceeded to punch or kick him in the back and leg and "crush" his head. (Dkt. No. 66-1 at 9–10.) Alfonzo testifies the Officer Defendants hit or "planted" Plaintiff's face against the pavement. (Dkt. No. 60-3 at 3.) As a result, Plaintiff briefly passed out and "saw stars." (Id. at 13.) A jury may find the quantum force used against Plaintiff was excessive.

The third factor, resistance or attempted flight, weighs slightly in Defendants' favor at the time Plaintiff stood and ran. Plaintiff admits to making a "swift movement" as McKissack's car approached. (Dkt. No 66-1 at 9.) Objectively, this would appear to a reasonable officer as flight. However, Defendants do not gain the benefit of this factor at the time Chin first pointed his gun at Plaintiff, which occurred before Plaintiff's apparent flight. Because the other factors—including the most important, the threat posed by Plaintiff—cut against Defendants, a jury may find the alleged conduct was not reasonable under the

circumstances and amounted to excessive force under the Fourth Amendment.

In addition, the Court finds qualified immunity does not apply—each of the Officer Defendants' alleged conduct clearly violated established law. Chin aimed his gun at Plaintiff, and later "grabb[ing him] by the neck," forcing him to the ground. (Dkt. No. 66-1 at 8-9.) In Robinson, the Ninth Circuit recognized, that "as a general principle" pointing a gun at an unarmed, nonthreatening suspect during an investigation violates the Fourth Amendment. 278 F.3d at 1015. Thus, Chin's alleged behavior violated established law.

McKissack and Rurey's assistance in restraining Plaintiff may also be viewed as excessive force. Plaintiff's facts show McKissack "slamm[ing]" Plaintiff's face into the pavement. (Dkt. No. 60-3 at 3.) Rurey admits to kicking at Plaintiff's foot to straighten out Plaintiff's leg, and Plaintiff claims he sustained bruises from kicks to his leg. (Dkt. Nos. 66-1 at 14; 66-2 at 31-32.) The factors considered above were clearly established at the time of the conduct. Graham, 490 U.S. 386; Davis, 478 F.3d at 1055. Under the Graham factors, no reasonable officer would have thought slamming the face of an unresisting, nonthreatening suspect into the pavement and kicking him was lawful. See Davis, 478 F.3d at 1055.

The Court DENIES Defendants' motion for summary judgment with respect to excessive force.

B. Claims Against City Defendants

1. Constitutional Claims

Defendants assert the City is not liable for Plaintiff's constitutional injuries whether under a theory that an official policy existed or by ratification. The Court agrees.

a. Policy

A municipality is subject to § 1983 liability if it causes a constitutional violation through an official policy. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978). Liability for failing to protect a plaintiff's constitutional rights requires showing (1) the plaintiff was deprived of a constitutional right, (2) the municipality had a policy, (3) this policy amounts to deliberate indifference to the plaintiff's constitutional right, and (4) the policy was the moving force behind the constitutional violation. City of Canton v. Harris, 489 U.S. 378, 388–91 (1989). Plaintiff's claim against the City fails on the second, third, and fourth elements.

As to the second element, Plaintiff admits the Seattle Police Department has no specific policy for off-duty police officers. (Dkt. No. 78 at 20.) Plaintiff's argument that this amounts to a "no-policy" policy is unconvincing, because off-duty officers are still required to adhere to all department policies even when off duty. (Dkt. No. 79-6 at 9.) As to the third element, Plaintiff fails to suggest the "no policy" policy is an act of deliberate indifference on the policymakers' part.

As to the fourth element, even if the no-policy theory were accepted, Plaintiff fails to show how it was the moving force behind Plaintiff's constitutional injuries. The OPA review by Kathryn Olson concluded Chin put himself in an "unnecessary and potentially dangerous situation" by engaging Plaintiff and his companions. (Dkt. No. 60-9 at 3.) Supervisory intervention was proposed for Chin regarding exercise of discretion. (Id.) Plaintiff does not show how existing policy can be the moving force behind Chin's conduct, while simultaneously recommending supervisory

intervention. Plaintiff argues the City should have adopted a policy similar to the Model Policy of Off-Duty Conduct identified by Plaintiff's expert Donald Van Blaricom, which recommends off-duty officers not become involved in minor crimes in which they are involved. (Dkt. No 64-1 at 5–6.) This Model Policy would have done no more than discourage Chin's actions, which the existing policy already does. The Court finds no basis for Monell liability.

b. Ratification

A municipality is subject to § 1983 liability if an authorized policymaker (1) ratifies a subordinate's unconstitutional behavior, and (2) approves the basis for the behavior. Christie v. Iopa, 176 F.3d 1231, 1238-39 (9th Cir. 1999) (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)). Ratification is ordinarily a question for the jury. Id. at 1239. Plaintiff's claim fails on the second element.

Here, Plaintiff argues the OPA report exonerating the Officer Defendants qualifies as ratification. (Dkt. No. 60-9.) Relying on the declaration of Van Blaricom, Plaintiff argues the OPA report creates the presumption that Seattle Police Department policy makers approved the Officer Defendants' actions. (Dkt. No. 64-1 at 8.) However, there is no evidence that the Chief of Police knew about the constitutional violation, as required for ratification. See Praprotnik, 485 U.S. at 127; see also Christie v. Iopa, 176 F.3d 1231, 1239 (9th Cir. 1999). As stated by the OPA report preparer, the OPA report was not brought to the attention of the Chief of Police. In addition, the OPA report also proposed supervisory intervention for Chin regarding exercise of discretion, which undermines Plaintiff's argument that it amounted to ratification.

(Dkt. No. 60-9.) Since Plaintiff has failed to establish necessary elements of municipal liability under either theory, the Court DISMISSES the constitutional claims against the City Defendant.

2. State Tort Claims

Plaintiff also sued Defendants for assault and battery and false imprisonment under state law. While Plaintiff voluntarily dismissed Officer Defendants from the state tort claims, City Defendant seeks summary judgment for claims remaining against the munipality. Cf. Orrick v. Fox, 828 P.2d 12, 19 (Wash.Ct.App. 1992)(recognizing plaintiff's ability to sue either employer or employee or both together).

City Defendant argues any intentional torts by Officer Defendants were not committed "in furtherance of the master's business," and therefore precludes liability. Kuehn v. White, 24 Wn. App. 274, 277 (1979). The Court disagrees. Defendants' argument ignores Defendants' admission that "Seattle Police Officers McKissack, Rurrey, Patterson, Boggs, and Chin were employed as Seattle Police Officers by the City of Seattle and that they were acting within the course and scope of their respective duties at all relevant times." (Dkt. No. 60-2 at 3, ¶ 3.) The cases relied on by Defendant only support the proposition that an employer is not liable for intentional torts committed "in order to effect a purpose of [an employee's] own." Blenheim v. Dawson & Hall, 35 Wn. App. 435, 440 (1983). Here, Defendants admit the purpose of the Officer Defendants' actions was the City's.

To the extent City Defendant believes it is not vicariously liable given that officers committed no tort, City Defendant's argument also fails. As discussed above, it is debatable as to whether the Officer

Defendants had probable cause to arrest Plaintiff, or whether excessive force was used. City Defendant may still be liable for assault and battery and false imprisonment under a theory of respondeat superior. The Court DENIES Defendant's motion for summary judgment on the state tort law claims.

3. Malicious Prosecution

Defendants seek a determination that the City of Seattle did not maliciously prosecute Plaintiff. Defendants only raise a potential basis for granting this relief in their reply.

The State of Washington requires five elements to show malicious prosecution: the prosecution must have been instituted or continued (1) by the defendant, (2) without probable cause to do so, (3) and with malice; (4) the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. Hanson v. City of Snohomish, 121 Wn.2d 552, 558 (1993). Defendants argue the claim fails because Plaintiff has not shown lack of probable cause, and assert Plaintiff has defaulted by failing to substantively respond. In their reply, Defendants also assert for the first time the lack of evidence of malice.

As discussed above, a jury could conclude from Plaintiff's evidence there was no probable cause to arrest him. As for the lack of malice, though the record contains no evidence of malice, Plaintiff has had no opportunity to respond because Defendants raise the argument for the first time in their reply. The Court grants Plaintiff leave to file a surreply before deciding the issue.

II. Motions to Strike

1. Plaintiff's Motion to Strike

On Fed. R. Evid. 401 and 403 grounds, Plaintiff seeks to strike evidence referring to (1) his alleged intoxication, (2) the Jeep's reckless driving, (3) the possibility Plaintiff drove the Jeep, and (4) reference to witness unavailability as the reason for dismissing charges against Plaintiff. (Dkt. No. 78 at 2-5.)

The first two items Plaintiff wishes struck are highly relevant in determining whether an arrest took place. Because Plaintiff was only a passenger in the Jeep, prejudice against drunken drivers does not apply to him. The third item, Chin's deposition testimony that he had basis to believe Plaintiff drove the Jeep, is relevant to establishing probable cause to arrest Plaintiff for DUI and reckless driving. The information poses no danger of prejudice. The fourth item, Defendants' suggestion that charges against Plaintiff were dropped only because of McKissack's unavailability as a witness, is unsupported by evidence and redundant. At most this indicates that the City of Seattle felt evidence of Plaintiff's aggression and resistance was strong. Because this other evidence is already before the Court, the City's evaluation adds nothing to this Court's analysis. The Court DENIES Plaintiff's motion to strike items (1), (2), and (3), and GRANTS Plaintiff's motion to strike item (4).

2. Defendant's Motion to Strike

Defendants seeks to strike the opinion provided by Van Blaricom that "there was neither reasonable suspicion to detain nor probable cause to arrest Plaintiff" as an impermissible legal conclusion. (Dkt. No. 64-1 at 7.) Experts may give their opinions as to the ultimate issues of a case, but not ultimate issues of law. Muhktar v. California State University, Hayward, 299 F.3d 1053, 1065 n.10 (9th Cir.2002).

Here, Van Blaricom expressly disclaimed any intent to offer opinions as to questions of law. (Id. at 3 ("My use of certain [legal] terms ... merely reflects my training, in applying reasonable standards of care to officers' conduct, and does not presume or imply a statement of any legal opinion.") Other courts considering Van Blaricom's similarly disclaimed testimony have permitted it, but cautioned that at trial "both the questions posed to him and his answers should avoid language in the form of a legal conclusion." Estate of Bojcic v. City of San Jose, No. C05 3877 RS, 2007 WL 3314008, at *3 (N.D. Cal. Nov. 6, 2007). This course of action is appropriate here.

The Court DENIES Defendants' motion to strike, but cautions Plaintiff and Plaintiff's expert to avoid legally conclusory testimony at trial.

Conclusion

The Court DENIES Plaintiff's motion for partial summary judgment and GRANTS in part and DENIES in part Defendants' motion for summary judgment. Specifically, the Court ORDERS:

1. Plaintiff's claim of unlawful detention against Officer Defendants be DISMISSED. Plaintiff fails to demonstrate a constitutional violation. While Plaintiff was later discovered to be a passenger, Defendant had reasonable suspicion to detain Plaintiff for driving under the influence and reckless driving.
2. With respect to Plaintiff's unlawful arrest claim against Officer Defendants, the parties' motions for summary judgment are both DENIED. A factual dispute exists as to when Plaintiff was arrested and qualified immunity does not apply.

3. Defendant's motion for summary judgment as to Plaintiff's excessive force claim against Officer Defendants is DENIED. A factual dispute exists as to the force used against Plaintiff and qualified immunity does not apply.
4. Plaintiff's constitutional claims against City Defendant (for unlawful detention, unlawful arrest, and excessive force) are DISMISSED. Plaintiff fails to demonstrate City Defendant is liable under Monell or due to ratification.
5. Defendants' motion for summary judgment as to state law claims is DENIED. City Defendant admitted that Officer Defendants were acting within the scope of their employment at all times; therefore, respondeat superior applies.
6. With respect to the malicious prosecution claim, Plaintiff is GRANTED LEAVE to file a surreply regarding the issue of malice. The surreply must be filed within seven (7) days of entry of this Order.
7. Plaintiff's request to strike evidence relating to Plaintiff's alleged intoxication, the Jeep's reckless driving and the possibility Plaintiff drove the Jeep, is DENIED.
8. Plaintiff's request to strike reference to witness unavailability as the reason for dismissing charges against Plaintiff is GRANTED.
9. Defendants' request to strike the opinion of Van Blaricom is DENIED.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 25th day of March, 2011.

s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. ANDREW McKISSACK, et al., Defendants.	CASE NO. C09-1693 MJP ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT

This matter comes before the Court in response to the Court's order to show cause as to Plaintiff's oral motion for judgment notwithstanding the verdict. (Dkt. No. 168.) Having reviewed the parties' responses (Dkt. Nos. 172, 174), and all related papers, the Court GRANTS in part Plaintiff's motion for judgment notwithstanding the verdict only as to nominal damages.

The jury found that Defendant Chin unlawfully seized Plainiff in violation of the Constitution by exceeding the reasonable scope and length of the initial Terry stop. Plaintiff was thus successful on one of his civil rights claims brought under 42 U.S.C. § 1983. The jury did not find Plaintiff to be entitled to any compensatory damages. The jury also did not find Plaintiff entitled to any nominal damages—the jury awarded him zero dollars and zero cents. The jury's verdict on nominal damages is inconsistent with the jury instructions and the law of this Circuit.

The jury was instructed to award nominal damages if Plaintiff succeeded on any of his claims:

> The law which applies to this case authorizes an award of nominal damages. If you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Final Instruction No. 26 (Dkt. No. 157 at 31) (Ninth Circuit Model Instruction No. 5.6). The verdict form, however, stated that "[i]f you find that any or all of the Defendants violated Plaintiff's constitutional rights, you may award nominal damages, which may not exceed one dollar." (Dkt. No. 171 at 5 (emphasis added).) This was in error. The Ninth Circuit has long instructed that a jury must award nominal damages if it finds a violation of the plaintiff's constitutional rights. George v. City of Long Beach, 973 F.2d 706, 708 (9th Cir. 1992). Here, the jury found such a violation and it was bound to award nominal damages not to exceed one dollar. Given the inconsistency between the instructions and verdict form, it is not unreasonable for the jury to have erred. The Court therefore corrects this error by GRANTING Plaintiff's motion for judgment notwithstanding the jury's verdict and awarding him one dollar in nominal damages. Plaintiff's motion as to all other issues is DENIED.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 6th day of June, 2011.

s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. JASON McKISSACK, et al., Defendants.	CASE NO. C09-1693 MJP ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

This matter comes before the Court on Defendants' renewed motion for judgment as a matter of law. (Dkt. No. 183.) Having reviewed the motion, the response (Dkt. No. 189), the reply (Dkt. No. 191), and all related papers, the Court DENIES the motion

Background

Given the parties' familiarity with the case, the Court provides little background. Because Defendants' arguments focus on the potential inconsistency between the unlawful detention and false imprisonment claims, the Court lays out the jury instructions in some detail.

In "Count Four," the jury was instructed on Rutherford's claim of false imprisonment. The jury was told to consider whether Defendant Chin falsely imprisoned Rutherford during "the events that transpired after Defendant Chin ordered Plaintiff to the ground in their initial confrontation." (Dkt. No. 157 at 23.) Rutherford had to prove to the jury three elements: "(1) Plaintiff was restrained or imprisoned;

(2) Defendant Chin's actions were a proximate cause of the restraint or imprisonment; and (3) Defendant Chin . . . exceeded the reasonable length and scope of the investigatory stop." (Id.) As to the first element the jury was instructed as follows:

> A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

(Id.)

The false imprisonment claim was similar to, but distinct from the unlawful detention claim in "Count One." In the unlawful detention claim, the jury was instructed to consider a similar time frame as to the commencement of the acts: "you are to focus only on the time from when Plaintiff exited Mr. Alfonzo's vehicle up to the point Plaintiff got up from being seated on the roadway." (Dkt. No. 157 at 16.) The unlawful detention claim required Rutherford to prove that Defendant Chin exceeded the reasonable length and scope of the investigatory stop. Rutherford had to prove three elements: (1) Defendant Chin seized Plaintiff's person; (2) in seizing Plaintiff's person, Defendant Chin acted intentionally; and (3) the seizure was unreasonable. (Id.) The parties stipulated to the fact that Rutherford was seized. (Id. at 17.) The Court also defined what it meant to be seized using the Ninth Circuit pattern instruction:

> A defendant "seizes" the plaintiff's person when he restrains the plaintiff's liberty by physical force or a show of authority. A person's liberty

> is restrained when, under all of the circumstances, a reasonable person would not have felt free to ignore the presence of law enforcement officers and to go about his business.

(Id.) Of particular note, this definition varies from the instructions defining "restrain or imprison" in the false imprisonment claim.

The jury returned a general verdict in favor of Rutherford only on the unlawful detention claim, not the false imprisonment or any other claim.

Analysis

A. Standard of Review

"Judgment as a matter of law is proper if the evidence, viewed in the light most favorable to the nonmoving party, permits only one reasonable conclusion." Graves v. City of Coeur D'Alene, 339 F.3d 828, 838 (9th Cir. 2003) abrogated on other grounds by Hiibel v. Sixth Judicial Dist. Ct. of Nv., 542 U.S. 177 (2004). "A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002).

The Court is instructed "not [to] weigh the evidence, but should simply ask whether the plaintiff has presented sufficient evidence to support the jury's conclusion." Harper v. City of Los Angeles, 533 F.3d 1010, 1021 (9th Cir. 2008). "If sufficient evidence is presented to a jury on a particular issue and if the jury instructions on the issue stated the law correctly, the court must sustain the jury's verdict." Id.

B. No Inconsistent Verdict

Defendants essentially argue that the jury returned an inconsistent verdict that requires judgment as a matter of law to be entered in their favor. This is erroneous. Defendants have failed to show an actual inconsistency in the verdict.

Although the Ninth Circuit has recognized three potential ways a general verdict can be inconsistent, only one is relevant here: when the jury returns "two general verdicts that, under any facts, seem to be legally irreconcilable." Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1032 (9th Cir. 2003). In Zhang the court found no inconsistency in a general verdict where the jury found for plaintiff on his § 1981 racial discrimination claim, but against him on his claim brought under Washington's Law Against Discrimination. Id. at 1034-35. The Court concluded that, "[u]nless one legal conclusion is the prerequisite for another, inconsistencies between them must stand." Id. at 1034.

Like the outcome in Zhang, Defendants have not shown the verdicts to be legally irreconcilable. The two claims involve different legal standards, and neither is a prerequisite to the other. In the false imprisonment claim, Rutherford had to prove he was "restrained or imprisoned," a fact to which the parties did not stipulate. In the unlawful detention claim, however, Rutherford had to prove he was "seized," a term that was not only defined differently from "restrained or imprisoned," but also stipulated to as being proved by the parties. The claims thus involved different legal questions, and although there was some overlap, the two claims are not coextensive or predicates to each other. The jury's general verdicts

produced no inconsistencies.

Defendants seize on the fact that both claims required the jury to determine whether Defendant Chin "exceeded the reasonable length and scope of the detention." But Defendants fail to explain how this one element makes the two claims legally coextensive or predicates to each other. They ignore that the two claims involve different legal standards and have different elements, which permitted the jury to reach different conclusions. This is a fatal defect in Defendants' motion. The Court DENIES Defendants' motion for judgment as a matter of law on this issue.

C. Sufficiency of Evidence Supports the Verdict

Defendants attempt to reargue the merits of the case without acknowledging or applying the deferential standard owed to Rutherford's presentation of the facts and the jury's verdict. See Pavao, 307 F.3d at 918. Defendants start from the faulty premise that the jury must have ignored the Court's instructions and considered the events occurring prior to Rutherford exiting the Jeep in order to find for Rutherford on the unlawful detention claim. See Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply Inc., 106 F.3d 894, 902 (9th Cir. 1997) ("[T]he court [is] to presume that juries follow the law."). Defendants' argument is deeply flawed.

In "Count One, the jury ultimately only had to determine whether Defendant Chin exceeded a reasonable length and scope of the Terry stop. The Court first instructed the jury that Defendant Chin had authority to investigate "the municipal law violations of reckless driving and driving under the influence." (Dkt. No. 157 at 16.) The jury was then told that it had to consider the totality of the

circumstances to determine whether the investigatory stop exceeded a reasonable length and scope from the time Rutherford exited the Jeep to when Rutherford got up from being seated in the roadway. (Id. at 16-17.) To make this determination the jury was instructed to consider: (1) the aggressiveness of the police methods; (2) how much of Plaintiff's liberty was restricted; and (3) whether the officer had a sufficient basis to fear for his safety to warrant the intrusiveness of the action taken. (Id.)

At trial, Rutherford put on substantial evidence that his detention exceeded a reasonable length and scope. The jury heard testimony that Defendant Chin used a highly aggressive manner in confronting all three individuals. The jury also heard testimony from Rutherford and Alfonzo that Defendant Chin pointed his gun at Rutherford and forced him to sit at gun point. (Rutherford Testimony at 35-39; Alfonzo Testimony at 22-26.) This severely restricted Rutherford's liberty and used an extremely high level of force for a situation where none of the suspects were armed, and were there was no ongoing criminal activity. The jury also heard testimony that Alfonzo identified himself as the driver, which permitted Defendant Chin to exclude Rutherford as a suspect of the two municipal violations he observed the driver of the Jeep make. While Defendant Chin may have had reason to doubt that Alfonzo was the driver, it was up to the jury to determine, based on the totality of the circumstances, whether it was reasonable to continue to detain Rutherford. (Dkt. No. 157 at 17.) This evidence was sufficient to permit the jury to return a verdict in favor of Rutherford on this claim, and the

Court must sustain the verdict. Harper, 533 F.3d at 1021.

The Court DENIES Defendants' motion on this issue.

D. Qualified Immunity

Defendants argue that Defendant Chin is entitled to qualified immunity because he was permitted to use his gun during the Terry stop without acting illegally. This is yet another untenable and flawed argument.

First, the argument improperly characterizes the jury's verdict. Because the jury returned a general verdict, the Court cannot know exactly why the jury found Defendant Chin exceeded the reasonable length and scope of the Terry stop. The jury was instructed to consider the totality of the circumstances and, as explained above, there were several factors it could have relied on to return a verdict in Rutherford's favor. Defendants simply view the evidence in their favor and conclude that Defendant Chin's use of his weapon was the sole basis on which the jury could return a verdict on the first claim. (Dkt. No. 183 at 16-17.) Applying the proper, deferential standard, the Court cannot make the same assumption. Thus, Defendants' qualified immunity argument is fatally flawed in its premise and is DENIED.

Second, even if the Court accepts for the sake of argument that the jury's verdict turned solely on the use of the weapon, the Court finds that Defendant Chin violated clearly established law and is not entitled to qualified immunity.

In performing a qualified immunity analysis, the Court engages in a two-step process in no mandatory order. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009). The Court asks whether the plaintiff has alleged a

violation of a constitutional right and whether the constitutional right is clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). Here, the only question is whether the constitutional right is clearly established, given the jury found Defendant Chin violated Plaintiff's constitutional rights under the Fourth Amendment.

"[T]he law [is] clearly established that, when making a Terry stop, officers may not use highly intrusive measures such as the ones used here [pointing a gun and ordering individuals out of a car], unless the circumstances reasonably justify such extraordinary procedures in order to ensure the officers' safety." Washington v. Lambert, 98 F.3d 1181, 1192 (9th Cir. 1996). "Under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment." Id. at 1187. The law is also "clearly established that if the Terry-stop suspects are cooperative and the officers do not have specific information that they are armed or specific information linking them to a recent or inchoate dangerous crime, the use of such aggressive and highly intrusive tactics is not warranted . . . [unless] there are no other extraordinary circumstances involved." Id. The extraordinary circumstances are four-fold:

> our cases make clear that we have only allowed the use of especially intrusive means of effecting a stop in special circumstances, such as 1) where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight; 2) where the police have information that the suspect is currently armed;

> 3) where the stop closely follows a violent crime; and 4) where the police have information that a crime that may involve violence is about to occur.

Id. at 1189.

Construing the facts in the light most favorable to Rutherford, Defendant Chin violated clearly established law by using a weapon during the Terry stop and detaining Rutherford after he learned he was not the driver of the parked vehicle. The circumstances of the case show that none of the exceptional circumstances set out in Washington that allow the use of a gun is met. First, construing the testimony in Rutherford's favor, it does not appear Rutherford was uncooperative—he sat in the road when asked and he remained there only until the speeding police vehicle appeared on the horizon caused him to fear for his safety. Williams, 98 F.3d at 1189. That he may have been reticent to act does not show lack of compliance. Second, there was no indication he was armed. Id. Third, no violent crime had been observed. Id. Fourth, there was no information a new crime of violence was about to occur. Id. Instead, the use of the gun was largely occasioned by Defendant Chin's poor judgment that led him to exit his unmarked, personal vehicle in plain clothes on a dark dead-end street to confront three individuals who were no longer driving. Moreover, Defendant Chin admitted he lacked probable cause to arrest Rutherford for the reckless driving and DUI offenses he believed he observed. There is no basis on which to grant Defendant Chin qualified immunity, given that Defendant Chin violated clearly established law.

Defendants try to turn the state of the law on its head by suggesting "only in extreme circumstances have courts found a mere display of potential force to be sufficient to transform a Terry stop into an arrest." (Dkt. No. 183 at 19.) Astoundingly, Defendants cite Washington to make this point, while ignoring the very holding of the case. Pointing and brandishing a gun during a Terry stop is only permissible in extreme cases. Washington, 98 F.3d at 1192. Defendants' argument is poorly thought through and certainly not well taken.

Defendants also seize on language in Washington to suggest an officer can always use a gun when outnumbered. This is not a valid argument. The court in Washington noted the Seventh Circuit has concluded that the use of a weapon can be proper in an investigative stop where the officer is outnumbered. Id. at 1190 (citing United States v. Serna-Barreto, 842 F.2d 965 (7th Cir. 1988)). A close examination of Serna-Barreto does not support the broad rule Defendants urge. As the court in Serna-Barreto first noted, "[i]t would be a sad day for the people of the United States if police had carte blanche to point a gun at each and every person of whom they had an 'articulable suspicion' of engaging in criminal activity." Id. at 967. Only the particular and unique facts of that case justified the use of the gun in effectuating the stop—facts that are entirely distinct from those before the Court now. In Serna-Barreto, a single officer at night confronted a car carrying four individuals that he had observed engage in a drug sale. Id. The officer suspected the passengers were likely armed and willing to shoot an officer, and indeed the defendant testified she was not scared by the gun. Id. at 967-68.

In the case before the Court here, however, no one was suspected of being armed, all three individuals were out in the open and they complied with the officer's demands to be seated and answer questions. Defendants make much of the fact Thant advanced on Defendant Chin, but the testimony at trial, construed in Rutherford's favor, showed he only moved directly toward Defendant Chin when ordered to do so. Thus, the mere fact Defendant Chin was outnumbered does not entitle him to qualified immunity.

Conclusion

Defendants have not shown any defect in the jury's verdict. Defendants ignore the legal standards requiring deference to the jury's verdict, and simply recast the testimony in their own favor in contravention to the proper legal standard. This is no basis to obtain relief. Defendants fail to show the jury's verdict was inconsistent or unsupported by the evidence. Defendants have also shown no right to qualified immunity given that Defendant Chin violated clearly established law. The Court DENIES the motion.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 4th day of August, 2011.

s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. JASON McKISSACK, et al., Defendants.	CASE NO. C09-1693 MJP ORDER GRANTING IN PART MOTION FOR ATTORNEY'S FEES

This matter comes before the Court on Plaintiff's motion for attorney's fees and costs. (Dkt. No. 181.) Having reviewed the motion, the response (Dkt. No. 185), the reply (Dkt. No. 188), and all related papers, the Court GRANTS the motion in part.

Introduction

Plaintiff Andrew Rutherford came before the Court to uphold his Fourth Amendment right to be free from illegal seizure and excessive force. After seven days of trial, the jury agreed with Rutherford that Defendant Officer Jonathan Chin, acting in his official capacity as a Seattle Police Officer, violated Rutherford's constitutional right to be free from illegal seizure. This single fact is not to be lost in the technical matters discussed below. Indeed, Defendants belittle the significance of the jury's verdict by relentlessly focusing on the fact Rutherford did not convince the jury he suffered any physical or emotional damages for which money can compensate. That Rutherford obtained only one dollar in damages does not diminish the fact he vindicated his constitutional rights.

Because of this victory, Rutherford is permitted to seek and obtain the reasonable attorney's fees and costs incurred in successfully prosecuting the matter. As explained below, Congress expressly authorized every successful litigant who defends constitutional rights pursuant to 42 U.S.C. § 1983 to seek attorney's fees and costs in order "to ensure that federal rights are adequately enforced." Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662, 1671 (2010). In light of the jury's verdict, the Court finds that Defendants must pay the reasonable attorney's fees and costs, which are less than what Rutherford requests.

Background

The facts of the case are well known to the parties, and the Court repeats few of them here. Plaintiff Andrew Rutherford filed suit against several individual Seattle Police Department officers and the City of Seattle for events that occurred in the early morning hours of September 9, 2007. At trial, Rutherford pursued three Fourth Amendment claims brought pursuant to 42 U.S.C. § 1983, and two state law claims. Against Defendant Officer Jonathan Chin alone, Rutherford pursued two claims: unlawful seizure and unlawful arrest. Against Defendants Officers Chin, Jason McKissack, and Joshua Rurey, Rutherford pursued a claim of excessive force. Against the City, Rutherford presented two claims: false imprisonment and assault.

After a seven-day trial, the jury returned a unanimous verdict in favor of Plaintiff as to only one claim, unlawful seizure, and found for the individual defendants and the City on all other claims. As the one claim on which Plaintiff prevailed, the jury instructions stated that "plaintiff alleges that Defendant Chin

deprived him of his rights under the Fourth Amendment to the Constitution by exceeding the reasonable length and scope of the investigatory stop." (Dkt. No. 157 at 16.) On this claim the jury was instructed to consider Defendant Chin's actions "from when Plaintiff exited Mr. Alfonzo's vehicle up to the point Plaintiff got up from being seated on the roadway." (Id.) The jury found that Defendant Chin exceeded the reasonable length and scope of the investigatory stop. (Dkt. No. 171.) The jury did not award Rutherford any compensatory damages—that is, they did not find that he was harmed in a manner that could be compensated monetarily. The jury was instructed that if it did not find any compensatory damages, it had to award nominal damages. (Id. at 31 ("If you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages ... [that] may not exceed one dollar.").) This rule has long been the law in this Circuit. George v. City of Long Beach, 973 F.2d 706, 708 (9th Cir. 1992). Due to an error on the verdict form, however, the jury was given discretion whether to award no nominal damages and the jury awarded no nominal damages. (Dkt. No. 171 at 5.) The Court granted Plaintiff's motion for judgment notwithstanding the verdict to correct the verdict and awarded nominal damages in the amount of one dollar. (Dkt. No. 175.)

Rutherford now moves for an award of attorney's fees and costs in the total amount of $437,700.96. (Dkt. No. 181.)

Analysis

I. Governing Principles

Rutherford filed suit pursuant to 42 U.S.C. § 1983, a civil statute that has a long, rich history, which the Court briefly reviews.

A. Basic tenets of a § 1983 claim

"It would be difficult to imagine a statute more clearly designed 'for the public good' and 'to prevent injury and wrong' than § 1983." Will v. Mich. Dep't of State Police, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting). Congress enacted § 1983 in 1871 as part of the Klu Klux Klan Act, to provide "a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." Monroe v. Pape, 365 U.S. 167, 172 (1961), overruled on other grounds by Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). "The roots of section 1983 go back to the Civil War, reflecting Congress' desire to provide a federal remedy against anyone using the power of state law to impinge on rights protected under the federal Constitution." Morgan v. Dist. of Columbia, 824 F.2d 1049, 1056 (D.C. Cir. 1987). And "[w]hile section 1983 has reaped its share of criticism for encouraging federal intervention in local affairs, it remains on the books as the workhorse of civil rights litigation." Id.

Those pursuing § 1983 claims seek to vindicate constitutional rights, and, in some instances to request monetary damages for physical or other compensable injuries they suffer as a result. Section 1983 claims sound in tort, and contain four elements similar to those of common law torts: duty, breach, causation, and damages. To succeed on a section 1983 claim, a plaintiff must show: (1) a violation of rights protected by the federal Constitution or created by federal law, (2) proximately caused (3) by the conduct of a person (4) who acted under color of law. A major difference

between a § 1983 claim and a common law tort claim is that the plaintiff alleging a 1983 claim must only allege injury to a federally-protect right not an injury to the body or mind. For example, the loss of the ability to engage in free speech is actionable under § 1983 where the person depriving the plaintiff of such a right acts under color of law. See Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009) (en banc) (upholding section 1983 claim filed to enforce first amendment rights where no physical damages were alleged). This is precisely because the aim of § 1983 is to "protect the people from unconstitutional action under color of state law 'whether that action be executive, legislative or judicial.'" Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting Ex parte Virginia, 100 U.S. 339, 346 (1879)).

A successful plaintiff in a § 1983 case need not prove any compensatory damages at all in order to be victorious. Even where a plaintiff receives only nominal damages, the plaintiff is considered the prevailing party. "In this Circuit, nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights." George, 973 F.2d at 708. The award of nominal damages is a "'a symbolic vindication of [the plaintiff's] constitutional right' whether or not the constitutional violation causes any actual damage." Id. (quoting Floyd v. Laws, 929 F.2d 1390, 1403 (9th Cir. 1991)). As the Supreme Court has explained "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." Farrar v. Hobby, 506 U.S. 103, 113 (1992). The award of nominal damages creates a "material alteration of the legal relationship between

parties" because "the plaintiff becomes entitled to enforce a judgment. . . ." Id. The reason is that "[a] plaintiff may demand payment for nominal damages no less than he may demand payment for millions of dollars in compensatory damages." Id. Thus, a plaintiff victorious on her § 1983 claim who seeks attorney's fees is not to be belittled simply because she did not receive a million-dollar verdict. See id.

B. Attorney's fees and § 1983

Congress has expressly permitted a successful § 1983 plaintiff to apply for and obtain an award of attorney's fees and costs. In 1976 Congress passed the Civil Rights Attorney's Fees Award Act to alter the general rule that each party bears its own attorney's fees and costs, and to provide that a prevailing party in certain civil rights actions may recover "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. "Congress enacted 42 U.S.C. § 1988 in order to ensure that federal rights are adequately enforced." Perdue, 130 S. Ct. at 1671. "The congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law." Seattle Sch. Dist. No. 1. v. Washington, 633 F.2d 1338, 1348 (9th Cir. 1980) (citation omitted). Thus, a plaintiff who prevails on any claim brought pursuant § 1983 is deemed to be the prevailing party, and may request attorney's fees and costs.

Where nominal damages are awarded by the jury, the Court has discretion whether to award attorney's fees and costs. Farrar, 506 U.S. at 115. The Court is instructed to "give primary consideration to the degree of success achieved when it decides whether to award

attorney's fees." Wilcox v. Reno, 42 F.3d 550, 554 (9th Cir. 1994). While the Court may award low fees or no fees at all, it should only do so where the verdict is a technical victory or where the award of fees would produce a windfall to the attorneys. Farrar, 506 U.S. at 115. The Ninth Circuit follows "the general rule, derived from Justice O'Connor's concurrence in Farrar, that '[i]f a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damage.'" Mahach-Watkins v. Depee, 593 F.3d 1054, 1059 (9th Cir. 2010) (quoting Wilcox, 42 F.3d at 555). That is, fees are appropriately awarded if "'the lawsuit achieved other tangible results—such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects.'" Guy v. San Diego, 608 F.3d 582, 589 (9th Cir. 2010) (quoting Wilcox, 42 F.3d at 555). The Ninth Circuit instructs the Court to consider three factors in determining "whether the plaintiff succeeded in some way beyond the judgment for nominal damages":

> First, the court should consider "[t]he difference between the amount recovered and the damages sought," which in most nominal damages cases will disfavor an award of fees. Farrar, 506 U.S. at 121 (O'Connor, J., concurring). Second, the court should consider "the significance of the legal issue on which the plaintiff claims to have prevailed." Id. Third, the court should consider whether the plaintiff "accomplished some public goal." Id. We have approved of the consideration of these factors in nominal

damages cases. Cummings v. Connell, 402 F.3d 936, 947 (9th Cir. 2005);

Mahach-Watkins, 593 F.3d at 1059-60 (citation omitted). If the district court properly considers these three factors, "the resulting award [of attorney's fees] is not an abuse of its discretion." Id. at 1060 (quoting Cummings v. Connell, 402 F.3d 936, 947 (9th Cir. 2005)).

II. An Award of Fees is Proper

The Court finds an award of attorney's fees and costs is appropriate in this case.

As an initial matter, the Court finds that Rutherford is the prevailing party. The jury found that Defendant Chin violated Rutherford's Fourth Amendment rights by exceeding the reasonable scope and length of the investigatory stop. Although the jury awarded no nominal or compensatory damages, the Court corrected the jury's verdict to follow Ninth Circuit law and awarded nominal damages of one dollar. Rutherford now has an enforceable judgment against Defendant Chin that alters the legal relationship of the parties. As the Supreme Court has stated, one who obtains even nominal damages is considered the prevailing party for purposes of 42 U.S.C. § 1988. Farrar, 506 U.S. at 111-12. Thus, Rutherford is a prevailing party and is entitled to seek attorney's fees and costs.

Considering the three factors set out in Mahach-Watkins, the Court finds an award of attorney's fees and costs merited in this case. The first factor weighs against Rutherford. Rutherford asked the jury to return a verdict of $300,000 in his favor, yet the jury awarded no compensatory damages at all. Defendants ask the Court to consider the fact Rutherford

demanded $3 million early in this litigation and contrast this to the lack of any compensatory damages awarded. Regardless of whether Rutherford requested $300,000 or $3 million, he still failed to obtain any compensatory damages he sought. This factor weighs notably against Rutherford. As to the second factor, the Court finds the significance of the issue litigated to be substantial and it weighs in favor of issuing fees. The question the jury decided was when an investigatory stop exceeds its permissible length and scope and converts into an unconstitutional seizure. This is an important legal issue, particularly because the line between a constitutional and unconstitutional investigatory stop is easily blurred. As the Ninth Circuit has recognized, the right to be free from illegal detention is an important legal issue. See Mahach-Watkins, 593 F.3d at 1062 (citing Piper v. Oliver, 69 F.3d 875, 877 (8th Cir. 1995)). The third factor also weighs strongly in favor of Rutherford. The jury's decision served an important public function by declaring Defendant Chin violated Rutherford's constitutional rights by exceeding the reasonable length and scope of the stop. Having a jury consider and determine the permissible length and scope of the investigatory stop in this case served an important role of providing feedback to law enforcement as to when the scope and length of a stop can be exceeded. The jury's verdict teaches Defendant Chin and other officers that an investigatory stop can convert into an unconstitutional seizure if the officer exceeds the length and scope needed to investigate the suspected offense. Here Defendant Chin, an off-duty officer with gun displayed, ordered Plaintiff to obey his demands while he investigated minor violations committed by the driver of a car now parked. Having considered all

three factors, the Court finds that the balance tips in favor of an award of attorney's fees and costs.

The Court finds that Rutherford produced a tangible result beyond the receipt of nominal damages. See Guy, 608 F.3d at 589. The Court believes that the nominal damages and an award of fees and costs here encourages the City to train its officers in how to conduct themselves as off-duty officers and to understand the limits of investigatory stops. This is not unlike the outcome in Guy, an excessive force case, where only nominal damages were awarded, but where the court concluded that "a fee award serves a purpose beneficial to society by encouraging the City of San Diego to ensure that all of its police officers are well trained to avoid the use of excessive force, even when they confront a person whose conduct has generated the need for police assistance." Id. The court in Guy reasoned that "[i]t is logical to expect, in the face of this jury verdict, that the police department would take a closer look at the level of force used by its police after they have subdued a suspect." Id. at 590. Here, the Court is of the opinion that an award of fees and the jury's verdict will have a beneficial, remedial impact on the Department's training polices and on Officer Chin. It serves as a cautionary example of when and how an off-duty officer whose authority cannot be recognized either through uniform or markings confronts citizens. Here the judgment exercised by the officer placed the officers and members of the public in a dangerous setting. Officer Chin failed to recognize that his individual conduct and lack of judgment placed everyone, including his fellow officers, at risk.

In opposition to this conclusion, Defendants submit a declaration from the Assistant Chief of Police, Dick

Reed, in which he states that the jury's finding on claim one "has provided the Department no basis to revisit current training protocols or policies." (Dkt. No. 87 at 2.) Just as the court in Guy gave little weight to such a statement, the Court here cannot rely on this self-serving declaration as the sole means of gauging whether the award of fees will have a remedial effect. 593 F.3d at 1062. It is a sad day when the Seattle Police Department cannot stop to reflect upon the voices of citizen jurors who think that their conduct has overstepped the line or contemplate a change when an officer's judgment is found wanting. It should be a marker laid down to police officers that their authority is not absolute and before deadly force is used or displayed to gain compliance with their orders they must recognize that citizens hold precious rights given to them by the Constitution that cannot be breached. The Assistant Chief's statement also seems disingenuous because the Seattle Police Department conducted an internal investigation into the incident and determined the Chin needed "supervisory intervention" and remedial counseling. (Dkt. No. 185 at 8 (Defendants' opposition brief).) The Court therefore finds the award of fees and costs proper in this matter because this litigation has accomplished a public goal beyond the award of nominal damages, regardless of whether or not the department is wise enough to take action.

III. Amount of Fees and Costs

While the Court finds the award of fees and costs proper in this case, it does not find the full amount requested reasonable.

Where nominal damages alone are awarded, it is within the Court's discretion to fashion an award of

fees that is reasonable. See Farrar, 506 U.S. at 115. "[T]he most critical factor in determining the reasonableness of a fee award is the degree of success obtained." Id. at 114 (internal quotation omitted). Ultimately, the Court is to determine the award after considering the "amount and nature of the damages" without necessarily engaging in a lodestar or twelve factor evaluation as to reasonableness. Id. Both taxable and non-taxable costs may also be awarded under 42 U.S.C. § 1988. Grove v. Wells Fargo Fin. Cal., Inc., 606 F.3d 577, 580-81 (9th Cir. 2010). "[T]he courts have long held [that certain non-taxable costs] can be awarded as part of a reasonable attorneys' fee since they are typically charged to paying clients by private attorneys." Davis v. San Francisco, 976 F.2d 1536, 1556 (9th Cir. 1992), vacated in part on other grounds, 984 F.2d 345 (1993). "[A]ttorneys' fees awards can include reimbursement for out-of-pocket expenses including the travel, courier and copying costs. . . ." Id.

After considering the degree of success and the amount and nature of the damages, the Court concludes that a reduced award from that requested is reasonable. The Court first notes that Rutherford enjoyed only limited success in the universe of claims he pursued. At trial, he prevailed on only one of the three federal claims he brought and neither of his two state law claims. He also prevailed against only one of the officers he sued. An award of all of the fees requested would therefore be unreasonable in light of the degree of success. As a starting point, the Court finds one-fifth of the fees requested a reasonable fraction by which to adjust the fees to reflect the level of success Rutherford had on his five claims. The Court then considers that this fraction does not

necessarily reflect the amount of work and overall effort put in by counsel to obtain victory on the one claim. Counsel expended a significant amount of time on pretrial matters and motions practice in order to bring the case itself to trial. In order to prevail on claim one, Rutherford's counsel had to present nearly all of the same factual matters submitted to the jury that supported the other four claims. Indeed, there was little distinction in the presentation of the five claims to the jury. While the Court might adjust the fee upward on the basis of this work, the Court is also of the opinion that counsel spent a substantial amount of time that was excessive and/or duplicative. For example, the trial itself did not necessarily need the participation of two attorneys (a fact applicable to both Plaintiff and Defendants). While the Court recognizes that the additional manpower can be helpful, it was not necessary in this case. The Court also notes that the attorneys did little to develop the physical and emotional damages to the jury and, in fact, the physical injuries were short lived. Having considered the factors weighing in favor of an upward or downward adjustment in the fees, the Court finds that an award of one-fifth of the fees requested proper. Separately, the Court notes that the declaration provided in support of the fees is of little to no value to the Court as it does not discuss whether the overall time expended was reasonable. (See Dkt. No. 182.)

After considering the degree of success, the hours reasonably expended, the billing records, and the overall quality of the presentation at trial by Plaintiff's counsel, the Court finds as a reasonable fee award $83,600. This is twenty percent of the amount requested, which primarily reflects the degree of

success obtained by Rutherford at trial. It takes into consideration the number of claims on which Rutherford prevailed and the reasonable efforts necessarily required to obtain this result. While counsel sought $418,000 in fees, the award of one-fifth is reasonable and proper.

The Court also finds an award of costs to be proper, but not in the full amount requested. Plaintiff requests an award of costs to include: (1) the filing fee ($230.95), (2) photocopying (total $5399.87); (3) messenger services ($329.50); (4) medical record retrieval ($408.73); (5) Dave Snyder Investigation Services ($5157.17); (6) postage costs ($25.12); (7) court reporting costs ($6240.52); (8) parking ($170); (9) mediation costs ($982.50); (10) witness fee checks ($756.60). (Dkt. No. 179-3 at 8.) The filing fees, messenger fees, postage costs, mediation costs, parking, and witness fee checks appear reasonably incurred in this matter, and are awarded in their full amount. Plaintiff has failed, however, to provide any explanation of what the medical record retrieval or investigation services were or why they were performed. Without a proper basis on which to award these unexplained costs, the Court awards nothing for both requests. The photocopying fees incurred do not appear reasonable and are otherwise unexplained in the supporting declarations of counsel. The Court awards one-half of the amount requested—$2699.34—which is reasonable given that this was not a particularly document-heavy piece of litigation. Plaintiff has also failed to explain how the court reporting costs were incurred. The court reduces the amount requested for such costs in the same manner that it did the attorney's fees requested (one-fifth).

Without knowing why and for what purposes the reporting the costs were incurred, the Court reduces them to reflect the level of success Plaintiff obtained in this lawsuit as a measure of the reporting services' utility. The Court awards $1,248.11 for reporting costs. The Court thus awards a total of $6,442.12 in fees. These reflect the reasonably-incurred costs necessary for the presentation the claim on which Plaintiff prevailed.

Conclusion

Andrew Rutherford stepped into Court to enforce his Fourth Amendment right to be free from illegal seizure. After hearing his presentation, the jury agreed with Rutherford and concluded that Defendant Chin exceeded the length and scope of the investigative stop. Although Rutherford did not convince the jury he was entitled to any compensatory damages, he still emerges the prevailing party on his § 1983 claim. As the Supreme Court has instructed, Rutherford is the prevailing party precisely because he vindicated his Fourth Amendment rights. Farrar, 506 U.S. at 112. That he received only one dollar in damages does not diminish the meaning or force of his victory. As Justice Blackmun wrote, § 1983 is a "symbol and . . . working mechanism for all of us to protect the constitutional liberties we treasure." Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away? 60 N.Y. U. L. Rev. 1, 29 (1985). Rutherford used that very mechanism to protect his constitutional rights and his success is not diminished in significance because he recovered no additional damages. This litigation has served a public good by airing a constitutional violation. Rutherford is

thus entitled to a reasonable award of the attorney's fees and costs that were incurred in prosecuting the matter. The Court GRANTS the motion and awards $83,600 in fees and $6,442.12 in costs. Defendants are ORDERED to pay the sum of $90,042.12 within 10 days of entry of this order.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 4th day of August, 2011.

s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

FILED
MAR 04 2013
MOLLY C DWYER, CLERK
US COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW RUTHERFORD, Plaintiff – Appellee, v. JASON McKISSACK, Defendant, and JONATHAN CHIN; CITY OF SEATTLE, a municipal corporation of the State of Washington, Defendants - Appellants.	No. 11-35740 D.C. No. 2:09-cv-01693-MJP Western District of Washington, Seattle ORDER

Before: W. FLETCHER and FISHER, Circuit Judges, and DEARIE, Senior District Judge.*

Judges Fletcher and Fisher have voted to deny the petition for rehearing en banc; and Judge Dearie so recommends.

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* The Honorable Raymond J. Dearie, Senior United States District Judge for the Eastern District of New York, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed February 5, 2013, is DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. JASON McKISSACK, et al., Defendants.	CASE No. C09-1693 MJP COURT'S FINAL INSTRUCTIONS TO THE JURY

Dated May 20, 2011

s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

INSTRUCTION NO. 1

Ladies and gentlemen, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. It is this final set of instructions that controls your consideration.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions,

prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. You must not make any assumptions based upon any changes from the preliminary set of instructions. It is the final set that you are governed by. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

* * *

INSTRUCTION NO. 15

This instruction relates to **Count One as to Defendant Chin**: unlawful seizure (Terry Stop).

As previously explained, the plaintiff has the burden to prove that the acts of the Defendant Officers deprived the Plaintiff of particular rights under the United States Constitution. In this count, the plaintiff alleges the Defendant Chin deprived him of his rights under the Fourth Amendment to the Constitution by exceeding the reasonable length and scope of the investigatory stop. In considering this count you are to focus only on the time from when Plaintiff exited Mr. Alfonzo's vehicle up to the point Plaintiff got up from being seated on the roadway. Plaintiff alleges that during this time, Defendant unlawfully seized him.

The Court has already determined that Defendant Chin had legal authority to briefly detain Plaintiff and investigate the municipal law violations of reckless driving and driving under the influence. An investigatory stop is a seizure under the Fourth Amendment, but the Court has not determined

whether Defendant Chin exceeded the reasonable length and scope of the investigatory stop. To decide this count, it is for you to determine whether Defendant Chin exceeded the reasonable length and scope of the investigatory stop.

Under the Fourth Amendment, a person has the right to be free from an unreasonable seizure of his person. In order to prove Defendant Chin deprived Plaintiff of this Fourth Amendment rights, Plaintiff must prove the following additional elements by a preponderance of the evidence:

1. Defendant Chin seized Plaintiff's person;
2. in seizing Plaintiff's person, Defendant Chin acted intentionally; and
3. the seizure was unreasonable.

A defendant "seizes" the plaintiff's person when he restrains the plaintiff's liberty by physical force or a show of authority. A person's liberty is restrained when, under all of the circumstances, a reasonable person would not have felt free to ignore the presence of law enforcement officers and to go about his business. The parties have stipulated that Plaintiff was seized.

A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Thus, Plaintiff must prove the defendants meant to engage in the acts that caused a seizure of the plaintiff's person. Although Plaintiff does not need to prove the defendants intended to violate the plaintiff's Federal Fourth Amendment rights, it is not enough if Plaintiff only proves Defendant acted negligently, accidentally or inadvertently in conducting the seizure.

In order to prove the seizure was unreasonable, Plaintiff must prove by a preponderance of the

evidence that his seizure during the investigatory stop exceeded a reasonable length and scope. In determining whether the length and scope of the seizure was reasonable, consider how Defendant Chin restricted Plaintiff's liberty and Defendant Chin's reasons for using such methods and for the length of the stop. There is no bright-line rule to determine when an investigatory stop becomes unreasonable. Rather, you are to consider the totality of the circumstances. In analyzing the totality of the circumstances you are to consider:

1. the aggressiveness of the police methods;
2. how much of Plaintiff's liberty was restricted; and
3. whether the officer had a sufficient basis to fear for his safety to warrant the intrusiveness of the action taken.

If you find Defendant Chin exceeded the reasonable length and scope of the investigatory stop, you must find Plaintiff was unlawfully seized and return a verdict in favor of Plaintiff. If you find that that Defendant Chin did not exceed the reasonable length and scope of the investigatory stop, you must return a verdict in favor of Defendant Chin.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. JASON McKISSACK, et al., Defendants.	CASE No. C09-1693 MJP VERDICT FORM

WE, THE JURY, unanimously find as follows in the case of Andrew Rutherford v. Jason McKissack, et al.:

1. **As to Count 1**, in which Plaintiff claims Defendant Chin unlawfully seized him during the investigatory stop, we find Defendant Chin exceeded the length and scope of the investigatory stop and violated Plaintiff's constitutional rights:

✓ Yes

___ No

2. **As to Count 2**, in which Plaintiff claims Defendant Chin arrested him without probable cause, we find Defendant Chin arrested Plaintiff without probable cause:

___ Yes

__✓__ No

If you answer "No" to both Questions 1 and 2 (Count 1 and Count 2), you are directed not to respond to Question 4 (Count 4 (false imprisonment)), below. If you answered yes to either or both Questions 1 and 2, then you may answer Question 4.

3. **As to Count 3**, in which Plaintiff claims Defendants Chin, Rurey, and McKissack used excessive force, we find:

A: Defendant Chin used excessive force:

___ Yes

__✓__ No

If you answer "No" as to Defendant Chin, you are directed not to respond to Question 5 (Count 5 (assault)) as to Defendant Chin, below.

B: Defendant Rurey used excessive force:

___ Yes

__✓__ No

If you answer "No" as to Defendant Rurey, you are directed not to respond to Question 5 (Count 5 (assault)) as to Defendant Rurey, below.

C: Defendant McKissack used excessive force:

___ Yes

__✓__ No

If you answer "No" as to Defendant McKissack, you are directed not to respond to Question 5 regarding (Count 5 (assault)) as to Defendant McKissack, below.

4. **As to Count 4**, in which Plaintiff alleges Defendant Chin falsely imprisoned him, we find Defendant Chin falsely imprisoned Plaintiff:

___ Yes

__✓__ No

5. **As to Count 5**, in which Plaintiff alleges Defendants Chin, Rurey, and McKissack assaulted Plaintiff, we find:

A: Defendant Chin assaulted Plaintiff

___ Yes

__✓__ No

B: Defendant Rurey assaulted Plaintiff

___ Yes

__✓__ No

C: Defendant McKissack assaulted Plaintiff

___ Yes

__✓__ No

Compensatory Damages

If you have answered yes to any of the questions above, proceed to questions 6, 7, and/or 8. If you have answered no to all of the questions above, sign and return the verdict.

6. We find that Plaintiff has proven he was damaged as a result of any or all violations of his constitutional rights or as a result of being falsely imprisoned or assaulted.

___ Yes

__✓__ No

If you find that Plaintiff has not proven any damages, please skip Question 7 and proceed to Question 8.

7. We award the following amount in damages

$ _____

Nominal Damages

If you find that any or all of the Defendants violated Plaintiff's constitutional rights, you may award nominal damages, which may not exceed one dollar.

8. We find that Plaintiff is entitled to nominal damages as a result of the violations of his constitutional rights in the amount of:

$ 0

Signed on the 24 of May, 2011

s/ Mike Stevens
Presiding Juror Mike Stevens