No. _____

IN THE

Supreme Court of the United States

SHAUN J. MATZ,

Petitioner,

v.

RODNEY KLOTKA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In its decision below, the Seventh Circuit "narrowly" upheld a *Terry* stop in Petitioner Shaun Matz's case brought under 42 U.S.C. § 1983, where officers threatened at gunpoint to blow Matz's "[expletive] head off" unless he stopped the car he was driving, used handcuffs to restrain Matz after he got out of the car, and searched him. Recognizing that the officers did not suspect Matz of any crime at the time of these events or see any suspected criminal in his vehicle, the court termed the existence of reasonable suspicion for the stop a "close" question, yet nevertheless concluded that the officers' actions did not exceed the constitutional bounds of a *Terry* stop.

The question presented is:

Whether the use of a firearm and handcuffs during an investigative stop of an individual not suspected of any crime exceeds the bounds of a permissible *Terry* stop where their use is justified by officers' suspicions about a different individual.

PARTIES TO THE PROCEEDING

Petitioner Shaun J. Matz was the plaintiff in the trial court.

Respondents Rodney Klotka, Karl Zuberbier, Shannon Jones, Percy Moore, Mark Walton, and Michael Caballero were the defendants in the trial court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shaun Matz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. In the alternative, in view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit denying rehearing and rehearing en banc is unreported, and is reproduced at App. A. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 769 F.3d 517, and is set forth at App. B. The order of the district court granting Respondents' motion for summary judgment is unreported and is reproduced at App. C.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued and judgment was entered on October 6, 2014. App. B. Rehearing and rehearing en banc were denied by the court of appeals on November 26, 2014. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> 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.

42 U.S.C. § 1983 provides:

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

INTRODUCTION

On September 16, 2003, while driving in their police cruiser, Officers Rodney Klotka and Karl Zuberbier (the "officers") saw a known gang member and criminal suspect, Javier Salazar, standing with other unknown individuals on the porch of a home. The officers made a U-turn back towards the home and the individuals on the porch dispersed. Officer

Zuberbier admitted that when he first saw Shaun Matz he was "already in [a] car" in an alley near that house, and he did not "see [him] actually get into the car." Neither Klotka nor Zuberbier saw Salazar in the car with Matz, and neither officer had ever seen or heard of Matz, or know of his involvement in any crime. But when the officers reached the alley, they drew their weapons, pointed them at Matz, and Zuberbier threatened to blow Matz's "[expletive] head off" unless he stopped the car. The officers ordered Matz out of the vehicle at gunpoint and placed him in handcuffs, though they knew by that point Salazar was not in the car. The officers eventually ran the VIN number of the car and learned that it was stolen, and Matz was taken to the city jail.[1] He later filed this suit under § 1983 alleging that the officers violated his Fourth and Fifth Amendment rights. Ultimately the district court granted summary judgment in favor of the officers on all claims.

On review, the Seventh Circuit equivocated in its opinion, holding that (i) the officers had only "narrowly" enough reasonable suspicion to detain Matz at gunpoint and that whether Matz's stop was supported by reasonable suspicion was a "close" question; and (ii) the officers did not exceed the bounds of a lawful *Terry* stop, though the court conceded that the officers' "use of a firearm and handcuffs undoubtedly put[] Matz's encounter at the outer edge of a permissible *Terry* stop" and went so far as to warn law enforcement that "in the ordinary

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[1] Subsequent to his arrest, Matz pled guilty to unrelated charges of first-degree reckless homicide and felony murder and is currently serving his sentence at the Columbia Correctional Institution.

case a *Terry* stop should *not* be functionally indistinguishable from a full-blown arrest."

The decision below directly contradicts controlling decisions of this Court. To determine the appropriate scope of an investigative stop, courts must "balance[e] the need to search or seize against the invasion which the search or seizure entails." *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (internal quotation omitted). "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, *reasonably warrant that intrusion*." *Id.* (emphasis added). In *Ybarra v. Illinois*, this Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause" or "reasonable belief" to support a search. 444 U.S. 85, 91-93 (1979). In that case, this Court stated that "[n]othing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or, indeed any search whatever for anything but weapons" just because a person is on or near a premises where an authorized search is taking place. *Id.* at 93-94. When officers lack a "reasonable belief or suspicion directed at *the person to be frisked*," a *Terry* stop is unlawful. *Id.* at 94 (emphasis added).

This Court has explained in cases involving far less egregious circumstances than this case that the scope or intensity of the invasion can outweigh the justification for the stop. In *Dunaway v. New York*, for example, this Court determined that transporting an individual in a police cruiser and questioning him at the police station without telling him that he was "free to go" was beyond the scope of a permissible

Terry stop and "indistinguishable from a traditional arrest." 442 U.S. 200, 212 (1979). Likewise, in *Florida v. Royer*, this Court held that "officers' conduct was more intrusive than necessary to effectuate an investigative detention" where an individual suspected of criminal activity was interrogated in the police room of an airport after his luggage, airline ticket, and identification were seized. 460 U.S. 491, 504 (1983) (plurality op.).

Thus, the Seventh Circuit clearly erred in deciding that "it was reasonable for the officers to draw a weapon and even handcuff Matz" during the stop, App. 14a, where the court found that the officers only had "narrowly" enough reasonable suspicion to stop Matz in the first place, *id.* at 13a, Matz was unknown to the officers at the time of the stop, *id.* at 48a-49a, 61a-62a, and the officers did not see Salazar in the car with Matz before stopping the car at gunpoint. *Id.* at 12a. "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway*, 442 U.S. at 213.

A writ of certiorari should be granted because the Seventh Circuit's decision conflicts with past decisions of this Court and other circuits. Alternatively, summary reversal may be appropriate.

STATEMENT OF THE CASE

A. Factual Background

On the evening of September 16, 2003, around 5 to 6 p.m., Petitioner Shaun Matz, Javier Salazar, and other individuals were standing on the front porch of a house located at 1335 S. Layton Boulevard in Milwaukee, Wisconsin. App. 4a.

Respondents Karl Zuberbier and Rodney Klotka, both Milwaukee Police Officers, were uniformed and riding in an unmarked police vehicle, when they turned onto Layton Blvd. *Id.* As they drove past the house at 1335 S. Layton Boulevard, Zuberbier believed he saw Salazar sitting on the front porch. *Id.* Zuberbier was familiar with Salazar from a warrant squad briefing; he believed that Salazar was wanted for an armed robbery and was a member of the Latin Kings gang. *Id.* After Zuberbier alerted Klotka of Salazar's potential presence on the porch, Klotka made a U-turn some distance down the street from the house. *Id.* at 5a. At this point, the individuals on the front porch began to leave, and by the time the vehicle stopped by the house, everyone had left the front porch. *Id.* Klotka admitted in his deposition that the officers likely took their "eyes off the porch" while making the U-turn. App. 56a.

Zuberbier exited the vehicle and ran along the south side of the house; Klotka ran south for a short distance and then headed west. *Id.* at 5a. Klotka proceeded to run along the south side of the porch between two houses to the back of the residence. *Id.* As Zuberbier was running down the alley, he saw three people—two males and a female—just starting

to run southbound in the alley, and two more people in a car. Matz was the driver of the vehicle. *Id.*

Neither Klotka nor Zuberbier saw Salazar in the car with Matz, *id.* at 12a, and neither officer had ever seen or heard of Matz, and had no knowledge of his involvement in any crime. *Id.* at 53a, 62a. Yet Zuberbier pointed his gun at Matz and threatened to blow Matz's "[expletive] head off" unless he stopped the vehicle. App. 5a, 15a. Matz immediately stopped the car, and Klotka directed him out of the vehicle at gunpoint and placed him in handcuffs. *Id.* at 5a. Matz was searched and then placed in a patrol car. *Id.* At this point, Klotka and Zuberbier did not know that the vehicle was stolen, though this fact was later discovered before Matz was taken to the police station. *Id.* at 5a, 13a. Salazar was thereafter arrested inside the house where he had been spotted on the porch. *Id.* at 6a.[2]

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[2] The facts are stated as the Seventh Circuit found them below, because even adopting the court's version of the facts, the use of a firearm and handcuffs during Matz's stop exceeded the scope of a lawful *Terry* stop. But while unnecessary to resolve for purposes of this petition, the facts as stated by the Seventh Circuit incorrectly overstate the support for the officers' actions because the court resolved key fact issues against Matz in granting the officers' motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also* App. 76a-80a (discussing at length court's errors in construing facts in favor of officers). For example, although Officer Zuberbier testified that he "didn't see [Matz] get into the car" and the individuals in the car "were already in the car when [he] first saw them," *id.* at 49a, the court—in several instances—stated that the officers saw Matz and Salazar together on the porch, *id.* at 11a, 12a, and that the officers saw Matz and Salazar leave the porch together. *Id.* at 10a, 12a. Indeed, these disputed facts (construed in favor of the officers) were the basis for the court's "narrow[]" and "close" decision that

B. The Proceedings Below

On June 6, 2008, Matz filed this lawsuit in the United States District Court for the Eastern District of Wisconsin. The complaint raised claims under 42 U.S.C. § 1983. Specifically, Matz alleged that Klotka and Zuberbier violated his Fourth Amendment right to be free from unlawful seizures without probable cause. The district court had jurisdiction over the claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). The district court dismissed the action *sua sponte* on screening, finding that Matz's claims were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). On appeal, the Seventh Circuit summarily reversed, holding that *Heck* did not bar Matz's claims.

On May 10, 2010, the district court appointed Matz counsel. Appointed counsel filed a Second Amended Complaint against officers Klotka, Zuberbier, Shannon Jones, Percy Moore, Mark Walton, and Michael Caballero.[3] In the Second Amended Complaint, Matz alleged, *inter alia*, that Klotka and Zuberbier violated his Fourth Amendment right to be

(continued…)

officers had reasonable suspicion to stop Matz in the first place. *Id.* at 13a, 14a. *But see Ybarra*, 444 U.S. at 94 ("The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.").

[3] Shannon Jones and Percy Moore served as detectives in the homicide division of the Milwaukee Police Department ("MPD") in September 2003. App. 33a. Mark Walton and Michael Caballero were both detectives in the homicide division of the MPD in September 2003. *Id.* at 34a.

free from unlawful seizure and arrest without the requisite reasonable suspicion or probable cause. On July 8, 2011, Defendants moved for summary judgment on all of Matz's claims. The district court granted their motion in its entirety on March 18, 2012, and entered final judgment in favor of Respondents. App. C.

Matz timely filed his notice of appeal on March 21, 2012. The Seventh Circuit affirmed the district court's grant of summary judgment in favor of Respondents on October 6, 2014. App. B.

Matz timely filed his petition for rehearing or rehearing en banc on October 17, 2014. The Seventh Circuit denied that petition on November 26, 2014. App. A.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION IGNORES WELL-SETTLED PRECEDENT OF THIS COURT

The "close" decision below that the officers were "reasonable" to "draw a weapon and even handcuff Matz" during the stop directly contradicts this Court's precedent regarding the scope of a lawful *Terry* stop. App. 14a. Indeed, this Court stated in *Terry* that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." 392 U.S. at 18. Thus, "[t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 19 (internal quotations omitted); *see also United States v. Sharpe*, 470 U.S. 675, 682 (1985) (same).

To determine the justifiable scope of a *Terry* stop, a court must "balance[e] the need to search or seize against the invasion which the search or seizure entails." *Terry*, 392 U.S. at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-45 (1967)). A police officer "must be able to point to specific and articulable facts" that "justify[] the *particular intrusion*." *Terry*, 392 U.S. at 21 (emphasis added). An officer must have "reasonable belief or suspicion *directed at the person to be frisked*," even if "that person happens to be on premises where an authorized . . . search is taking place." *Ybarra*, 444 U.S. at 94 (emphasis added). Moreover, "[i]n the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person . . . . [n]or may the police seek to verify their suspicions by means that approach the conditions of arrest." *Royer*, 460 U.S. at 499.

Although there is no "litmus-paper test for distinguishing . . . when a seizure exceeds the bounds of an investigative stop," *Royer*, 460 U.S. at 506, this Court has determined that certain factors can transform a stop into a *de facto* arrest requiring probable cause. For example, transporting an individual in a police car to a police station, and placing them in an interrogation room while not informing them that they are "free to go" is "in important respects indistinguishable from a traditional arrest." *See Dunaway*, 442 U.S. at 212. Likewise, moving a suspect into an airport interrogation room to speak with police officers alone, while not telling him that he is free to go quickly "evaporate[s]" any "consensual aspects of" an

encounter with police to exceed the bounds of a lawful *Terry* stop. *See Royer*, 460 U.S. at 504-07.

Yet here the Seventh Circuit, while acknowledging that "[t]he use of a firearm and handcuffs undoubtedly puts Matz's encounter at the outer edge of a permissible *Terry* stop," App. 16a, and admitting that "handcuffs generally signif[y] an arrest,"*id.* at 19a, nevertheless held that Matz's stop was not transformed into an arrest requiring probable cause. The court even warned that "the hallmarks of formal arrest such as applying handcuffs, drawing weapons, and placing suspects in police vehicles should not be the norm during an investigatory detention," App. 16a-17a, and expressed concern with Officer Zuberbier's testimony that "[w]e detain people all the time. We handcuff them . . . let them go. It's part of daily police work." *Id.* at 19a. But the court justified its "close" decision that pointing a weapon at and handcuffing *Matz* did not exceed the scope of a lawful *Terry* stop because the officers were pursing Salazar, "an individual suspected of having committed armed robbery and possibly murder who was a member of the Latin Kings gang," and because there was a "possibility that *Salazar* was hidden inside the vehicle" and a "possibility, given the nature of *Salazar's suspected crimes*, that individuals in the car may have been armed." *Id.* at 17a-18a (emphasis added). Thus, the court's justifications for officers threatening to blow *Matz's* head off and handcuffing *Matz* after he abided by their request to stop the car, were based entirely on the officers' suspicions about *Salazar*, who the officers did not even see in the vehicle at the time of Matz's stop. *Id.* at 12a.

The Seventh Circuit's justifications fall well short of *Terry*'s requirement that officers "must be able to point to specific and articulable facts" that "justify[] the *particular intrusion*" in question, 392 U.S. at 21 (emphasis added), and *Ybarra*'s condition that an officer must have "reasonable belief or suspicion *directed at the person to be frisked*," despite the person's propinquity to another person suspected of criminal activity, 444 U.S. at 94 (emphasis added). At the time of his stop, officers did not suspect Matz or anyone with him in the car of any crime, and officers did not see Salazar in the car with Matz. Thus, threatening to blow Matz's "[expletive] head off" with weapons drawn, forcing him out of the car at gunpoint, and immediately handcuffing him made the encounter "indistinguishable from a traditional arrest," and was not justified by fears for officer safety. *Dunaway*, 442 U.S. at 212. Indeed, even the Seventh Circuit stated that using handcuffs and pointing a gun at Matz made the "stop" "functionally indistinguishable from a full-blown arrest." App. 19a. Yet the court inexplicably and erroneously held that the stop did not exceed the constitutional bounds of a *Terry* stop.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS

The Seventh Circuit's decision that an encounter where officers drew and aimed their firearms at an unknown individual and then placed him in handcuffs falls within the "outer edge of a permissible *Terry* stop" contradicts the well-reasoned conclusions of other circuit courts. "The drawing of guns has been explicitly described as one of the

'trappings of a technical formal arrest' while the failure to draw guns or otherwise use force has been relied on to distinguish *Terry* stops from arrests requiring probable cause." *United States v. Ceballos*, 654 F.2d 177, 184 (2d Cir. 1981) (quoting *Dunaway*, 442 U.S. at 215 n.17). Indeed, the Second, Third, Fifth, Sixth, Ninth, and Tenth circuits have all held that officers effectuate an arrest, which must be supported by probable cause, when they approach the occupant of a vehicle with their firearms drawn. *See Ceballos*, 654 F.2d at 182 n.7 (collecting cases); *see also, e.g.*, *United States v. Williams*, 630 F.2d 1322, 1324 (9th Cir. 1980) ("When the defendants were told, at gun point, to come out of the motor home and were frisked and placed in the back of a border patrol sedan, they were arrested within the meaning of the fourth amendment."); *United States v. Wilson*, 569 F.2d 392, 394 (5th Cir. 1978) (holding that although defendant was never told he was under arrest, that he was placed under arrest when a federal officer approached his car with a drawn gun and frisked him); *United States v. Whitlock*, 418 F. Supp. 138, 142 (E.D. Mich. 1976), *aff'd without op.* 556 F.2d 583 (6th Cir. 1977) (arrest occurred when car blocked while backing out of driveway, officers' guns drawn); *United States v. Lampkin*, 464 F.2d 1093, 1095 (3d Cir. 1972) ("[I]t seems evident that, under the circumstances before us, the arrest was effectuated at the instant the agents, with guns drawn, halted appellant and informed him of who they were."); *United States v. Troutman*, 458 F.2d 217, 220 (10th Cir. 1972) (holding that "arrest was made at the time the officers stopped the Thunderbird and approached the stopped vehicle with drawn guns").

In *Ceballos*, the Second Circuit held that officers arrested the defendant "at the moment the progress of his car was blocked and he was faced by the officers with their guns drawn and ordered out of his car." 654 F.2d at 184. In reaching this conclusion, the court noted that the defendant was "completely unknown to the officers" and "was not known to be armed or reasonably suspected of being armed." *Id.* The officers had observed the defendant entering a building inhabited by a known drug-dealer and exiting shortly thereafter with a small paper bag. *Id.* The officers contended that the defendant looked up and down the block in a curious manner, and was Hispanic, which matched the profile of the drug-dealer's customers, and that "narcotics traffickers are often armed and violent." *Id.* The court reasoned that generalizations such as these, without more, are insufficient to justify such an extensive intrusion by the officers. *Id.* The danger with such generalizations, the court noted, is that if they were enough to allow officers to stop individuals at gunpoint, "any narcotics suspect, even if unknown to the agents and giving no indication that force is necessary, could be faced with a 'maximal intrusion' based on mere reasonable suspicion." *Id.*

This reasoning applies with equal force to the use of handcuffs incident to a *Terry* stop. "[T]he use of handcuffs during a *Terry* stop . . . requires some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose." *Bennett v. City of Eastpointe*, 410 F.3d 810, 836 (6th Cir. 2005); *see also United States v. Bailey*, 743 F.3d 322, 340 (2d Cir. 2014) (holding handcuffing constituted arrest because "police faced no [] physical threat" after two suspects

exited the vehicle and were subjected to a patdown for weapons); *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996) (reasoning that "handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop"); *United States v. Shareef*, 100 F.3d 1491, 1507 (10th Cir. 1996) (holding that "once the officers learned that" the defendant was not armed and not the suspect they were looking for, "the continued use of handcuffs constituted an unlawful arrest").

In *El-Ghazzawy v. Berthiaume*, the Eighth Circuit held that handcuffing an individual constituted an arrest despite the officer's contention that the measure was necessary to protect personal safety. 636 F.3d 452, 457 (8th Cir. 2011). The court reasoned that nothing indicated the defendant was armed or dangerous, nor did the defendant exhibit any erratic behavior, and the officer did not conduct a basic investigation into the facts before handcuffing the defendant and left the handcuffs on while conducting the investigation. *Id.* at 458. The Eighth Circuit cautioned that officers cannot invoke officer safety to justify intrusive tactics during a *Terry* stop, or else "officers would be allowed to handcuff, frisk, and detain virtually every suspect they encounter, without regard to the nature of the crime, the behavior exhibited by the suspect, or the circumstances surrounding the alleged crime, under the pretext of officer safety." *Id.* at 458-59.

Thus, the Seventh Circuit's decision that the use of firearms and handcuffs to conduct an investigative stop of an individual who was not suspected of any crime falls within the "outer edge of a permissible

Terry stop" is at odds with the well-reasoned conclusions of other circuit courts. Indeed, this case is strikingly similar to *Ceballos* because here the officers aimed their weapons at Matz despite not having any reason to believe he or his passenger were armed or dangerous other than a mere suspicion that the car's occupants may have been associated with a gang member. Officer Zuberbier admitted that when he first saw Matz, he was "already in [a] car" in an alley near the house, and he did not "see [him] actually get into the car." App. 49a. The officers simply had no basis for believing Matz was armed or dangerous, especially when it is undisputed that neither officer saw Salazar in the car with Matz. By aiming their weapons at Matz and threatening to fire, the officers exceeded the "narrow scope" of a *Terry* stop. *See Dunaway*, 442 U.S. at 210.

Moreover, despite Matz's compliance with the officers' threats and orders, the officers nonetheless handcuffed and placed Matz in a squad car while the officers conducted their investigation. Much like in *El-Ghazzawy*, however, the officers still lacked any specific articulable fact indicating Matz was armed or dangerous. Neither Matz nor the passenger exhibited any erratic behavior or other indications that implied they would obstruct the officers' investigation—in fact, Matz stopped and exited the car when ordered to do so. The Seventh Circuit reasoned that the officers were confronting a situation where drawing weapons was necessary to protect themselves because of "the possibility that Salazar was hidden inside the vehicle, their clear disadvantage attempting on foot to stop a moving vehicle, and the possibility, given the nature of Salazar's suspected crimes, that individuals in the

car may have been armed." App. 17a-18a. Once Matz and the passenger complied with the officers' commands and exited the vehicle, however, the search for weapons and the running of the car's VIN number could have been accomplished without additional intrusive measures. Thus, if Matz was somehow not arrested when the officers pointed a gun at him and threatened to blow his head off, he was undoubtedly under arrest when he was handcuffed and later placed into the squad car. Yet, even the Seventh Circuit implicitly recognized that the officers lacked probable cause to conduct such a full-blown arrest. App. 13a. ("Officers Klotka and Zuberbier had (narrowly) enough reasonable suspicion to briefly detain Matz . . . .").

Mere invocation of concern for officer safety cannot justify the use of firearms and handcuffs to conduct an investigative stop. Other courts that have addressed this issue have required that officers point to specific, articulable facts underpinning their concerns for safety. *See, e.g.*, *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1995) (finding police exceeded scope of investigatory stop when they pointed their guns and handcuffed suspects "without any reason to feel threatened" by suspects or "fear [they] would escape"); *United States v. Ramos-Zaragosa*, 516 F.2d 141, 144 (9th Cir. 1975) (holding that an encounter between "agents and the appellant and his passenger was an arrest, as opposed to an investigatory stop, because the agents at gun point, under circumstances not suggesting fears for their personal safety, ordered the appellant and his passenger to stop and put up their hands"); *see also Graham v. Sequatchie Cnty. Gov't*, No. 1:10-cv-20, 2011 U.S. Dist. LEXIS 36286 (E.D. Tenn. Apr. 4,

2011) (finding that the question of whether it is reasonable for officers to use firearms during investigative stop is for the jury to decide).

The officers here did not point to a single observable fact other than Matz's mere propinquity to the porch where the officers observed a suspect to justify their use of firearms and handcuffs during his stop. The Seventh Circuit failed to explain why Matz posed any threat to the officers' safety, relying instead on the risk Salazar may have posed to justify the intrusive detention of Matz. App. 17a-18a. Indeed, the court admitted there may have been "less intrusive ways—from a Fourth Amendment perspective—the officers could have detained Matz and the others." *Id.* at 18a. Yet despite the lack of specific evidence justifying the intrusive measures used on Matz, and the Seventh Circuit's concern with Officer Zuberbier's testimony that detentions of this sort are part of "'normal' police work," the court affirmed the grant of the officers' motion for summary judgment.

* * * *

The court noted in its decision below that "for better or for worse," there is a growing trend of expanding *Terry* stops to include "the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons, and other measures of force more traditionally associated with arrest." App. 17a (quoting *United States v. Tilmon*, 19 F.3d 1221, 1224-25 (7th Cir. 1994). Indeed, in this case, one of the officers who conducted the stop in question admitted that detentions involving handcuffs are part of "normal" police work, and that he "detain[s] people

all the time. We handcuff them, we find out it's all legitimate, talk to them, let them go." App. 19a. Yet if the "narrowly drawn authority" of police to conduct an investigative search articulated in *Terry* maintains any limits whatsoever, they were certainly exceeded here. Matz was ordered out of a car at gunpoint, handcuffed, and searched while not suspected of a crime, based only on police officers' hunches about a gang member spotted nearby. "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway*, 442 U.S. at 213.

This Court should grant certiorari to clarify that a stop at gunpoint and handcuffing of an individual based solely on an observation of an entirely different individual suspected of a crime who is not present at the time of the stop is not proper under *Terry*, *Dunaway*, *Ybarra*, and *Royer*. In the alternative, a summary reversal may be appropriate.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. In the alternative, in view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

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February 24, 2015

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 26, 2014

Before

RICHARD A. POSNER, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

No. 12-1674

SHAUN J. MATZ, *Plaintiff–Appellant,* *v.* RODNEY KLOTKA, et al., *Defendants–Appellees.*	Appeal from the United States District Court for the Eastern District of Wisconsin No. 2:08-v-00494 Rudolph T. Randa, *Judge*.

O R D E R

No judge of the court having called for a vote on the Petition For Rehearing and Rehearing En Banc filed by Plaintiff-Appellant on October 17, 2014, and

all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition For Rehearing and Rehearing En Banc is **DENIED**.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 12-1674

SHAUN J. MATZ,

Plaintiff-Appellant,

v.

RODNEY KLOTKA, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 2:08 CV 00494 – **Rudolph T. Randa**, *Judge*.

ARGUED SEPTEMBER 9, 2013 – DECIDED OCTOBER 6, 2014

Before POSNER, ROVNER, and HAMILTON, *Circuit Judges*.

ROVNER, *Circuit Judge*. Shaun J. Matz brought this action under 42 U.S.C. § 1983 against a number of current and former Milwaukee Police Department officers. He claims that in September 2003 the officers violated his Fourth and Fifth Amendment rights by arresting him without reasonable suspicion

or probable cause, failing to make a prompt probable cause determination once he was under arrest, and continuing to question him after he invoked his right to remain silent. The district court granted summary judgment to the defendants, and Matz appeals. We affirm the grant of summary judgment in favor of the defendants on Matz's § 1983 claims.

I.

Because we are reviewing the district court's grant of summary judgment against Matz, we recount the facts in the light most favorable to him, noting discrepancies in the parties' version of events where relevant. *See Zepperi-Lomanto v. Am. Postal Workers Union*, 751 F.3d 482, 483 (7th Cir. 2014). On the evening of September 16, 2003, Matz and several other individuals were on the porch of an apartment located at 1335 South Layton Boulevard in Milwaukee, Wisconsin. That same evening two Milwaukee police officers then assigned to the warrant squad, defendants Rodney Klotka and Karl Zuberbier, were driving through the area on an unrelated matter. Klotka and Zuberbier were both in uniform and were driving an unmarked squad car. As they drove down Layton Boulevard, Zuberbier, who was the passenger, saw an individual named Javier Salazar standing with the others on the porch. Zuberbier recognized Salazar from a warrant squad briefing as a member of the Latin Kings gang who he believed was wanted for armed robbery. Specifically, Zuberbier thought there was a "temporary felony want" for Salazar, who Zuberbier believed was also a suspect in two homicides and several shootings. Zuberbier pointed out Salazar to Klotka, who looked over at the individuals on the porch.

By the time Klotka was able to make a U-turn and approach the apartment, everyone on the porch was leaving. Matz admits having seen the police, but claims that he had already left the porch when their car turned around. He acknowledges having heard someone say "detects" as he was leaving the porch. When Klotka pulled up to the curb, Zuberbier jumped out and ran along the south side of the house where several of the individuals had headed. Klotka followed shortly behind him. As Zuberbier ran into the alley he saw three people starting to run southbound down the alley and two more people in a car starting to drive away. As he ran towards the car, he drew his gun and pointed it at the vehicle while shouting, "Police! Stop!" Matz says that Zuberbier also threatened to blow his "fucking head off" if he did not stop. Klotka, who by that point also had his gun drawn, arrived right behind Zuberbier and ordered Matz and the vehicle occupants to get out and keep their hands visible.[1] Although the parties differ as to the precise order of the events that happened next, it is clear that the following occurred within a short period of time after the stop: (1) Matz was handcuffed and put into a patrol car; (2) it came to light that the car he was driving was stolen; and (3) other officers (at least six squads total) arrived at the scene in response to a call for backup. Klotka then

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[1] Although it is immaterial to Matz's claim, there is a dispute about the order in which the officers arrived on the scene and who directed Matz out of the vehicle. Klotka recalls arriving first, pointing his gun, and ordering the car to stop, but Matz recalls that it was Zuberbier who first arrived and gave the command to stop. Klotka also recalls that another officer removed Matz from the vehicle while he left the scene to search for the others.

briefly left the scene to ascertain if anyone else from the porch was still in the vicinity. And although there is conflicting testimony as to which officer arrested Salazar, it is undisputed that he was arrested shortly thereafter inside the residence.

According to Matz, while he was in the patrol van Michael Caballero, a detective in the homicide division, grabbed his left arm and stated, "he's one of them" when he saw Matz's tattoos. Matz also alleges that Caballero questioned him about two homicides and continued to do so after Matz said he did not want to talk about it and wanted an attorney. Matz was then taken to the city jail, where he was booked and given a cell. The next morning two more homicide detectives, Shannon Jones and Percy Moore, interviewed Matz about the homicides and an armed robbery. Matz claims that although he told Jones and Moore from the outset that he did not wish to speak to them about the homicides and wanted to go back to his cell, they continued questioning him for over three hours. Later that same evening, Caballero and another defendant, Detective Mark Walton, again interrogated Matz in the face of his insistence that he did not want to talk. Matz says Walton acknowledged Matz's rights but insisted that he give them a statement anyway. After several hours of questioning, Matz, who was sitting in a "defeated" position, provided a statement admitting his involvement in the homicides. Throughout this period Matz was never provided with various medications he had been taking for psychosis and depression (Olanzapine, Prozac, Klonopin, and Neurontin). He alleges that being without his medication impaired his thought process, affected his impulsivity, and caused him to make poor decisions.

He was also at this time still recovering from pneumonia, for which he had been hospitalized until two days before his arrest on September 16. He later recanted his inculpatory statement and named Salazar as the shooter, although he admitted being present. He said he confessed because he believed it was the only way he could return to his cell. Despite recanting his statement, Matz pleaded guilty to one count of first-degree reckless homicide and one count of felony murder with robbery as the underlying crime. The Milwaukee County Circuit Court sentenced him to a total of sixty years imprisonment and forty-five years extended supervision between the two counts.

Matz was not presented for an initial in person appearance before a court commissioner until seven days after his arrest. To support their claim that Matz received an adequate probable cause determination, the defendants submitted an "arrest-detention report" signed by a Milwaukee County Court Commissioner at 10:58 a.m. on September 18, 2003—less than two days after his initial arrest. The report reflects Commissioner Liska's determination that probable cause existed to believe that Matz committed a crime and her decision setting cash bail at $100,000.00.

Matz initiated this suit under § 1983 in 2010, alleging that Klotka, Zuberbier, Jones, Moore, Walton, and Caballero violated his Fourth and Fifth Amendment rights. The district court appointed counsel, who filed a second amended complaint and added an additional Fifth Amendment claim against certain defendants. Ultimately the district court granted summary judgment in favor of the

defendants on all of Matz's claims. The court concluded that Matz had failed to establish that his Fourth Amendment rights were violated because Klotka and Zuberbier had reasonable suspicion to detain Matz when he attempted to leave the scene and that no reasonable factfinder would conclude that the officers lacked probable cause for his subsequent arrest. Relying on the arrest-detention report submitted by the defendants, the district court also concluded that it was undisputed that Matz had received a timely probable cause determination. Finally, the district court rejected Matz's Fifth Amendment claim based on his allegedly coerced confession, concluding that because both his conviction and sentence depended in part on the confession, Matz's challenge was barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

II.

We review the district court's grant of summary judgment de novo. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *e.g.*, *Hawkins v. Mitchell*, 756 F.3d 983, 990-91 (7th Cir. 2014). We construe the evidence in the light most favorable to Matz as the non-moving party, and draw all reasonable inferences from the evidence in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Miller v. Gonzalez*, ---- F.3d ----- 2014, 2014 WL 3824318, at *4.

A. Reasonable Suspicion for a *Terry* Stop

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. Ordinarily seizures are

"reasonable" only when supported by probable cause to believe an individual has committed a crime. *See*, *e.g.*, *Dunaway v. New York*, 442 U.S. 200, 213 (1979); *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013). The longstanding exception to this rule arises under *Terry v. Ohio*, 392 U.S. 1 (1968), which authorizes brief investigatory detentions based on the less demanding standard of reasonable suspicion that criminal activity is afoot, *id.* at 21-22; *United States v. Baskin*, 401 F.3d 788, 791 (7th Cir. 2005). Such a brief detention is permitted when it demands only a limited intrusion into an individual's privacy and rests on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. Determining whether such an investigatory detention is constitutional requires balancing the governmental interest in the seizure against the degree to which it intrudes on an individual's personal liberty. *See id.* at 20-21. And although reasonable suspicion is a less demanding standard than probable cause, such a stop requires at least a minimal level of objective justification and the officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. *Id.* at 27; *see also Ill. v. Wardlow*, 528 U.S. 119, 123-24 (2000). Ultimately, determining whether reasonable suspicion exists is not an exact science, and "must be based on commonsense judgments and inferences about human behavior." *Wardlow*, 528 U.S. at 125.

Although Matz insists that Officers Klotka and Zuberbier have demonstrated nothing beyond an unparticularized hunch to support their decision to stop his car, the record establishes otherwise. The

officers both saw and recognized Salazar from their warrant squad briefings, where he was identified as a member of the Latin Kings gang wanted in connection with an armed robbery. Zuberbier had also been told that Salazar was a suspect in several homicides. And by the time the officers were able to make a U-turn and approach the building in an attempt to speak with Salazar, every individual on the porch was leaving the scene.[2] During the chase that ensued, officers had no way of knowing where exactly Salazar had gone and could reasonably have believed he was hidden in the car with Matz and other individuals from the porch.

In the face of this evidence, Matz insists that neither his proximity to Salazar on the porch nor his flight from officers, standing alone, would establish reasonable suspicion to support a *Terry* stop. Matz's assertion is correct as far as it goes. We have recognized that simply being in the presence of others who are themselves suspected of criminal activity is insufficient standing alone to establish particularized suspicion for a *Terry* stop and frisk. *See Ybarra v. Ill.*, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, *without more*, give rise to probable cause to search that person.") (emphasis added). Likewise, we have acknowledged that

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[2] Matz submitted a declaration in the district court in which he maintained that he "did not run from the porch area." But he has not disputed the accounts of both Klotka and Zuberbier that by the time they exited their vehicles all occupants of the porch had left and were moving quickly enough that it was necessary for the officers to give chase in order to speak with anyone from the porch.

suspicion of illegal activity at a particular location does not transfer such a suspicion to an individual leaving the property. *See United States v. Bohman*, 683 F.3d 861, 864 (7th Cir. 2012). Neither does the act of choosing to avoid a police encounter—either by refusing to cooperate or leaving the scene—by itself create sufficient objective justification for a seizure or detention. *See*, *e.g.*, *Fl. v. Bostick*, 501 U.S. 429, 437 (1991).

But it is axiomatic that in determining whether officers had the requisite particularized suspicion for a *Terry* stop, we do not consider in isolation each variable of the equation that may add up to reasonable suspicion. *See*, *e.g.*, *United States v. Johnson*, 170 F.3d 708, 714 (1999) ("Applying the *Terry* standard, we have consistently held that reasonable suspicion is to be determined in light of the totality of the circumstances."). Instead, we consider the sum of all of the information known to officers at the time of the stop. *Terry*, 392 U.S. at 22-23; *United States v. Lenoir*, 318 F.3d 725, 729 (7th Cir. 2003). And this includes behavior that may in other circumstances be considered innocent; in other words, context matters. *Baskin*, 401 F.3d at 793 ("[B]ehavior which is susceptible to an innocent explanation when isolated from its context may still give rise to a reasonable suspicion when considered in light of all the factors at play."); *United States v. Fiasche*, 520 F.3d 694, 697-98 (7th Cir. 2008).

First, it is undisputed that the officers had particularized suspicion as to Salazar connecting him to armed robbery and multiple homicides. Given that Salazar and Matz were together on the porch, they also had a basis from which to conclude that Salazar

may have fled in the same car as Matz and the other individual visible to them in the car. Although Salazar was not visible to the officers from their vantage point outside the car, he could have been hidden in the car to avoid detection and capture. In fact, it is unlikely that a person police believed to be wanted for armed robbery and possibly multiple homicides, who had run from law enforcement, would remain in plain view as officers approached the car rather than hide in some way. Given that both Salazar and Matz were together on the porch and both exited the area simultaneously, the officers had an objectively reasonable basis to believe that Salazar could be in the vehicle with Matz, and therefore had an objectively reasonable basis to stop the vehicle and briefly detain the occupants while they ascertained whether Salazar was with him or whether they were complicit in helping him evade law enforcement. And it does not matter whether that was their actual motivation for stopping the vehicle, because the test under the Fourth Amendment is whether the seizure was objectively reasonable. *E.g.*, *Whren v. United States*, 517 U.S. 806, 813-14 (1996).

In sum, the officers possessed particularized and specific suspicion as to Salazar, a known gang member suspected of committing violent crimes. Their attempt to approach Salazar was met with the precipitous departure of the entire group, including Matz. In their justifiable attempt to apprehend Salazar, Klotka and Zuberbier gave chase to everyone scattering from the porch. They were outnumbered as they approached a moving vehicle that they reasonably could have believed contained Salazar, who was suspected of committing violent crimes and

who could very well have been armed. Given these circumstances, it was reasonable for them to conduct further investigation, including stopping the vehicle leaving the scene and detaining the occupants so they could assess the situation. *See United States v. Howard*, 729 F.3d 655, 659 (7th Cir. 2013) (collecting cases and noting that the Supreme Court "has recognized limited situations at the scene of police activity in which it may be reasonable for police to detain people not suspected of criminal activity themselves, so long as the additional intrusion on individual liberty is marginal and is outweighed by the governmental interest in conducting legitimate police activities safely and free from interference"); *cf. Wardlow*, 528 U.S. at 125 (recognizing that when officers confront behavior susceptible of two potential explanations, one innocent and one potentially criminal, they are entitled to "detain the individuals to resolve the ambiguity").

B. Probable Cause for Arrest

So Officers Klotka and Zuberbier had (narrowly) enough reasonable suspicion to briefly detain Matz as they attempted to get the situation under control and ascertain where Salazar had gone. But Matz argues that what they actually did was more akin to a full-blown arrest than the limited detention permitted under *Terry*. And although eventually the officers learned that Matz was driving a stolen vehicle, he maintains that functionally, he was under arrest before the officers had probable cause. In assessing the reasonableness of an investigatory stop, we first consider whether the detention was justified from the outset and then ask "whether it was reasonably related in scope to the circumstances which justified

the interference in the first place." *Terry*, 392 U.S. at 20; *see also Rabin v. Flynn*, 725 F.3d 628, 632 (7th Cir. 2013); *Jewett v. Anders*, 521 F.3d 818, 824 (7th Cir. 2008). A *Terry* stop may be transformed into a formal arrest requiring probable cause if an officer's use of force is sufficiently disproportionate to the purpose of the stop—which may include ensuring the safety of the officers or others—in light of the surrounding circumstances. *Rabin*, 725 F.3d at 632-33; *Jewett*, 521 F.3d 824-25. It may also become a de facto arrest if the detention continues longer than necessary to accomplish the purpose of the stop or becomes "unreasonably intrusive." *See United States v. Bullock*, 632 F.3d 1004, 1015 (7th Cir. 2011). The investigation following a *Terry* stop "'must be reasonably related in scope and duration to the circumstances that justified the stop in the first instance so that it is a minimal intrusion on the individual's Fourth Amendment interests.'" *Id.* (quoting *United States v. Robinson*, 30 F.3d 774, 784 (7th Cir. 1994)).

Although the issue is again close, we conclude that given the circumstances it was reasonable for the officers to draw a weapon and even handcuff Matz while they controlled the situation and accounted for the individuals from the front porch. At the outset, we note that only a short period of time elapsed between when the officers first detained Matz and when they learned that he was driving a stolen vehicle. According to Matz, Zuberbier ran the VIN for the vehicle and discovered it was stolen sometime *before* the backup officers arrived at the scene. And although neither side has presented a specific time line, even a generous reading of the facts supports the conclusion that not much time could have elapsed

between the time Matz was ordered out of the car and the moment Zuberbier (or another officer) [3] learned the car was stolen, thus providing probable cause for an arrest. This sequence of events makes it clear that police were diligently investigating to confirm or dispel their suspicions about the occupants of the vehicle. *See Rabin*, 725 F.3d at 634 (upholding detention of individual for approximately an hour and a half while officers verified legitimacy of his firearm license and noting that evidence suggested officers had diligently pursued likely avenue to resolve their suspicions); *United States v. Adamson*, 441 F.3d 513, 520 (7th Cir. 2006) ("There is no bright-line rule as to how long an investigative detention may last; instead we look to whether the police diligently pursued a means of investigating that was likely to confirm or dispel quickly their suspicions."). So the *duration* of the stop is unproblematic given that officers diligently pursued information that, as it turned out, revealed in short order evidence that gave them probable cause for a full-blown arrest.

We are thus left with the question whether Matz has created a triable issue of fact as to whether the manner in which the officers effectuated the detention—pointing guns at Matz while ordering him to stop or risk having his "fucking head" blown off, frisking, handcuffing, and placing him in a patrol

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[3] Under the officers' version of events, Matz was placed in a police vehicle while they tracked down the other individuals from the porch and one of the backup officers who had arrived on the scene discovered that the car 3 was stolen. The precise chronology is immaterial given our conclusion that under either version, officers were diligently pursuing information to resolve their suspicions.

car—was reasonably related in scope to the circumstances which initially justified the interference. *Terry*, 392 U.S. at 20. The use of a firearm and handcuffs undoubtedly puts Matz's encounter at the outer edge of a permissible *Terry* stop.

As we have previously recognized, "'[s]ubtle, and perhaps tenuous distinctions exist between a *Terry* stop, a *Terry* stop rapidly evolving into an arrest and a *de facto* arrest.'" *Bullock*, 632 F.3d at 1016 (internal quotations and citation omitted). These tenuous distinctions are at the heart of Matz's claim: he asserts that Zuberbier and Klotka made a *de facto* arrest without probable cause, and the officers argue, in essence, that a legitimate *Terry* stop evolved rapidly into an arrest supported by probable cause. The officers argue alternatively that qualified immunity protects them from liability because under the circumstances it would not have been clear to a reasonable officer that using force and handcuffs to detain Matz violated clearly established law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (setting forth well-known qualified immunity test that government officials are protected from civil damages as long as conduct does not violate clearly established constitutional rights of which a reasonable person would have known); *Jones v. Clark*, 630 F.3d 677, 680 (7th Cir. 2011) (entitlement to qualified immunity turns on whether facts describe the violation of a clearly established constitutional right).

Although the hallmarks of formal arrest such as applying handcuffs, drawing weapons, and placing suspects in police vehicles should not be the norm

during an investigatory detention, all of those measures have been recognized as appropriate in certain circumstances. *See Bullock*, 632 F.3d at 1016 (collecting cases); *Tilmon*, 19 F.3d at 1224-25 (noting "for better or for worse" the trend of expanding *Terry* stops to include "the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons, and other measures of force more traditionally associated with arrest than with investigatory detention"); *United States v. Weaver*, 8 F.3d 1240, 1244 (7th Cir. 1993) (measured use of appropriate force does not convert seizure into arrest). In evaluating whether the force used converted an encounter into a full arrest, we must consider whether the surrounding circumstances would support an officer's legitimate fear for personal safety. *See Jewett*, 521 F.3d at 824. We must also take into account the suspect's own behavior in resisting an officer's efforts. *Id* at 825. (citing *United States v. Lawshea*, 461 F.3d 857, 860 (7th Cir. 2006)).

First, the officers were undoubtedly confronting a situation where they may have legitimately believed drawing weapons was necessary to protect themselves. They were pursuing an individual suspected of having committed armed robbery and possibly murder who was a member of the Latin Kings gang. Not only were they outnumbered, they were approaching a moving vehicle containing individuals who had been with Salazar just moments beforehand. Given the possibility that Salazar was hidden inside the vehicle, their clear disadvantage attempting on foot to stop a moving vehicle, and the possibility, given the nature of Salazar's suspected crimes, that individuals in the car may have been

armed, it was not unreasonable to draw weapons to safely effect the stop.

These same reasons support the officers' decision to detain Matz with handcuffs, frisk him, and search the car to verify that Salazar was not inside. Matz and everyone else in the vicinity had already made it patently clear that they did not intend to remain where they were and speak to the police, and so Klotka and Zuberbier could reasonably have believed handcuffing the occupants of the car was the most safe and efficient way to ascertain Salazar's whereabouts and any pertinent information about his suspected crimes. It was also a reasonable approach to deal with the rapidly evolving situation and prevent things from turning violent. Cf. *Brendlin v. Cal.*, 551 U.S. 249, 258 (2007) ("It is also reasonable for passengers to expect that an officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."). Klotka and Zuberbier called for backup almost immediately. With the benefit of hindsight we may be able to think of less intrusive ways–from a Fourth Amendment perspective—the officers could have detained Matz and the others. But the "fact that 'the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable.'" *Tilmon*, 19 F.3d at 1225 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973)); *see also United States v. Ocampo*, 890 F.2d 1363, 1369-70 (7th Cir. 1989) (stop not rendered unreasonable by fact that officer could have effectuated it without drawing his gun). Furthermore, we must "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).

Although we conclude that the officers' safety and the dynamic situation they confronted justified using force and restricting Matz's movement, we again caution law enforcement officers that in the ordinary case a *Terry* stop should *not* be functionally indistinguishable from a full-blown arrest. Of particular cause for concern in this regard is Zuberbier's deposition testimony that he considers such detentions with handcuffs as part of "normal" police work: "[W]e detain people all the time. We handcuff them, we find out it's all legitimate, talk to them, let them go. It's part of daily police work." On the contrary, we remind law enforcement that using handcuffs generally signifies an arrest, which requires probable cause and not the less demanding reasonable suspicion standard that permits only a brief and minimally intrusive detention. Indeed, the fact that we have recognized exceptions for concerns such as officer safety should not be read to imply that the use of handcuffs and more intrusive measures will not be a significant factor in assessing whether officers have exceeded the bounds of a limited *Terry* detention. *See Ramos v. City of Chicago*, 716 F.3d 1013, 1018 (7th Cir. 2013) ("The proliferation of cases in this court in which '*Terry*' stops involve handcuffs and ever-increasing wait times in police vehicles is disturbing, and we would caution law enforcement officers that the acceptability of handcuffs in some cases does not signal that the restraint is not a significant consideration in determining the nature of the stop."); *see also Rabin*, 725 F.3d at 639-41 (concurring opinion) (detailing exceptions supporting use of handcuffs and other formal hallmarks of arrest

and reiterating that such invasive measures should be exception not rule).

C. Probable Cause Determination

Matz next claims that after his arrest, he never received the constitutionally required prompt determination of probable cause. It is well-established that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite for detention." *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975). Probable cause determinations made within 48 hours of arrest are presumptively prompt. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Beyond the requirement of a "prompt" determination, states retain wide latitude to craft procedures for probable cause determinations that "accord with a State's pretrial procedure viewed as a whole," and the Supreme Court has expressly recognized "the desirability of flexibility and experimentation by the States." *Gerstein*, 420 U.S. at 123. Matz argues principally that "Milwaukee County's practice of allowing court commissioners to make probable cause determinations based on arrest and detention reports" is inconsistent with *Riverside's* requirement of a prompt determination of probable cause.

Matz's claim cannot succeed insofar as it is leveled against Milwaukee County or the "court commissioner" (who the parties fail to describe beyond referring to her as "Commissioner Liska").[4] A

[4] Neither party provides any more detail about the "court commissioner" and nowhere does Matz argue expressly that the court commissioner fails to satisfy the requirement of a "judicial determination" of probable cause, so we do not explore the issue further.

damages suit under § 1983 requires that a defendant be personally involved in the alleged constitutional deprivation. *See Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010) ("[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation'") (quoting *Palmer v. Marion Cty*, 327 F.3d 588, 594 (7th Cir. 2003)). As the quoted language above makes clear, Matz's claim hinges on Milwaukee County's "practice," allegedly followed in his case, of allowing unsworn statements in an arrest report presented to a county commissioner to supply the necessary probable cause for arrest. And as troubling as this practice may be, Matz has presented no evidence that any defendants named here had anything to do with it.

Indeed, the entire thrust of his argument on this point has shifted on appeal. In the district court, Matz argued that genuine issues of material fact existed as to whether he received a timely probable cause determination. Specifically, Matz claimed that Captain Moffet's affidavit accompanying the "probable cause determination" report signed by Commissioner Liska failed to establish that Moffet was qualified to verify that the report was kept during the regular course of business, and so the report was inadmissable hearsay as to the question of whether Matz receive a probable cause determination. The district court rejected this argument, and Matz does not renew it on appeal. Instead, as discussed above, he attacks the practice of allowing unsworn statements and the unsworn statements themselves. But as the defendants point out, the report was not authored, signed, nor otherwise created by any of the named defendants.

The report states that it was written by an officer Richard Wearing, who was assigned to the warrant squad. He describes the encounter Zuberbier and Klotka had with Matz that culminated in the revelation that he was driving a stolen vehicle. There is then another paragraph written by Detective Gary Temp, who recounts that Omar Rodriquez was shot and killed five days prior to Matz's arrest, Victoriano Mariano was shot and killed four days before Matz's arrest, and that two other individuals were shot and sustained injuries four days before Matz's arrest. The report then states that after being advised of and waiving his *Miranda* rights, Matz admitted to shooting all four individuals. The report bears the seal of a notary (David B. Zibolski), who signed to verify that it was subscribed and sworn before him on September 18, 2003. Finally, a box bearing the heading "Probable Cause Determination," contains a signature the parties agree to be that of Commissioner Liska. It is clear that at least the second portion of the report, written by Detective Temp, was sworn before a notary. But Matz claims that we cannot consider this section because it is based on his confession allegedly procured in violation of the Fifth Amendment, and the portion written by Wearing is also off limits because it is unsworn.

Citing our decision in *Haywood v. City of Chicago*, 378 F.3d 714 (7th Cir. 2004), Matz now advances the argument that any probable cause determination is constitutionally inadequate because the report contains unsworn statements—specifically, the portion written by Richard Wearing that recounts

Matz's arrest.[5] *Haywood* does little for Matz, however, because in that § 1983 suit the plaintiff sued the City of Chicago and two arresting officers, one of whom forged the other's name on the complaint presented to secure probable cause to hold the plaintiff. The problem in *Haywood* was that although the complaint purported to satisfy the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation," the only basis the defense advanced for finding probable cause "was a falsely sworn complaint whose falsity was, so far as appears, unknown to the judge at the probable-cause hearing." *Id.* at 718. Here there is no allegation that Officer Wearing or Detective Temp falsely signed the report or that the report contained false information. Matz believes that because the notarized seal is closest to the portion of the report authored by Temp, Officer Wearing's contribution is necessarily unsworn and therefore inadequate under the Fourth Amendment to establish probable cause. *Haywood* is obviously and immediately distinguishable based on the fact that both the City and the individuals who authored and (falsely) claimed to have authored the report were sued. Matz has not sued Gary Temp, Richard Wearing, or Milwaukee County, who he claims has a "practice" of allowing unsworn statements to suffice

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[5] Both parties agree that Officer Wearing provides a confusing description of the events leading to Matz's arrest. This is because Wearing refers interchangeably to Salazar and Matz as the "subject," and fails to identify Matz by name, thus leaving it unclear whether Zuberbier and Klotka arrested Salazar or Matz after stopping the vehicle. But it is ultimately of no consequence because Matz is not suing Officer Wearing for writing an inadequate report about the encounter.

for probable cause determinations. Indeed, as it is not a defendant, we have no way of knowing what Milwaukee County's "practice" is and whether it was followed here. In any event, what is clear is that Matz has presented no evidence that Matz, Klotka, Jones, Caballero, Walton, or Moore had any hand in crafting the report or presenting it to the court commissioner for a probable cause determination.

Matz deems it "irrelevant" whether the defendants were personally involved in authoring the arrest report. But in a § 1983 claim for damages, the sole issue cannot be, as he would have it "whether the district court correctly found that the arrest report established, as a matter of law" that Matz received an adequate and timely probable cause determination. That question itself is irrelevant if none of *these defendants* were personally involved in the alleged deprivation. It is thus hardly irrelevant whether these defendants participated in submitting the arrest report to the commissioner in lieu of providing him with an in-person probable cause determination (a process that did not occur until September 23, 2003, seven days after Matz's arrest and well outside *Riverside's* 48-hour window). He belatedly argues in his reply brief that Klotka and Zuberbier provided some information in the report and Walton, Caballero, Jones, and Moore were involved in obtaining the allegedly coerced statement recounted by Detective Temp—and that the named defendants were therefore "involved" in the deprivation. But according to Matz, it is the practice of using unsworn statements, and the use of an allegedly coerced confession that make the document submitted to Commissioner Liska deficient. And he has presented no evidence that these defendants

either knew about that practice or participated in the decision to include Matz's allegedly coerced confession in the report. Thus, they are entitled to summary judgment on Matz's Fourth Amendment *Riverside* claim. *See Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1039 (2003) ("'Section 1983 creates a cause of action based on personal liability and predicated upon fault; thus, liability does not attach unless the individual defendant caused or participated in a constitutional deprivation.'") (quoting *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996)).

D. Fifth Amendment Claim

That leaves Matz's claim that several of the defendants violated his Fifth Amendment rights by continuing to interrogate him after he invoked his right to remain silent. It is undisputed that Matz did not make any incriminating statements during either his interview in the patrol van with Detective Caballero or the next day when Jones and Moore interviewed him at the police station. The Fifth Amendment "privilege against self-incrimination, and thus the *Miranda* doctrine, concerns the use of compelled statements in criminal prosecutions." *Hanson v. Dane Cnty.*, Wis., 608 F.3d 335, 339 (7th Cir. 2010). No rational juror could conclude that the first two interrogations violated Matz's Fifth Amendment rights—he said nothing incriminating at all, and so there was obviously no statement used against him in his criminal proceeding. *See id.* ("Police cannot 'violate *Miranda*,' despite colloquial usage. ... There's nothing wrong with compelling people to speak."). Matz, however, claims that he may still be entitled to monetary damages against

Moore and Jones because their initial interrogations were part of the "causal chain" that resulted in his later involuntary confession to Caballero and Walton.

But whether treated as a continuous interrogation that produced an inculpatory statement or separated into three distinct interviews, we agree with the district court that Matz's Fifth Amendment claim for damages is barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a plaintiff may not recover damages under § 1983 when a judgment in his favor would necessarily imply the invalidity of a criminal conviction or sentence that has not been reversed, expunged, invalidated, or otherwise called into question. *See id.* at 486-87; *Helman v. Duhaime*, 742 F.3d 760, 762 (7th Cir. 2014). There is no question that Matz's conviction and sentence have neither been invalidated nor called into question.[6] The only question is thus whether Matz's conviction or sentence necessarily depended on his allegedly coerced confession.

We conclude, like the district court, that success on Matz's Fifth Amendment claim would necessarily imply the invalidity of Matz's sentence. At sentencing, the judge relied heavily on Matz's confession as well as his subsequent decision to recant his admissions. Specifically, Matz explained to the judge that he confessed out of loyalty to his fellow Latin King codefendants in the hopes that he could take the fall and the rest of them "would be able to go home." The sentencing judge rejected the

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[6] Matz's conviction was affirmed on direct appeal and the Wisconsin Supreme Court denied his petition for review; he has also unsuccessfully petitioned under 28 U.S.C. § 2254 to vacate, set aside, or correct his sentence.

notion that Matz confessed because "it was the right thing to do," and opined instead that Matz thought he could be out in "five — ten years" and emerge in his "rightful spot" as the leader of the Latin Kings brotherhood because he had stepped up and taken responsibility for the "weaklings" beneath him. The judge believed that when the reality of the prison sentence Matz was facing set in and it came to light that his fellow Latin Kings had inculpated him in the crime, he was scared and realized that it was not worth taking the fall for his confederates. The court accordingly concluded that Matz had only a "sort of a selfish, self-centered remorse" and thus posed a high risk of reoffending. Matz's confession and the sentencing judge's assessment of the reasons behind it thus figured prominently in the court's decision to sentence Matz consecutively on the two counts of conviction. Because that sentence remains intact, Matz cannot pursue a § 1983 claim for damages premised on his allegedly coerced confession because success on his claim would call into question his sentence. *Heck* thus bars Matz's Fifth Amendment claim. *See Davis v. Kan. Dep't of Corr.*, 507 F.3d 1246, 1249 (10th Cir. 2007) (barring claim challenging sentencing calculation); *cf. Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam) (summarizing *Heck* bar as applicable to any § 1983 damages action that "would implicitly question the validity of conviction or *duration of sentence*" that has not been previously invalidated) (emphasis added).

III.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the defendants.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SHAUN J. MATZ,

Plaintiff,

-vs-

RODNEY KLOTKA, KARL ZUBERBIER, SHANNON JONES, PERCY MOORE, MARK WALTON, MICHAEL CABALLERO, JOHN DOES 1-100, and JANE DOES 1-100,

Case No. 08-C-0494

Defendants.

DECISION AND ORDER

The plaintiff, Shaun J. Matz, is proceeding *pro se* in an action brought under 42 U.S.C. § 1983. He was allowed to proceed on Fourth and Fifth Amendment claims against defendants Rodney Klotka, Karl Zuberbier, Shannon Jones, Percy Moore, Mark Walton, Michael Caballero, John Does 1-100, and Jane Does 1-100.[1] The Fourth Amendment claims

[1] In addition to the six named defendants, the plaintiff named the City of Milwaukee, Milwaukee County, John Does 1-100, and Jane Does 1-100 as defendants in his Second Amended

are based on the plaintiff's averments that he was unlawfully seized and denied a probable cause determination within forty-eight hours of his arrest. The Fifth Amendment claim is based on the plaintiff's averments that he was questioned after he invoked his right to remain silent. Now before the Court is the defendants' motion for summary judgment.

I. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986); *Ames v. Home Depot U.S.A., Inc.,* 629 F.3d 665, 668 (7th Cir. 2011). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson,* 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or

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Complaint, filed July 2, 2010. In a Decision and Order dated July 20, 2010, the Court dismissed the City of Milwaukee and Milwaukee County but allowed the plaintiff to proceed on the remaining claims. The plaintiff was allowed to proceed on his claims against the John Does and Jane Does, but they were never identified and served. As a result, the plaintiff's claims against them will be dismissed with prejudice.

declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(l). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

II. FACTS[2]

The plaintiff is a state prisoner who is housed at Columbia Correctional Institution. He is serving a sixty-year prison sentence for one count of first-degree reckless homicide and one count of felony murder with armed robbery as the underlying crime.

The plaintiff was arrested on September 16, 2003. On the day of his arrest, defendants Karl Zuberbier and Rodney Klotka were assigned to the same squad car. Defendant Zuberbier is employed by the Milwaukee Police Department (MPD) and was assigned to the warrant squad at all times relevant. Defendant Klotka is retired from the MPD and served as a police officer on the warrant squad at all times relevant.

Defendants Zuberbier and Klotka were both in uniform but were in an unmarked police vehicle.

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[2] The Facts are taken from the parties proposed findings of fact and affidavits. Where there are disputes, the Court has presented the plaintiff's version of the facts. *See Gonzalez v. City of Elgin,* 578 F.3d 526, 529 (7th Cir. 2009).

They had located an individual suspected of stealing a police officer's gun on the 2500 block of West Greenfield Street and, in the course of resolving that matter, drove toward a restaurant on 25th and National Avenue. They eventually turned north onto Layton Boulevard. As they turned onto Layton, the defendants identified Javier Salazar sitting on a porch with other individuals. The defendants were aware that Salazar was wanted for armed robbery and that there was a "temporary felony want" for his arrest. (Defendants' Proposed Finding of Fact [DPFOF] ¶ 19.) The defendants believed that Salazar was a member of the Latin Kings gang, and Zuberbier had previously been informed that Salazar was a suspect in two homicides and several shootings.

When Zuberbier told Klotka about Salazar's identity, Klotka turned and looked at the individuals on the porch. This action took away the "element of surprise [which] always works on the police side." (Smokowicz Aff., Attachment B [Klotka Dep.] at 35-36). Klotka, who was driving the vehicle, made a u-turn. According to the defendants, "[a]s soon as the squad car started to make the turn, the people on the porch began to disperse." (DPFOF ¶ 18.) By the time the vehicle had stopped, no individuals remained on the porch. The plaintiff denies any implication that he witnessed Klotka making the turn and avers that he left the porch before the car made the u-turn.

Defendants Klotka and Zuberbier ran after the individuals on the porch. Klotka ran on the south side of the porch while defendant Zuberbier ran down an alley toward the backyard. As he was running down the alley, Zuberbier saw two males and a female running southbound in the alley. Zuberbier

avers that he saw two additional people in a car on a parking slab adjacent to the alley. The car began pulling out of the alley as he was coming into the yard. Klotka approached the vehicle and saw two occupants in it, but he noticed that Salazar was not in the vehicle. Klotka proceeded to point his gun at the car and told the plaintiff, who was driving the vehicle, to stop. Zuberbier pointed his gun at the plaintiff, swore at him and threatened to blow his head off unless he stopped the vehicle. The plaintiff stopped the vehicle for fear of being shot. Klotka directed the plaintiff out of the vehicle at gun point and cuffed him. Klotka then searched the plaintiff while Zuberbier searched the car. Klotka did not know the vehicle was stolen when he stopped it, but, prior to the arrival of the other officers, Zuberbier checked the VIN number and learned that the vehicle was stolen. At least six other squads ultimately responded to the scene.

The plaintiff was placed in the back of a paddy wagon, where he was approached by two detectives, one of whom was defendant Michael Caballero, a detective in the homicide division of the MPD in September 2003. As the detectives entered the paddy wagon, the detective with Caballero swore at the plaintiff, grabbed him by the throat, and pushed him against the wall of the paddy wagon. Caballero grabbed the plaintiff by his left arm, looked at the plaintiff's tattoos, and stated, "he's one of them." (Declaration of Shaun J. Matz [Matz Dec] ¶ 27.) The detectives began to interrogate the plaintiff about two homicides. The plaintiff responded by stating that he did not want to talk and wanted an attorney, but the detectives continued to interrogate the plaintiff. Eventually, the plaintiff was taken

downtown to the police station for booking and further interrogation.

At the time of his arrest, the plaintiff was battling a number of mental health issues. He did not have his anti-psychotic and anti-depressant medication with him. When the plaintiff was not on his medication, his thought process, mood and impulsivity were greatly impaired, calling into question his ability to make informed decisions and disrupting his ability to think clearly. The plaintiff also had recently been in St. Luke's Hospital for two days for pneumonia.

Defendants Shannon Jones and Percy Moore served as detectives in the homicide division of the Milwaukee Police Department in September 2003. They interviewed the plaintiff on September 17, 2003. The plaintiff was removed from his cell at about 6:20 a.m. After the plaintiff was read his Miranda rights, he informed defendants Jones and Moore that he did not wish to speak with them or anyone else about the homicides and the shootings and that he wanted to go back to his cell. The plaintiff was not returned to his cell until almost 11:00 a.m. Jones and Moore questioned the plaintiff about two homicides and an armed robbery. They attempted to cajole the plaintiff into talking. For example, Moore told the plaintiff at one point that it would go easier for him if he just cooperated and told them what happened. When the detectives realized that they were not going to get a statement from the plaintiff, they noted on his interrogation form that he did not want to talk to them. However, they failed to note his exact response, which was that he did not want to speak

with anyone at any point about the shootings and the homicides.

The plaintiff was removed from his cell for further interrogation around 8:52 p.m. that evening. This time, it was defendants Michael Caballero and Mark Walton, both detectives in the homicide division of the MPD in September 2003, who conducted the interrogation. The plaintiff told Caballero and Walton that he did not want to speak with them, but they continued to question the plaintiff about two homicides. Walton acknowledged that the plaintiff had certain rights, but said the plaintiff would give them a statement regardless. The plaintiff was sitting in a defeated position during this interview. Eventually, and as a direct result of the defendants ignoring the plaintiff's invocation of his right to remain silent, the plaintiff provided a statement concerning his involvement in two homicides. The plaintiff avers that the statement was not true but that he provided it because he believed it was the only way they would return him to his cell. He was returned to his cell at 2:50 a.m., six hours after the interrogation began.

On September 18, 2003, at approximately 10:58 a.m., Milwaukee County Court Commissioner Liska found that there was probable cause that a crime had been committed and that the plaintiff had committed the crime. The Commissioner also set cash bail of $100,000.00. A copy of the arrest-detention report bearing the signature of Commissioner Liska is attached to the affidavit of Milwaukee County Sheriff Department Captain Anthony Moffett. Captain Moffett avers that he is "employed by the Milwaukee County Sheriff's Department and in [that] position

[has] access to arrest records maintained in the routine course of business of the department concerning individuals who have been held in custody in the jail facilities operated by the department." (Moffett Aff. ¶ 1.)

III. DISCUSSION

The defendants assert that they are entitled to summary judgment on the plaintiff's Fourth Amendment claims because they had reasonable suspicion to stop the plaintiff and probable cause to arrest him; they also contend that they are entitled to qualified immunity. Next, they submit that they are entitled to summary judgment on the plaintiff's claim regarding a prompt probable cause hearing because they submitted evidence that a probable cause determination was made by a Milwaukee County Court Commissioner within forty-eight hours of the plaintiff's arrest. Finally, with regard to the plaintiff's Fifth Amendment claim, the defendants assert that the plaintiff's claim is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because the statement the plaintiff finally gave was relied on, at least in part, during the plaintiff's sentencing.

In response, the plaintiff contends that there are genuine issues of material fact regarding whether defendants Klotka and Zuberbier had reasonable suspicion to stop the plaintiff and/or probable cause to arrest him. Moreover, the plaintiff asserts that qualified immunity does not apply to the present case. The plaintiff also argues that there are genuine issues of material fact regarding whether the plaintiff received a timely and meaningful probable cause determination. Finally, the plaintiff asserts that his prior conviction does not interfere with his § 1983

claim, as statements from the plaintiff's second interrogation were not used as part of his sentencing.

A. Unlawful Arrest Claim

The plaintiff maintains that defendants Klotka and Zuberbier did not have reasonable suspicion to stop him and that they lacked probable cause to arrest him.

1. Stop

The Fourth Amendment protects against unreasonable searches and seizures. *Ashcroft v. al-Kidd*, ____ U.S. ____, 131 S. Ct. 2074, 2080 (2011). The Supreme Court has held that an investigative stop does not violate the Fourth Amendment if the officer conducting the stop had reasonable suspicion that the individual violated the law. *Terry v. Ohio*, 392 U.S. 1 (1968). Such a stop may be used to determine an individual's identity and obtain more information. *Pliska v. City of Stevens Point*, 823 F.2d 1168, 1176-77 (7th Cir. 1987).

In determining whether an officer had reasonable suspicion, courts take a "totality-of-the-circumstances" approach. *United States v. Arvizu,* 534 U.S. 266, 273-74 (2002). Reasonable suspicion must be supported by specific, articulated facts from which the officer draws rational inferences. *Pliska,* 823 F.2d at 1176-77. Indeed, "the officer must be able to articulate more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Illinois* v. *Wardlow,* 528 U.S. 119, 124 (2000) (quoting *Terry,* 392 U.S. at 27). Courts may consider: (1) an individual's presence in an area of high crime; (2) his flight upon seeing police officers; and (3) his evasive behavior. *Wardlow,* 528 U.S. at 124-25. The Supreme Court has stated that an officer may have

reasonable suspicion even if an individual's conduct may be innocent:

> Respondent and amici also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The officer observed two individuals pacing back and forth in front of a store, peering into the window and periodically conferring. 392 U.S., at 5-6, 88 S.Ct. 1868. All of this conduct was by itself lawful, but it also suggested that the individuals were casing the store for a planned robbery. *Terry* recognized that the officers could detain the individuals to resolve the ambiguity. *Id.*, at 30, 88 S.Ct. 1868.

Id. at 125.

The Supreme Court has not determined whether flight, on its own, is sufficient to justify a *Terry* stop. *United States v. Wilson,* 2 F.3d 226, 231 (7th Cir. 1993). However, other courts have held that flight is not a "reliable indicator of guilty" without additional facts supporting reasonable suspicion. *United States v. Green,* 670 F.2d 1148, 1152 (D.C. Cir. 1981).

Finally, the basis for a stop "must be particularized with respect to" the person being stopped. *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979). For instance, in *United States v. Wheeler,* 800 F.2d 100 (7th Cir. 1986), the court stated that "while the defendant was with identifiable members of a gang, he himself was not known to be in the gang, and his affiliation alone

with those gang members would be insufficient to uphold a *Terry* stop." (Pl.'s Resp. at 13) (citing *Wheeler,* 800 F.2d at 103). The *Wheeler* court ultimately upheld the *Terry* stop as reasonable under the Fourth Amendment because the defendant appeared to be carrying a weapon. *Id.*

The parties dispute whether the plaintiff actually fled from the police and whether the officers had sufficient information to conclude that the plaintiff was associating with a member of the Latin Kings. Whether or not the plaintiff actually saw and fled from the police is not material, as the *Wardlow* court noted that officers may detain individuals even if there is a possible innocent explanation for the behavior that forms the basis of the officer's reasonable suspicion. 528 U.S. at 124-25. Moreover, the plaintiff fails to cite evidence in denying that the officers had sufficient knowledge to conclude that Salazar was a gang member. The defendants have testified that they were aware that at least one individual on the porch was a known gang member. Both parties agree that the individuals on the porch scattered when the unmarked police car made a u-turn toward the house, although they dispute the possible explanations for this fact. In considering the totality of the circumstances, these facts are enough to create reasonable suspicion even if there are possible innocent explanations for the plaintiff's and others' behavior. Thus, the plaintiff's Fourth Amendment rights were not violated with regard to the *Terry* stop.

Furthermore, the court need not consider whether flight or affiliation with gang members in and of themselves are sufficient to form the basis of

reasonable suspicion in the present case. As previously noted, the plaintiff has not presented evidence to properly dispute the defendants' averments that they were aware of Salazar's gang activities. In addition, the court acknowledges the *Wheeler* court's holding that a person's "affiliation alone with . . . gang members [is] insufficient to uphold a *Terry* stop." (Pl.'s Resp. at 13) (citing *Wheeler,* 800 F.2d at 103). However, in this case, the officers were not solely relying on either the flight or affiliation. Indeed, the plaintiff's behavior as a whole suggested that he may have been involved in criminal activity. Thus, the officers were reasonable in detaining him to resolve any ambiguities. *See Wardlow,* 528 U.S. at 124-25.

2. Arrest

Next, the Court will consider whether there was probable cause to support the plaintiff's arrest. For an arrest to be lawful, it must be supported by probable cause. *Simkunas v. Tardi,* 930 F.2d 1287, 1291 (7th Cir. 1991). "Probable cause for an arrest exists if, at the time the arrest was made, the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person to believe that an offense was committed." *Id.* Probable cause may be established by a report from a single and credible witness or by an identification. *Woods v. City of Chicago*, 234 F.3d 979, 996 (7th Cir. 2000). Additionally, the fact that there may also be an innocent explanation for the behavior of an individual does not affect the probable cause determination. *United States v. Gomez,* 758 F. Supp. 145, 149 (S.D. N.Y. 1991); *United States* v.

Price, 559 F.2d 494, 502 (2d Cir. 1979). Even if the individual is later determined to be innocent, officers "will be cloaked with qualified immunity" if probable cause existed at the time of the arrest. *Jenkins v. Keating,* 147 F.3d 577, 585 (7th Cir. 1998). Finally if a *Terry* stop continues too long or is "unreasonably intrusive," it can turn into a de facto arrest requiring probable cause. *United States v. Bullock,* 632 F.3d 1004, 1015 (7th Cir. 2011).

Here, the defendants admit that it is unclear whether the plaintiff was initially arrested or whether Klotka and Zuberbier simply detained the plaintiff for a reasonable period of time at the scene until it was discovered that the car the plaintiff was driving had been stolen and arrested him for operating a vehicle without an owner's consent. However, the plaintiff's own evidence suggests that his detention was not too long and that probable cause for his arrest, the fact that the car he was driving was stolen, was discovered quickly.

It appears, however, that there is some information missing from the facts before the court. For instance, the plaintiff makes arguments regarding marijuana found in the car, but there are no proposed findings of fact from either party regarding that issue. Additionally, in response to the defendants' proposed findings of fact, counsel for the plaintiff indicates that Zuberbier ran the VIN for the vehicle and discovered it was stolen before other officers arrived on the scene. The defendants had probable cause to arrest the plaintiff once they knew the car the plaintiff had been driving was stolen. At least six other squads responded to the scene, as well as a paddy wagon to transport those who were arrested. In such a

situation, even viewing the evidence in the light most favorable to the plaintiff, a great amount of time could not have elapsed between the stop and the discovery that the vehicle was stolen, given that the plaintiff argues Zuberbier ran the VIN before other police vehicles arrived at the scene. Additionally, the plaintiff's sequence of events makes it seem as though contraband might have been found in the car even before Zuberbier ran the VIN, which could have been another independent source of probable cause.

Accordingly, a reasonable fact finder could not concluding that the plaintiff was arrested without probable cause and, therefore, the defendants are entitled to summary judgment on the plaintiff's Fourth Amendment claim regarding his arrest.

B. Fourth Amendment Probable Cause Determination

The defendants submit evidence that a probable cause determination was made within forty-eight hours of the plaintiff's arrest and, therefore, argue that they are entitled to summary judgment on this claim.

"When a person is arrested without the benefit of a warrant supported by probable cause, the Fourth Amendment requires a judicial determination of probable cause to occur 'promptly' after their arrest." *Jones v. City of Santa Monica,* 382 F.3d 1052, 1055 (9th Cir. 2004) (quoting *Gerstein v. Pugh,* 420 U.S. 103, 125 (1975)). However, "judicial determination . . . may be informal and non-adversarial . . . and the Supreme Court has left to the States wide latitude to fashion probable cause determinations that 'accord with a State's pretrial procure viewed as a whole.'" *Id.* Moreover, "[i]n [*County of Riverside* v.] *McLaughlin,*

[500 U.S. 44, 56 (1991),] the Supreme Court held that probable cause determinations made within 48 hours of arrest are presumptively prompt." *Jones,* 382 F.3d at 1055 (citing *McLaughlin,* 500 U.S. at 56).

The plaintiff contends that there are genuine issues of material fact regarding whether the plaintiff received a timely and meaningful probable cause determination. Specifically, he contends that Captain Moffett's affidavit fails to establish that he is the custodian or other qualified witness who can attest to the fact that the probable cause document was a document that was in fact kept during the regular course of business at the Sheriff's Department.

Under Federal Rule of Evidence 802, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Federal Rule of Evidence 803(6) states that records of "regularly conducted activity" may be excepted from the hearsay ban if certain conditions apply:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a

> statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The plaintiff argues that Captain Moffett fails to establish that he is the "custodian or other . . . witness" qualified to authenticate records of regularly conducted business. Fed. R. Evid. 803(6). However, Captain Moffett avers that he is "employed by the Milwaukee County Sheriff's Department and in [that] position [has] access to arrest records maintained in the routine course of business of the department concerning individuals who have been held in custody in the jail facilities operated by the department." (Moffett Aff. ¶ 1.) Contrary to the plaintiff's arguments, Rule 803(6) does not require the affiant to testify that he is the custodian, because it also allows other qualified witnesses to authenticate documents. As noted above, Captain Moffett has testified that arrest records were "kept in the regular course of business" and that "it was the regular practice of that business activity to make [such] record[s]." Fed. R. Evid, 803(6). He also refers to the record in his question in his affidavit and has compared the original copy of the arrest record to the copy attached to his affidavit. Thus, the arrest-detention record is properly authenticated. The court may consider "properly authenticated and admissible documents or exhibits" at the summary judgment stage. *Woods v. City of Chicago,* 234 F. 3d 979, 988 (7th Cir. 2000). The court will grant the portion of the defendants' motion for summary judgment

relating to the plaintiff's Fourth Amendment "probable cause determination" claim.

C. Fifth Amendment

Next, with regard to the plaintiff's Fifth Amendment claim, the defendants assert that a § 1983 suit must be dismissed if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck v. Humphrey,* 512 U.S. 477, 487 (1994); *see also Hoeft v. Anderson,* 409 Fed. Appx. 15, 2001 WL 195538, at *2 (7th Cir. 2011). The defendants explain that the plaintiff's Fifth Amendment claim is barred because he has not alleged that his conviction or sentence has been invalidated and because his conviction and sentence both depend at least in part upon his confession.

The plaintiff may not maintain a § 1983 action where a judgment in his favor would necessarily imply the invalidity of a previous criminal conviction that has not been reversed, expunged, or called into question by the issuance of a federal court writ of habeas corpus. *McCann v. Neilsen,* 466 F.3d 619, 620-21 (7th Cir. 2006) (citing *Heck,* 512 U.S. at 487).

The Seventh Circuit reversed and remanded this Court's dismissal of this case based on *Heck,* noting that Fourth Amendment claims for false or wrongful arrest are not barred under *Heck. See Copus* v. *City of Edgerton,* 151 F.3d 646, 648 (7th Cir. 1998). However, the plaintiff did not assert a violation of his Fifth Amendment rights in his original complaint. This claim was added in the Amended Complaint the plaintiff filed after remand.

The plaintiff argues that his prior conviction does not interfere with his § 1983 claim, as statements from the plaintiff's second interrogation were not

used as part of his sentencing. He contends that the sentencing court relied primarily on statements made by the plaintiff's co-defendants and other witnesses in sentencing him, not on statements obtained from the plaintiff's interrogation. In contrast, the defendants have cited the portions of the transcript of the plaintiff's sentencing where the trial court discussed the plaintiff's statement to the police, and his recanting of that confession at sentencing.[3] The court's sentence was based, at least in part, on the plaintiff's statements and his later disavowal of it. Without that statement, the sentence (or at least the reasoning underlying it) would have been different.

The plaintiff's inculpatory statement to the police is simply too intertwined with his sentence for the plaintiff to proceed on this claim. *See Hoeft,* 409 Fed. Appx. at 18. The invalidation of that statement would necessarily call into question the plaintiff's sentence. *See id.* As a result, the defendants are entitled to summary judgment on the plaintiff's Fifth Amendment claim because it is barred by *Heck.*

IV. ORDER

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment (Docket #70) is **GRANTED.**

IT IS FURTHER ORDERED that the plaintiff's claims against defendants identified in plaintiff's Second Amended Complaint as John Does 1-100 and

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[3] The transcripts are part of the record in the plaintiff's petition for writ of habeas corpus case *(Matz v. Thurmer,* Case No. 08-C-294, E.D. Wis.); this Court denied that petition in a Decision and Order entered July 1, 2008.

Jane Does 1-100 are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 8th day of March, 2012.

BY THE COURT:

_____

HON. RUDOLPH T. RANDA
U.S. District Judge

APPENDIX D

U.S. DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SHAUN J. MATZ,
Plaintiff,
vs. Case No. 08-C-0494
RODNEY KLOTKA, KARL ZUBERBIER, SHANNON JONES, PERCY MOORE, MARK WALTON, MICHAEL CABALLERO, MILWAUKEE COUNTY, JOHN DOES 1-100, and JANE DOES 1-100,
Defendant.

Deposition of KARL ZUBERBIER
Tuesday, June 7th, 2011
1:08 p.m.
at
QUARLES & BRADY LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, Wisconsin

Exhibit 2

Reported by Loretta L. Stoeckmann, RPR

* * *

[Page 22]

A That's correct.

Q Why is his name crossed off?

A Because I made a mistake when I put his name as being on Greenfield Avenue. He was actually the passenger in the back seat of the stolen car – or the Ford Thunderbird.

Q He was in the back seat?

A Yes.

Q Okay. And Jonnie Mitschke?

A Yes.

Q Was she the woman that you saw running?

A That's correct.

Q Okay. And then I notice when I look on the next page, it has Shaun Matz's name, is that correct?

A Yes.

Q And then Andres Fonroza?

A Yes.

Q And why are their names there, sir?

A Because he was driving the -- Shaun Matz was driving the red Thunderbird and Andre Fonroza was in the back passenger seat, and that portion of my memorandum book indicated who was in the car.

Q Okay. When did you discover that these individuals were in the car?

A I saw them in the car.

Q Okay. But you didn't know who they were originally, is that correct?

A I didn't know their names when I ran past them, no.

Q Okay. Did you see them -- did you see them specifically get into the car?

A They were already in the car when I first saw them. The car was starting to back into the alley.

Q So you didn't see them actually get into the car, is that accurate?

A No. No. I didn't see them get into the car, no.

Q Okay. Over on the next page, there's a few more names. There's -- is that Sheryl Reesman?

A Reesman.

Q Reesman. Who is that?

A She's the owner of the stolen car.

Q The Thunderbird?

A That is correct.

Q And then we say Javier Salazar, is that correct?

A That's correct.

Q And Suzanne Caballero?

A That is correct.

Q Why are their names on here, sir?

A Because Salazar was the guy we were looking for, and we found him -- or I didn't -- wasn't in the house, but they found him in the house, and his girlfriend was up there as well, so I wrote her name down because she was important. And then there was a third name.

Q Melissa Vanidestine?

A Yes.

Q Okay. And why is her name on here?

A She was also in the house.

Q Okay.

A So generally anybody we have contact with in the course of investigation, we note their names.

Q Okay.

MR. SMOKOWICZ: Just for the record before we go away from the book, I just want to indicate that officer's or detective's who appears -- name is at the top right-hand corner, that's my handwriting.

MS. REMINGTON: So the name that's written on the top right-hand corner of Exhibit 23 is your handwriting?

MR. SMOKOWICZ: Right.

MS. REMINGTON: Okay. Fair enough.

MR. SMOKOWICZ: Just so we could identify the book.

BY MS. REMINGTON:

Q Who went up to get Javier Salazar?

A I don't know for sure. All I know is we contained the house. I was in the alley, and I knew we had some more squads coming, and I don't know who actually went up and made contact with him.

Q Okay. But it was not you?

A I did not, no.

Q How long did it take you after you came upon Bradford Lynd and the two other individuals with him to go back to the arrest scene?

A A couple of minutes. There was actually an off-duty police officer that saw what was happening. Jose Lazo was on his way home from work and stopped to help me out. So we were able to handcuff

all three of those three. We walked them back into the alley where the car was, where I knew Rod was with the other two people from the car. So at that point when I got back he had already had the other two suspects detained by the car.

Q The ones that were in the car?

A The two guys from the car were detained back at the car.

Q At that point was Salazar in custody?

* * *

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police. It's not a normal reaction unless you've got something to hide. So we detain people all the time. We handcuff them, we find out it's all legitimate, talk to them, let them go. It's part of daily police work.

Q When you brought those individuals back to the scene of the arrest, were they under arrest, or were they just being detained at that time?

A At that point they were being detained until we can determine what involvement they had in what we were investigating.

Q Do you know if those individuals were eventually arrested?

A They were all taken downtown for questioning, further questioning, because it was evident that there was more to what was going on than we knew at the time. So they were detained and taken downtown. I don't know who got charged with what. I know specifically a couple of -- Shaun Matz got charged, obviously, with several counts, and Salazar got charged. The other ones, I'm not sure what happened with them.

Q Okay. So you don't know if at any point the three individuals that you were detaining ever turned out to be arrested at some future point? Does that make sense?

A Yeah, I don't know if they -- they were arrested, but they were never -- I don't know if they got charged. There's a difference between being arrested -- just because you're arrested doesn't mean you're getting charged.

Q Okay.

A But if you get brought downtown in handcuffs, it's an arrest, but we do that on a regular basis as well. I mean, people get arrested and then released administratively, do further investigations, and then they can be brought back in later for charging if you find more evidence. I mean, it's -- it's natural process of police work. It happens every day.

Q Okay. Were you involved, other than what you've already described, in the detaining of Shaun Matz?

A Not initially. I was standing near him while we were waiting for everything to unfold, I mean, while he was in handcuffs. So I guess, yeah, I was making sure he didn't leave, so if you want to say I was part of the detention, yes.

Q Okay. And are you aware of the fact that at some point Shaun was under arrest?

A Yes. That he was conveyed downtown, yes.

Q Do you know what he was under arrest for?

A Same as everybody -- well, first of all, it was -- we found out that the car that he was driving was stolen, and there was marijuana in the car, so obviously we weren't going to let him go until we were able to sort

through that, get more information and details on that, so -- I mean, at that point he was under arrest for driving a stolen car.

Q Okay. At the point that Shaun was under arrest, did you have any knowledge that he was involved in the homicides?

A Not specific knowledge, no.

Q Is my understanding correct that the only person at the time that you thought may have been involved in the homicides was Javier Salazar?

A Javier Salazar and several other of his associates, Latin Kings. Which here he is a few days later with these other guys. It was a strong possibility that these guys were involved with him or had knowledge of it.

Q Okay. But you didn't know that specifically, is that correct?

A Not specific, no.

Q Did you know for a fact that these other individuals were Latin Kings when you detained them?

A No, but like I said earlier, Latin Kings don't let any other gang members or associates hang with them, or anybody else for that matter. I mean, it's a very tight-knit group. They don't want anybody knowing their business for obvious reasons. I mean, they do a lot of illegal activities that they like to keep to themselves, and a close -- people that they can trust, they keep close. They don't let any outsiders hang around with them, because they don't want them knowing their business.

Q Fair to say that they don't like to speak to the police?

A That's fair to say.

Q As to Bradford Lynd, did you convey him downtown?

A I can't say for sure. I don't know if we – who we conveyed, if we conveyed anybody. Like I said, we had another investigation going on at the time, too.

Q Did you ever return to that other investigation that day?

A I can't remember how that whole thing went. I worked till two o'clock in the morning, so I was

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* * *

APPENDIX E

Deposition of Rodney J. Klotka – June 2, 2011

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SHAUN J. MATZ,
Plaintiff,
vs. Case No. 08C0494
RODNEY KLOTKA, KARL ZUBERBIER
SHANNON JONES, PERCY MOORE,
MARK WALTON, MICHAEL CABALLERO,
MILWAUKEE COUNTY, JOHN DOES 1-100,
and JANE DOES 1-100,
Defendants.

Deposition of RODNEY J. KLOTKA
Thursday, June 2nd, 2011
1:10 p.m.
at
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin

Reported by Sandra K. Nelson, RPR

Exhibit 1

* * *

[Page 50]

various directions, but predominantly after they left the porch area, what would be westbound through, I would say, the yards.

Q Did you have your eye on the porch the whole time from when you first saw the people on the porch to when the car stopped?

A I'm not sure, because based upon making a U-turn, under those circumstances both of us may have taken our eyes off the porch to make sure when we were making our U-turn we didn't get hit by another car that was southbound on Layton.

Q Did you activate your lights or sirens?

A We did not.

Q Was there any point in which the view of the porch was obstructed to you?

A I don't believe so.

Q When you step out of the vehicle after it stopped, were you walking or running?

A I was running.

Q In what direction?

A I ran south for a short distance and then west.

Q Were you running in the street or on the sidewalk or somewhere else?

A I definitely recall running on the sidewalk, but I don't remember whether I was the driver of the vehicle or not. I don't know if I started in the street, but eventually ended up on the sidewalk.

Q Did you run past the porch?

A I did.

Q And you said you eventually ran west -- I'm sorry -- yeah, west. Sorry. Did I say that right?

A Correct, west.

Q When you ran west, you stepped on the grass, correct?

A Probably on the grass, yes.

Q Okay. Do you recall what side of the porch you ran west on?

A What side of the porch. Can I review the photos again?

Q Certainly.

A Would have been south of the porch.

Q Okay. Did you have to run in between two houses?

A I did.

Q Where did you stop running?

A In the back of the residence -- behind the residence.

Q When you were running west and south of the porch, did you have anybody in your sights?

A To the best of my recollection, there were still people that were -- they were still continuing westbound in the back area of the residence.

Q Do you know if any of those individuals were Javier?

A I don't recall if -- what direction he took when he went off the porch.

Q The individuals that you just described seeing running west, were they Hispanic, could you tell, or white?

A There was, I would say, a mixed group of individuals.

Q How many individuals did you see running west?

MR. SMOKOWICZ: As he was running along the side of the house?

MS. REMINGTON: Yes.

THE WITNESS: I actually don't recall. There were several people still running from the back of the residence. I don't recall exactly how many.

BY MS. REMINGTON:

Q Okay. More than one, though?

A More than one.

Q Were you looking to see what they might be running towards?

A I was looking to see what direction they were running, yes.

Q Okay. Did you eventually reach them?

A I actually reached a couple of them who were no longer running.

Q What were they doing?

A They were occupants of a vehicle.

Q What color was the vehicle?

A I believe it was a dark red.

Q How many occupants did you see in the vehicle?

A I believe I observed two.

Q In the front seat or in the back seat?

A There was definitely a person in the driver's seat which would have been the front seat. I don't recall where the second person that was in the vehicle was, in the front seat or the back seat.

Q Did you see them actually get into the vehicle?

A I did not.

Q What did you do when you saw these individuals in the vehicle?

A As I approached the vehicle, it was starting to go in motion, and I tried to effect a stop so they would stop. As that was the direction where the majority of the people had ran, I believe

* * *

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A No, I do not.

Q Was there somebody else handling the passenger in the vehicle?

A There was.

Q You weren't interacting with the passenger at this point?

A No, I was not.

Q Okay. Do you know how many other officers, if there was more than one, were dealing with the passenger of the vehicle?

A I do not recall that, either.

Q Do you remember ever using profanity towards the driver of the vehicle?

A No, I do not.

Q Do you remember hearing any other officers using profanity towards the driver of the vehicle?

A No, I do not.

Q Do you recall seeing a paddywagon at the arrest scene at some point?

A Sometime -- yeah, sometime after the arrest, there was a paddywagon or patrol wagon that arrived.

Q Do you recall seeing that paddywagon before the driver was removed from the vehicle or after?

A I don't recall if it was at the same time or shortly thereafter. I don't recall.

Q Fair enough. When the driver was removed from the vehicle, do you recall if he was placed on the ground?

A I don't recall that, either.

Q Do you recall him being placed against the car?

A As in the car that he was stopped in?

Q Yes.

A He may have been placed against the car.

Q Was he handcuffed at any point?

A He was eventually placed in handcuffs, I believe.

Q Do you know how soon after he was removed from the vehicle he was placed in cuffs?

A I was not actually the one that placed handcuffs on him. So, no, I do not recall what the time frame was thereafter.

Q Did you see him physically get cuffed?

A I did.

Q Where was he when this happened?

A I would of -- it would have been right in the area of him being removed from the car. So right in the alley.

Q Okay. Do you know the officer who cuffed him?

A I actually do not recall who did.

Q Was it the same officer who was assisting you on that side of the vehicle?

A It, more than likely, would have been one of the officers that helped me make the stop, right.

Q Okay. Did you see what happened to this individual after he was cuffed?

A I believe -- or I recall shortly after him being taken into custody by the responding officers, I continued to proceed into what would be the neighborhood to the west, as there were other individuals yet that we had not located that had left the porch.

And I was trying to make sure that there were no other people hiding in the immediate area, as the responding officers probably had not yet known exactly what had transpired.

So as a safety matter of safety, since he was being controlled and the occupants were being controlled, I had the most knowledge regarding what had transpired, and I continued to look for other people that were still in that immediate area.

Q Did you find anybody else?

A I did not.

Q Did you see the driver of this vehicle be placed in the paddywagon?

A I don't recall if I did or not. I don't believe I did, though.

Q Did you question the driver of the vehicle at all yourself?

A No, I did not.

Q Did you know who the driver of the vehicle was?

A Could you be more specific as to the --

Q Certainly. Did you have any interaction with this individual on prior occasions that you can recall?

A I don't believe so.

Q At the time that you made this arrest, would the name Shaun Matz have meant anything to you?

A Prior to the arrest or --

Q Yes.

A I don't believe so.

Q Okay. When you made the arrest, did this individual resemble somebody that you had been looking for?

A No.

Q Okay. When you made the arrest, did you believe the individual was Javier Salazar or did you not know?

A Based on my recollection from the photo that I had previously seen -- may have even previously had -- I did not believe it was Javier Salazar.

Q Okay. When you approached the vehicle, did you see Javier Salazar in the vehicle?

A When I approached the vehicle, I did not see him in the vehicle.

Q During this time your partner -- Karl -- obviously went in a different direction, is that fair to say?

A He did.

Q Okay. Did you know where he went?

A The general direction, yes; specific location he was headed to, no.

Q What general direction did he go in?

A He also went the same original route that I did, westbound through the yards.

Q At what point did you lose sight of him?

A I would say probably about the time that I stopped the occupants in the vehicle, when my focus became what was in front of me, and that's when I took my focus off of everything else that was going on.

Q Okay. Did you at any time go into the house, the 1335 South Layton Boulevard house?

A I don't believe I did.

Q After you searched the area west of the house and didn't find anybody else, what did you do?

A I actually came back to where the arrest occurred.

Q Okay. And what did you do after that?

A I began talking to some of the other officers that were at the location, and I received information relative to -- about the car, what was with the vehicle.

Q And what kind of information did you receive?

A That the vehicle had previously been reported stolen several days earlier.

Q When you initially stopped the vehicle, you did not know that, correct?

A I did not know that the car was stolen at the time of the stop.

Q When the driver was placed in cuffs, in your opinion, was he under arrest at the time?

MR. SMOKOWICZ: Object to the question to the extent it seeks a legal opinion from this witness. Subject to the objection, to the best of your

understanding as a former police officer, you can answer the question.

THE WITNESS: He -- at that point he was -- when we took him into custody, he was being -- he was being detained based upon reasonable suspicion, based upon the events that occurred prior to him actually getting into the car, and him actually attempting to get in the car and attempting to leave.

BY MS. REMINGTON:

Q So he wasn't under arrest, but he was being detained, is that what your belief was at the time?

A At the original time of the apprehension or the stop? He was being detained, right, for further investigation.

Q Okay. And that's true even when he was placed in the cuffs; is that correct?

A That's correct.

Q At some point did that change in your mind, did it go from a detention to an arrest?

A Once the investigation revealed that the car was reported stolen and he was operating the vehicle, yes.

Q Okay. Were you the one to make that decision, or was there another police officer there, if there was a decision to be made?

MR. SMOKOWICZ: If you can answer that question.

THE WITNESS: I don't recall who made the decision.

BY MS. REMINGTON:

Q Okay. When you came back to the scene, was the driver in the paddywagon or was he still outside of the paddywagon?

A I don't recall if he was outside the paddywagon yet or if he was actually inside the paddywagon.

Q Do you ever recall seeing the driver sitting on a curb in the alleyway, for example?

A I don't recall that, either.

Q You mentioned that when you came back to the scene, you had some discussions with other officers. Aside from the fact that they told you the car was stolen, did you guys discuss anything else?

A Could you be more specific?

Q Sure. Certainly. Did you discuss where Javier was at all when you came back?

A I believe by the time I got back and started talking to the officers, I had received information that Javier Selgado -- was it Selgado?

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* * *

APPENDIX F

No. 12-1674

**IN THE
UNITED STATES COURT OF APPEALS FOR
THE
SEVENTH CIRCUIT**

SHAUN J. MATZ (State Prisoner: #264654),
Plaintiff-Appellant,

v.

RODNEY KLOTKA, et al.,
Defendants-Appellees.

**On Appeal from the U.S. District Court for the
Eastern District of Wisconsin,
Case No. 2:08-cv-00494-RTR
Honorable Rudolph T. Randa, Presiding Judge**

PETITION FOR REHEARING OR FOR REHEARING *EN BANC* OF PLAINTIFF-APPELLANT SHAUN J. MATZ

Brian J. Murray*
Meghan E. Sweeney
JONES DAY

77 W. Wacker Dr., Suite 3500
Chicago, IL 60601-1692
T: (312) 782-3939
F: (312) 782-8585
*Appointed by Court Order of December 12, 2012

October 17, 2014 *Pro Bono Attorneys for Plaintiff-Appellant*
Shaun J. Matz

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FEDERAL RULE OF APPELLATE PROCEDURE 35(B)(1) STATEMENT REGARDING REHEARING

Plaintiff-Appellant Shaun J. Matz respectfully seeks panel or *en banc* rehearing of the decision issued in this case on October 6, 2014 for the following reasons:

First, the panel's decision that Defendants-Appellees Rodney Klotka and Karl Zuberbier (the "Officers") had "(narrowly) enough reasonable suspicion" to conduct a *Terry* stop of Mr. Matz rested on disputed facts erroneously construed in favor of the Officers, instead of in favor of Mr. Matz as is required on appeal from a grant of summary judgment. *See Matz v. Klotka*, No. 12-1674, 2014 U.S. App. LEXIS 19074, at *14 (7th Cir. Oct. 6, 2014) (attached as Ex. A). Indeed, in several instances the panel erroneously relied on the following disputed facts, which it construed in favor of the Officers:

- That Klotka and Zuberbier saw Javier Salazar and Matz together on the porch. *Id*. at *10, *11, *12.
- That the officers saw Salazar and Matz exit the porch simultaneously. *Id*. at *12.

But construing the facts as required—in favor of Mr. Matz—demonstrates that neither Klotka nor Zuberbier saw Matz standing on the porch with Salazar, leaving the porch (either alone or with Salazar), or entering the car. (R.84 ¶ 25; R.93 ¶ 55.)

[1] Rather, Matz was already in the car when

Zuberbier first saw the vehicle in the alley. (R.84 ¶ 25; R.88-2, Zuberbier Dep. Tr. 23:5-12.) Likewise, prior to the *Terry* stop and arrest of Matz, neither officer had ever heard of Matz, and had no knowledge of his involvement in any crime. (R.88-1, Klotka Dep. Tr. 65:7-21; R.88-2, Zuberbier Dep. Tr. 36:10-13.) Given that the panel decision relied heavily on disputed facts construed in favor of the Officers, the outcome of the Court's admittedly "narrow" determination that reasonable suspicion existed at the time of the Matz's *Terry* stop was erroneous.

Second, the panel's "close" decision that it was reasonable for officers to draw a weapon, handcuff Matz, and place him in a patrol vehicle as part of a *Terry* stop, while admitting that the officers only "narrowly" had reasonable suspicion to stop him in the first place, conflicts with other decisions of this Court and presents an issue of exceptional importance. *See*, *e.g.*, *Lawrence v. Kenosha County*, 391 F.3d 837, 842 (7th Cir. 2004) ("Lawrence was seized when Vena grabbed Lawrence's arm and attempted to physically remove him from his vehicle. A reasonable person, at that point, would have felt that he was not free to leave."). The panel's decision expands the scope of a permissible *Terry* stop outside of this Court's prior holdings—and decisions of other circuits—and offers no guidance to individuals or law enforcement on the constitutional bounds of a *Terry* stop. The panel even admitted that Matz's encounter with officers was "at the outer edge of a permissible *Terry* stop," 2014 U.S. App. LEXIS 19074, at *16; such an expansion of what constitutes a permissible

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[1] Record materials are cited by docket number as (R._). Appellant's appendix materials are cited as (A._).

stop requires clarification by the Court or runs the risk of eviscerating Fourth Amendment protections altogether.

Mr. Matz therefore respectfully asks that this Court grant panel rehearing or rehearing *en banc*, vacate its earlier decision, and remand to the district court for proper consideration.

STATEMENT OF THE CASE

In the evening of September 16, 2003, around 5 to 6 p.m., Matz, Javier Salazar, and other individuals were standing on the front porch of a house located at 1335 S. Layton Blvd. in Milwaukee, Wisconsin. (R.86 ¶ 3.) The parties dispute whether this home was located in a high-crime neighborhood. (R.71 at 11-12; R.93 ¶ 4.)

Zuberbier and Klotka, both Milwaukee Police Officers assigned to the warrant squad, were uniformed and riding in an unmarked police vehicle, when they turned onto Layton Blvd. (R.84 ¶¶ 2-3, 5.) As they drove past the house at 1335 S. Layton Blvd, Zuberbier believed he saw Salazar sitting on the front porch. (*Id.* ¶ 9.) Zuberbier was familiar with Salazar from a warrant squad briefing; he believed that Salazar was wanted for an armed robbery and was a member of the Latin Kings gang. (*Id.* ¶ 10.) Defendants do not dispute, however, that they did not have a warrant for Salazar's arrest, (R.93 ¶¶ 63, 70), or that there was no temporary felony want for Salazar in effect on September 16, 2003, (*id.* at ¶ 66). After Zuberbier alerted Klotka as to Salazar's potential presence on the porch, Klotka made a U-turn in a break in the boulevard some distance down the street from the house. (R.84 ¶ 17.) At this point, the individuals on the front porch began to leave, and

by the time the vehicle stopped by the house, everyone had left the front porch. (*Id.* ¶¶ 18-19.) Matz did not run from the porch area, and neither Klotka nor Zuberbier recalls seeing Matz on the porch. (R.93 ¶¶ 19, 55.) In fact, Klotka admitted in his deposition that the officers likely took their "eyes off the porch" while making the U-turn. (R.88-1, Klotka Dep. Tr. 50:7-11.)

Zuberbier exited the vehicle and ran along the south side of the house; Klotka ran south for a short distance and then headed west. (R.84 ¶¶ 22-23.) Klotka proceeded to run along the south side of the porch between two houses to the back of the residence. (*Id.* ¶¶ 24.) As Zuberbier was running down the alley, he saw three people—two males and a female—just starting to run southbound in the alley, and two more people in a car. Matz was the driver of the vehicle. (*Id.* ¶¶ 25.) Matz was already in the vehicle when Zuberbier first saw the car. (*Id.*; R.88-2, Zuberbier Dep. Tr. 23:5-12 ("They were already in the car when I first saw them.").) Klotka and Zuberbier also conceded that they did not see Salazar in the car, and they did not contend that anyone else in the car was committing a crime. (R.93 ¶ 24.)

When Zuberbier saw Matz in the car, he pointed his gun at Matz and threatened to blow Matz's head off unless he stopped the vehicle. (R.84 ¶ 30; R.86 ¶ 16.) Matz immediately stopped the car, and Klotka directed him out of the vehicle at gunpoint and placed him in handcuffs. (R.86 ¶ 19.) When Klotka and Zuberbier first stopped Matz, they did not know who he was or whether he had committed any crime. (R.88-1, Klotka Dep. Tr. 65:7-21; R.88-2, Zuberbier

Dep. Tr. 36:10-13; R.93 ¶¶ 12, 56.) Klotka proceeded to search Matz while Zuberbier searched the car. (R.93 ¶¶ 27-28.) At this point, Klotka and Zuberbier did not know that the vehicle was stolen, but this fact was later discovered before Matz was taken to the police station. (R.84 ¶ 38-39.)

After being brought to the station and interrogated, Matz later pled guilty to one count of first-degree reckless homicide and one count of felony murder with armed robbery as the underlying crime. (R.84 ¶ 1). He currently is serving his sentence at the Columbia Correctional Institution. (*Id*.)

On June 6, 2008, Matz filed this lawsuit in the U.S. District Court for the Eastern District of Wisconsin. The complaint raised claims under 28 U.S.C. § 1983. Specifically, Matz alleged that Klotka and Zuberbier violated his Fourth Amendment right to be free from unlawful seizures without probable cause. (R.1.) The district court dismissed the action *sua sponte* on screening, *see* 28 U.S.C. § 1915A(a), finding that Matz's claims were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). This Court summarily reversed, holding that *Heck* did not bar Matz's claims. (R.18.)

On May 10, 2010, the district court appointed Matz counsel. (R.47.) Appointed counsel filed a Second Amended Complaint against Klotka, Zuberbier, Jones, Moore, Walton, and Caballero. (R.52.) In the Second Amended Complaint, Matz alleged, *inter alia*, that Klotka and Zuberbier violated his Fourth Amendment right to be free from unlawful seizure and arrest without the requisite reasonable suspicion or probable cause. (*Id*.) On July 8, 2011, Defendants moved for summary judgment on all of Matz's claims. (R.70.) The district court granted their motion in its

entirety on March 18, 2012, (R.94), and entered final judgment in favor of Defendants (R.95).

Matz timely filed his notice of appeal on March 21, 2012. (R.97.) This Court affirmed the district court's grant of summary judgment in favor of Defendants on October 6, 2014. *Matz*, 2014 U.S. App. LEXIS 19074.

ARGUMENT

I. THE PANEL'S DECISION THAT THE OFFICERS HAD REASONABLE SUSPICION TO SUPPORT A *TERRY* STOP RESTS ON DISPUTED FACTS THAT IT ERRONEOUSLY CONSTRUED IN FAVOR OF THE OFFICERS.

On appeal from a grant of summary judgment, the court must "examine the record in the light most favorable to . . . the non-moving party, resolving all evidentiary conflicts in h[is] favor and according h[im] the benefit of all reasonable inferences that may be drawn from the record." *See Coleman v. Donahoe*, 667 F.3d 835, 842 (7th Cir. 2012). Thus, "the standard that applies to motions for summary judgment" requires that, even if the court's "account of the facts . . . is not necessarily true in an objective sense," it must construe facts in favor of the nonmovant. *See id*. A "grant of summary judgment will not be sustained if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *See Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922 (7th Cir. 2001); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 762 (7th Cir. 2014) (reversing grant of summary judgment because "[t]he district court's analysis . . . failed to take the facts in

the light most favorable to the plaintiffs"). To determine whether an officer had reasonable suspicion for a *Terry* stop, "courts examine the totality of the circumstances *known to the officer at the time of the stop* . . . ." *United States v. Bullock*, 632 F.3d 1004, 1012 (7th Cir. 2011) (emphasis added).

In this case, the panel held that Officers Klotka and Zuberbier had only "narrowly" enough reasonable suspicion to detain Matz. *See Matz*, 2014 U.S. App. LEXIS 19074, at *14. This holding, however, was based on an erroneous view of the facts. Indeed, in several instances, the panel relied almost entirely on the disputed fact that the Officers saw Matz on the porch with Salazar, or saw Matz leaving the porch, to support its holding that Klotka and Zuberbier had reasonable suspicion to stop Matz:

- "During the chase that ensued, officers had no way of knowing where exactly Salazar had gone and could reasonably have believed he was hidden in the car with Matz and other individuals from the porch." *Id.* at *9.
- "First, it is undisputed that the officers had particularized suspicion as to Salazar connecting him to armed robbery and multiple homicides. Given that Salazar and Matz were together on the porch, [the officers] also had a basis from which to conclude that Salazar may have fled in the same car as Matz . . . ." *Id.* at *11-12.[2]

[2] When asked why temporary felony wants are removed from the system after a period of time, Officer Klotka stated that it

- "Given that both Salazar and Matz were together on the porch and both exited the area simultaneously, the officers had an objectively reasonable basis to believe that Salazar could be in the vehicle with Matz . . . ." *Id*. at 12.
- "In their justifiable attempt to apprehend Salazar, Klotka and Zuberbier gave chase to everyone scattering from the porch." *Id*. at *13.

But, in fact, *the record is devoid of any evidence* that Klotka or Zuberbier saw Matz either standing on the porch with Salazar, leaving the porch (with or without Salazar), or entering the car. (R.84 ¶ 25; R.93 ¶ 55.) Rather, construing the evidence in the light most favorable to Matz (as required), Matz was already in the car when Zuberbier first saw the vehicle in the alley. (R.84 ¶ 25.) In fact, in his deposition, Zuberbier stated that he "didn't see them get into the car" and that "[t]hey were already in the car when I first saw them." (R.88-2, Zuberbier Dep. Tr. 23:5-12.)

Thus, the record in this case, viewed in the light most favorable to Matz, establishes that at the time of his *Terry* stop Klotka and Zuberbier had not seen Matz on the porch with Salazar, and had not seem

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"would constitute an unlawful arrest ... if someone is no longer wanted for a crime and [officers] detain them on a want that's not valid." (R.88-1, Klotka Dep. Tr. 94:14-95:6.) But Defendants do not dispute that they did not have a warrant for Salazar's arrest, (R.93 ¶¶ 63, 70), or that there was no temporary felony want for Salazar in effect on September 16, 2003, (id. at ¶ 66). Thus, it is also disputed whether the Officers had probable cause to arrest Salazar.

him leaving the porch with the other individuals. Instead, the first time the officers saw Matz he was in the car in the alley. (*Id*.) Therefore, when the officers stopped Matz, the only information they knew about him was that he was in a car driving away from 1335 S. Layton Blvd. Thus, the panel's determination that "[g]iven that *both Salazar and Matz were together on the porch* and *both exited the area simultaneously*, the officers had an objectively reasonable basis to believe that *Salazar could be in the vehicle with Matz*, and therefore had an objectively reasonable basis to stop the vehicle and briefly detain the occupants," *Matz*, 2014 U.S. App. LEXIS 19074, at *12 (emphasis added), was in error. Reasonable suspicion is based on "the totality of the circumstances known to the officer at the time of the stop," *Bullock*, 632 F.3d at 1012, and the record viewed in favor of Matz establishes that the Officers had not seen Matz, specifically, prior to seeing him in the car. Therefore, the only thing tying Matz to Salazar at the time of the stop was the fact that he was in the same vicinity as Salazar when the officers first spotted Matz in the car. This is not enough to establish reasonable suspicion for a *Terry* stop. *United States v. Bohman*, 683 F.3d 861, 864 (7th Cir. 2012) ("[M]ere suspicion of illegal activity at a particular place is not enough to transfer that suspicion to anyone who leaves that property.").

Additionally, though the panel did not reach the issue, Klotka and Zuberbier are not entitled to qualified immunity because "it [is] well known . . . that an officer's decision to perform an investigatory stop must be justified by reasonable suspicion—that is, by some objective manifestation that the person stopped is, or is about to be, engaged in criminal

activity." *Jones v. Clark*, 630 F.3d 677, 682 (7th Cir. 2011) (internal quotations omitted). It was well-established in this Circuit that at the time of Matz's stop, suspicion of illegal activity at a particular place was not enough, by itself, to support reasonable suspicion for a stop of every person in the vicinity. *See Bohman*, 683 F.3d at 864. Since the officers had never heard of Matz prior to the encounter in question, and did not see him leave the porch, "under [Matz's] version of the facts, [the defendant officers] violated [his] clearly established rights." *Jones*, 630 F.3d at 682.

II. THIS PANEL'S DECISION REGARDING THE PERMISSIBLE BOUNDS OF A *TERRY* STOP CANNOT BE RECONCILED WITH DECISIONS FROM THIS COURT AND OTHER CIRCUITS AND FURTHER GUIDANCE FROM THIS COURT IS REQUIRED.

The fact that the Officers pointed their weapons at Matz, threatened to blow his "f[-ing] head off," handcuffed him, and placed him into a patrol car, transformed his *Terry* stop into an unlawful arrest. But although the panel stated in its decision that "[t]he use of a firearm and handcuffs undoubtedly puts Matz's encounter at the outer edge of a permissible *Terry* stop," *Matz*, 2014 U.S. App. LEXIS 19074, at *16, and that "the hallmarks of formal arrest such as applying handcuffs, drawing weapons, and placing suspects in police vehicles should not be the norm during an investigatory detention," *id.* at *18, the panel nonetheless affirmed the grant of summary judgment in favor of the Officers and held that Matz was not arrested without probable cause.

The panel justified its admittedly "close" decision, *id*. at *15, based on its view that the officers were "undoubtedly" confronting a situation where they may have believed that their safety required drawing weapons because "[t]hey were pursuing an individual suspected of having committed armed robbery and possibly murder who was a member of the Latin Kings gang," *id*. at *19. Thus, the panel determined that the officers' extreme actions were justified under the circumstances despite the fact that—on the panel's own admission—the officers barely had reasonable suspicion (if they had any, at all) to stop Matz in the first place. *Id*. at *15-19. In addition, the panel's suggestion that it was "reasonable" for the officers to point a gun at and handcuff Matz during the stop to "prevent things from turning violent" was unjustified, given that the officers were admittedly searching for Salazar, not Matz, (R.93 ¶ 140), they did not see Salazar in the car with Matz at the time of the stop, (*id*. at ¶ 24), and they had no idea who Matz was or that he had been involved in any crime, (R.88-1, Klotka Dep. Tr. 65:7-21; R.88-2, Zuberbier Dep. Tr. 36:10-13; R.93 ¶¶ 12, 56). Likewise, the officers have provided no evidence to suggest that at the time of the stop they thought that the individuals in the car were armed.

In cases with far less egregious facts, this Court concluded that a *Terry* stop transformed into an arrest requiring probable cause. For example, in *Lawrence v. Kenosha County*, this Court held that "Lawrence was seized when Vena grabbed Lawrence's arm and attempted to physically remove him from his vehicle. A reasonable person, at that point, would have felt that he was not free to leave." 391 F.3d 837, 842 (7th Cir. 2004). Likewise, in

United States v. Smith, this Court held that an individual was "in custody" when he "had been frisked, placed in handcuffs and told to sit at a specific place on the grass by the side of the road." 3 F.3d 1088, 1097 (7th Cir. 1993). In each of these cases, officers had not drawn their weapons, as Klotka and Zuberbier did in this case, and this Court has noted that a "pointed gun . . . makes the encounter far more frightening than if the officer's gun remains holstered or even drawn but pointed down at his side." *United States v. Serna-Barreto*, 842 F.2d 965, 967 (7th Cir. 1988).

Similarly, other circuits have held that where an officer pointed a weapon at or handcuffed an individual, a *Terry* stop was transformed into an arrest requiring probable cause. For example, in *United States v. Ramos-Zaragosa*, the Ninth Circuit held that '[t]he encounter of the agents and the appellant and his passenger was an arrest, as opposed to an investigatory stop, because the agents at gun point, under circumstances not suggesting fears for their personal safety, ordered the appellant and his passenger to stop and put up their hands." 516 F.2d 141, 144 (9th Cir. 1975). Likewise, in *Cortez v. McCauley*, the Tenth Circuit, viewing the facts in the light most favorable to the plaintiff on summary judgment, held that "the scope and duration of a lawful investigative detention was quickly exceeded in this case, and the situation became a full custodial arrest" when officers "grabbed" the defendant and removed him from the doorway of his home, handcuffed him, advised him of his *Miranda* rights, placed him in the backseat of a locked patrol car, and questioned him. 478 F.3d 1108, 1116 (10th Cir. 2007).

Thus, the panel's decision broadens the scope of a permissible *Terry* stop beyond what this Court and others have allowed, and leaves individuals and officers in need of guidance as to the constitutional bounds of a *Terry* stop. Indeed, this Court has stated that "[f]or an investigative stop based on reasonable suspicion to pass constitutional muster, the investigation following it must be reasonably *related in scope and duration to the circumstances that justified the stop in the first instance* so that it is a minimal intrusion on the individual's Fourth Amendment interests." *Bullock*, 632 F.3d at 1015 (emphasis added). Thus, *Bullock* demonstrates that the panel's decision authorizing extreme police action such as pointing a weapon at and handcuffing Matz during his *Terry* stop cannot be reconciled with its holding that the Officers only "narrowly" had reasonable suspicion to stop Matz to begin with. In other words, the extreme scope of the *Terry* stop in this case vastly exceeded the circumstances that justified the stop in the first place, and transformed it into an arrest requiring probable cause. *Id*; *see also Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality op.) ("[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.").

The facts of this case demonstrate that almost instantly after Klotka and Zuberbier confronted Matz in the car, he was placed under arrest. In fact, immediately upon seeing the car in the alley, Zuberbier "ran towards the car," "drew his gun and pointed it at the vehicle while shouting, 'Police! Stop!'" and threatened to "blow [Matz's] 'f[-ing] head off.'" *Matz*, 2014 U.S. App. LEXIS 19074, at *3. Then,

Klotka, who also drew his gun, ordered Matz and the others to get out of the vehicle and to "keep their hands visible." *Id.* Construing the facts in the light most favorable to Matz, he was then handcuffed and put into a patrol car. *Id.* These facts are certainly more egregious than in *Lawrence*, where this Court held that grabbing an individual's arm and ordering them out of their vehicle constituted an arrest. 391 F.3d at 842. In fact, as Judge Posner noted during oral argument of this case, an individual is unlikely to "move an inch" with police officers pointing a gun at them, (Oral Arg. Audio 25:50), which indicates that "[a] reasonable person, at that point, would have felt that he was not free to leave," *Lawrence*, 391 F.3d at 842. And if pulling a weapon on an individual by itself does not constitute arrest, certainly handcuffing them and putting them in a patrol car after pointing a gun at them would. *See*, *e.g.*, *Cortez*, 478 F.3d at 1116.

Finally, though the panel did not reach the qualified immunity issue directly, the Officers are not entitled to qualified immunity in this case on this issue. Qualified immunity is not available where an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury[.]" *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Based on recent caselaw in this Circuit warning that "although we have upheld the use of handcuffs to ensure officer safety in a *Terry* stop of brief duration, without automatically escalating the situation to an arrest, that does not mean that law enforcement has carte

blanche to handcuff routinely," *Ramos v. City of Chicago*, 716 F.3d 1013, 1018 (7th Cir. 2013); *see also United States v. Clark*, 657 F.3d 578, 581 (7th Cir. 2011), cert. denied, 132 S.Ct. 1159 (2012) (assuming, without deciding, that approaching the defendant with guns drawn, patting him down, and placing him in handcuffs effectuated a *de facto* arrest rather than investigatory *Terry* stop), and this Court's decisions calling the increasing trend of handcuffing individuals and putting them in police cruisers during a stop "disturbing," *Ramos*, 716 F.3d at 1018, the Officers here reasonably should have known that pointing a weapon at, handcuffing, and placing in a patrol car an individual that they only knew was in the area of a known gang member was a "deprivation" of Matz's "constitutional rights." *See Harlow*, 457 U.S. at 815.

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As the panel noted in this case, "'for better or for worse' the trend of expanding *Terry* stops to include 'the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons, and other measures of force more traditionally associated with arrest than with investigatory detention" continues. *Matz*, 2014 U.S. App. LEXIS 19074, at *18 (quoting *United States v. Tilmon*, 19 F.3d 1221, 1224-25 (7th Cir. 1994)).[3] But in this case—which has taken this "expansion" of *Terry*

[3] As the panel acknowledged, Officer Zuberbier admitted in his deposition that officers "detain people all the time. We handcuff them, we find out it's all legitimate, talk to them, let them go. It's part of daily police work." Indeed, as the panel admitted, such routine behavior is a "particular cause for concern." *Matz*, 2014 U.S. App. LEXIS 19074, at*21.

much further, and threatens to swallow the protections of the Fourth Amendment altogether—rehearing is necessary in order to articulate some boundaries on the permissible scope of *Terry* stops (if any still exist). If police officers are allowed to point a gun at, threaten, handcuff, and detain in a police car an individual who they only "narrowly" had reasonable suspicion to stop in the first place, then the "disturbing" "proliferation of cases in this court in which *'Terry'* stops involve handcuffs and ever-increasing wait times in police vehicles" is sure to continue. *See Ramos*, 716 F.3d at 1018. Indeed, if left to stand, this case expands the scope of a permissible *Terry* stop beyond law enforcement activity that this Court has already found "disturbing" and authorizes a police officer to threaten an individual at gunpoint, without any indication that the individual poses any particular danger to the officer, or has committed a crime.

CONCLUSION

WHEREFORE, in light of the extraordinary importance of this issue, and the panel's erroneous characterization of disputed facts, Mr. Matz respectfully requests this Court to grant panel or *en banc* rehearing in this case.

Dated: October 17, 2014 Respectfully submitted,

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CIRCUIT RULE 30(D) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned hereby certifies that this brief complies with the page limit of Fed. R. App. P. 40(b) because it is 15 pages long. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared it using Microsoft Office Word 2007 and uses 12-point Bookman Old Style type, and 11-point font for footnotes.

Dated: October 17, 2014

/s/ Brian J. Murray
Brian J. Murray

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2014, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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