No. 14-1045

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

RESPONDENTS' BRIEF IN OPPOSITION

GRANT F. LANGLEY
City Attorney

JAN A. SMOKOWICZ
Assistant City Attorney
Counsel of Record
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
(414) 286-2601
jsmoko@milwaukee.gov
Attorneys for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment To The United States Constitution

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

U.S. Const. amend. IV.

42 U.S.C. § 1983

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 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.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

The factual statements supplied by Shaun Matz in his Statement of the Case do not set forth all of the facts relevant to a determination of the petition. The following is, therefore, provided as a complete statement of all pertinent facts.

Shaun J. Matz ("Matz"), is presently a prisoner at the Columbia Correctional Institution, 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.

At the time of the litigation below, Karl Zuberbier ("Zuberbier") was employed by the Milwaukee Police Department as a detective, assigned to the Milwaukee Metro Drug Unit. At the time of the arrest of Shaun Matz on September 16, 2003, Zuberbier was a Milwaukee Police Officer assigned to the warrant squad. Rodney Klotka ("Klotka") is retired from the Milwaukee Police Department, and was a police officer with the department for twenty-two years; on September 16, 2003, he too was in the warrant squad. Klotka summarized the officers' "duties on the warrant squad [as] to look for subjects that were wanted for . . . criminal offenses, major criminal offenses,

[and those wanted on] warrants, whether they be municipal, state warrants, [or] federal warrants. . . . [and] to look for people that were wanted for major crimes where there was not actually a warrant in place."

On the day of Matz' arrest, Zuberbier and Klotka were both assigned to the same squad, an unmarked police vehicle, but they were both in uniform. In the course of their duties, Klotka and Zuberbier were able to drive past 1335 South Layton Boulevard. As they were proceeding west on Greenfield Avenue, Zuberbier and Klotka made a turn to proceed north on Layton Boulevard.

As soon as they made the turn, Zuberbier, the passenger in the squad, could see a man that was discussed in a preceding police briefing in connection with his possible involvement in an armed robbery. The suspect was Javier Salazar, a member of the Latin Kings gang.

Klotka was also aware that Salazar was a member of the Latin Kings gang. Zuberbier had also been informed that Salazar was also a suspect in two homicides and a couple of shootings. Klotka would also have been at the briefings or learned about this from written materials.

Zuberbier alerted Klotka to Salazar being on the porch and Klotka acknowledged this. Klotka turned and looked at the individuals on the porch after Zuberbier alerted him to them and Klotka described this as "[u]nfortunate[ ]," because it took away the

"element of surprise [which] always works on the police side" as Klotka believes that "possibly by us looking in that general direction, people that are being sought after by the police have a tendency to pay attention to squad cars," even if the vehicles are unmarked, as they are still identifiable as police cars.

Klotka made a u-turn in an opening through the boulevard some distance down the street. As soon as the squad started to make the turn, the officers observed that people on the porch began to disperse, with a few running around the south side of the building and then running west through the yards, and with a couple others going down the front yard.

By the time the vehicle had stopped, "everybody had left the porch." Most of the people from the porch area had fled west, through the yards.

Once Klotka pulled up, Zuberbier "bailed out . . . and started running up into the yards where [he had] seen them run." Zuberbier ran along the south side of the house, 1335 South Layton Boulevard, in the gangway.

Klotka got out of the squad and "ran south for a short distance and then west." Klotka ran along the south side of the porch between two houses to the back of the residence.

As he was running down the gangway, Zuberbier saw three people, two males and a female, just starting to run southbound in the alley and two more people in a moving car. The people in the car started

to pull out into the alley as Zuberbier was coming into the yard and Zuberbier pointed his gun at the driver, swore at him, and threatened to shoot him if he did not stop.

Zuberbier could hear Klotka behind him yelling at the people in the car to stop, police, and once Zuberbier knew that Klotka "had the car," Zuberbier searched the car; Matz was the driver and was stopped and ordered out of the vehicle. At some point, Zuberbier left to search for other people, stopped them and eventually detained those suspects.

At least six other squads responded to the scene. Once other officers arrived, Klotka went into the neighborhood to the west to look for others who had fled and who may have been hiding.

Before the other officers arrived, Zuberbier checked the VIN and learned that the vehicle was stolen. Klotka did not know that the vehicle was stolen at the time that he stopped it. At some point, Salazar was found and arrested.

Zuberbier explained that he detained the three individuals he pursued because they were with a homicide suspect who was a known Latin Kings gang member who would not let anyone get close to him unless they were fellow gang members or associates, and because these individuals all fled when they saw police. As Klotka further explained, "[t]he other individuals that were with [Salazar] on the porch at that time would have been considered confederates, associates, possibly involved in something, [given] the

fact that when we pulled up, they all ran, they attempted to flee the scene." Matz was arrested because the car he was driving was stolen.

REASONS FOR DENYING THE PETITION

I. The Petitioner Has Not Shown That The Lower Court's Ruling On The Fourth Amendment Claim Conflicts With Any Pertinent Decision Of This Court

This Court should not exercise its discretion, consistent with Sup. Ct. R. 10(c), to grant the petition here because the Seventh Circuit has not "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id*. Contrary to any claim by petitioner, the Seventh Circuit properly followed the mandates of this Court to conclude that Officers Klotka and Zuberbier acted lawfully under *Terry v. Ohio*, 392 U.S. 1 (1968) in stopping Matz before his arrest for operating a stolen vehicle.

In affirming summary judgment for Zuberbier and Klotka, the Seventh Circuit acknowledged and applied the controlling decisions of this Court. *Terry* "authorizes brief investigatory detentions based on the less demanding standard of reasonable suspicion." Pet. App. 9a, citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The Seventh Circuit further recognized that a *Terry* stop "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.'" Pet. App. 9a, quoting *Terry*, 392 U.S. at 21. The appellate court further acknowledged this Court's directive that to determine "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." Pet. App. 9a, citing *Terry* 392 U.S. at 20-21.

In his petition for a writ, Matz focuses upon the related question of whether the use of certain types of force, that is, drawing firearms and using handcuffs, transformed the detention from a lawful *Terry* stop into an arrest without probable cause. Pet. 9. In addressing this particular issue, however, the appellate court also properly acknowledged the limits placed by this Court.

The Seventh Circuit acknowledged that it must "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.'" Pet. App. 13a-14a, quoting *Terry*, 392 U.S. at 20. Citing only to two of its earlier decisions, the appellate court then explained that, "[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." Pet. App. 14a, citing to *Rabin v. Flynn*, 725 F.3d 628, 632-33 (7th Cir. 2013)

and *Jewett v. Anders*, 521 F.3d 818, 824-25 (7th Cir. 2008).

The citations to its earlier decisions, however, is ultimately grounded in pertinent decisions of this Court. *Rabin* relies upon the earlier Seventh Circuit decision in *Jewett*. *Rabin*, 725 F.3d at 632-33, citing *Jewett*, 521 F.3d at 824-25. *Jewett* cites, in particular, to *Tom v. Voida*, 963 F.2d 952, 958 (7th Cir. 1992). *Tom*, in turn, relies in part upon this Court's determination in *United States v. Hensley*, 469 U.S. 221, 224, 235 (1985) that when an officer drew a weapon, pointed in the air, and approached a stopped car, the officer's actions did not transform a *Terry* stop into an arrest requiring probable cause.

Aside from these particular decisions of this Court, however, there are certain other determinations that it has made which govern here. In *Terry* itself, this Court noted the number of law enforcement officer deaths, most often then committed with guns and knives, in stating that, "[i]n view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Terry*, 392 U.S. at 24. This Court reaffirmed that conclusion in *Adams v. Williams*, 407 U.S. 143, 146 (1972): a "policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." Ultimately, this Court has held that there is no "litmus-paper test" or "sentence or a paragraph" rule that establishes

when the "endless variations in the facts and circumstances" transforms an investigative stop into an arrest requiring probable cause. *Florida v. Royer*, 460 U.S. 491, 506-507 (1983).

Contrary to Matz' assertion that the Seventh Circuit's decision "contradicts this Court's precedent," the lower court properly adhered to the decisions of this Court given the particular circumstances confronting Officers Zuberbier and Klotka in their encounter with Matz and the other individuals who had fled from the porch on the officers' approach. This Court has recognized that in an investigatory stop, there is a "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Terry*, 392 U.S. at 24.

As the Seventh Circuit recognized, Zuberbier and Klotka were "confronting a situation where they may have legitimately believed [that] drawing weapons was necessary to protect themselves" because the officers were: 1) "pursuing an individual [Salazar] suspected of having committed armed robbery and possibly murder who was a member of the Latin Kings gang;" 2) "outnumbered;" 3) "approaching a moving vehicle;" 4) approaching people inside the vehicle who had been with Salazar "just moments beforehand;" 5) reasonably concerned that Salazar might be hiding in the vehicle; 6) at a "clear disadvantage," trying to stop a moving vehicle while they were "on foot;" and, 7) possibly confronting "individuals in the car [who] may have been armed," given the

nature of Salazar's crime. Pet. App. 17a-18a. Added to all of these risk factors, though unmentioned by the Seventh Circuit, is the officers' own knowledge that the individuals were all likely gang confederates or associates as Salazar would not likely have let anyone other than Latin Kings gang members or associates to be close to him.

The Seventh Circuit thus properly adhered to this Court's determinations in *Terry*, *supra*, and *Adams*, *supra* that officers may take appropriate steps to protect themselves in an investigatory stop. It also properly considered, in accordance with this Court's directions in *Royer*, *supra* that particular circumstances may require officers to take measures to protect themselves or others in certain situations such as here where the officers are outnumbered, dealing with trying to stop a moving vehicle while the officers are on foot, and in pursuit of a dangerous suspect who may be armed and hiding with his gang confederates in the vehicle. The appellate court did not, therefore, contradict this Court's decisions by concluding that the investigatory stop was not transformed into an arrest when the officers drew their weapons.

Similarly, the appellate court properly adhered to this Court's decisions in holding that detaining Matz with handcuffs, frisking him, and searching the car for Salazar also did not transform the investigatory stop into an arrest. Pet. App. 18a. "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 police," and, thus, it was reasonable to handcuff "the occupants of the car [as] the most safe and efficient way to ascertain Salazar's whereabouts and any pertinent information about his suspected crimes." *Id*. The Seventh Circuit thus once again properly adhered to this Court's determinations in *Terry*, *supra*, and *Adams*, *supra* that officers may take appropriate steps to protect themselves in an investigatory stop and this Court's directions in *Royer*, *supra* that particular circumstances may require officers to take measures to protect themselves or others in certain situations such as here where the officers are outnumbered, dealing with people who are trying to flee from police, and where the officers are searching for a dangerous individual who is suspected to have committed or been involved with serious crimes while armed.

Matz furthermore lacks factual support in arguing that the Seventh Circuit's decision conflicts with this Court's decisions in *Dunaway v. New York*, 442 U.S. 200 (1979) or *Royer*, *supra*. In contrast to those situations, Matz was not transported from the scene or questioned about any homicides until *after* he was arrested at the scene when it was determined that the vehicle he had been driving was reported as stolen. Pet. App. 5a-6a (court of appeals opinion); 32a (district court opinion). The investigatory stop had ended before Matz was questioned or transported from the scene.

Finally, Matz improperly construes the facts and the appellate court's decision in contending that it

failed to follow this Court's holding that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause" or to "reasonable belief" to support a search. *Ybarra v. Illinois*, 444 U.S. 85, 91-93 (1979). Zuberbier and Klotka obviously possessed more than knowledge of Matz' "mere propinquity" to Salazar. They observed Matz in the company of Salazar, a known member of the Latin Kings, suspected of a recent armed robbery and possibly murder. They also observed other matters that created reasonable suspicion with respect to Matz and the others.

Matz and the others fled once they appeared to observe the approach of police. The officers also observed Matz and others attempting to drive away and, from the officers' vantage, could not discern whether Salazar had secreted himself in the car. The officers also knew that Salazar was a member of the Latin Kings and, from their experience, knew that he would not let others, such as Matz, be in his presence unless Matz was also a member or associate. It was not, therefore, "mere propinquity" that supported the investigatory stop and the appellate court's decision does not, therefore, conflict with this Court's decisions. *Ybarra*, 444 U.S. at 91. The petitioner has simply not shown that the lower court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

II. The Petitioner Has Not Shown That The Lower Court's Ruling Conflicts With Pertinent Decisions Of Other United States Courts Of Appeals

Matz contends that the Seventh Circuit's decision "contradicts the well-reasoned conclusions of other circuit courts." Pet. 12. To the contrary, various other circuits have also held that an investigatory stop is not transformed into an arrest when an officer draws a weapon or employs handcuffs in an effort to protect the officer and to prevent escape. This Court should not exercise its discretion, consistent with Sup. Ct. R. 10(a), to grant the petition here because the Seventh Circuit has not "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id*.

Other courts of appeals have, in fact, repeatedly held that an investigatory stop is not transformed into an arrest because an officer draws a firearm or handcuffs the detainee. In *United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987) the appellate court held that, "the use of force during a stop does not convert the stop into an arrest if it occurs under circumstances justifying fears for personal safety" and concluded that there had not been an arrest when the individuals had been forced from their vehicle and made to lie down on wet pavement at gunpoint. In *United States v. Trullo*, 809 F.2d 108, 113 (1st Cir.), *cert. denied*, 482 U.S. 916 (1987), the appellate court also held that the display of weapons during a stop was justified.

In *United States v. Conyers*, 118 F.3d 755, 756 (D.C. Cir. 1997), police stopped the travel of a vehicle whose driver was suspected of transporting cocaine by parking the squad in front of the vehicle and drawing a weapon as the officer approached the driver. "We conclude that the detaining officers did not act unreasonably when they pulled their cruiser in front of Conyers' car [as a]n officer may take whatever steps are reasonably necessary to prevent a subject from fleeing during the course of an investigatory stop." *Id*. at 757. The appellate court further held that the officer "acted reasonably when he approached Conyers with his weapon drawn." *Id*. "An officer may stop an individual at gunpoint when the threat of deadly force appears 'reasonably necessary for the protection of the officer.'" *Id*. (citation omitted). "[A]lthough 'it might have been unreasonable to assume that a suspected drug dealer in a car would be armed' in 1968 when the Supreme Court decided *Terry*, nowadays 'it could well be foolhardy for an officer to assume otherwise.'" *Id*. at 757-58 (citation omitted).

In determining that an officer had not violated a person's civil rights by ordering an individual in a *Terry* stop out of a vehicle at gunpoint, the Eleventh Circuit recounted that it and the Fifth Circuit had repeatedly concluded that merely displaying a weapon does not transform an investigative stop into an arrest. *Courson v. McMillian*, 939 F.2d 1479, 1493-96 (11th Cir. 1991). It quoted with approval the following: "'Regarding the drawn gun, this Court has

indicated that an officer's display of weapons does not necessarily convert an investigatory stop into an arrest.'" *Courson*, 939 F.2d at 1493, quoting *United States v. Roper*, 702 F.2d 984, 987 (11th Cir. 1983). It reaffirmed the guidance the *Roper* court drew from an earlier decision of the Fifth Circuit which also held that merely drawing a weapon does not transform an investigatory stop into an arrest; "'[t]o require an officer to risk his life in order to make an investigatory stop would run contrary to the intent of *Terry v. Ohio*, 392 U.S. 1 (1968).'" *Roper*, 702 F.2d at 987, quoting *United States v. Maslanka*, 501 F.2d 208, 213 n. 10 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975). As to the law in the Eleventh Circuit, the *Courson* court explained, "[c]learly, this circuit condoned officers' having drawn weapons when approaching and holding individuals for an investigatory stop in May, 1985, when reasonably necessary for protecting an officer or maintaining order." *Courson*, 939 F.2d at 1494-95.

In *United States v. Campbell*, 178 F.3d 345, 349 (5th Cir. 1999), the court reaffirmed its earlier ruling in *United States v. Sanders*, 994 F.2d 200, 206 (5th Cir. 1993) that, "'using some force on a suspect, pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect – whether singly or in combination – do not automatically convert an investigatory detention into an arrest requiring probable cause.'" In a case in which an individual quickly turned back on an isolated rural road leading to the site of a police drug raid upon

seeing police up the road, the Tenth Circuit held that "[i]t was not unreasonable under the circumstances for the officers to execute the *Terry* stop with their weapons drawn." *United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir. 1993). As the *Perdue* court explained, "other circuits have held that police officers may draw their weapons without transforming an otherwise valid *Terry* stop into an arrest." *Id.*, citing *United States v. Alvarez*, 899 F.2d 833, 838 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991); *United States v. Taylor*, 857 F.2d 210, 214 (4th Cir. 1988); *United States v. Serna-Barreto*, 842 F.2d 965, 968 (7th Cir. 1988); *United States v. Jones*, 759 F.2d 633, 638 (8th Cir.), *cert. denied*, 474 U.S. 837 (1985); and *United States v. Jackson*, 652 F.2d 244, 249 (2d Cir.), *cert. denied*, 454 U.S. 1057 (1981). The *Perdue* court also noted that its "holding is consistent with the recent trend allowing police to use handcuffs or place suspects on the ground during a *Terry* stop" and that "[n]ine courts of appeals, including the Tenth Circuit, have determined that such intrusive precautionary measures do not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment." *Perdue*, 8 F.3d at 1463 (citations omitted).

Contrary to Matz' assertion that "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 an occupant of a vehicle with their firearms drawn" (Pet. 13), as demonstrated above, a number of circuits, including the First, Second, Fourth, Fifth, Eighth,

Ninth, Tenth, Eleventh, and District of Columbia Circuits have all held that by merely drawing a weapon, an officer does not transform an investigatory stop into an arrest and that, in particular circumstances, such action is appropriate in the course of such a stop. Furthermore, also contrary to Matz' assertion that using handcuffs transforms a *Terry* stop into an arrest, as noted by the appellate court in *Perdue*, "[n]ine courts of appeals, including the [Second, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, District of Columbia and] Tenth Circuit, have determined that such intrusive precautionary measures do not necessarily turn a lawful *Terry* stop into an arrest under the Fourth Amendment." *Perdue*, 8 F.3d at 1463 (citations omitted).

As noted above, under the particular circumstances of the underlying incident, Zuberbier and Klotka acted reasonably in drawing their weapons and then placing Matz and the other occupants of the vehicle in handcuffs. Matz and the others had been in the presence of a known Latin Kings gang member, suspected of a recent armed robbery and possibly involved in murder. From their experience, the officers knew that Salazar would only let other gang members and associates around him. Once the individuals apparently noted the approach of police, not just Salazar but everyone on the porch fled. By the time the officers got to the back of the yard, several of them, including Matz, were attempting to flee in a vehicle.

Outnumbered, then on foot, and facing the possibility that the vehicle might not be driven away but also towards the officers, Zuberbier and Klotka pointed their guns at the car and ordered that it stop. They ordered the occupants out of the vehicle, a measure that prevented further flight in the vehicle, limited access to any weapon that might be in the vehicle, and allowed a search inside to determine if Salazar was attempting to hide therein.

It was then further reasonable to handcuff the occupants, including Matz, rather than continue to detain them by using drawn firearms. This limited the possibility of further attempted flight and allowed the outnumbered police officers to attempt to conduct an investigation.

Even Matz acknowledges that the use of handcuffs during an investigatory stop may not only be based on a reasonable belief that a suspect is armed but also because "'the restraints are necessary for some other legitimate purpose.'" Pet. 14, quoting *Bennett v. City of Eastpointe*, 410 F.3d 810, 836 (6th Cir. 2005); see also Pet. 17, quoting *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1995) which notes that pointed weapons and handcuffs were not reasonable where there was not only no threat, but also no fear that the suspects "would escape." In this case there was the obvious legitimate purpose of preventing further flight and controlling people who outnumbered the officers so that the officers could conduct an investigation.

Matz has not, therefore, shown that the Seventh Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* and alternative request for summary reversal should be denied.

Dated this 24th day of March, 2015.

Respectfully submitted,

GRANT F. LANGLEY
City Attorney

JAN A. SMOKOWICZ
Assistant City Attorney
Counsel of Record
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
(414) 286-2601
jsmoko@milwaukee.gov
Attorneys for Respondents