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

BRIAN J. MURRAY
Counsel of Record
MEGHAN E. SWEENEY
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

Counsel for Petitioner

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.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

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

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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,

BRIAN J. MURRAY
Counsel of Record
MEGHAN E. SWEENEY
JONES DAY
77 West Wacker Drive
Suite 3500
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com

February 24, 2015

Counsel for Petitioner