APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
[filed October 27, 2017]

No. 15-1366

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Wisconsin.
No. 14-CR-25 — Rudolph T. Randa, *Judge*.

Argued November 30, 2016 — Decided October 27, 2017

Before WOOD, *Chief Judge*, and FLAUM, EASTERBROOK, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Police in Milwaukee saw a car stopped within 15 feet of a crosswalk, which is unlawful unless the car is "actually engaged in loading or unloading or in receiving or discharging passengers". Wis. Stat. §346.53. One police car drew up parallel to the stopped car, while another drew up behind. Shining lights through the car's windows (it was after 7 P.M. in January), police saw a passenger in the back seat try to hide a firearm. Randy Johnson, the passenger,

was prosecuted for possessing a weapon that, as a felon, he was forbidden to have. 18 U.S.C. §922(g)(1). After the district court denied his motion to suppress the gun, see 2014 U.S. Dist. LEXIS 135367 (E.D. Wis. Sept. 25, 2014), adopting 2014 U.S. Dist. LEXIS 135374 (E.D. Wis. Aug. 7, 2014), Johnson entered a conditional guilty plea and was sentenced to 46 months' imprisonment. A panel of this court affirmed the conviction, 823 F.3d 408 (7th Cir. 2016), but that decision was vacated when the full court decided to hear the appeal en banc.

Johnson concedes that the car was stopped 7 or 8 feet from a crosswalk. The district court held that this gave the police probable cause to issue a ticket, a process that entails a brief seizure of the car and its occupants. As Officer Conway approached he saw Johnson make movements that led him to infer that Johnson was hiding something such as alcohol, drugs, or a gun. Concerned for his safety, Conway ordered Johnson to get out of the car. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (officers making a traffic stop on probable cause may require a car's occupants to get out). Once the car's door was open, Conway saw a gun on the floor. This led to Johnson's arrest.

Johnson says that the judge should have suppressed the gun, because the statutory exception for receiving or discharging cargo or passengers means that the police did not have adequate reason to issue a ticket or even to approach the car until they had observed long enough to know that the car was not within the scope of the exception. The district court rejected that contention, as do we.

First, the district court found that, when the police approached, all four doors of the car were shut and no one was standing nearby, so that the exception was inapplicable. 2014 U.S. Dist. LEXIS 135374 at *6 ("there is simply no evidence that the SUV was engaged in loading or unloading, or in receiving or discharging passengers, as the doors to the vehicle were closed and there is no evidence that any individuals were in the immediate vicinity of the vehicle"). That finding is not clearly erroneous. Indeed, Johnson does not contest it.

Second, although Johnson contends that Wisconsin's judiciary would treat a driver's stop to buy something from a nearby store as within the "loading or unloading or … receiving or discharging passengers" exception, we need not address that issue of state law. Officers who had probable cause—recall that it has been stipulated that the car was within 15 feet of the crosswalk—were entitled to approach the car before resolving statutory exceptions. Police possessed of probable cause can hand out tickets (or make arrests) and leave to the judicial process the question whether a defense, exception, proviso, or other limitation applies. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 145–46 (1979); *Hurem v. Tavares*, 793 F.3d 742, 745–46 (7th Cir. 2015); *Askew v. Chicago*, 440 F.3d 894, 896 (7th Cir. 2006). Parking-enforcement patrols approach stopped cars countless times every day. Depending on what they find, sometimes they write tickets and sometimes they don't. If the car is occupied, the difference may turn on what the driver says. The Fourth Amendment requires searches and seizures to be reasonable; it does not demand that police and other public officials resolve all possible exceptions

before approaching a stopped car and asking the first question.

When denying Johnson's motion to suppress, the district court relied on *Whren v. United States*, 517 U.S. 806 (1996), which holds that probable cause to believe that a car's driver is engaged in speeding or another motor-vehicle violation supports a stop and arrest—and that the possibility of an ulterior motive, such as a desire to investigate drugs, does not matter, because analysis under the Fourth Amendment is objective. Johnson, who believes that the police had an ulterior motive for approaching his car, contends that *Whren* does not apply to infractions by stopped cars, which he labels parking violations rather than moving violations.

Yet *Whren* did not create a special rule for moving offenses. The two doctrines that underlie *Whren*'s holding—(1) that probable cause justifies stops and arrests, even for fine-only offenses, and (2) that analysis of search-and-seizure issues disregards the officers' thoughts—are of general application. See, e.g., *Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546–47 (2017) (collecting cases); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001); *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

We assumed in *United States v. Shields*, 789 F.3d 733, 744– 46 (7th Cir. 2015), that *Whren* applies to parked as well as moving vehicles, and to parking violations as well as moving violations. Every other circuit that has addressed the issue expressly has so held. See *Flores v. Palacios*, 381 F.3d 391, 402–03 (5th Cir. 2004); *United States v. Copeland*, 321 F.3d 582, 594 (6th Cir. 2003); *United States v. Choudhry*, 461 F.3d 1097, 1101 (9th Cir. 2006) (collecting cases).

If there were to be a difference, it would be easier to deem "reasonable" (the constitutional standard) an officer's approach to a car already stopped than the halting of a car in motion. "[I]f police may pull over a vehicle if there is probable cause that a civil traffic violation has been committed, then [the police] surely did not violate the Fourth Amendment by walking up to [a suspect], who was sitting in a car that rested in a spot where it was violating one of [a city's] parking regulations." *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999).

United States v. Paniagua-Garcia, 813 F.3d 1013 (7th Cir. 2016), and *United States v. Flores*, 798 F.3d 645 (7th Cir. 2015), do not hold otherwise. Both of these decisions concern the circumstances under which moving vehicles may be stopped on reasonable suspicion. Cf. *Terry v. Ohio*, 392 U.S. 1 (1968). The stop of a moving vehicle is more intrusive than approaching a parked car. Because the police approached Johnson's car with probable cause to believe that the driver was violating a traffic law, and the car was not moving, it is unnecessary to consider today how *Terry* applies when cars are in motion. It is enough to conclude that *Whren* applies to both parking and moving offenses.

We grant that the police did more than just stroll up: two squad cars, which bathed the parked car in bright light, implied that the occupants were not free to drive away. The district judge treated this as a seizure; so do we. But issuing a ticket always entails a brief seizure. Johnson concedes that the driver of a car approached with probable cause to investigate a parking offense is not entitled to leave. What is more, when the officers approached this parked car, no one was in the driver's seat. (The driver was

inside a liquor store making a purchase.) So both as a matter of the suspects' legal entitlements and as a matter of brute fact, it did not make any difference whether the police approached with two cars rather than one, or whether the cars' spotlights were on. Johnson's car was not going anywhere.

The district court concluded that the way in which the stop was conducted was not responsible for the gun's discovery. 2014 U.S. Dist. LEXIS 135374 at *13–16. That finding is not clearly erroneous. We therefore do not consider whether the officers' show of force was excessive under the circumstances. The United States contends that the use of two cars and searchlights was reasonable to reduce the risk the officers faced in making a nighttime stop in a high-crime area, circumstances in which a city will not rely on foot patrols to enforce traffic laws. Cf. *Arizona v. Johnson*, 555 U.S. 323 (2009) (discussing steps that officers may take for self-protection during auto stops). The district court did not address that subject; we do not either.

Finally, it is worth noting that Johnson has never contended that the police considered the race of the car's occupants when deciding to approach it, or when deciding to use two cruisers rather than one. Indeed, Johnson has not contended that the police even observed the race of the car's occupants until after they approached it; recall that Johnson's principal contention is that police had the car in view for only an instant before deciding to approach. We therefore do not consider whether, and if so when, using racial criteria to select among potential targets of investigation would require the suppression of evidence.

AFFIRMED

HAMILTON, *Circuit Judge*, joined by ROVNER and WILLIAMS, *Circuit Judges*, dissenting. Five officers in two police cars seized the passengers of a stopped car. The officers swooped in on the car, suddenly parking close beside and behind it with bright lights shining in from both directions, opening the doors, pulling all the passengers out and handcuffing them. The district court found, and the majority and I agree, that the passengers were seized as the officers swarmed them, *before* the officers had any sign that one passenger had a firearm. The sole basis for this intrusive and even terrifying "investigatory stop"? A suspected parking violation … for parking too close to an unmarked crosswalk.

The majority errs by extending *Terry v. Ohio*, 392 U.S. 1 (1968), and *Whren v. United States*, 517 U.S. 806 (1996), to allow this pretextual seizure based on the suspected parking violation. This extension is not supported by existing law. It also runs contrary to the core Fourth Amendment standard of reasonableness. No other appellate court has tolerated such police tactics to address a suspected parking violation. Nor should we, at least absent extraordinary circumstances not present here. We should find a Fourth Amendment violation in this seizure of the passengers in the car idling outside a store.

As applied to moving traffic violations, Fourth Amendment doctrine has evolved in recent decades to give police officers so much discretion, including the power to conduct pretextual traffic stops, that some scholars have described this power as the "the twentieth-century version of the general warrant." Sarah A. Seo, *The New Public*, 125 Yale L.J. 1616,

1669 (2016); see also Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221 (1989) (written before the most dramatic expansions of this discretion). The doctrinal evolution has enabled stops for what is often called "driving while black." See generally, e.g., David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544 (1997). Unless the target of such a seizure can offer evidence of racial motivation in the particular case, which is rarely available, such seizures are difficult to limit.

By extending *Terry* and *Whren* to the suspected parking violation in this case, the majority errs by taking the further step of enabling seizures that can be used for "parking while black." The majority's extension of doctrine is arguably defensible. But defensible does not mean correct. Cf. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000) (drawing line to block drug checkpoints in city, despite arguable support for practice in Supreme Court precedents, "to prevent such intrusions from becoming a routine part of American life"). The police tactics here would never be tolerated in more affluent neighborhoods. This extension will further erode the Fourth Amendment, trading away privacy rights of some for the hope of more security for others, and stripping those targeted in searches of both security and privacy. We should find that the tactics in this case violated the Fourth Amendment. I respectfully dissent.

I

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated … ." "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968). In *Terry*, the Supreme Court struck a practical and necessary balance between protecting privacy and allowing effective law enforcement. *Id.* at 20–21. *Terry* did so by allowing a brief investigatory stop in response to signs of an imminent armed robbery.

In applying *Terry*, "which is grounded in the standard of reasonableness embodied in the Fourth Amendment," the court "balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228 (1985); see also 4 Wayne R. LaFave, Search and Seizure § 9.2(c) (5th ed. 2012) ("The *Terry* rule should be expressly limited to investigation of serious offenses."). When the governmental interest is based on a car parked too close to a crosswalk, the balance looks very different from the balance in *Terry*. The alleged governmental interests pale in comparison to the intrusion on personal security in this seizure.

Before digging into the doctrinal issues, consider the circumstances of this seizure. It was just after 7:30 p.m. on January 8, 2014 in Milwaukee. It was dark and very cold, during the memorable "Polar Vortex" of that winter. The air temperature was

eight degrees Fahrenheit, with a wind-chill of twenty degrees below zero and eight inches of snow on the ground. The streets were quiet.

In a tough neighborhood in Milwaukee, five police officers were patrolling together in two squad cars. They were part of the Milwaukee Police Department's Neighborhood Task Force Street Crimes Unit assigned to patrol so-called "hot spots." As one officer testified, "part of our initiative is to look for smaller infractions and hope that possibly they may lead to bigger and better things," posing the danger of police overreach that was realized here.

In this search for "bigger and better things," the officers saw a car parked on a side street in front of a liquor store. The motor was running. The officer in charge saw an opportunity. The car was within fifteen feet of a crosswalk. That meant it *might* have been parked illegally.

The officer in charge made a split-second decision. The police cars quickly turned onto the side street and closed in on the parked car—one police car pulled up next to and a little in front of the parked car, and the other pulled up right behind it. From both directions, the police lit up the parked car with headlights and spotlights. The five officers got out of their cars and immediately opened the doors of the parked car, shined a flashlight at the passengers, and ordered the passengers out of the car and handcuffed them. One, defendant Johnson, was unlawfully in possession of a firearm that he had placed on the floor of the car.

The district court found, and the majority agrees, that the car's passengers were seized the moment

the police cars pulled up next to and behind the parked car. From that moment, the passengers could not have felt free to walk away.

II

This was not a reasonable seizure. It cannot be justified as the constitutional equivalent of an officer strolling up to a parked car to see if the driver or passengers are willing to chat. The passengers in the car were seized, and in a sudden, terrifying, and unjustified way. Absent the most extraordinary circumstances, these intrusions on privacy and restraints on liberty—by police officers looking for "bigger and better things"—simply are not justifiable to write a parking ticket. And the government has not argued for any other ground to justify this seizure.

There are two distinct grounds for reversal here. The first is that the doctrines allowing pretextual traffic stops under the combination of *Terry* and *Whren v. United States*, 517 U.S. 806 (1996), should not be extended to mere parking violations. The second and narrower ground is that even if such an extension might be available in theory, the police did not have a reasonable basis for this particular seizure.

On the first ground for reversal, the Supreme Court itself has not gone so far as to allow seizure of a person to investigate a possible parking violation. The core Fourth Amendment standard of reasonableness is what drove the balance between privacy and law enforcement in *Terry*. 392 U.S. at 20– 21; see also *United States v. Hensley*, 469 U.S. 221, 228 (1985) (balancing governmental interest against intrusion on personal security). Extending

Terry and *Whren* to allow police to use a mere parking violation as a pretext for seizing a car's passengers, and then using the occasion to remove them and handcuff them, loses sight of reasonableness and proportion.

Terry authorizes investigatory stops without a warrant when a police officer has a reasonable suspicion that a person is engaged or is about to engage in crime. The logic of *Terry* has been understood to authorize traffic stops for moving violations. E.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) ("no question about the propriety" of stop because car had expired tags); see also *Rodriguez v. United States*, 575 U.S. —, —, 135 S. Ct. 1609, 1614 (2015) (routine traffic stop more analogous to *Terry* stop than to formal arrest). Since *Whren*, Fourth Amendment law allows the police to carry out intrusive traffic stops based on the pretext of investigating a moving traffic violation.

This combination of constitutional decisions already enables a host of aggressive and intrusive police tactics. Police officers are trained to exploit those powers, as the officers tried to do here in their search for "bigger and better things." Officers who have probable cause for a trivial traffic violation can stop the car under *Whren* and then order all occupants out of the car, *Maryland v. Wilson*, 519 U.S. 408 (1997), often frisk them, *Arizona v. Johnson*, 555 U.S. 323 (2009), question them in an intimidating way, visually inspect the interior of the car, *Colorado v. Bannister*, 449 U.S. 1, 4 & n.3 (1980), often search at least portions of the vehicle's interior, *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983), and hold the driver and passengers while a drug-detection dog

inspects the vehicle, *Illinois v. Caballes*, 543 U.S. 405, 406–08 (2005).

In these encounters, the danger of further escalation is always present. With authority to stop comes the authority to require the subject to submit to the stop, and to use reasonable force in doing so. *Hensley*, 469 U.S. at 235; *Tom v. Voida*, 963 F.2d 952, 958 (7th Cir. 1992) (no violation where *Terry* stop led to fatal shooting by police officer). The Fourth Amendment also allows police to arrest suspects for minor traffic infractions even if a court could impose only a fine, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and arrested persons can be strip-searched, *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 339 (2012), fingerprinted, photographed, and perhaps even subjected to a DNA test, see *Maryland v. King*, 569 U.S. —, —, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting). Moreover, a *Terry* stop can even be justified by an officer's *mistake* of either law or fact. *Heien v. North Carolina*, 574 U.S. —, —, 135 S. Ct. 530, 536 (2014).

Adding these doctrines together gives the police broad discretion to impose severe intrusions on the privacy and freedom of civilians going about their business. This potential is not entirely new. In 1940, the future Justice Jackson said: "We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning." R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, quoted in *Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting); see also, e.g., David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev.

271, 273 ("Since virtually everyone violates traffic laws at least occasionally, the upshot of these decisions is that police officers, if they are patient, can eventually pull over almost anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over.").

Courts usually examine these aspects of Fourth Amendment doctrine piecemeal, focusing on the one or two aspects most salient for the particular case. But when we consider a significant extension of Fourth Amendment authority, such as extending *Terry* and *Whren* to suspected parking violations, we must consider the cumulative effects of the doctrine. Those effects mean that authority to conduct an investigatory stop can trigger sweeping intrusions and even dangers. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125 (2017) (reviewing cumulative effects); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 Geo. Wash. L. Rev. 882, 884 n.2 (2015) (collecting literature on consequences of *Whren*).

The government's theory here is that the suspected parking violation justified the seizure of the passengers. The government sees no difference between parking violations and suspected traffic violations, so that all the police tactics permitted in a pretextual traffic stop under *Whren* can be used when a car might be parked illegally.

Relevant case law is both sparse and divided, perhaps because the notion of using such aggressive

police tactics in response to parking violations seems so audacious. As noted, the Supreme Court has not extended these powers to the parking context. It should not do so, particularly with an eye toward practical consequences, including whether the cumulative effects of Fourth Amendment doctrine are reasonable and whether such intrusions may become "a routine part of American life." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (limiting "special needs" doctrine).

In *United States v. Thornton*, 197 F.3d 241 (7th Cir. 1999), two officers in a "high crime" neighborhood walked toward a car parked in a no-parking zone. They saw the driver get out of the car with what looked like a police-radio scanner. The officers patted down the driver and spotted what looked like a package of cocaine on the floor of the back seat. We said that whether "an illegally parked car, a crime-ridden neighborhood, the driver's sudden exit, and the driver's possession of a device that was monitoring police radio traffic adds up to sufficient suspicion to justify a *Terry* stop is a close call." *Id.* at 248. In this case, by contrast, the police had much less to go on than the police had with that "close call" in *Thornton*. And the police tactics here were much more intrusive than walking up to the car, as in *Thornton*.

In *United States v. Shields*, 789 F.3d 733 (7th Cir. 2015), the panel treated a parking violation as enough to support an investigatory *Terry* stop, though the real action in *Shields* concerned the driver's decision to flee from the officers. The panel supported that extension of *Terry* to a parking citation by citing *United States v. Choudhry*, 461 F.3d 1097, 1103–04 (9th Cir. 2006) (allowing

investigatory stop of vehicle in no-stopping/tow-away zone), which cited in turn *United States v. Copeland*, 321 F.3d 582, 594 (6th Cir. 2003) (allowing stop based on parking violation). 789 F.3d at 745.

These extensions of *Terry* to suspected parking violations remain few in number and are mistaken when there is no additional basis for the seizure. And at least two state supreme courts have taken a different view of the Fourth Amendment. See *State v. Duncan*, 43 P.3d 513, 517 (Wash. 2002) (*Terry* did not extend to seizure to investigate suspected civil infractions such as possession of open container of alcohol in public); *State v. Holmes*, 569 N.W.2d 181, 184–86 (Minn. 1997) (*Terry* did not authorize seizure to investigate suspected parking violation). An illegally parked car is a far cry from the would-be robbers casing their target in *Terry v. Ohio*.[1]

Extending *Terry* stops and the further intrusions they entail to pretextual parking violations loses sight of the core test of reasonableness and the balance at the core of *Terry* and the Fourth Amendment itself. "The makers of our Constitution … conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a

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[1] Where a parking violation may, under the circumstances, signal a threat to security or safety, the Fourth Amendment does not and should not prevent reasonable responses by law enforcement to protect safety or security. Consider, for example, a van stopped illegally beside a federal office building or a car idling in front of a street full of marching demonstrators. Those are not mere parking violations.

violation of the Fourth Amendment." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), overruled in relevant part, *Katz v. United States*, 389 U.S. 347, 353 (1967). We should find a violation of the Fourth Amendment in the unreasonable and intrusive seizure of the passengers in this case for the supposed purpose of investigating this parking violation.[2]

III

Extending *Terry* and *Whren* to real parking violations is bad enough. The seizure here had even less foundation because the police did not have a reasonable basis for suspecting a parking violation. That is the second and narrower ground for reversal here.

The police relied on a Wisconsin statute that provides:

> No person shall stop or leave any vehicle standing in any of the following places except temporarily for the purpose of and while actually engaged in loading or unloading or in receiving or discharging passengers and while the vehicle is attended by a licensed operator so that it may promptly be moved in case of an emergency or to avoid obstruction of traffic:
>
> (1) In a loading zone.
>
> (2) In an alley in a business district.

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[2] The majority suggests that a seizure of an already-stopped car is less intrusive than a seizure of a moving car. I disagree. It is not less intrusive to seize a person sitting on a park bench than to seize a person walking past that park bench.

> (3) Within 10 feet of a fire hydrant, unless a greater distance is indicated by an official traffic sign.
>
> (4) Within 4 feet of the entrance to an alley or a private road or driveway.
>
> (5) Closer than 15 feet to the near limits of a cross-walk.
>
> (6) Upon any portion of a highway where and at the time when parking is prohibited, limited or restricted by official traffic signs.

Wis. Stat. § 346.53.

The seized car and passengers could stand lawfully where they were if the car was there "temporarily for the purpose of and while actually engaged in loading or unloading or in receiving or discharging passengers and while the vehicle is attended by a licensed operator." That was all the police saw here: the driver had gone into a store, and the motor was running.

A car stopped in front of a store with its motor running is not itself suspicious. Given the sensible statutory proviso for cars that are loading and unloading, the police here could not reasonably decide, in the few seconds it took them to swoop in to seize this car and its passengers, that this seizure was justified.

Yet the majority treats what the police saw as suspicious enough to justify the seizure. That rationale overlooks the statute itself, which of course does not require the driver to "occupy" the car while

loading or unloading. It requires only that the car be "attended" so it can be moved if needed. At the risk of stating the obvious, a driver making deliveries and pick-ups will not always occupy the vehicle, but he or she may "attend" it for these purposes.

To avoid the logic of the provision for loading and unloading, the majority cites cases from quite different contexts where police officers who receive conflicting information can make arrests and "leave to the judicial process the question whether a defense applies." Ante at 3, citing *Baker v. McCollan*, 443 U.S. 137, 145–46 (1979) (arrest based on mistaken identity), and other arrest cases, such as *Hurem v. Tavares*, 793 F.3d 742 (7th Cir. 2015) (trespass arrest of apartment tenant who could not produce copy of lease), and *Askew v. Chicago*, 440 F.3d 894 (7th Cir. 2006) (arrest for threat based on eyewitness accounts).

The majority's treatment of the loading-and-unloading proviso bears no practical relationship to reality or to what happened here on the streets of Milwaukee. Imagine that the police tried these tactics in Milwaukee's affluent east side. Citizens would be up in arms, and rightly so. No police officer could expect to keep his job if he treated a car standing in front of a store as worthy of such an intrusive *Terry* stop. The government's theory—that the seizure of a stopped car by the police would be justified because the occupants could always explain *in court* that they had merely stopped the car to make a purchase—invites intolerable intrusions on people just going about their business.

We have rejected similar efforts to authorize stops on grounds that would apply to a high

proportion of people engaged in lawful behavior. *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014–15 (7th Cir. 2016) (reversing denial of motion to suppress; police could not distinguish between driver's lawful and unlawful use of mobile telephone); *United States v. Flores*, 798 F.3d 645, 648–49 (7th Cir. 2015) (reversing denial of motion to suppress where police made traffic stop on unreasonable theory that would render illegal a "substantial amount" of lawful conduct).

What made the officers decide so fast to swoop in to seize this car? On this record, the only explanation is the neighborhood, and the correlation with race is obvious. It is true that Johnson has not made an issue of race, but we should not close our eyes to the fact that this seizure and these tactics would never be tolerated in other communities and neighborhoods. If we tolerate these heavy-handed tactics here, we enable tactics that breed anger and resentment, and perhaps worse, toward the police.

Defendant Johnson is not a sympathetic champion of the Fourth Amendment, of course. That is not unusual in Fourth Amendment litigation. But the practical dangers of the majority's extension of *Terry* and *Whren* to suspected parking violations will sweep broadly. Who among us can say we have never overstayed a parking meter or parked a little too close to a crosswalk? We enforce the Fourth Amendment not for the sake of criminals but for the sake of everyone else who might be swept up by such intrusive and unjustified police tactics. I respectfully dissent.

APPENDIX B

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Before FLAUM, EASTERBROOK, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Police in Milwaukee saw a car stopped within 15 feet of a crosswalk, which is unlawful unless the car is "actually engaged in loading or unloading or in receiving or discharging passengers". Wis. Stat. § 346.53(5). One police car drew up parallel to the stopped car, and another drew up behind. Shining lights through the car's windows (it was after sunset), police saw a passenger in the back seat try to hide a firearm. Randy Johnson, the passenger, was prosecuted for possessing a weapon that, as a felon,

he was forbidden to have. 18 U.S.C. § 922(g)(1). After the district court denied his motion to suppress the gun, see 2014 U.S. Dist. LEXIS 135367 (E.D. Wis. Sep. 25, 2014), adopting 2014 U.S. Dist. LEXIS 135374 (E.D. Wis. Aug. 7, 2014), Johnson entered a conditional guilty plea and was sentenced to 46 months' imprisonment. His sole argument on appeal is that the district judge should have granted the motion to suppress.

Johnson concedes that the car was stopped within 15 feet of a crosswalk. The district court held that this gave the police probable cause to issue a ticket, see *Whren v. United States*, 517 U.S. 806 (1996)—and as soon as they approached they saw the gun.

Johnson says that the statutory exception for receiving or discharging cargo or passengers means that the police could not have probable cause until they had observed the car long enough to know that it was not within the scope of the exception. The district judge considered and rejected that possibility. Even a brief glimpse of the car revealed probable cause, because officers need not negate all possible defenses. They can hand out tickets (or make arrests) and leave to the judicial process the question whether a defense applies. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 145–46 (1979); *Hurem v. Tavares*, 793 F.3d 742 (7th Cir. 2015); *Askew v. Chicago*, 440 F.3d 894 (7th Cir. 2006). What's more, the district judge thought, a brief look was long enough to think that the car was just sitting there. The car's doors were closed. No one was getting in or out, walking away, or approaching. When the police got closer they saw that no one was in the driver's seat, a further problem because the statutory exception has a proviso: a vehicle stopped for loading or unloading must be

"attended by a licensed operator so that it may promptly be moved in case of an emergency or to avoid obstruction of traffic." Wis. Stat. § 346.53(5).

The district court added that, whether or not the police had probable cause, there was enough evidence to justify a brief stop for the purpose of investigation. See *United States v. Shields*, 789 F.3d 733, 744–46 (7th Cir. 2015), another case arising from a car stopped too close to a crosswalk. The judge assumed that pulling police cruisers alongside and behind the stopped car amounted to a seizure, see *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014), even though it was not blocked in front, but thought it reasonable for the police to investigate whether the stopped car was within the scope of the statutory exception. *Shields* establishes that probable cause to believe that a parking offense is ongoing justifies at least a brief stop. Johnson has not asked us to reexamine *Shields*—and the holding of *Atwater v. Lago Vista*, 532 U.S. 318 (2001), that a fine-only offense may be followed by a custodial arrest, forecloses any argument that police must refrain from making stops to enforce those laws that lead to citations. No driver is free to zoom away while the police are writing a parking ticket.

Police approach stopped cars countless times every day; the number of parking tickets issued (usually to unoccupied cars) is high. Sometimes officers write tickets; sometimes they don't; if the car is occupied, the difference may depend on what the driver says. The Fourth Amendment requires searches and seizures to be reasonable; it does not demand that police resolve all possible defenses and exceptions before asking the first question.

Indeed, because the car was stopped in a public street, police did not need any reason at all to approach and look through the window. See, e.g., *United States v. Dunn*, 480 U.S. 294 (1987); *United States v. Contreras*, No. 15-1279 (7th Cir. Apr. 19, 2016), slip op. 7–10. Officers do not violate the Fourth Amendment by viewing things they can see "from a public vantage point where they have a right to be." *Florida v. Riley*, 488 U.S. 445, 449 (1989). Contrast *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (discussing limits on what can be done in or near a home). It was the fact that the police approached the car that enabled them to see the gun. Everything else followed naturally (and legally).

We grant that the police did more than just stroll up: two squad cars, which bathed the parked car in bright light, implied that the occupants were not free to drive away. But as it happened the number of cars, and the use of lights, did not play a role in the causal sequence. (The cruisers' lights may have played some role by supplementing the streetlamps, but Johnson does not contend that shining light into a car on a public street is unreasonable under the Fourth Amendment. See *Dunn*, 480 U.S. at 305.) No one was in the driver's seat, so the parked car *could not* drive away, no matter what the occupants wanted or thought they were free to do. A lone officer who ambled up amiably and shone a flashlight through the window would have seen everything needed to set up a lawful seizure of the gun. When the contested activity (here, the show of force through the use of two cars and bright lights) does not matter, it is also not a basis for suppressing evidence. When discovery would have occurred anyway, through proper means, the exclusionary

rule would be overkill and must not be employed. See, e.g., *Nix v. Williams*, 467 U.S. 431, 444 (1984).

An undertone of Johnson's brief is the suggestion that the police displayed excessive force, whether or not they had reasonable suspicion or even probable cause. Is it reasonable, Johnson wonders, for the police to use two cruisers and powerful lights just to determine whether someone deserves a ticket for a parking violation? (Johnson does not contend that excessive force was *used*, only that the display was over the top.) Was it necessary, he asks, for one officer to open a door and tell all occupants to put their hands where they could be seen?

The police call this a high-crime area, and perhaps the presence of multiple officers and electric lights—which Justice Brandeis called "the most efficient policeman," *Other People's Money* 62 (1933)—prevented the handgun from being used. But we need not try to determine whether the police put on an unnecessary display. This is a criminal prosecution, not a suit seeking damages. We held in *United States v. Jones*, 214 F.3d 836 (7th Cir. 2000), that damages, not the exclusion of evidence, is the appropriate remedy for the use of unreasonable force, when the application of reasonable force would have produced the same evidence anyway.

The Supreme Court reached the same conclusion in *Hudson v. Michigan*, 547 U.S. 586 (2006), when holding that a violation of the knock-and-announce requirement does not justify exclusion, because if the police had knocked and waited a reasonable time, as they should have done, they would have seized the same evidence. The Justices discussed the high social costs of excluding evidence and held that damages are

the right remedy for search-and-seizure errors that do not give the police access to evidence that could not have been obtained lawfully. See also, e.g., *United States v. Langford*, 314 F.3d 892 (7th Cir. 2002). The multiple cars, the searchlights, and the visible-hands order all were out of the causal sequence and do not justify suppression, even if each step was unjustified when compared with sending a single officer to saunter up to the parked car.

Likewise damages would be the right remedy for a stop motivated by race, as they are for other violations of the Equal Protection Clause, if the police had probable cause or were otherwise where they had a right to be, and therefore did not violate the Fourth Amendment when seeing a gun. At all events, Johnson does not contend that his race, or that of the other occupants, played any role in this stop.

So although we agree with the district court that, given *Shields*, the police had at least reasonable suspicion to stop the parked car long enough to find out what was going on, we also conclude that the police would have discovered the same evidence without a seizure (because any officer was free to walk up to the parked car, which lacking a driver was not going anywhere), and that exclusion of evidence in a criminal prosecution would be the wrong remedy for the harmless steps of using extra cruisers and excessive lighting.

AFFIRMED

HAMILTON, *Circuit Judge*, dissenting. The police violated the Fourth Amendment rights of defendant Johnson and the four other occupants of the car. What happened here was extraordinary. No other court has tolerated such tactics in such a case. Five officers in two police squad cars seized the passengers of a parked car. They swooped in on the car, parking close beside and behind it, with bright lights shining into it from both directions, opened the doors, pulled all passengers out, and handcuffed them. The passengers were seized before the officers had any sign that one passenger might have a firearm.

The sole basis offered to justify this highly intrusive, even terrifying, "investigatory stop" was a suspected *parking violation!* The phenomenon of police seizures for "driving while black" has long been recognized. See, e.g., David A. Harris, *Driving While Black and all Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544 (1997). In this case, we seem to be taking the further step of enabling police seizures for "parking while black."

Taking this further step is a mistake not required by existing law, and it runs contrary to the core Fourth Amendment standard of reasonableness. There are two alternate grounds for reversal here. The first and broader is that the rule allowing pretextual traffic stops under the combination of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Whren v. United States*, 517 U.S. 806 (1996), should not be extended to mere parking violations where the legal sanction would be only a citation and fine. The second and narrower ground is that even if such an extension is

recognized in theory, the police did not have a reasonable basis for this seizure.

On the first, broader question of extending *Terry* and *Whren* to allow seizure of a person to investigate a possible parking violation, the Supreme Court has not gone so far. The core Fourth Amendment standard is reasonableness. That's what drove the balance between privacy and law enforcement in *Terry* itself. 392 U.S. at 20–21. Extending *Terry* and *Whren* to allow police to use a parking violation as a pretext for seizing a car's passengers, and then using the occasion to remove them and handcuff them, loses sight of reasonability and proportionality.

Terry of course authorized investigatory stops without a warrant when a police officer has a reasonable suspicion that a person is engaged or is about to engage in crime. The logic of *Terry* has long been understood to authorize traffic stops to address violations of traffic laws. E.g., *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); see also *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (routine traffic stop more analogous to *Terry* stop than to formal arrest). And since *Whren*, American constitutional law has allowed police officers to carry out intrusive traffic stops based on the pretext of investigating a moving traffic violation.

This combination of constitutional decisions already enables aggressive and intrusive police tactics. Officers who have probable cause for a trivial traffic violation can stop the car and then order all occupants out of the car, *Maryland v. Wilson*, 519 U.S. 408 (1997), often to frisk them, *Arizona v. Johnson*, 555 U.S. 323 (2009), to inspect the interior of the car

visually, *Colorado v. Bannister*, 449 U.S. 1, 4 n.3 (1980), and often to search at least portions of the vehicle's interior. *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983). Add in the fact that a stop can be justified by an officer's *mistake* of either law or fact, *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014), and the opportunities for pretextual intrusions on civilians multiply.[1]

So let's set the stage for this case. It's just after 7:30 p.m. on January 8, 2014, in a tough neighborhood in Milwaukee. It's dark, and it's very cold, during the "Polar Vortex." The air temperature is about 8 degrees Fahrenheit, with a wind-chill of about 20 degrees below zero. There is about eight inches of snow on the ground. The streets are quiet.

Five police officers are patrolling together in two squad cars. They are part of the Milwaukee Police Department's Neighborhood Task Force Street Crimes Unit assigned to patrol so-called "hot spots." As one officer testified, "part of our initiative is to

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[1] A violation as minor as a blown light bulb for a license plate can be used to justify such intrusions. E.g., *United States v. Harrison*, 606 F.3d 42, 45 (2d Cir. 2010); *United States v. Smith*, 86 Fed. App'x 966 (7th Cir. 2004). We regularly see cases where a police officer is instructed to conduct a traffic stop on a particular suspect's vehicle, which can be done virtually at will. This is not a new observation. The future Justice Jackson said in 1940: "We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning." R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, quoted in *Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting).

look for smaller infractions and hope that possibly they may lead to bigger and better things." Tr. 66. Hence the exploitation of *Whren*.

In search of "bigger and better things," the officers see a car parked on a side street in front of a liquor store. The motor is running. The officer in charge decides this is an opportunity: the car is parked within fifteen feet of a crosswalk. That means the car *might be* parked illegally! (I'll overlook the fact that the crosswalk is both unmarked and snow-covered.)

The officer makes a split-second decision. The police cars quickly turn onto the side street and close in on the parked car—one police car pulls up next to and a little in front of the parked car, and the other pulls up right behind it. From both directions, the police light up the parked car with their headlights, spotlights, and flashlights. The five officers get out of their cars and immediately open the car doors and remove and handcuff the passengers. One, defendant Johnson, is unlawfully in possession of a firearm that he had placed on the floor of the car's interior.

The district court found, and I agree, that the car's passengers were seized the moment the police cars pulled up next to and behind the parked car. From that moment, the passengers could not have felt free to walk away. This was not a reasonable seizure. It cannot be justified as the constitutional equivalent of an officer strolling up to a parked car to see if the driver or passengers are willing to chat. The passengers in the car were seized, and in a sudden and terrifying way.

The government's theory here is that the suspected parking violation justified the seizure of the passengers. The government sees no difference between this and a suspected traffic violation, so that all the police tactics permitted in a pretextual traffic stop under *Whren* can be used when a car might be parked illegally. The Supreme Court has not gone so far, and other relevant case law is sparse.

In *United States v. Thornton*, 197 F.3d 241 (7th Cir. 1999), two officers in a "high crime" neighborhood walked toward a car parked in a no parking zone. They saw the driver get out of the car with what looked like a police radio scanner. The officers patted down the driver and spotted what looked like a package of a kilogram of cocaine on the floor of the back seat. Citing both *Florida v. Royer*, 460 U.S. 491 (1983), and *Whren*, we affirmed denial of a motion to suppress the evidence found in the car. We reasoned that if the police could simply approach a person on a public street for no reason and could pull over a vehicle for a civil traffic violation, then the officers did not violate the Fourth Amendment by "walking up to Thornton, who was sitting in a car that rested in a spot where it was violating one of Chicago's parking regulations." 197 F.3d at 248.

We went on to note, however, that whether "an illegally parked car, a crime-ridden neighborhood, the driver's sudden exit, and the driver's possession of a device that was monitoring police radio traffic adds up to sufficient suspicion to justify a *Terry* stop is a close call." *Id*. When the police seized the car and its occupants in this case, they had much less to go on than the police had with that "close call" in *Thornton*. And the police tactics here were much more intrusive than the officers' approach in *Thornton*.

The majority and the district court have found support in *United States v. Shields*, 789 F.3d 733, 745 (7th Cir. 2015), where we treated a parking violation as enough to support an investigatory *Terry* stop, though the real action in *Shields* concerned the driver's decision to flee from the officers. We supported that extension of *Terry* to a parking citation by citing *United States v. Choudhry*, 461 F.3d 1097, 1103–04 (9th Cir. 2006) (allowing investigatory stop of vehicle in no-stopping/tow-away zone), which cited in turn *United States v. Copeland*, 321 F.3d 582, 594 (6th Cir. 2003) (allowing stop based on parking violation).

These extensions of *Terry* to suspected parking violations remain few in number and are, I believe, mistaken. An illegally parked car is a far cry from the would-be robbers casing their target in *Terry v. Ohio*. The officers could only have issued a citation here. In *Terry* the Supreme Court struck a practical and necessary balance between protecting privacy and allowing effective law enforcement, see 392 U.S. at 20–21, but it did so in the context of an imminent armed robbery. That balance looks very different where the threat to law and order is a parking violation. The intrusions on privacy and restraints on liberty authorized by *Terry* are not justifiable to write a parking ticket.

There is a second, narrower ground for reversal here. Even if *Terry* and *Whren* might be extended to reach some actual parking violations, such an extension should not justify the seizure of passengers here. The police did not reasonably suspect a parking violation when they pounced here.

The police relied on a Wisconsin statute that provides:

> No person shall stop or leave any vehicle standing in any of the following places except temporarily for the purpose of and while actually engaged in loading or unloading or in receiving or discharging passengers and while the vehicle is attended by a licensed operator so that it may promptly be moved in case of an emergency or to avoid obstruction of traffic:
>
> (1) In a loading zone.
>
> (2) In an alley in a business district.
>
> (3) Within 10 feet of a fire hydrant, unless a greater distance is indicated by an official traffic sign.
>
> (4) Within 4 feet of the entrance to an alley or a private road or driveway.
>
> (5) Closer than 15 feet to the near limits of a cross-walk.
>
> (6) Upon any portion of a highway where and at the time when parking is prohibited, limited or restricted by official traffic signs.

Wis. Stat. § 346.53.

The law makes clear that the car and passengers the police seized in this case could stand lawfully exactly where they were if the car was there "temporarily for the purpose of and while actually

engaged in loading or unloading or in receiving or discharging passengers and while the vehicle is attended by a licensed operator." That was what the police saw here: the driver had gone into the liquor store, and the motor was running.

Without more, a car stopped in front of a store with its motor running is simply not suspicious. Given the sensible statutory proviso for cars that are loading and unloading, the police here could not decide that this seizure was reasonably justified in the few seconds they took from spotting the car until they swooped in to seize it and its passengers.

Yet the majority treats what the police saw as suspicious enough to justify the seizure. That rationale overlooks the fact that the statute does not require the driver while loading or unloading. It requires only that the car be "attended" by a driver so it can be moved if needed. A lone driver making deliveries and pick-ups will not always be in the vehicle but may "attend" it for these purposes.

To avoid the logic of the provision for loading and unloading, the majority cites cases from quite different contexts where police officers who receive conflicting information may make arrests and "leave to the judicial process the question whether a defense applies." Slip op. at 2, citing *Baker v. McCollan*, 443 U.S. 137, 145–46 (1979) (arrest based on mistaken identity), and other arrest cases, such as *Hurem v. Tavares*, 793 F.3d 742 (7th Cir. 2015) (trespass arrest of apartment tenant who could not produce copy of lease), and *Askew v. Chicago*, 440 F.3d 894 (7th Cir. 2006) (arrest for threat based on eyewitness accounts).

That reasoning bears no practical relationship to what happened on the streets of Milwaukee in this case. No police officer could expect to keep his job if he treated a standing car as worthy of a *Terry* stop, leaving the driver to explain *in court* that he had just stopped to pick up a package or passenger. Imagine that the police tried that approach in Milwaukee's affluent east side. Citizens would be up in arms, and rightly so.

What made this car different? What made the officers decide instantly to swoop in on this one? On this record, the only explanation is the neighborhood, and the correlation with race is obvious. If these outrageous police tactics could ever be justified based on nothing more than a real parking violation, and they should not, they were not justified in this case.

The majority responds that none of this really matters. The theory is that the unreasonable police tactics did not actually cause the discovery of the firearm in Johnson's possession. The majority speculates that a police officer could have walked up to the parked car and seen the firearm, prompting the more intrusive removal and handcuffing of all passengers and the search of the car's interior, where the firearm was found.

This rationale runs into at least three problems. First, it was not the district court's or the government's rationale. Second, the district court's factual findings do not support it. The district court correctly found that the car's passengers were seized the moment the police cars stopped next to their car and shined their lights in. No passenger at that point could have thought he was free to just

walk away. There is no finding that Johnson's "furtive movements" occurred before the unreasonable seizure of the car. We should base our decision on what the police here actually did, not on an imaginative hypothesis.

Third, the majority's version is not even a plausible account of what happened. We must accept for purposes of appeal the district court's decision to credit Officer Conway's testimony about seeing Johnson's furtive movements. But surely there is no doubt that those movements were reactions to the unreasonable seizure by the police: the sudden presence of police and lights surrounding the parked car. The police are not allowed to violate the Fourth Amendment and then seize the evidence they discover as a person reacts to their violation.

Finally, the majority's suggestions that damages for excessive force or for racial discrimination might be better remedies than exclusion of evidence in the criminal prosecution miss the point of defendant's appeal. Assuming the majority's general premise is correct, Johnson is not claiming that the officers used excessive force in violation of the Fourth Amendment. Nor has he tried to prove racial motivation in the seizure of the car's passengers. His claim, which I think is valid, is that the *seizure* of the car's passengers was unreasonable in violation of the Fourth Amendment. For that claim, the correct remedy is exclusion of the evidence obtained by means of the unconstitutional seizure, which can offer meaningful deterrence of the violation. See generally *Herring v. United States*, 555 U.S. 135, 140–45 (2009). In addition, exclusion serves the purpose of reassuring the people who are potential victims of unlawful police conduct that the courts will not allow

law enforcement agencies to profit from their lawless behavior. *Id*. at 151–53 (Ginsburg, J., dissenting).

For all these reasons, we should reverse the denial of Johnson's motion to suppress. *Terry* and *Whren* should not be extended to authorize seizure of a car's passengers for suspected parking violations. And even if those doctrines could be thus extended in some situations, the officers here had no reasonable basis to believe this car was parked illegally. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[filed Sept. 25, 2014]

UNITED STATES OF AMERICA,
Plaintiff,
-vs- Case No. 14-CR-25

RANDY JOHNSON,
Defendant.

DECISION AND ORDER

Defendant Randy Johnson (Johnson) disagrees with Magistrate Judge William E. Callahan's recommendation to this Court denying Johnson's motion to suppress evidence.

The Court has read the recommendation and the briefs of the parties and rules as follows. The Court adopts the Magistrate Judge's recommendation *in toto*, including the reasoning supporting the recommendation. Therefore Johnson's motion to suppress is denied.

IT IS HEREBY ORDERED THAT:

Johnson's motion to suppress evidence (ECF No. 13) is **DENIED**. Dated at Milwaukee, Wisconsin, this 25th day of September, 2014.

BY THE COURT:
/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[filed Aug. 7, 2014]

UNITED STATES OF AMERICA,
Plaintiff,
-vs- Case No. 14-CR-25

RANDY JOHNSON,
Defendant.

RECOMMENDATION RE: DEFENDANT'S MOTION TO SUPPRESS

I. BACKGROUND

On February 11, 2014, a federal grand jury returned a one-count indictment against the defendant, Randy Johnson. Count One charges Johnson, as an individual who previously had been convicted of a crime punishable by imprisonment for a term exceeding one year, with knowingly possessing two firearms which, prior his possession of them, had been transported in interstate and foreign commerce, in violation of Title 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

On March 14, 2014, Johnson filed a motion to suppress for use as evidence any and all fruits of a search of a Black Toyota Highlander on January 8, 2014. On June 3, 2014, an evidentiary hearing was conducted with respect to the defendant's motion to suppress. Subsequent briefing of the issues has been completed, and Johnson's motion to suppress is now ready for resolution. For the reasons that follow, it will be recommended that the defendant's motion to suppress be denied.

II. FACTUAL BACKGROUND

Four witnesses testified at the hearing on June 3, 2014: Officer Christopher Conway ("Conway"), Officer Christopher Navarrette ("Navarrette"), Officer Scott Kaiser ("Kaiser"), and Dinah Wilcox. The following is a brief summary of the testimony offered at the evidentiary hearing.

On January 8, 2014, Milwaukee Police Department Officers Conway, Navarrette, and Kaiser, all assigned to the Street Crimes Unit of the Neighborhood Task Force ("NTF"), were on crime patrol. Working for the NTF, the officers are deployed to "hot spots" of violent crime, where they are trained to look for violations of the law, including traffic violations. At 7:41 p.m., the officers were driving northwest on Atkinson Avenue, towards 11th Street, when they encountered a black Toyota Highlander SUV ("SUV") stopped within fifteen feet of a crosswalk, in violation of Wis. Stat. § 346.53. Officer Navarrette, who was driving, turned left on 11th Street, and pulled the squad car parallel with the SUV. Officer Navarrette activated the squad car's spotlight, and the officers exited the vehicle. Officer Kaiser was the front passenger and Officer Conway was the rear right passenger in the squad car. Another squad car pulled up behind the SUV, and the spotlight of that car was also activated. There were two street lights on that evening at the intersection, in addition to the lights from a nearby storefront.

Officers Navarrette, Conway, and Kaiser got out of their squad and approached the SUV, which was running, to conduct a field interview for the parking violation. As he exited the squad car, Officer Conway

observed the rear left passenger of the SUV lean back and move both hands toward his waist. Officer Conway testified that he observed what appeared to be a large black handgun in Johnson's left hand, and that Johnson "came up with his left hand, his shoulders back" and "immediately went to the floorboard in front of him, behind the driver's seat." (Tr. 23.) According to Officer Conway, he saw Johnson make these movements three times, which led him to believe that Johnson was concealing a weapon. Officer Conway opened the rear, left passenger door and yelled for Johnson, who was not wearing a seat belt, to get out. Officer Conway then placed Johnson in handcuffs. When he leaned over, Officer Conway saw a firearm on the floor of the vehicle under the seat. According to Officer Conway, the firearm's placement was consistent with the firearm having been previously held in Johnson's left hand, as the barrel was pointed toward the front passenger seat and the magazine was pointed towards the driver side of the vehicle. Once Officer Conway confirmed that there was a firearm, he stated the code "C1" for the officers to arrest everyone in the vehicle.

Dinah Wilcox was the front passenger in the Toyota Highlander on January 8, 2014. She is Johnson's sister. According to Ms. Wilcox, Johnson is right-handed.

III. DISCUSSION

In support of his argument for suppression, Johnson makes three arguments: (1) the officers illegally seized the SUV; (2) the Fourth Amendment did not permit the seizure of the SUV and its

occupants for an alleged parking violation; and (3) the officers exceeded the scope of the stop.

A. Seizure of the SUV

Johnson first claims that the traffic stop of the SUV of which he was an occupant was not supported by reasonable suspicion. According to Johnson, any suspicion that the SUV was illegally parked was unreasonable because the officers saw the vehicle for only a split- second before surrounding it with their squad cars. The statute allegedly violated, Wis. Stat. § 346.53(5), provides that "[n]o person shall stop or leave any vehicle standing . . . [c]loser than 15 feet to the near limits of a cross walk." However, Wis. Stat. § 346.53 provides an exception for standing vehicles, which are defined as those that are stopped "temporarily for the purpose of and while actually engaged in loading or unloading or in receiving or discharging passengers." *Id.* Johnson argues that "[n]o person could reasonably suspect that the SUV was illegally parked, rather than legally standing, after observing it for such a brief moment." (Def.'s Br. 7.)

Police can stop an automobile when they have probable cause to believe that the driver violated even a minor traffic law. *United States v. McDonald*, 453 F.3d 958, 960 (7th Cir. 2006); *United States v. Muriel*, 418 F.3d 720, 724 (7th Cir. 2005) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). Probable cause exists when an officer reasonably believes that a driver committed a traffic offense. *McDonald*, 453 F.3d at 960 (citing *Muriel*, 418 F.3d at 724 ("Probable cause exists when 'the circumstances confronting a police officer support the

reasonable belief that a driver has committed even a minor traffic offense.'")

The record before the court supports the conclusion that the officers had probable cause to believe that the SUV was violating a traffic law, specifically, Wis. Stat. § 346.53(5), which prohibits stopping or leaving any vehicle within fifteen feet to the near limits of a cross walk. There is no question that the SUV was parked much less than fifteen feet from a cross walk. The area was well-lit, both from the officers' squad headlights and spotlights as well as the city light posts and the light from the liquor store adjacent to the street. Johnson's argument that the police officers' decision to make contact with the occupants of the vehicle after observing it for only a "split second" does not negate the fact that the SUV was illegally parked, thereby violating Wisconsin law. *See Matos v. City of Racine*, Case No. 06-CV-1011, 2009 U.S. Dist. LEXIS 6566, *14-15 (E.D. Wis. Jan. 23, 2009) (finding unpersuasive the defendant's argument that he had been double parked for less than a minute before the officer arrived on the scene because it was a violation of the traffic law, regardless of how long he was stopped). As to the "standing vehicle exception" to Wis. Stat. § 346.53, there is simply no evidence that the SUV was engaged in loading or unloading, or in receiving or discharging passengers, as the doors to the vehicle were closed and there is no evidence that any individuals were in the immediate vicinity of the vehicle. Officers were not required to wait to determine whether the SUV would be engaged in these activities in the immediate future.

Next, Johnson argues that *Terry* does not justify the officers' detention of him in this case because,

while *Terry* allows for detention of a person whom police suspect is engaged in illegal conduct, here, the driver was absent from the vehicle. Accordingly, the police officers did not have the requisite reasonable suspicion to believe any of the passengers were violating any parking regulations. However, as will be covered in detail below, I do not find that the officers detained Johnson because of the traffic violation. The traffic violation justified the officers' **seizure** of the SUV. It was Johnson's behavior while Officer Conway approached the vehicle—namely, his possessing and attempting to conceal a weapon—that justified his detention and subsequent protective weapon search.

B. *Terry* Stop

Johnson argues that even if the officers had reasonable suspicion, the "parking violation at issue is simply not an infraction that a *Terry* stop can be used to investigate, particularly with regard to a vehicle's passengers." (Def.'s Br. 19.) More specifically, *Terry* stops are typically limited to circumstances where criminal liability may result. As such, Johnson argues that officers cannot seize individuals for parking violations.

A *Terry* investigatory stop is a brief detention that gives officers a chance to verify or dispel well-founded suspicions that a person has been, is, or is about to be engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968). To justify an investigatory detention, or *Terry* stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Id.* at 21. In other words, an officer may

conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30). Reasonable suspicion is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. It is something less than probable cause and more than a hunch." *United States v. Swift*, 220 F.3d 502, 506 (7th Cir. 2000) (internal citation omitted). The test for reasonable suspicion is an objective one. *Terry*, 392 U.S. at 21-22.

Additionally, the Court has set forth circumstances in which police officers may legally perform a patdown or protective search of a vehicle. In searching for weapons, an officer need not be "absolutely certain that the individual is armed." *Id.* at 27. Rather, "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* Moreover, the Court in *Michigan v. Long*, 463 U.S. 1032, 1049 (1983), held that a search of the passenger compartment of an automobile is permissible if the officer possesses a reasonable belief that the suspect is dangerous and may gain immediate control of a weapon. In other words, the legality of such a search depends on "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 1050.

Johnson's argument is predicated upon the belief that the officers performed an investigatory stop because the vehicle was parked illegally. This was not the case, however. Because the SUV was parked illegally, the officers were lawfully entitled to seize

the vehicle and approach it to conduct additional investigation. As the officers approached the vehicle, Officer Conway observed Johnson making furtive movements, as if to conceal a weapon, and indeed, Officer Conway testified that he observed what he thought was a weapon in Johnson's left hand. Thus, what began as a routine traffic stop quickly escalated into a situation where officers had to verify or dispel well-founded suspicions that the occupants of the vehicle had engaged in or were engaging in criminal activity.

According to Johnson, Officer Conway's testimony was simply not credible. More specifically, Johnson argues that it is "somewhat bizarre and seemingly incredible" that an armed suspect would use his "off-hand to raise a gun up to shoulder height thus revealing the gun to police before attempting to conceal it," and that Officer Conway would not call out to his colleagues that he saw a gun until after he handcuffed Johnson. (Def.'s Br. 22.) Although Officer Conway did not yell "C1" upon first seeing Johnson with a weapon, the record suggests that so little time elapsed between his observing the weapon and his opening the door that it was not unreasonable for him to not have alerted his colleagues about the weapon. Moreover, Officer Conway testified that, for his own safety, he did not "stop and redirect [his] attention somewhere else." (Tr. 50.) He was focused on Johnson for his own protection. This court cannot fault Officer Conway for his safety concern. Moreover, I do not find it incredible that Johnson was seen holding a weapon in his left hand, even though he is right-handed. He was not using the weapon at the time. The testimony was that he was observed trying to conceal the weapon.

Finally, although the SUV's rear windows were tinted, the SUV was illuminated by the headlights and spotlights of two police squad cars, by two street lights, and by the lights of the nearby storefront. Additionally, Officer Conway testified that, when in contact with a target, he is "trained to look for hands because hands are the part of the body that can actually hurt you or cause harm to you." (Tr. 68.) Given the reasonableness of Officer Conway's testimony, as well as his demeanor on the witness stand, I find him credible.

A review of the totality of the circumstances reveals that Officer Conway's detention of Johnson and subsequent search of the SUV were constitutional. Officer Conway observed Johnson attempting to conceal what he observed to be a weapon. The location of the stop was a "hot spot," or in other words, an area known for high crime. Thus, Officer Conway had reasonable suspicion to detain Johnson, and based upon a reasonable belief that his safety as well as the safety of the other officers were at risk, the investigatory stop and subsequent weapon search were constitutionally permissible. *See also United States v. Evans*, 994 F.2d 317, 321 (7th Cir. 1993) (upholding warrantless search of an automobile where officers stopped defendant for unsafe driving in a high crime area, then saw him make a furtive gesture).

Lastly, Johnson argues that there is a distinction between traffic violations and parking violations. The latter are usually non-urgent, do not affect public safety, do not require the driver to be present to be enforceable, and penalizes the registered owner, not the driver. As such, the governmental interest in enforcing such a violation such as this is

weak, and therefore, the parking infraction does not justify the officers' performing a *Terry* stop.

Again, it was not the parking violation per se that prompted Officer Conway to detain Johnson. Officer Conway detained Johnson because he observed Johnson with a weapon. In any event, the Seventh Circuit Court of Appeals has rejected the notion that there is a distinction between traffic and parking infractions. *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999). In *Thornton*, the appellant argued that "police had no business approaching his car in the first place, because in Chicago a parking violation is a civil offense, not a crime." *Id.* at 248. The court concluded that the officers did not violate the Fourth Amendment by walking up to the appellant who was sitting in his illegally parked car, reasoning that the Fourth Amendment does not prohibit police from approaching someone on a public street for no reason, or from pulling over a vehicle if they have probable cause to believe that a civil traffic violation has been committed. *Id.* Two district courts in this circuit have followed suit, finding probable cause for police to conduct a traffic stop for an illegally parked vehicle. *See United States v. Shield*s, No. 11 CR 440, 2012 U.S. Dist. LEXIS 158412, at *10-14 (N.D. Ill. Nov. 2, 2012) (finding probable cause to stop vehicle parked in crosswalk); *Matos*, 2009 U.S. Dist. LEXIS 6566, at *14-15 (affirming stop of a double-parked vehicle). Finally, other courts have rejected any distinction, for purposes of executing a *Terry* stop, between a parking violation and a traffic violation. *See United States v. Wallace*, 2014 U.S. Dist. LEXIS 23946, at *22 (E.D. Pa. Feb. 24, 2014) (collecting cases).

C. Scope

According to Johnson, the officers exceeded the scope of the *Terry* stop by surrounding the vehicle, approaching it, opening the doors to the vehicle, shining a flashlight at them, and ordering the occupants to show their hands. These actions were excessive for a parking infraction, Johnson argues. Johnson further argues that Officer Kaiser was the first officer to open any door—the driver's side door. As the first to open the vehicle's door, Officer Kaiser had no facts to believe that any of the occupants of the vehicle were dangerous or could gain immediate control of weapons. *See Michigan v. Long*, 463 U.S. 1032 (1983). Moreover, none of the officers made any reasonable inquiries at any point during the stop.

Where a police officer has reasonable suspicion that criminal activity may be afoot, the officer may briefly stop an individual and make "reasonable inquiries aimed at confirming or dispelling his suspicions." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (citing *Terry*, 392 U.S. at 30). During such a stop, "the 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." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

First, there is not enough evidence in the record to determine who opened the door to the SUV first. Officer Kaiser testified that he opened the driver's-side door to the SUV 10 to 15 seconds after seeing it, and Officer Conway testified that he opened the driver's- side rear door to the SUV no more than 30 seconds after seeing it. By this account, approximately 15 to 20 seconds would have elapsed

between Officer Kaiser's opening of the driver's-side door and Officer Conway's opening of the driver's side rear door. Given how quickly officers seized the SUV, I find this account of how events unfolded that evening rather unlikely. The officers were merely approximating how much time elapsed between seeing the SUV and opening its doors. Thus, this testimony is not persuasive evidence about who opened which door first. Moreover, Officer Kaiser testified that he was not sure when, in relation to his opening the driver side door, Officer Conway opened the rear door to the SUV. (Tr. 83, 86.)

In any event, it would make no difference whether Officer Kaiser opened the driver's-side door merely seconds before Officer Conway opened the rear door because Officer Conway had reasonable suspicion to detain Johnson, being that he observed Johnson trying to conceal a weapon before **any** doors to the vehicle were opened. If this had been a routine traffic stop, Johnson's argument that the officers exceeded the scope of the stop may have more merit. However, as previously stated, once Officer Conway observed a weapon in the hands of one of the vehicle's occupants, the officers were permitted to conduct a weapons investigation. For their safety, it was not unreasonable to have more than one officer approach the vehicle (which Officer Navarrette testified that officers always do in a multi-occupant traffic stop anyway), open its doors, instruct the occupants to show their hands, and, because it was dark, use flashlights to illuminate the interior of the vehicle and its occupants. Given the presence of a weapon, it was not unreasonable for officers not to have asked any immediate questions upon opening the SUV's doors.

For the reasons stated above, the officers lawfully effected a traffic stop of the SUV on the night in question. Because Officer Conway observed Johnson with a weapon, he had reasonable suspicion to further advance his investigation by detaining Johnson and searching the SUV for weapons. Therefore, the court will recommend that Johnson's motion to suppress be denied.

NOW THEREFORE IT IS RECOMMENDED that the defendant's motion to suppress physical evidence be **DENIED**.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (c), and Federal Rule of Criminal Procedure 59(b)(2) (as amended effective December 1, 2009), whereby written objections to any recommendation herein or part thereof may be filed within fourteen days of the date of service of this recommendation. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of a party's right to appeal.

Dated at Milwaukee, Wisconsin this 7th day of August 2014.

BY THE COURT:

s/ William E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge