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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-3267

Casondra Pollreis, on behalf of herself
and her minor children, W.Y. and S.Y.

Plaintiff - Appellant

v.

Lamont Marzolf; Josh Kirmer

Defendants - Appellees

Roderick and Solange MacArthur Justice Center

Amicus on Behalf of Appellant

Appeal from the U.S. District Court
for the Western District of Arkansas

Submitted: September 21, 2022
Filed: April 27, 2023

Before SMITH, Chief Judge, KELLY and GRASZ, Circuit Judges.

Appendix A

GRASZ, Circuit Judge.

On January 8, 2018, Casondra Pollreis saw Officer Lamont Marzolf pointing a firearm at her 12- and 14-year-old sons down the street from their family's home. When Pollreis approached to ask what happened, Officer Marzolf repeatedly ordered her to "get back." After Pollreis questioned the order, Marzolf briefly pointed his taser at her. Pollreis then complied with his orders. Her sons were eventually cleared of any wrong-doing. Pollreis filed a 42 U.S.C. § 1983 action against Officer Marzolf claiming he used excessive force. The district court* granted summary judgment to Officer Marzolf on the claim after concluding he was entitled to qualified immunity. Pollreis appeals, and we affirm.

I. Background

After receiving a tip, members of the Springdale Police Department were conducting surveillance on a suspected gang member and attempted a traffic stop on a Chevy Cobalt. The driver refused to stop and eventually crashed the car. The four occupants of the car fled, with two heading north and two heading south.

Officer Marzolf received instructions to set up a perimeter near the suspected gang member's house. Officer Marzolf was also informed over the radio that one suspect was known to carry a gun. Mere moments

*The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

later, W.Y. and S.Y., Pollreis's sons, began walking down the street toward Officer Marzolf's car. Officer Marzolf turned on his high beams, stopped his car, and asked, "Hey, what are you guys doing?" W.Y. responded, but it is not intelligible on the dashcam. Officer Marzolf then instructed the boys to stop and turn away as he walked toward them with his firearm drawn.

Officer Marzolf continued to question the suspects for approximately one minute before Pollreis walked up from behind him asking, "Officer, officer, may I have a word with you?" Officer Marzolf reported to dispatch that he had two juvenile individuals in dark hoodies and pants stopped, and Sergeant Kirmer gave instructions to detain them. Then, Officer Marzolf ordered the boys to lay on the ground, and they complied. Before long, Pollreis approached Officer Marzolf and asked, "what happened?" and Officer Marzolf acknowledged her by saying, "Hey, step back." After Pollreis identified herself as the boys' mother, Officer Marzolf again ordered her to "get back" while stepping toward her. She responded, "Are you serious?" Officer Marzolf answered, "I am serious, get back." While still pointing his gun at the boys with his right hand, Officer Marzolf then pulled his taser with his left hand and pointed it at Pollreis. Pollreis, attempting to reassure her children said, "It's OK, boys" while Officer Marzolf holstered his taser and again ordered her to "get back." At this point, Pollreis asked, "Where do you want me to go?" Officer Marzolf responded, "I want you to go back to your house." She replied, "Are you serious? They're 12 and 14 years old." Officer

Marzolf retorted, "And I'm looking for two kids about this age right now, so get back in your house." Pollreis acquiesced and told her boys, "You're OK guys, I promise." Pollreis went back to her house and does not appear on the dashcam video again.

Officer Marzolf continued to detain the boys for several more minutes while he, and later another officer and sergeant, questioned them. After the likelihood of the boys being the fleeing suspects was dispelled, they were released. Based on the timestamped dashcam, the entire encounter lasted approximately seven minutes.

At his deposition, Officer Marzolf explained that he "was going to stop any individuals along that area that I was working because that's what your job is on the perimeter." He also highlighted that evening's dark and rainy conditions, which made it difficult to see. Officer Marzolf testified that information "was relayed over the radio that [one of the fleeing suspects] had been known to carry a handgun and that ammunition magazines were found." He also explained that he drew his taser on Pollreis because she disobeyed his verbal commands and came up behind him in a "high threat situation."

Pollreis brought four claims under 42 U.S.C. § 1983 on behalf of her children. This court previously held Officer Marzolf was entitled to qualified immunity on these claims. *See Pollreis v. Marzolf*, 9 F.4th 737 (8th Cir. 2021). Pollreis also brought an excessive force claim on her own behalf. The district court granted Officer Marzolf summary judgment, holding

he was entitled to qualified immunity. Pollreis now appeals the grant of qualified immunity on her excessive force claim against Officer Marzolf.

II. Analysis

"Summary judgment is appropriate if the evidence, viewed in the light most favorable to [Pollreis] and giving [her] the benefit of all reasonable inferences, shows there is no genuine issue of material fact." *Goffin v. Ashcraft*, 977 F.3d 687, 690–91 (8th Cir. 2020) (quoting *Morgan v. A.G. Edwards*, 486 F.3d 1034, 1039 (8th Cir. 2007)). "We review *de novo* a district court's grant of summary judgment on the basis of qualified immunity." *Dooley v. Tharp*, 856 F.3d 1177, 1181 (8th Cir. 2017). This court may affirm the grant of summary judgement "on any ground supported by the record." *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958 (8th Cir. 2019).

"Qualified immunity shields a government official from liability unless his conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Burns v. Eaton*, 752 F.3d 1136, 1139 (8th Cir. 2014) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "To defeat qualified immunity, Pollreis must prove that: '(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.'" *Pollreis*, 9 F.4th at 743 (quoting *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009)).

Pollreis argues that Officer Marzolf's pointing of his taser at her constituted excessive force in violation of her Fourth Amendment rights. "[C]laims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]" *Graham v. Connor*, 490 U.S. 386, 395 (1989). "Although the claim here alleges use of excessive force, the parties dispute the threshold question whether [Officer Marzolf] seized [Pollreis] at all within the meaning of the Fourth Amendment." *Martinez v. Sasse*, 37 F.4th 506, 509 (8th Cir. 2022). Therefore, to prevail on the first prong of the qualified immunity analysis, whether there was a constitutional violation, Pollreis must demonstrate that (1) Officer Marzolf seized her, and (2) the force applied was objectively unreasonable under the totality of the circumstances. *Clark v. Clark*, 926 F.3d 972, 977 (8th Cir. 2019).

A. Seizure

The "seizure" of a person "can take the form of 'physical force' or a 'show of authority' that 'in some way restrain[s] the liberty' of the person." *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). The parties agree Officer Marzolf did not use physical force as he did not touch Pollreis, so the question is whether there was a show of authority that in some way restrained her liberty.

"[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that [s]he was being ordered to restrict h[er] movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v. Hodari D.*, 499 U.S. 621, 628 (1991). "Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement." *Torres*, 141 S. Ct. at 1001; *accord Atkinson v. City of Mountain View,* 709 F.3d 1201, 1207–08 (8th Cir. 2013).

To make this determination, we consider factors including "the presence of several officers, a display of a weapon by an officer, physical touching of the person, or the 'use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *United States v. Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007) (quoting *United States v. Hathcock*, 103 F.3d 715, 718–19 (8th Cir. 1997)). "[I]f in view of all of the circumstances surrounding the incident, a reasonable person would have believed that [s]he was not free to leave," a seizure by a show of authority has occurred. *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall,* 446 U.S. 544, 554 (1980)).

The seizure of a person often occurs in the context of an arrest or detainment. Here, Pollreis was neither arrested nor detained. Neither was she told she was "not free to leave[.]" *Brendlin*, 551 U.S. at 255 (quoting same). Nonetheless, we conclude Pollreis was

seized, even if for only a moment. For a brief time, Pollreis stood, with a taser pointed at her. She then asked, "Where do you want me to go?" and was told, after more back and forth, to "go back to your house." Viewed in the light most favorable to Pollreis, when Officer Marzolf aimed his taser at her, he restricted her freedom of movement while displaying a weapon. *See Hodari D.*, 499 U.S. at 627–28. Officer Marzolf reiterated his command to "get back" in a "tone of voice indicating that compliance . . . might be compelled," *Flores-Sandoval*, 474 F.3d at 1145, while also aiming a taser. A reasonable person in Pollreis's shoes would not believe she was free to ignore Officer Marzolf's commands. This is further evidenced through the fact that Pollreis submitted to Officer Marzolf's show of authority by leaving the scene even though her children were being detained at gunpoint. Considering the circumstances, we hold Officer Marzolf briefly seized Pollreis through a show of his authority.

B. Objective Reasonableness of the Force

To establish a constitutional violation, Pollreis must next "show the amount of force used was objectively unreasonable under the particular circumstances." *Baude v. Leyshock*, 23 F.4th 1065, 1073 (8th Cir. 2022). "[R]easonableness is generally assessed by carefully weighing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *County of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017) (quoting *Tennessee v. Garner,* 471 U.S. 1, 8 (1985)).

Thus, "[f]orce may be objectively unreasonable when a plaintiff does not resist, lacks an opportunity to comply with requests before force is exercised, or does not pose an immediate safety threat." *Wilson v. Lamp*, 901 F.3d 981, 989 (8th Cir. 2018). However, "threat[s] to an officer's safety can justify the use of force," even if someone is not actively resisting arrest. *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009).

Pollreis was not suspected of committing any crime and was not actively resisting arrest. But while she commendably remained calm and nonthreatening, a reasonable officer in this situation would be understandably concerned for his own safety. This event took place at night in the rain. Officer Marzolf was alone on the scene when Pollreis approached from behind. Officer Marzolf was placed in a position where he had two possibly armed suspects detained in front of him and a third unknown individual approaching from behind, creating a potentially serious safety risk. Adding to the circumstances, when Officer Marzolf ordered Pollreis to "get back," she moved to the side, but she did not immediately comply by moving backward. Rather, she questioned the order and moved sideways. Ordered to get back a second time, she again questioned the order and remained where she was until after the taser was drawn.

We must "judge the reasonableness of [an officer's] use of force 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Loch v. City of Litchfield*, 689 F.3d 961,

965 (8th Cir. 2012) (quoting *Graham*, 490 U.S. at 396); *accord Zubrod v. Hoch*, 907 F.3d 568, 575–76 (8th Cir. 2018). Under the totality of the circumstances, Officer Marzolf momentarily pointing his taser at Pollreis to gain control of the scene was not unreasonable.†

Because we conclude Officer Marzolf did not violate Pollreis's constitutional rights, we need not address whether these rights were clearly established at the time of the incident.

III. Conclusion

For the reasons stated above, we affirm the district court's order granting summary judgment to Officer Marzolf on Pollreis's excessive force claim.

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†The dissent believes we can only reach this result by making inferences in favor of the movant, Officer Marzolf. However, "facts must be viewed in the light most favorable to the nonmoving party *only* if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis added). The evidence we rely upon to reach our legal conclusion that the momentary seizure was not unreasonable is not disputed and therefore need not be viewed in the light most favorable to the nonmoving party. Rather, both parties agree, and we can see from the dashcam video, that (1) Officer Marzolf was on the scene alone; (2) Officer Marzolf was ordered to hold two potentially armed suspects at the scene; (3) Pollreis approached Officer Marzolf from behind, which pulled his attention away from the potentially armed suspects in front of him; and (4) the event occurred at night. We can also see from the dashcam video that Pollreis did not immediately comply with Officer Marzolf's directive to "get back."

KELLY, Circuit Judge, dissenting.

I agree that Pollreis was seized within the meaning of the Fourth Amendment. But because genuine issues of material fact remain regarding whether Officer Marzolf's use of force was excessive, I would reverse.

In this qualified immunity appeal, we view the evidence in the light most favorable to Pollreis and draw all reasonable inferences in her favor. Wilson, 901 F.3d at 986, 990; see also Banks v. Hawkins, 999 F.3d 521, 527 (8th Cir. 2021) ("Where the record does not conclusively establish the lawfulness of an officer's use of force, summary judgment on the basis of qualified immunity is inappropriate.").

According to Pollreis, she saw a police car stop and detain her two sons while they were walking home. When she was approximately "two houses" away from the scene, she began trying to announce her presence to Officer Marzolf. The dashcam video shows Officer Marzolf looking over his shoulder as a person out of frame says, "Those are my boys." A few seconds later, the person asks Officer Marzolf, "Can you hear me?" and he confirms that he can. The person continues to speak, and words like "twelve and fourteen" and "I was waiting for them" can be heard. Officer Marzolf turns his back to the camera,[‡] walks towards the boys, and orders them to the ground at gunpoint. By this point, Officer Marzolf knew he had detained "two

[‡]The camera was positioned at the front of the squad car facing out.

juveniles," he knew the name of one of them, and the person approaching claimed to be a parent of the boys.

The video then shows that when Pollreis finally comes into view, Officer Marzolf is standing on the sidewalk with a gun drawn on the boys. Pollreis walks out into the street from the sidewalk, directly in front of Officer Marzolf's squad car and asks, "What happened?" Officer Marzolf tells her to "get back." Pollreis could not move directly "back" because the squad car was behind her, so she walks back the way she came, telling the officer "those are my boys" as she does so. In response, Officer Marzolf takes a few steps toward her and yells, "Get back!" Pollreis, now out of frame, asks, "Are you serious?" At that point, Officer Marzolf draws his taser and points it directly at her.

Based on these facts, a reasonable jury could find that Pollreis complied, or was attempting to comply, with Officer Marzolf's request to "get back." See, e.g., McReynolds v. Schmidli, 4 F.4th 648, 653 (8th Cir. 2021) ("[P]rior to using force officers must allow a reasonable opportunity to comply with their commands."); Smith v. Conway Cnty., 759 F.3d 853, 860–61 (8th Cir. 2014) (holding that the second use of a taser was not reasonable where a pretrial detainee was no longer acting aggressively towards officers after being tased once and was "attempting to comply with [the officer's] orders"). The video shows Pollreis, in an attempt to avoid backing up into the police car directly behind her, walking away from Officer Marzolf as soon as he tells her to "get back." It is Officer Marzolf who then steps closer to Pollreis—now out of

the dashcam's view—while he repeats his order. A reasonable jury could find that Pollreis was complying but that it was not clear just how far "back" Officer Marzolf wanted her to go. Significantly, when Pollreis expressly asked, "Where do you want me to go?" Officer Marzolf told her to "go back to your house." And Pollreis did just that.

The court acknowledges that Pollreis was not suspected of committing any crime, was not resisting arrest, and was calm and nonthreatening. Yet it concludes that her presence raised a concern for Officer Marzolf's safety. The court relies in part on the fact that it was a dark and rainy night—factors a jury could take into consideration. But such conditions do not invariably create a threat to officer safety. And they cannot be dispositive of whether Officer Marzolf's show of force was reasonable when the primary inquiry is whether Pollreis engaged in conduct that would justify the use of force at all. See, e.g., Baude, 23 F.4th at 1073 (explaining that courts must assess "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively resisting arrest or attempting to evade arrest by flight"); Brown, 574 F.3d at 497 (concluding that whatever suspicions the officers may have had about the potentially serious crimes the driver committed, the officers had no reason to believe the passenger whom the force was used against had anything to do with the driver's conduct).

The court also concludes that Pollreis "did not immediately comply" with Officer Marzolf's directive to "get back." But we have repeatedly held that whether and to what degree an individual is noncompliant or poses a threat are issues of fact properly resolved by a jury. See, e.g., MacKintrush v. Pulaski Cnty. Sheriff's Dep't, 987 F.3d 767, 770 (8th Cir. 2021) (holding that the district court did not err in ruling that material factual disputes prevented it from determining whether an officer used reasonable force where there were disputes about an individual's compliance and the level of threat he posed); Schmidli, 4 F.4th at 653 (holding that whether a reasonable officer could have viewed an individual's "alleged delay" in following the officer's directive "as noncompliant is, at most, a jury question"); see also Kelsay v. Ernst, 933 F.3d 975, 988 (8th Cir. 2019) (en banc) (Smith, Chief J., dissenting) (disagreeing with the court's conclusion that the appellant ignored an officer's command and stating that if there is a dispute of fact about whether the appellant complied, "it is material and should be resolved by a jury").

Here, Officer Marzolf had information that the person approaching the scene claimed to be the mother of the two juveniles he had just ordered to the ground at gunpoint and was seeking clarification about what happened. Even if Pollreis could be said to have "questioned" the officer's command, to question an order is not necessarily the same as defying it. Cf. Brown, 574 F.3d at 499 (finding that the officer's use of force was not reasonable where the suspect's "only noncompliance with the officer's commands was

to disobey two orders to end her phone call to a 911 operator"). A reasonable jury could conclude that any "questions" Pollreis asked of Officer Marzolf were just that, questions, and not a refusal to comply with his commands.

Viewing the evidence in the light most favorable to Pollreis, a reasonable jury could find that drawing a taser on a nonthreatening bystander who was complying or attempting to comply with an officer's orders was not objectively reasonable. Only by making inferences in favor of Officer Marzolf can the court reach a different result. For this reason, I respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-3267

Casondra Pollreis, on behalf of herself and her minor children, on behalf of W.Y., on behalf of S.Y.,

Appellant

v.

Lamont Marzolf and Josh Kirmer,

Appellees

Roderick and Solange MacArthur Justice Center and Law Enforcement Action Partnership

Amici on Behalf of Appellant(s)

Appeal from the U.S. District Court for the Western District of Arkansas - Fayetteville
(5:18-cv-05200-TLB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Appendix B

Judge Kelly and Judge Erickson would grant the petition for rehearing en banc.

July 24, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

Appendix C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASONDRA POLLREIS, on behalf of herself and her minor children, W.Y. and S.Y. — **PLAINTIFF**

V. — **CASE NO. 5:18-CV-5200**

LAMONT MARZOLF and JOSH KIRMER, in their individual capacities — **DEFENDANT**

ORDER

In accordance with the August 16 , 2021 , Opinion and Judgment of the Court of Appeals, and now having received the formal Mandate, the Court finds that its March 13, 2020 , Memorandum Opinion and Order (Doc. 43) denying qualified immunity to separate defendant Lamont Marzolf has been **REVERSED.**

IT IS THEREFORE ORDERED that, in accordance with the Mandate of the Eighth Circuit, Mr. Marzolf is granted summary judgment on the remaining claims against him in this action. Judgment will enter concurrently with this Order.

Appendix C

IT IS SO ORDERED on this 8th day of September, 2021.

/s/ TLB
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASONDRA POLLREIS, on behalf of herself and her minor children, W.Y. and S.Y. — **PLAINTIFF**

V. — **CASE NO. 5:18-CV-5200**

LAMONT MARZOLF and JOSH KIRMER, in their individual capacities — **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

Currently before the Court is a Motion for Summary Judgment (Doc. 20) filed by Defendants Lamont Marzolf and Josh Kirmer.[1] Plaintiff Casonda Pollreis filed a Response in Opposition (Doc. 31), and Defendants then filed a Reply (Doc. 34). For the reasons explained below, the Court **GRANTS IN PART AND DENIES IN PART** the Motion for Summary Judgment (Doc. 20).

I. THE FACTS

W.Y. and S.Y., two boys ages 14 and 12, respectively, at the time of the incident at issue, were

[1] As Defendants were police officers for the Springdale Police Department at all times relevant to this action, the Court refers to them as "Officer Marzolf " and "Officer Kirmer" throughout this Memorandum Opinion and Order.

walking home one evening and were stopped by Springdale Police Officer Lamont Marzolf. In the course of this stop, the boys were forced to lie facedown on the ground at gunpoint, and they were subsequently handcuffed and searched. The boys and their mother, Ms. Pollreis, claim that Officer Marzolf and Officer Josh Kirmer, who was in communication with Officer Marzolf, violated their civil rights.

The following facts are taken from a dashcam video, deposition testimony, and other uncontroverted evidence in the record. Officer Marzolf's dashcam captured the entire event, and facts from the dispatch transcript are also interspersed throughout the following narrative.

On January 8, 2018, Officer Kirmer responded to a tip that Jennifer Price, who had outstanding warrants, was staying with Tomas Silva at 2100 Lynn Street, in Springdale, Arkansas. (Doc. 22-1, p. 2). Mr. Silva was known to Officer Kirmer as a gang member and a prior suspect in cases involving guns and drugs. *Id.* During his surveillance of Mr. Silva, Officer Kirmer saw two males, one shorter and skinnier than the other, get into a Chevy Cobalt. *Id.* Officer Kirmer radioed this information to other officers in the area, and another officer tried to initiate a traffic stop of the Chevy Cobalt. *Id.* Mr. Silva fled and eventually wrecked the Chevy Cobalt. *Id.* Four occupants, including Mr. Silva, fled the disabled car; two went south and two went north. *Id.* at 3. Over the radio, Officer Kirmer requested that a perimeter be set up, and Officer Marzolf responded to this call. *Id.*

Appendix D

According to Officer Marzolf's dashcam,[2] he receives the dispatch call at · time stamp 21:37:07.[3] He arrives at 40th Street and Luvene Avenue a minute and a half later. (21:38:30). Dispatch instructs Officer Marzolf to drive down to the intersection of Luvene and Lynn Street to watch for the suspects. (21:39:50). As Officer Marzolf approaches the intersection, someone announces over the radio that "the last time we made contact with Tomas, he had a gun." (21:39:29). In response, Officer Marzolf says, "Shit." Someone asks over the radio, "Is he the one that's on foot?" Another officer responds, "Yeah, him and three others, one possibly a female by the name of Jennifer Price." (21:39:56).

Almost immediately after that, W.Y. and S.Y. become visible on the dashcam video. Officer Marzolf's blue lights are flashing. W.Y. and S. Y. are on the sidewalk on the east side of Lynn Street slowly walking side-by-side in the direction of Officer Marzolf's patrol car. They both are wearing hoodies and light colored pants. From Officer Marzolf's perspective, the boy on the left is larger and taller than the boy on the right. Officer Marzolf turns on his high beams and angles his car toward the boys. He stops the car and says, "Hey, what are you guys doing?" The larger boy, who was later identified as 14-year old W.Y., responds audibly and points past Officer Marzolf, but his response is not intelligible on the recording. Officer Marzolf

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[2] Associated timestamps will be noted in parentheses.

[3] The video has two audio recordings associated with it; one from what appears to be a microphone on Officer Marzolf's body and another from inside his patrol car.

then says, "Hey, stop, stop, turn away, turn away from me." (21:40:18). W.Y. and S.Y. stop and turn away from Officer Marzolf with their arms held out to their sides. At this point, Officer Marzolf enters the frame from the left with his firearm in his right hand pointed at the boys.

Officer Marzolf says, "What are your names?" (21:40:21). At the same time, Officer Marzolf pulls out his flashlight with his left hand and points it at the boys' backs. One of the boys (it is unclear which) audibly responds, and Officer Marzolf responds, "Huh?" The same boy, in a louder voice, clearly says his name. Officer Marzolf replies, "What?" The boy reiterates his name a third time. (21:40:27). Officer Marzolf audibly confirms the boy's name, and the boy responds, "Yes sir." Officer Marzolf holsters his flashlight, but his weapon remains drawn and pointed at the boys.

Next, Ms. Pollreis, who is off-screen, says, "Officer, officer, may I have a word with you?" (21:40:33). Officer Marzolf turns his head and looks behind him, and he lowers his firearm so that it is pointing at the ground. Ms. Pollreis continues speaking, but the recording does not clearly pick up what she is saying. Officer Marzolf then speaks into his radio, "45 Springdale, I've got [W.Y.] in front of me, I've got two juvenile individuals, dark hoodies and pants." Officer Kirmer responds, "Ok, detain both of those." (21:40:57). Officer Marzolf then says to Ms. Pollreis, "Yeah, I can hear you." (21:40:58). Ms. Pollreis can be heard speaking with Officer Marzolf, but her words are not clear on the recording. Officer Marzolf then

radios, "10-9." Officer Kirmer responds, "Detain both of them. Is one taller than the other? The short one should be short and skinny." (21:41:08). Officer Marzolf responds, "10-4." (21:41:12). Officer Kirmer then says, "Yeah, hold onto them please." (21:41:15).

Officer Marzolf then approaches the boys and tells them to get on the ground. (21:41:14). His gun is drawn and pointed at them. They comply. Officer Marzolf says, "Put your hands out," and they put their arms out to their sides (21:41:16). Ms. Pollreis then enters the camera's view from the left, walking towards Officer Marzolf, and she says, "What happened?" (21:41:23). Officer Marzolf responds, "Hey, step back." (21:41:24). While taking a sideways step, she says, "They're my boys." (21:41:25). In a louder voice, Officer Marzolf says, "Get back." (21:41:26). He then steps towards her, his gun in his right hand still pointed at the boys on the ground. Ms. Pollreis says, "Are you serious?" Officer Marzolf responds, "I am serious, get back." At the same time, with his gun still pointed at the boys, he draws his taser with his left hand and points it at Ms. Pollreis (21:41:30). Ms. Pollreis then says, "It's OK, boys." (21:41:36). Officer Marzolf holsters his taser but again commands Ms. Pollreis to "get back." (21:41:38). Ms. Pollreis says, "Where do you want me to go?" (21:41:38). He responds, "I want you to go back to your house." Ms. Pollreis retorts, "Are you serious? They're 12 and 14 years old." Officer Marzolf responds, "And I'm looking for two kids about this age right now, so get back in your house." Ms. Pollreis, who sounds upset, says, "Oh, my God. You're OK guys, I promise." According

to the dispatch logs, around this time, Officer Patrick Gibbs states on the radio that one of the suspects "will be H/M blk hoodie blk jeans whi shoes med hair." (Doc. 22-1, p. 30).

For nearly two minutes, Officer Marzolf then stands over the boys with his gun pointed at them. (21:41:36–21:43:28). During these two minutes, he asks them if they have identification, and they respond in the negative. All the while, Officer Marzolf's gun appears to be pointed at the boys. Also during this two minute period, Officer Marzolf asks dispatch, "I've got my two on the ground here, can I have another unit?" He then tells dispatch, "I'm going to be about halfway down Lynn, off of Chapman."

Off-screen, the boys' stepfather can be heard to say, "Officer . . . can I have a word with you?" (21:43:29). Officer Marzolf answers, "No, not right now." The stepfather responds, "Those are my kids," and Officer Marzolf responds, "Ok." The stepfather explains, "We just left her parents' right there. When you guys passed with your lights on, they were walking behind my car. I also have witnesses if you want me to call them." Officer Marzolf responds, "That's fine, I just need to find out who these kids are right now." The stepfather states the boys' names, and Officer Marzolf verbally acknowledges that he heard the stepfather's statement. (21:44:01).

Officer Adrian Ruiz arrives, and he and Officer Marzolf walk towards the boys with guns drawn and pointed at the boys. (21:44:19). At the same time, one of the boys reaches back to adjust his shirt or belt, and

Officer Marzolf says, "Hey, keep your hands out!" (21:44:19). At this time, dispatch records show that someone said, "Tomas and Jennifer are the only two left out[,] he is wearing a blu[e] jacket with maybe a gr[a]y hoodie under." (Doc. 22-1, p. 31). While Officer Ruiz continues to point his gun at the boys, Officer Marzolf holsters his weapon and tells W.Y. to "put his hands behind his back." (21:44:37). Officer Marzolf then handcuffs W.Y.'s hands behind his back. Officer Marzolf told dispatch, "I've got black hoodies and khaki pants and jeans." (21:44:43). Officer Ruiz, responds, "Black hoodie, and a white backpack . . . ."(21:44:50). Sergeant Franklin[4] arrives, and Officer Marzolf says to him, while pointing backwards past the patrol car, "Sarge, you got a parent back there." (21:44:55). Officer Marzolf also handcuffs the 12-year old S.Y.

Once the boys are handcuffed, Sergeant Franklin asks them if they were the ones who ran from the police. (21:44:56). They respond in the negative. Sergeant Franklin then asks, "What are you doing down here?" (21:44:58). One of the boys responds, "We were at our grandparents . . . and we just started walking home." (21:45:07). One of the officers says on his radio that "these are white kids on Lynn Street." (21:45:15). Sergeant Franklin then asks, "What are your names?" (21:45:11). The boys identify themselves. Officer Marzolf begins frisking W.Y. and searching his pant pockets. (21:45:23).

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[4] Sergeant Franklin's first name is not part of the record.

Appendix D

While Officer Marzolf searches W.Y., Sergeant Franklin asks Officer Marzolf, "Were they running?" (21:45:32). Officer Marzolf replies, "No, they were just walking, sir." (21:45:38). In response, Sergeant Franklin says, "Ok, so these guys probably aren't them?" (21:45:42). Officer Marzolf responds, "Probably not. I mean we had both parents come out . . . ." (21:45:45).

The boys' grandparents then approach and ask to speak with the officers. While the officers speak with the grandparents, Officer Ruiz searches S.Y.'s backpack. (21:46:09). After speaking with the grandparents, Sergeant Franklin orders the officers to remove the handcuffs and let the boys go. (21:46:21). According to the time stamps on the dashcam video, the entire encounter lasted approximately seven minutes.

At his deposition, Officer Marzolf explained why he stopped the boys:

> What I'm telling you is that even though I was relayed a description of Hispanic, two Hispanic males, I'm not putting it out of the realm of possibilities as a police officer to be sitting on a perimeter and encounter two individuals that may not be the ethnic origin of what was initially relayed.

(Doc. 31-2, p. 15). Officer Marzolf also admitted that he "was going to stop any individuals along that area that I was working because that's what your job is on the perimeter." *Id.* He also explained that it was dark, it was raining, his lights were flashing, and the boys had hoods over their heads because of the rain. *Id.* at 6.[6] He concedes that he never saw the boys run, and they did not seem like they were out of breath. *Id.* Officer Marzolf further testified that the description of the suspects he received was that one of the suspects was taller and bigger than the other. *Id.* at 14. He also states that, at that time, he understood that at least one of the suspects, Tomas Silva, was a Hispanic male. *Id.* at 15.

Officer Marzolf testified that he drew his gun because "[i]t was relayed over the radio that one of the individuals that we were looking for was known to carry a handgun." *Id.* at 6.[7] Officer Marzolf justified his decision to continue the stop of the boys because he was told by Officer Kirmer to detain them. *Id.* at 8.

As for his decision to draw his Taser on Ms. Pollreis, he testified that she initially approached him and informed him that the boys were her children. *Id.* He asserts that Ms. Pollreis disobeyed his verbal commands and advanced on him in a "high threat

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[6] The dashcam video shows that only S.Y. had his hood over his head.

[7] Officer Marzolf also notes that ammunition was found by other officers, but the record indicates that the ammunition was found after the boys had been released.

situation." *Id.* He claims that he did not know if "she's part of all this or what the situation is . . . ." *Id.*

Pursuant to 42 U.S.C. § 1983, Ms. Pollreis, on behalf of her children, asserts four claims against Officer Marzolf and Officer Kirmer in their individual capacities: illegal seizure; illegal arrest and detention; illegal search; and excessive use of force. On her own behalf, Ms. Pollreis also brings a § 1983 claim for excessive force against Officer Marzolf and Officer Kirmer in their individual capacities. Defendants seek dismissal of these claims because the real parties in interest have not been joined to this action. Officer Marzolf also contends that all of his actions towards Ms. Pollreis and her children were objectively reasonable and should be dismissed as a matter of law. As for Officer Kirmer, he argues that all of the claims against him fail because he was not personally involved in and did not have responsibility for any of the alleged constitutional violations. Officer Marzolf and Officer Kirmer also contend that they are entitled to qualified immunity against Plaintiff's claims.

II. LEGAL STANDARD

A. Summary Judgment

Under Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Court must review the facts in the light most favorable to the opposing party and give that party the benefit of any inferences that can

be drawn from those facts. *Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212–13 (8th Cir. 1997). The moving party bears the burden of proving the absence of a genuine dispute of material fact and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Nat'l. Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602, 606 (8th Cir. 1999).

Once the moving party has met its burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(c)). However, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to survive summary judgment. *Anderson v. Durham D&M, L.L.C.*, 606 F.3d 513, 518 (8th Cir. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Rather, in order for there to be a genuine issue of material fact that would preclude summary judgment, the non-moving party must produce evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248). To meet its burden, "[t]he nonmoving party must do more than rely on allegations or denials in the pleadings, and the court should grant summary judgment if any essential element of the prima fade case is not supported by specific facts sufficient to raise a genuine issue for trial." *Register v. Honeywell Fed. Mfg. & Techs., LLC*,

397 F.3d 1130, 1136 (8th Cir. 2005) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

B. Qualified Immunity

When a government official, such as a police officer, is accused of violating an individual's constitutional rights, qualified immunity will shield that government official from liability unless his conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This is a two-step inquiry. In order for a plaintiff to overcome an officer's defense of qualified immunity, he must show: "(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kan. City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009). "Whether an officer is entitled to qualified immunity because he 'acted reasonably under settled law in the circumstances' is a question of law for the court, both before and after trial." *New v. Denver*, 787 F.3d 895, 899 (8th Cir. 2015) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)).

"For a right to be deemed clearly established, the 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Buckley v. Rogerson*, 133 F.3d 1125, 1128 (8th Cir. 1998) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "The question is

whether the law gave the officials 'fair warning that their alleged conduct was unconstitutional.'" *Bonner v. Outlaw*, 552 F.3d 673, 679 (8th Cir. 2009) (quoting *Brown v. Fortner*, 518 F.3d 552, 561 (8th Cir. 2008)). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

When assessing qualified immunity at the summary judgment stage, the Court must grant the nonmoving party "the benefit of all relevant inferences." *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 528 (8th Cir. 2009) (quoting *Plemmons v. Roberts*, 439 F.3d 818, 822 (8th Cir. 2006)). "[I]f there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be no summary judgment." *Id.* (quoting *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001)) (internal quotation omitted).

III. DISCUSSION

This Opinion is organized in the following manner. First, the Court discusses whether the claims are properly brought by W.Y. and S.Y.'s representative and next friend. Second, the Court addresses the illegal seizure, illegal arrest, illegal search, and excessive force claims against Officer Marzolf. For most of these claims, the Court first addresses whether there is a genuine issue of material fact in dispute on the merits of the claim. If Officer Marzolf is entitled to summary judgment on the merits of the claim, the Court does not discuss qualified immunity on that claim. If, on the other hand, summary judgment is not appropriate

on the merits of a particular claim, the Court addresses whether Officer Marzolf is entitled to qualified immunity on that claim. The only exception to this format may be found in the discussion of Ms. Pollreis's excessive force claim against Officer Marzolf; there, the Court jumps directly to the issue of qualified immunity. Finally, the Court discusses the claims against Officer Kirmer.

A. Real Party In Interest

Defendants argue that the claims of W.Y. and S.Y. should be dismissed for failure to prosecute in the name of a real party in interest. According to Defendants, Federal Rule of Civil Procedure 17 requires that minors sue through their next friend or guardian *ad litem*, and since Ms. Pollreis is proceeding as neither, the claims she brings on the boys' behalf should be dismissed, Ms. Pollreis argues that Defendants waived this argument by failing to raise it in their answer.

It is clear to the Court that Ms. Pollreis is bringing W.Y. and S.Y.'s claims in her representative capacity and as their mother and next friend. Defendants' argument places form over obvious substance. Accordingly, the Court finds that the claims of the real parties in interest are properly before the Court.

Appendix D

B. Claims Against Officer Marzolf

1. Illegal Seizure

Ms. Pollreis argues that Officer Marzolf illegally seized W.Y. and S.Y. by "stopping [their] freedom of movement and keeping them stopped for an unnecessarily excessive amount of time." (Doc. 1, ¶ 28). In other words, it is alleged that the children were subject to an unlawful investigatory stop, commonly referred to as a "*Terry*" stop. *Terry v. Ohio*, 392 U.S. 1 (1968).

The Eighth Circuit has identified three "noncontroversial and well-established principles" regarding *Terry* stops:

> First, the scope of an investigatory detention under [*Terry*] is limited. While an officer may conduct a limited, warrantless search of a suspect if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous, the scope of such a search must be confined to a search reasonably designed to discover concealed weapons. The sole justification for such a search is the protection of the officer and others. Because of the limited scope of an investigatory detention under *Terry*, officers must use the least intrusive means that are reasonably necessary to protect officer safety.

> Second, where an officer exceeds the permissible scope of *Terry*, the investigatory detention is transformed into an arrest.
>
> Third, a *Terry* stop that becomes an arrest must be supported by probable cause.

United States v. Aquino, 674 F.3d 918, 923–24 (8th Cir. 2012) (cleaned up). The "reasonable suspicion" necessary to justify a *Terry* stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). "The standard takes into account 'the totality of the circumstances—the whole picture.'" *Navarette*, 572 U.S. at 397 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). The Eighth Circuit has held that "[w]hile a person's mere presence in a suspicious location does not, in and of itself, justify a *Terry* stop, *Johnson v. Phillips,* 664 F.3d 232, 237 (8th Cir. 2011), the court is to 'determine whether the facts *collectively* provide a basis for reasonable suspicion.'" *Clark v. Clark*, 926 F.3d 972, 978 (8th Cir. 2019) (quoting *United States v. Stewart*, 631 F.3d 453, 457 (8th Cir. 2011). "Factors that may reasonably lead an experienced officer to investigate include time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence." *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995). On the other hand, "a person's temporal and geographic proximity to a crime scene, combined with a matching description of the

suspect, can support a finding of reasonable suspicion." *United States v. Quinn*, 812 F.3d 694, 698 (8th Cir. 2016) (quoting *United States Juvenile TK*, 134 F.3d 899, 903–04 (8th Cir. 1998)).

Additionally, while executing an investigatory stop, officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235 (1985). "To establish an unreasonably prolonged detention, the [complaining party] must show that the officer detained him beyond the amount of time otherwise justified by the purpose of the stop and did so without reasonable suspicion." *United States v. Donnelly*, 475 F.3d 946, 951–52 (8th Cir. 2007).

Here, the parties do not dispute that W.Y. and S.Y. were seized within the meaning of the Fourth Amendment. The question, therefore, is twofold: (1) whether the initial seizure was supported by reasonable suspicion and (2) whether the prolonged seizure was of reasonable length and supported by reasonable suspicion. The Court will address each of these claims in turn.

i. The Initial Seizure

Applying the above principles to the undisputed facts, the Court concludes that there are no genuine disputes of material fact as to whether Officer Marzolf's initial stop of W.Y. and S.Y. was supported by a reasonable suspicion. The following factors supported Officer Marzolf's initial decision to stop W.Y. and S.Y.:

1. an ongoing crime—dispatch alerted Officer Marzolf that four suspects were currently fleeing from police, three of whom were male;

2. threat level—dispatch alerted Officer Marzolf that one of the male suspects was known to carry a firearm;

3. the location—Officer Marzolf encountered W.Y. and S.Y. in relatively close proximity to the location where the suspects were last seen;

4. the visibility—it was nighttime, and it was raining.

The following factors, however, did not support Officer Marzolf's decision to stop W.Y. and S.Y.:

1. demeanor—W.Y. and S.Y. were calmly walking on a sidewalk in the direction of Officer Marzolf's patrol car, which had its blue lights activated, when he stopped them;

2. residential neighborhood—there is no evidence that W.Y. and S.Y. were in a high-crime area or that it was odd for W.Y. and S.Y. to be outside at that time.

More difficult to weigh is whether W.Y. and S.Y. met the vague description of the suspects. Depending on

the circumstances, the Eighth Circuit allows *Terry* stops when a detainee is an inexact match with a vague description of a suspect. *See Quinn*, 812 F.3d at 699 (holding that an officer's stop of an individual that was an imperfect match with the description of a suspect was excused "due to the lack of other pedestrians within the perimeter" and because the individual reacted suspiciously); *United States v. Witt*, 494 F. App'x 713, 716 (8th Cir. 2012) (unpublished per curiam) (finding stop of a green station wagon was supported by reasonable suspicion where suspect was believed to be driving a "dark green or black station wagon" since traffic was light and the detainee was the only person driving a station wagon); *Juvenile TK*, 134 F.3d at 903–04 (holding that, despite a vague description, an officer had reasonable suspicion to stop an individual due to the lack of other vehicles in the area at the time).

The undisputed facts show that dispatch alerted Officer Marzolf that at least three of the suspects were males and one a female. Thus, a reasonable officer in Officer Marzolf's shoes could have believed that W.Y. and S.Y. (who were clearly male) met the description of two of the suspects. Given the relative physical and temporal proximity to the site where the suspects fled and where Officer Marzolf encountered W.Y. and S.Y., as well as the fact that there were no other observable pedestrians, the Court concludes that Officer Marzolf had reasonable suspicion to stop W.Y. and S.Y. Accordingly, Officer Marzolf is entitled to summary judgment on this claim.

ii. The Prolonged Seizure

The Court next turns to assess Officer Marzolf's decision to prolong the seizure of W.Y. and S.Y. Taking the undisputed facts in the light most favorable to Plaintiff, the Court concludes that a genuine issue of material fact remains in dispute as to whether Officer Marzolf's prolonged seizure of W.Y. and S.Y. was supported by reasonable suspicion. "The police [are] required to act with diligence and to take reasonable steps to confirm or dispel their suspicions in a timely manner." *Seymour v. City of Des Moines*, 519 F.3d 790, 799 (8th Cir. 2008) (citation omitted). "To establish an unreasonably prolonged detention, the defendant must show that the officer detained him beyond the amount of time otherwise justified by the purpose of the stop and did so without reasonable suspicion." *Donnelly*, 475 F.3d at 951–52 (citations omitted).

Viewing the undisputed evidence in the light most favorable to W.Y. and S.Y., the Court concludes that the objective facts that came to light after the initial stop did not support a reasonable suspicion that W.Y. and S.Y. were the fleeing suspects. First, W.Y. and S.Y.'s behavior after the initial stop did not give rise to a reasonable suspicion that they had just committed a crime: they were not out of breath, they did not act suspiciously, and they were entirely compliant with Officer Marzolf's commands. Second, almost immediately after the boys were stopped by Officer Marzolf, Ms. Pollreis identified herself as the mother of W.Y. and S.Y. Instead of questioning her, Officer Marzolf directed her to return to her home. For the next

two minutes, Officer Marzolf's only attempt to confirm or dispel his suspicions was to ask the young boys if they had identification. Next, the boys' stepfather approached Officer Marzolf and informed him that the boys had just been at their grandparents' house. After the stepfather spoke to Officer Marzolf, Officer Marzolf continued to point his firearm at the boys while they lay facedown on the ground.

The only evidence that supports Officer Marzolf's decision to continue detaining the boys is the fact that they partially matched a vague description provided by Officer Kirmer.[8] Specifically, Officer Kirmer informed Officer Marzolf that one of the suspects would be taller and skinner than the other; the boys are indeed different sizes. As previously discussed, the Eighth Circuit has held that "generic suspect descriptions and crime scene proximity can warrant reasonable suspicion where there are few or no other potential suspects in the area who match the description." *Quinn*, 812 F.3d at 699. But all of the other evidence that came to light while the boys were detained suggested that they were not the fleeing suspects. Indeed, once he learned the boys' names and had received corroboration from Ms. Pollreis and the boys' stepfather, Officer Marzolf knew that neither of the boys was Mr.

[8] The parties shed considerable ink in their briefing about the ethnicity of the boys and the suspects. But none of the dispatch logs indicate that Officer Marzolf knew, at the time he stopped the boys, that all of the suspects were Hispanic.

Silva.[9] This makes Officer Marzolf's extension of the detention even less excusable: Once he knew that neither of the boys was Mr. Silva and that they had just been at their grandparents' house, he no longer had any reason to believe that either of the boys was armed or dangerous, and he should have swiftly ended the stop. In other words, by the time the 12 and 14-year old boys' stepfather verified their identities and provided a very logical alibi, no reasonable officer would have believed that the boys were the fleeing suspects. The Court concludes that there is a genuine issue of material fact as to whether Officer Marzolf's prolonged seizure of the boys was supported by reasonable suspicion.[10]

The Court turns to address Officer Marzolf's argument that his actions are excused because Officer Kirmer directed him to detain the boys. Officer Marzolf does not point the Court to any case law that suggests a supervising officer's command necessarily

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[9] Officer Marzolf did testify that he believed Mr. Silva was Hispanic, which further lessens his reasonable suspicions for believing that the boys—who appear to be Caucasian on the dashcam video—were armed and dangerous.

[10] It is true that the Eighth Circuit has upheld *Terry* stops even when the police continue an investigation after determining that a detained individual is not the sought suspect. But in such cases, there are additional facts that created a separate reasonable suspicion in the mind of the investigating officer. *See, e.g.*, *United States v. Meier*, 759 F. App'x 523, 532 (8th Cir. 2019) (unpublished per curiam). (holding that the suspect admitted to facts that suggested he was indeed the cause of a second 911 call). Here, once it became clear that the boys were not the fleeing suspects, there were no other grounds for detaining them.

excuses a subordinate's unconstitutional acts.[11] Instead, as always, the Court must determine whether reasonable suspicion existed "by looking to what the officer reasonably knew at the time." *United States v. Hollins*, 685 F.3d 703, 706 (8th Cir. 2012) (quoting *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999)). A reasonable officer in Officer Marzolf's shoes would have known that Officer Kirmer was ignorant of the following crucial facts: (1) the boys were not running or out of breath; (2) the boys had not been acting suspiciously; (3) the boys immediately complied with all commands; (4) the boys' parents had verified the boys' identities and provided alibis; and (5) the boys appeared to be the ages stated by their parents. Officer Marzolf was the only individual in possession of these facts, and he failed to communicate any of them to Officer Kirmer. Thus, a reasonable officer in Officer Marzolf's shoes would have either communicated those facts to Officer Kirmer or taken

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[11] In their Reply, Defendants argue that, under the "collective knowledge" theory, the Court should assume Officer Marzolf knew everything Officer Kirmer knew. While it is true that the Eighth Circuit has allowed searches to be based on collective knowledge of investigating officers when there is some degree of communication," *United States v. Robinson*, 664 F.3d 701, 703 (8th Cir. 2011), the facts known only to Officer Marzolf as a result of his presence at the scene of the stop abrogated any reasonable suspicion or probable cause, regardless of Officer Kirmer's instruction or what Officer Kirmer knew. Indeed, even if all of the facts known to Officer Kirmer had been communicated to Officer Marzolf—such as a more detailed description of the suspects—Officer Marzolf's justification for stopping the boys would have been weakened, not strengthened.

those facts into account when determining whether to prolong the seizure of the boys.[12]

The Court next turns to address whether Officer Marzolf is entitled to qualified immunity on the prolonged seizure claim. The Court concludes that he is not. Even if an officer conducts an unlawful stop, that officer "may nonetheless be entitled to qualified immunity if she had *arguable* reasonable suspicion—that is, if a reasonable officer in the same position could have believed she had reasonable suspicion." *Waters v. Madson*, 921 F.3d 725, 736 (8th Cir. 2019) (citing *De La Rosa v. White*, 852 F.3d 740, 744 (8th Cir. 2017)). The "arguable reasonable suspicion" test is another way of saying that a plaintiff must establish the "clearly established" prong of qualified immunity. *El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 459 (8th Cir. 2011). It was well known at the time of this incident that a *Terry* stop is only valid if "police officers have a reasonable and articulable suspicion that criminal activity may be afoot." *Johnson*, 664 F.3d at 237 (quoting *Navarret-Barron*, 192 F.3d at 790). Viewing the facts in the light most favorable to

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[12] While the Court understands that the permissibility of a *Terry* stop is focused on what was objectively reasonable, the Court also notes the subjective observations of the officers on the scene. When Sergeant Franklin arrived on the scene, his first question to Officer Marzolf was, "Were they running?" Officer Marzolf replied, "No, they were just walking, sir." In response, Sergeant Franklin said, "Ok, so these guys probably aren't them?" Officer Marzolf: "Probably not. I mean we had both parents come out." These remarks suggest that a reasonable officer in Officer Marzolf's shoes would not have believed that W.Y. and S.Y. were the fleeing suspects.

W.Y. and S.Y., after W.Y.'s and S.Y.'s stepfather offered additional corroboration of the boys' identities and alibis, no officer in Officer Marzolf's shoes would have reasonably suspected that the boys were the fleeing suspects. Accordingly, the Court concludes that Officer Marzolf is not entitled to qualified immunity on the prolonged seizure claim.

2. Illegal Arrest

The Court next turns to the claim that Officer Marzolf violated the Fourth Amendment by illegally arresting W.Y. and S.Y. If the investigatory detention of the boys exceeded the scope of a *Terry* stop, then the stop would become a *de facto* arrest that must be supported by probable cause. "An officer possesses probable cause to effectuate a warrantless arrest 'when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.'" *Thurairajah v. City of Fort Smith, Ark.*, 925 F.3d 979, 983 (8th Cir. 2019) (quoting *Borgman v. Kedley*, 646 F.3d 518, 522–23 (8th Cir. 2011) (internal quotation omitted)). To the extent the stop of the boys became a *de facto* arrest, the question of whether there was probable cause can be dispensed with quickly: Since there is a genuine question of material fact as to whether there was a reasonable suspicion to prolong the stop of the boys after their parents intervened, the Court concludes that there must also be a genuine question of material fact as to whether probable cause supported Officer Marzolf's arrest of the boys. Thus, the only issue remaining is

whether the stop became a *de facto* arrest at any point.

The Court finds that a genuine issue of material fact exists as to whether W.Y.'s and S.Y.'s detention was a *de facto* arrest supported by probable cause. "[A]n action tantamount to arrest has taken place if the officers' conduct is more intrusive than necessary for an investigative stop." *United States v. Raino*, 980 F.2d 1148, 1149 (8th Cir. 1992) (citation and quotation marks omitted). The Eighth Circuit has recently noted that the line between an investigatory stop and an arrest "can be hazy." *Chestnut v. Wallace*, 2020 WL 360458, at *2 (8th Cir. Jan. 21, 2020). "An investigative detention may turn into an arrest if it lasts for an unreasonably long time or if officers use unreasonable force." *U.S. v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006) (quoting *Maltais*, 403 F.3d at 556 (internal quotations omitted)).

Factors to consider in determining whether an investigative stop is elevated into an arrest include:

> 1) the number of officers and police cars involved; 2) the nature of the crime and whether there is reason to believe the suspect might be armed; 3) the strength of the officers' articulable, objective suspicions; 4) the erratic behavior of or suspicious movements by the persons under observation; and 5) the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

Raino, 980 F.2d. at 1149–50.

"[H]andcuffs are a hallmark of formal arrest," but "[t]he use of handcuffs does not *always* convert an investigative stop into an arrest. *El-Ghazzawy v. Berthiaume*, 708 F. Supp. 2d 874, 882 (D. Minn. 2010) (emphasis in original) (quotations and citations omitted), *aff'd* 636 F.3d 452 (8th Cir. 2011). "[F]or the use of handcuffs during a *Terry* stop, the Fourth Amendment requires some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose." *El-Ghazzawy*, 636 F.3d at 457 (quoting *Bennett v. City of Eastpointe*, 410 F.3d 810, 836 (6th Cir. 2005)). Further, "[i]t is well established . . . that when officers are presented with serious danger in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety." *United States v. Fisher*, 364 F.3d 970, 973 (8th Cir. 2004) (citations omitted).

In *El-Ghazzawy*, the Eighth Circuit held that a *de facto* arrest occurred where a police officer handcuffed a man suspected of selling counterfeit watches because: (1) the officer had no indication that the man was dangerous; (2) the suspected crime did not involve a weapon; (3) the man did not act suspiciously; (4) the officer failed to conduct any investigation before handcuffing the suspect; and (5) there were no exigent circumstances. 636 F.3d at 457–58. On the other hand, in *Waters*, the Eighth Circuit found that handcuffing an individual and placing him in a squad

car for 20 minutes was not a *de facto* arrest. 921 F.3d at 737. The individual refused to allow store employees to verify his purchase at a lumberyard, and he failed to identify himself to police officers or comply with their instructions to step out of his vehicle. *Id.* The Eighth Circuit held that this detention was not an arrest because of the individual's suspicious behavior and because the individual was larger than the police officers who were present. *Id.* In a third case, *Chestnut*, the court found no *de facto* arrest where the plaintiff—Wallace—when asked for identification by a police officer, provided his birthdate and declined to provide his full social security number. 2020 WL 360458, at *1. He was then frisked for weapons but none were found, and then he was placed in handcuffs. *Id.* After approximately twenty minutes, the handcuffs were removed. *Id.* Comparing these facts with *Waters*, the Eighth Circuit concluded that Wallace had not been arrested given that the plaintiff in *Waters* had undergone an "arguably more intrusive" interaction that was not considered an arrest. *Id.* at *2.

For the following reasons, the Court concludes that a material issue of fact remains in dispute as to whether W.Y.'s and S.Y.'s detention was transformed into a *de facto* arrest. First, while W.Y.'s and S.Y.'s detention was shorter than the twenty-minute detentions described in *Waters* and *Chestnut*, their interaction with the police was considerably more intense: The 12 and 14-year old boys were handcuffed and held at gunpoint while laying facedown on the ground and surrounded by police officers. Second, at the time

W.Y. and S.Y. were handcuffed by Officer Marzolf, given the boys' compliance with prior commands, no reasonable officer in Officer Marzolf's shoes would have believed that they were armed or dangerous or that handcuffing them was necessary to maintain the *status quo*. Third, as discussed above, Officer Marzolf's objective, articulable suspicion that the boys had committed a crime had evaporated by the time the boys were handcuffed because the boys' parents had already corroborated their identities and alibis. Fourth, while there was reasonably an immediate need to stop and question the boys when they might have been fleeing suspects, given their compliance and the information provided by their parents, no reasonable officer would have believed that handcuffing the boys at gunpoint was the least intrusive means necessary to conduct the stop.

Considering the totality of the circumstances, the Court concludes that Officer Marzolf's conduct—handcuffing two boys laying facedown on the ground, at gunpoint, given the considerable evidence that the boys were not the fleeing suspects—was more intrusive than necessary for an investigative stop. Since Officer Marzolf's detention of the boys was far more intrusive than necessary to confirm or dispel his initial reasonable suspicions, the Court concludes that a reasonable jury could conclude that Officer Marzolf arrested W.Y. and S.Y.

The Court next turns to whether Officer Marzolf is entitled to qualified immunity on the illegal arrest claim. The Court finds that he is not. "[A]n officer is

entitled to qualified immunity [for a warrantless arrest] if there is at least 'arguable probable cause.'" *Thurairajah*, 925 F.3d at 983 (quoting *Borgman*, 646 F.3d at 522–23) (other citations omitted). Arguable probable cause exists if a warrantless arrest is "based on an objectively reasonable—even if mistaken—belief that the arrest was based in probable cause." *Ulrich v. Pope Cnty.*, 715 F.3d 1054, 1059 (8th Cir. 2013). Viewing all of the facts discussed above in the light most favorable to W.Y. and S.Y., after W.Y.'s and S.Y.'s stepfather offered additional corroboration of the boys' identities and alibis, no reasonable officer in Officer Marzolf's shoes would have believed that the boys were the fleeing suspects. Officer Marzolf lacked even arguable probable cause for the arrest. Accordingly, the Court concludes that Officer Marzolf is not entitled to qualified immunity on the illegal arrest claim.

3. Illegal Search

The Court next turns to the claim that Officer Marzolf violated the Fourth Amendment by illegally searching W.Y. and S.Y. Warrantless searches are per se unreasonable under the Fourth Amendment unless a recognized exception applies. *Riley v. California*, 573 U.S. 373, 382 (2014) (citation omitted). One such exception applies during *Terry* stops: Police officers, assuming they have reasonable suspicion that a crime is being, has been, or will be committed, are permitted to frisk a detained person for weapons, so long as the officer has an articulable suspicion that the person is armed and a danger to the safety of officers or others.

Minnesota v. Dickerson, 508 U.S. 366, 373 (1993); *United States v. Davidson*, 808 F.3d 325, 329 (8th Cir. 2015). Additionally, a warrantless search of an arrestee is permitted if the search is "incident to a lawful arrest." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). If, however, an arrest is unlawful, then the search incident to arrest is invalid. See *United States. v. Chartier*, 772 F.3d 539, 545 (8th Cir. 2014).

W.Y. and S.Y. argue that they were illegally searched because they were handcuffed and then searched. The dashcam video depicts three distinct searches: (1) the frisk of W.Y.; (2) the frisk of S.Y.; and (3) the search of S.Y.'s backpack. The Court denies summary judgment on the claim based upon the frisk of W.Y. but grants summary judgment on the claims for the frisk of S.Y. and the search of S.Y.'s backpack.

i. The Frisk of W.Y.

The Court finds there is a genuine issue of material fact in dispute as to whether the frisk of W.Y. was legal. As discussed above, the Court has concluded that, at the point the boys were handcuffed, there is a genuine issue of material fact in dispute as to whether a *de facto* arrest occurred and whether such a *de facto* arrest was supported by probable cause. The dashcam video shows that Officer Marzolf frisked W.Y. *after* he was handcuffed; thus, if the jury concludes that the *de facto* arrest was not supported by probable cause, then they would have to conclude that the frisk of W.Y. was not a lawful search incident to arrest. *See Chartier*, 772 F.3d at 545. Accordingly, the Court concludes that there is a genuine issue of material fact as

to whether Officer Marzolf's search of W.Y. was a permissible warrantless search.

Furthermore, even if the search were incident to a permissible *Terry* stop and not a *de facto* arrest, there remains a genuine issue of material fact as to whether Officer Marzolf's search was permissible as part of a *Terry* stop. Under *Terry*, an officer who reasonably suspects that the persons being investigated are armed and dangerous to "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, 392 U.S. at 30. Such a frisk "requires more than an officer's inchoate and unparticularized suspicion or hunch." *United States v. Woods*, 747 F.3d 552, 555 (8th Cir. 2014) (internal quotations and citations omitted). But, as the Court has already discussed, by the time Officer Marzolf handcuffed and frisked W.Y. and S.Y., any reasonable suspicion that they had committed a crime had dissipated, and Officer Marzolf had been repeatedly informed by the young boys' parents that neither of them was the suspect who was known to carry a gun. Additionally, the boys had been completely compliant with Officer Marzolf's commands, and there was no other indication that they were armed and dangerous at the time W.Y. was frisked. Accordingly, viewing the undisputed record evidence in the light most favorable to W.Y. and S.Y., the Court concludes that no reasonable officer would have suspected that W.Y. and S.Y. were armed and dangerous, and therefore Officer Marzolf's frisk was not supported by reasonable suspicion.

The Court now turns to discuss whether Officer Marzolf is entitled to qualified immunity for the frisk of W.Y. The Court concludes that he is not. To determine whether Officer Marzolf is entitled to qualified immunity on this illegal search claim, the Court must assess whether arguable probable cause or arguable reasonable suspicion justified the search. *See Waters*, 921 F.3d at 736 (holding that arguable reasonable suspicion is the standard for qualified immunity during *Terry* stop searches); *Schaffer v. Beringer*, 842 F.3d 585, 592 (8th Cir. 2016) (holding that arguable probable cause is the standard for qualified immunity during searches incident to arrest). As discussed at length above, viewing the facts in the light most favorable to W.Y., by the time Officer Marzolf frisked W.Y. there were no facts that provided arguable probable cause or arguable reasonable suspicion that W.Y. had committed a crime or that he was armed and dangerous. Accordingly, Officer Marzolf is not entitled to qualified immunity on this claim.

ii. The Frisk of S.Y. and the Backpack Search

The Court grants summary judgment on the claim that Officer Marzolf illegally frisked S.Y. and searched S.Y.'s backpack. For a governmental official to be held liable under § 1983 in their individual capacity, that official must have directly participated in the unconstitutional acts. *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010). The dashcam video reveals that Officer Marzolf did not frisk S.Y. or search his backpack; instead, it appears that Officer Ruiz performed those acts. Further, there is no evidence that

Officer Marzolf ordered Officer Ruiz to search S.Y. or his backpack. Accordingly, since Officer Marzolf did not directly participate in those allegedly unconstitutional acts, the Court grants Officer Marzolf summary judgment on the claims for the frisk of S.Y. and his backpack.

4. Use of Excessive Force Against W.Y. and S.Y.

W.Y. and S.Y. argue that Officer Marzolf used excessive force against them by repeatedly pointing his firearm at them. Officer Marzolf argues that he did not use excessive force against W.Y. and S.Y. because he gave no indication that he intended to fire his gun.

The Court finds that there remains a genuine, material question of fact as to whether Officer Marzolf used excessive force against W.Y. and S.Y. The Eighth Circuit has found that pointing a firearm at an individual may, depending upon the totality of the circumstances, constitute use of excessive force. *Compare Clark*, 926 F.3d at 979 (holding that it was not an excessive use of force to point a gun at an armed suspect who had not yet been "removed from the vehicle, patted down, and restrained"), *with Wilson v. Lamp*, 901 F.3d 981, 990 (8th Cir. 2018) (finding that officers used excessive force by keeping weapons drawn and pointed at suspects after they realized that they had the wrong individual and had patted him down).

Here, the dashcam video shows that Officer Marzolf had his service weapon drawn and pointed at W.Y. and S.Y. at multiple points from the very

beginning of the encounter until the 21:44:25 mark on the dashcam video. Yet, for most of this encounter, the boys were lying facedown on the ground with their arms spread out to the side. They were compliant with Officer Marzolf's commands throughout the entire encounter. Officer Marzolf's assertion that his gun was pointed at the ground is belied by the video evidence. Further, while dispatch warned Officer Marzolf that Mr. Silva was possibly armed and dangerous, Officer Marzolf *continued* to point his firearm at W.Y. and S.Y. even after learning that the boys were 12 and 14 years old and had been walking home from their grandparents' house. Viewing these facts in the light most favorable to W.Y. and S.Y. and considering the amount of force used by Officer Marzolf against two compliant suspects, the Court believes a reasonable jury could conclude that Officer Marzolf used excessive force against W.Y. and S.Y.

The Court next turns to the question of whether Officer Marzolf is entitled to qualified immunity on this excessive force claim. The Court concludes that he is not. "The right to be free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures." *Ngo v. Storlie*, 495 F.3d 597, 604 (8th Cir. 2007) (quoting *Samuelson v. City of New Ulm*, 455 F.3d 871, 877 (8th Cir. 2006)). "In order for the right to be clearly established, 'existing precedent must have placed the constitutional question beyond debate' so that 'a reasonable official would understand that what he is doing violates that right.'" *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1012 (8th

Cir. 2017) (quoting *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 989 (8th Cir. 2015)).

The Eighth Circuit has held that the right not to have a gun pointed at a compliant suspect was clearly established by at least February 2016, well before this encounter took place. *Rochelle v. City of Springdale Police Dep't*, 768 F. App'x 588, 590 (8th Cir. 2019) (citing *Thompson v. City of Monticello*, 894 F.3d 993, 990 (8th Cir. 2018)). Summary judgment is therefore denied as to this excessive-force claim.

5. Use of Excessive Force Against Ms. Pollreis

Ms. Pollreis asserts that Officer Marzolf used excessive force by drawing and pointing his taser at her. Officer Marzolf argues that, due to Ms. Pollreis' "repeated noncompliance with his commands," pointing his taser at her was objectively reasonable under the circumstances.

For the following reasons, the Court concludes that Officer Marzolf is entitled to qualified immunity on this claim. While the Eighth Circuit has not decided whether the act of drawing a taser and pointing it at an individual, without firing it, constitutes an excessive use of force, several district courts have addressed this very issue. In *Policky v. City of Seward, Neb.*, the district court concluded that an officer's act of drawing and pointing a taser gun did not constitute use of excessive force. 433 F. Supp. 2d 1013, 1025 (D. Neb. 2006). Similarly, in *Price v. Busbee*, 2006 WL 435670, at *3 (M.D. Ga. Feb. 21, 2006), the district court concluded that it was not an excessive use of

force to threaten the use of a taser since the threat was "used in a good faith attempt to restore discipline." The district court did note that "an excessive force claim for immediate, malicious threat of electrical shock would not be indisputably meritless." *Id.* (quoting *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001)); *see Parker v. Asher*, 701 F. Supp. 192, 195 (D. Nev. 1988) (holding that "guards cannot aim their taser guns at inmates for the malicious purpose of inflicting gratuitous fear").

This Court previously held that aiming a taser at a suspect for no legitimate purpose was not a violation of clearly established law. *Brown v. Boone Cnty.*, 2014 WL 4405433, at *4 (W.D. Ark. Sept. 5, 2014). This Court noted that "existing law within the Eighth Circuit did not put [the officer] on notice that the mere drawing and pointing of the taser constituted excessive force" and that "[n]o such constitutional violation has been clearly established in this jurisdiction." *Id.* This Court believes the state of the law in the Eighth Circuit on the threatened use of a taser is essentially the same as it was at the time of this Court's decision in *Brown*. It is true that the Eighth Circuit has developed its case law regarding the threatened use of *firearms*, but there have been no such developments surrounding the threatened use of tasers.

Here, the undisputed evidence shows that Officer Marzolf drew and pointed his taser at Ms. Pollreis *after* he had twice commanded her to step back. There is nothing in the record to suggest that Officer Marzolf pointed his taser at Ms. Pollreis for a malicious

purpose, or even for no purpose. Instead, Officer Marzolf pointed his taser at Ms. Pollreis in order to enforce his command, misguided though that command may have been. Ms. Pollreis has failed to point to cases of controlling authority in this jurisdiction at the time of the incident that would have provided a "fair and clear warning" to Officer Marzolf that his conduct was unlawful. *Payne v. Britten*, 749 F.3d 697, 708 (8th Cir. 2014) (citation omitted). Thus, the Court finds that Officer Marzolf is entitled to qualified immunity on Ms. Pollreis' excessive force claim.

C. Claims Against Officer Kirmer

Ms. Pollreis alleges that Officer Kirmer is also responsible for the unconstitutional acts against her and her children. Officer Kirmer argues that he did not directly participate in the alleged constitutional violations, so Ms. Pollreis' claims against him must be dismissed as a matter of law.

Assuming that Officer Kirmer's order caused Officer Marzolf to prolong the detention of W.Y. and S.Y., the Court concludes that, based upon the facts *known to Officer Kirmer*, Officer Kirmer had an objectively reasonable suspicion that W.Y. and S.Y. were the fleeing suspects even if was mistaken. *See Hollins*, 685 F.3d at 706 ("'The determination of whether probable cause,' or reasonable suspicion, 'existed is not to be made with the vision of hindsight, but instead by looking to what the officer reasonably knew at the time.'") (quoting *Sanders*, 196 F.3d at 913). Officer Marzolf informed Officer Kirmer that he had stopped two juveniles and that they were wearing dark

hoodies and pants. Also, after Officer Kirmer responded that one of the suspects would be shorter and skinnier than the other, Officer Marzolf said, "10-4." These were the facts known to Officer Kirmer when he gave his third and final order to Officer Marzolf to detain W.Y. and S.Y. Officer Kirmer had no way of knowing that the size and height discrepancy between the boys was due to their prepubescence.

The Court notes that Officer Kirmer did not know that: (1) W.Y. and S.Y. had not been running and were not out of breath; (2) W.Y. and S.Y. complied immediately with Officer Marzolf's commands; (3) the age of the boys; and (4) the age of the boys and their alibis had been vouched for by their mother and stepfather. If he had known these facts, the Court's analysis would be different. As the record stands, however, the Court concludes that a reasonable officer in Officer Kirmer's shoes would have had reasonable suspicion that supported ordering Officer Marzolf to stop W.Y. and S.Y. The Court therefore grants Officer Marzolf summary judgment on the illegal seizure claim against him.

Finally, the Court finds that Officer Kirmer is entitled to summary judgment on the remaining claims against him. "Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Parrish*, 594 F.3d at 1001 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). The record is devoid of any evidence of a causal connection between Officer

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Kirmer's order to Officer Marzolf and Officer Marzolf's decision to search, arrest, or excessively use force against Ms. Pollreis or her children. Accordingly, the Court dismisses all of the illegal search, illegal arrest, and excessive use of force claims against Officer Kirmer.

IV. CONCLUSION

The Court's rulings are summarized in this table:

Claim	Current Status of the Claim for Trial
Cause of Action 1 against Officer Marzolf Illegal Seizure of W.Y. and S.Y.	As to the **initial seizure** of W.Y. and S.Y., summary judgment on the merits of this claim is granted. As to the **prolonged seizure** of W.Y. and S.Y., summary judgment on the merits of this claim is denied and qualified immunity is denied.
Cause of Action 2 against Officer Marzolf Illegal Arrest and Detention of W.Y. and S.Y.	Summary judgment on the merits is denied and qualified immunity is denied.

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Cause of Action 3 against Officer Marzolf Illegal Search of W.Y. and S.Y.	As to the **frisk of W.Y.**, summary judgment on the merits is denied and qualified immunity is denied. As to the **frisk of S.Y. and the backpack search**, summary judgment is granted.
Cause of Action 4 against Officer Marzolf Use of Excessive Force Against W.Y. and S.Y.	Summary judgment on the merits is denied and qualified immunity is denied.
Cause of Action 5 against Officer Marzolf Use of Excessive Force Against Ms. Pollreis	Qualified immunity is granted.
All Causes of Action Against Officer Kirmer	Summary judgment is granted on all claims against Officer Kirmer

IT IS THEREFORE ORDERED that Officer Marzolf and Officer Kirmer's Motion for Summary

Judgment (Doc. 20) is **GRANTED IN PART AND DENIED IN PART**. All of the claims against Officer Kirmer are **DISMISSED WITH PREJUDICE**. The following claims against Officer Marzolf are **DISMISSED WITH PREJUDICE**:

- As to Count One of the Complaint, the claim based upon the initial seizure of W.Y. and S.Y.;
- As to Count Three of the Complaint, the claim based upon the frisk of S.Y. and the backpack search;
- All of Count Five of the Complaint;

The following claims against Officer Marzolf, however, **remain pending** for trial:

- As to Count One of the Complaint, the claim based upon Officer Marzolf's prolonged seizure of W.Y. and S.Y.;
- All of Count Two of the Complaint;
- As to Count Three of the Complaint, the claim based upon the frisk of W.Y.;
- All of Count Four of the Complaint.

IT IS SO ORDERED on this 13th day of March, 2020.

/s/ TLB
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

Appendix E

Excerpts from the Deposition of Casondra Pollreis (July 10, 2019)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASONDRA POLLREIS, on behalf of herself and her minor children, W.Y. and S.Y. **PLAINTIFFS**

V. **CASE NO. 5:18-CV-5200-TLB**

LAMONT MARZOLF and JOSH KIRMER, **DEFENDANTS**

* *

DEPOSITION OF

CASONDRA POLLREIS

TAKEN IN SPRINGDALE, ARKANSAS

JULY 10, 2019

* *

APPEARANCES:
On Behalf of the Plaintiff:
DOUG NORWOOD, Esq.
P.O. Box 1960
Rogers, Arkansas 72757

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On Behalf of the Defendants:
GABRIELLE GIBSON, Esq.
SARA MONAGHAN, Esq.
Arkansas Municipal League
Post Office Box 38
North Little Rock, Arkansas 72115

HENDRIX REPORTING SERVICE
1701 SOUTH ARCH
LITTLE ROCK, ARKANSAS 72206
(501) 372-2748

* * * * *

[3]

(Witness Sworn)

Thereupon,

CASONDRA POLLREIS,

having been called for examination, and having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MS. GIBSON:

Q Ms. Pollreis, would you state your full name for the record, please?

A Uh-huh. Casondra Deann Pollreis.

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Q Ms. Pollreis, have you ever been deposed before?

A No.

Q Okay. Let me know if you ever need a break and we can take a short break. And if you don't understand my question or I need to rephrase it, just ask me and I can do that.

A Okay.

Q What is your current address?

A 2104 Lynn Street.

Q And how long have you lived at 2104 Lynn Street?

A We've been there I guess two, it will be three years.

Q Have you always lived in Arkansas?

A Since I was four or five, yes.

Q Okay. Where were you born?

A Denver, Colorado.

Q And then you moved here after that to Arkansas?

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A No. My parents ran a group home for Boys Town, so we lived in Lincoln, Nebraska, or Omaha

Nebraska, and then we moved to Florida and then here.

Q Oh, okay. And when you moved to Arkansas, did you move to Northwest Arkansas?

A Yes.

Q Have you lived anywhere else in Arkansas besides Springdale?

A Yes.

Q Okay. Where have you lived?

A Gentry, Arkansas; Siloam Springs, Arkansas; Sulfur Springs, Arkansas; Bella Vista, Arkansas; and I think that's it.

Q Okay. And you said Springdale, you'd lived at 2104 for two years?

A Two-and-a-half, yes. I guess this October will be three years.

Q Okay. And who do you live there with?

A Bryan, my husband, and then my four children.

Q Okay. And are your other two children, besides W.Y. and S.Y., are they minor children as well?

A Yes.

Q And what are their initials?

A Initials?

Q Yeah.

A M.N. and M.N.

* * * * *

[7]

Q Is she married?

A Uh-huh.

Q What's her husband's name?

A Gabe Kimbro.

Q Okay. Any other, you said aunts and uncles maybe?

A Yes. I have Rob and Christie Weir, they live in Siloam, and then I have an aunt Debbie Archer that lives in Springdale.

Q Anybody else?

A I don't believe so. That's pretty much it.

Q Okay. So we're here today because of an encounter that happened on January 8, 2018 between your family members, specifically your two sons, and two officers of the Springdale Police Department. Prior to that incident did you know Officer Marzolf?

A No.

Q Okay. Prior to that incident did you know Sergeant Kirmer?

A No.

Q You said that you've lived at 2104 for about two-and-a-half years. Did you know or know of Tomas Silva?

A No.

Q Okay. Did you know --

So you live at 2104, your neighbors would be 2102, right, and then 2106, would that be accurate?

A I think so.

* * * * *

[10]

one street over, basically. It's just theirs is like a little, seems a little separate than my neighborhood.

Q Okay. So in order to get from your parents house to your house, would you have to go on Chapman?

A Yes.

Q So you would go from Jean to Chapman to Lynn --

A Yes.

Q -- in order to get to your house. Okay. You said about 2000 feet.

A Uh-huh.

Q Okay. So that night on January 8, 2018, where were you and your family prior to that encounter?

A We were at my parents' having dinner and watching the SEC championship game, the boys. We left at halftime. I told them that we had to wrap it up, we had school the next day. And so we all loaded up, and at the last minute [S.Y.] said "[W.Y.], do you want to walk home with me?" And he agreed, he said yes. And I looked at the time and I said, "Okay, hurry up, go." So they started walking, and my husband and I got in the vehicle with the girls and went home and got the girls out.

Well, as we were pulling down the street I could see blue lights like go by. I was like, "Oh, something's going on." I didn't, you know, just kind of like, 'That's weird. I wonder why. . ."

I didn't see anything else. I get to my house, get the girls

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out, go back outside to get the food and the stuff out of our vehicle, and that's when I saw the officer turning on my road with his lights on.

So in my mind I didn't even get the stuff, I just start walking towards the boys, because I had a feel, just I need to go over there and make sure that they're okay.

I see him stop and I knew exactly, he was stopping because they were my boys, and so when he got out of the vehicle I said, "Officer, my name is Casi Pollreis. I live on this road. These are my boys. Is everything okay?"

Didn't respond to me, so I didn't know if he couldn't hear me, but I said, "Officer," and at that point I can hear him yelling at the boys, "Who are you? What's your names? Put your hands up." And [S.Y.] said, "I'm [S.Y.]," and you know, [W.Y.] answered, "I'm [W.Y.]."

And he said, "Turn around," pulls his gun out, and at that point I said, "Officer, did you hear me?" Like, "I'm their mom. We live right here. We've been at my parents' house. What's going on?" And he just kept yelling.

He said, "Get back." And then he told the boys to get on the ground. And I'm like, "What is going on?" Like, "You have to tell me what's going on. Those are my -- He's 12 and 14." Like, "Why are you holding a gun at them?" And then he has the taser at me, and he said, "You need to back up."

And I said, "Okay, what do you want me to do?" And he

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said, "Go. You need to leave; Go back home."

So I didn't have my phone on me. I turned around, I just told the boys, I said, "Boys, everything's going to be okay. Just be calm. I promise I'll be right back." And I turned around and ran home, got my husband, and he booked it out.

And then I called my dad immediately. And then I stayed there with the girls while -- I didn't go back down there because I was a mess. I was with my daughters.

Q Okay. So let's start from the beginning of that and kind of break it down.

Okay, so you and your family members, your husband and your two boys and your two girls --

A Uh-huh.

Q -- were at your parents' house?

A Yes.

Q And y'all were watching the SEC championship game?

A Uh-huh.

Q Was it over when y'all were leaving?

A It was halftime.

Q Okay, halftime. And you said they had school the next day, so it was time for y'all to go home?

A Yeah. It was like 9:30, and I said, "It's too late, we've gotta go."

Q Okay. And what was the reason? Why did, I think you said it was W.Y. that said he wanted to walk home?

* * * * *

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A Yes, like that, so the spotlight was there. And he asked them who they were. And when I was walking up I said, "Officer, my name is Casi Pollreis. Those are my boys. They've been, you know, we've been at my -- they're just walking home from their grandparents', and they're 12 and 14. We live right down here on 2104.

I was trying to explain as much as I could, but he didn't respond to me, so I didn't know if he heard me talking. And at that point is when he started yelling at them to, you know, put their hands up and whatever.

And I said, "Officer, did you hear me?" And he said, "I heard you." And then he pointed the taser at me and told me to get back. And I said, "You have a gun on my 12 and 14 year olds, what do you expect me to do?" And he told me to leave, to go home.

Q Okay. So when he told you to, the first time when he told you to get back, did you get back, or did you stay there because of your boys?

A I stopped. I stopped, but then I like walked around this direction (Indicating), cause I was like, 'What is going on? You need to tell me what's going on and why you have my kids at gunpoint on the ground?' Like what –

And then he said, that's when he said, 'We're looking for two suspects that are these ages,' or something. And I said, "So you're looking for 12 and 14-year-olds?" I said, "I assure you

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They've been with me all night-at my mom's." And then that -- I couldn't talk to him then.

Q Now you said that he had them at gunpoint. Are you saying that he had his gun drawn, or are you saying that his gun was pointed at the kids at all times?

A Yeah, his gun was pointed at the kids.

Q For the entire time?

A That I was there, yes.

Q Okay.

A Other than when he had the taser. I mean, he was doing that (Demonstrating) number at me.

Q Okay. And did he like turn his body like towards you at that point? Is that why you said that he was holding you at gunpoint?

A Yes, I believe he did at one point. I can't remember exactly if he turned, I just knew that there was two things going on and I at that point was like, 'Okay, he's freaking out. I need to be calm.'

Q Okay. Have you seen the video of the dash cam?

A I have.

Q Okay. And we'll probably get to that in a little bit. Okay, so when you very first walk out there and you're trying to introduce yourself to Officer Marzolf to tell him who you are and who the boys are, about how far away from him are you, distance-wise?

[19]

A I don't -- Well, I started yelling it like two houses away, but I think I got up to on the sidewalk. I don't remember.

Q Okay.

A I truly don't. I'm sorry.

Q No, no, no, that's okay. Do you remember -- So do you remember about like what was the closest point that you got to him?

A Around the -- I walked around, I think, his side of, not his side of the vehicle, the other side of the vehicle, just to see the boys. Like I was never close to him, just --

Q But as close as me and you are or further?

A I would say further, but I may be wrong. I was kind of --

Q Okay. And at that point where's your focus? Are you focusing on your children?

A Yes, I'm focused on my children and the fact that he has guns out and whatever and I could tell he was very upset, very, like he just seemed very hostile. Like I just, I didn't know, I was kind of freaking out, like what if he does something? I just told the boys to be calm and --

Q Now you didn't hear any of the information that was relayed to that officer over the radio, right?

A Not that at point.

Q What do you mean by "not at that point"?

A I heard over the radio when I met with the Chief of Police and watched the video. I heard what he said to him.

[20]

Q Okay. But in the moment you had no idea like what he knew --

A No, I had no idea what was going on.

Q Okay. Did you know that a parameter was set up on your street?

A No.

Q Okay. Did you know that he was looking for potentially armed gang members?

A No.

Q Did you know that he was looking for two individuals, one was taller than the other?

A Not at that point, I didn't.

Q Okay. So after you approached the officer and he told you to get, he told you to get back, and then he told you to get to your house, after you said, 'What do you want me to do, or what am I supposed to do?'

A Uh-huh.

Q So then you leave and you go home, right?

A Yeah.

Q And then is that when your husband comes out?

A Uh-huh.

Q So you relayed this information to your husband?

A I ran in the front door and I said, "Bryan, the cops have the boys at gunpoint, I have no idea what's going on." And he had just, we had just gotten home, he had just taken his shoes

* * * * *

[24]

A you." And so we put him on speaker and he sat around and talked to all of us at that point about the situation.

Q Okay. And what -- So you said [S.Y.] went to his room?

A Yeah, for a little bit, and then he came back out.

Q He did come back. Okay.

A Uh-huh.

Q So [S.Y.] came back out when Officer Franklin, Sergeant Franklin is talking with you?

A Yes.

Q And what is being said? What's he saying? What are y'all saying?

A He looked at the boys and he said, "I am so sorry that this happened. It should not have happened." And he said, "I have words. This what took place tonight never should have happened to you. They were not who we were looking for. We are looking

for Hispanics. Clearly these are white boys that do not match the description." And he said, "I'm just so sorry."

He was like, "If there's anything -- " He was like, "I will be writing a letter to the Chief about what took place." And he was a sergeant, I believe. Yes, sergeant. That he was going to be writing him up for, you know, what took place.

And he gave us his card, and he said if we had any questions or any concerns or anything, to please contact him.

Q He said, the sergeant said that your two boys were clearly white boys.

[25]

A Uh-huh.

Q Did he say that just based on their skin color? I mean, what color is their hair?

A Blonde.

Q So both of them have blonde hair?

A Blue eyes, yes.

Q Like bleached blonde hair --

A No.

Q -- or like dirty blonde hair?

A No, not dirty blonde. Like, I mean, they're blonde, blue-eyed kids.

Q Okay. And this incident occurred at what time?

A I think it was around 10:00, 9:30. I know at halftime it was 9:30. That's when I was like, "It's late. We gotta go." So I believe it was right around 9:45, somewhere in there.

Q Okay. So after that conversation that you and your family had with Sergeant Franklin, did you ever meet with him again?

A No.

Q Did you ever meet with any other officers after that incident?

A I did. I met with one other officer when I met with the chief of police to watch the video. I don't remember his name. I may actually have his contact in my phone. I don't know that – He was the officer sitting in with us when we watched the video.

[26]

Q Okay. So about how long after the incident did you go to – I guess you went to the police department, is that right?

A Right.

Q So about how long .was it after the incident that you went to the police department to watch the video?

A I don't know, probably like three to four months. I don't remember.

Q Okay. So that was the purpose of you going to the police department was to watch the video?

A Yes. The chief of police asked me to come in.

Q Oh, he did? Okay. So the Chief contacted you via cell phone?

A Yes.

Q Okay. Do you know why he contacted you?

A Because he wanted to talk to me about the incident and he walked through the video with us, or with me.

Q Was he doing an investigation that you know of?

A Not that I know of. He just apologized and --

Q So you watched the video, and it was the dash cam video, right?

A Yes. I watched the dash cam video and then I heard in the other part where Officer Kirmer is telling him to, when he asked about is one taller than the other and one shorter? And he said yes. And he said, "Go ahead and detain them."

Q Did the chief or the other officer that was present during

[27]

that meeting, did they give you any opinion on, you know, the incident or, you know, if they thought that Officer Marzolf was out of line?

A Yes.

Q Okay. And what did they say?

A They said that there was no reason for him to pull his gun, that it could have been handled a lot differently, detaining does not mean put on the ground in handcuffs, it means, you know, the Chief told me he could have easily walked over and said, "Hey, guys, what's your names? I need you to sit here for just a second, stand back. When you arrived on the scene, he should have walked over and gotten more information from you," but, he said, "guns should not have been drawn. He should have asked some more questions before he went to that point."

Q So he told you this verbally?

A Yes.

Q Okay. Did you ever see any statements from the Chief with these --

A No. He just made me a copy of the video and I couldn't get it to play, and so he had his secretary

give me another one, and that's the only contact I've had.

Q Knowing what you know now as far as the officers setting the parameter looking for potentially armed gang members, knowing that now, and knowing that your two boys have walked home from your parents' house to your house, you know, more

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than once, would you; if they weren't your two boys that night, would you have wanted the officers to stop and detain these potentially armed gang members?

A Would I have wanted them to stop? Yeah. I mean, of course. I mean, if they're looking for someone --

I mean, I understand that, yeah, stop them, ask them, like figure it out. I mean, yes.

Q Okay. So you said you understand like the stopping them and that.

A Yeah.

Q So what is your main, what was your main issue with how the incident occurred that you saw?

A The fact that he was given their names several times by me and by my children, he has a gun out, a taser out, isn't saying anything except to back up and go home.

I'm telling him I'm their mother, they're my minor children on the ground. He would not -- He just was not taking anything, like he was not listening. Like he would not hear anything.

And I think the fact that he, you know, had his gun out. He has my boys handcuffed. Where's the threat? What's the threat then? They've done everything you've asked. Yes, sir. Everything.

So where's your threat with, why is there a gun? They're not trying to run from you. They're doing exactly as they're

* * * * *

[37]

A It's weekly, depending on if they're full time or part time.

Q Okay. How much do you get paid weekly?

A Per child?

Q Uh-huh.

A Well, if they're under two and they're full time it's $150 a week. If they're older or if they're part-time kids, part time is $80.

Q Do you split that, is it your mom, you said?

A My grandma.

Q Do you split that with your grandma?

A Uh-huh.

Q Did this incident cause you to miss any weeks of babysitting?

A No. I think I took a day, but no.

Q Would you have still gotten paid your full amount?

A Yeah.

Q Even if you missed a day?

A Uh-huh.

Q In the complaint that was filed, on page 4 you mention that the officer, Officer Marzolf, had both children at gunpoint execution style with a loaded gun pointed at the back of their heads. What is "execution style"?

A I don't -- Okay, cause I remember he had them on the ground at gunpoint like on the ground. I don't understand.

Q There you go. I'm handing you Exhibit One to the

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complaint, and if you'll flip to page 4 it is Paragraph 14, the last sentence (Handing document to witness).

A (Examining document) Okay. Okay. I don't remember that. I don't know if that was -- They were just on the ground at gunpoint.

Q So you don't know what "execution style" is, or what is "execution style"?

A I don't know.

Q Okay. So let's go through the details with the gun, then, so I can just make sure I understand.

A Okay.

Q So when you very first approached Officer Marzolf, is his back to you or is he facing you?

A No, his back is to me.

Q So his back is to you initially and is the gun -- Where is the gun? Is it in his right hand or his left hand?

A He had his hands like this (Demonstrating) with the gun.

Q Both hands on it?

A Until he got his taser.

Q So both hands are on the gun with his back to you. Is the gun, can you see if it's in front of him or if his arms are out or if his arms are down? Can you see where his arms are?

A No, I just saw him pull his gun and start yelling at the kids. His arms were like this (Demonstrating). He was standing, like the door of the car, like if he was sitting in the

[39]

car, the door was open. He stood up and he was standing in between at that point, like that (Demonstrating).

Q With the door in front of him?

A Uh-huh, yeah. And then he walked around, and that's when he pulled his taser out and told me to stop, I believe, the best that I remember.

Q Okay. So when his back is to you, can you see if his arms are fully extended or if they're closer to his body then?

A No, I don't -- I just know he pulled his gun out and he's (Demonstrating).

Q And then at some point he steps out from behind the door of his car?

A Uh-huh.

Q Is his back still to you at this point?

A He was doing both. He was saying, "Get the heck," you know, whatever, with his taser and his gun like (Demonstrating), so he was doing both.

Q So he will turn towards you at some point and turn away from you at some points?

A Uh-huh.

Q And during all those times, obviously when he's turned towards you you can see where his hands are in front of him.

A Yeah. He's got his gun and taser out (Demonstrating). Yeah.

Q And is his gun in one hand and the taser in the other?

[40]

A Uh-huh.

Q Is he looking at you at that point?

A Both. I mean, he's just going back and forth.

Q I guess he eventually puts his taser away when you got back to the house?

A I don't remember watching him, but in a way I just remember running back. I'm not sure. I don't remember that.

Q Did you ever see his gun to the side of him or his taser to the side of him, or was it always in front of him somewhere?

A In front.

MS. GIBSON: I don't have any more questions.

Any questions?

MR. NORWOOD: I don't have any.

MS. MONAGHAN: Thank you.

(Whereupon, said proceedings were concluded at 10:03 a.m.)

Appendix F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASONDRA POLLREIS, on behalf of herself and her minor children, W.Y. and S.Y. — **PLAINTIFFS**

V. — **CASE NO. 18-5200-TLB**

LAMONT MARZOLF and JOSH KIRMER, in their individual capacities — **DEFENDANTS**

COMPLAINT

Comes now the Plaintiff, on behalf of herself and on behalf of W.Y. and S.Y., and for her complaint states and alleges as follows:

PARTIES

1. The Plaintiff, Casondra Pollreis, is an adult resident of Washington County, Arkansas. The Plaintiff is the biological mother of two minor children, who are identified by their initials only in this Complaint, 14-year-old W.Y. and 12-year-old S.Y, who both reside with the Plaintiff in Washington County, Arkansas. The Plaintiff is bringing this Complaint on behalf of herself and on behalf of her two minor children, W.Y. and S.Y.

2. The Defendant Lamont Marzolf (hereinafter "Marzolf") is an adult resident of Washington County, Arkansas.

3. The Defendant Josh Kirmer (hereinafter "Kirmer") is an adult resident of Washington County, Arkansas.

4. For all times related to the Complaint, both Defendants, Marzolf and Kirmer, were police officers for the City of Springdale, Arkansas. The City of Springdale, Arkansas is a municipal corporation formed and regulated under the laws of the State of Arkansas.

5. The Defendants are sued in their individual capacity only.

JURISDICTION AND VENUE

6. This action arises under Title 42 U.S.C. Sections 1983 & 1988. This is a claim for money damages for violation of the Fourth and Fourteenth Amendments to the United States Constitution. Subject matter jurisdiction is by reason of Title 28 U.S.C. Sections 1331, 1334, and 1367. Venue is in the Western District of Arkansas by reason of Title 28 U.S.C. Sections 1391 (b & c), as the acts or omissions complained of occurred in the Western District of Arkansas, and all parties reside in the Western District of Arkansas.

FACTUAL ALLEGATIONS

7. On or about January 8, 2018, at approximately 9:30 p.m., the Springdale Police Department sent a

dispatch to officers stating they were looking for one Hispanic male named Tomas Silva, one female named Jennifer Price, and two other Hispanic males. The Defendants were both aware that the Springdale Police Department was looking for three Hispanic males and one female.

8. Marzolf drove to the relevant location inside the city of Springdale, Arkansas, to help set up a perimeter to look for the three Hispanic males and one female. Marzolf parked his police vehicle off of Luvene Avenue in the middle part of Lynn Street with blue lights flashing in Springdale, Washington County, Arkansas.

9. Almost immediately, Marzolf saw two young, Caucasian children calmly walking on the sidewalk on Lynn Street towards his police vehicle and the flashing blue lights. The two young, Caucasian children, who were W.Y. and S.Y., were walking home from their grandparents' house. The children live with their Mother, the Plaintiff, on Lynn Street and were just a few houses away from being home.

10. Despite the obvious fact that these two children were Caucasian (not matching the suspect descriptions of three Hispanic males and one female), and that people fleeing from the police would most likely not be calmly walking towards a police vehicle with flashing blue lights, Marzolf exited his patrol vehicle, drew his gun, pointed his loaded gun at the two children and screamed at them: "Hey! Stop! Stop! Stop! Turn away!" W.Y. and S.Y. immediately complied, stopped walking, and turned away from Marzolf.

11. While continuing to hold the children at gunpoint, Marzolf then asked the children what their names were. W.Y. and S.Y. complied and told Marzolf their names. Nothing about their names would lead one to believe that they were Hispanic.

12. The Plaintiff, who is a Caucasian adult, then arrived on scene on foot and spoke with Marzolf. She told Marzolf that the children were her "boys," that they were walking home from their grandparents' house behind her, and that she was waiting for them to get home. Despite now knowing that he was detaining two Caucasian children at gunpoint (at a time when he knew or should have known that these children could not possibly be the suspects the Springdale Police Department was looking for) and despite the fact that the mother of the children was on scene explaining who they were and what they were doing, Marzolf did not let the children go, but, instead, continued to hold them at gunpoint.

13. Marzolf informed dispatch that he had detained two juvenile individuals and told dispatch at least one of the boy's names. After hearing this over dispatch, and without asking for any more information about the two children, Kirmer gave an order to "detain both of those" children.

14. Marzolf then, while still pointing a loaded gun at both children (who were standing up side by side facing away from Marzolf pursuant to his instructions), ordered both children to get on the ground and stick their hands out to their side. W.Y. and S.Y. complied immediately. Marzolf had both children held at

gunpoint "execution style" with a loaded gun pointed at the back of their heads.

15. Upon seeing this, the Plaintiff (the mother of the children) asked Marzolf what happened. Marzolf responded by shouting at the Plaintiff to "Step back!" The Plaintiff said "they are my boys." Marzolf again yelled at the Plaintiff telling her to "Get back!" The Plaintiff asked "are you serious?" Marzolf said "I am serious; get back." Marzolf then pulled out his taser gun, crisscrossed his arms in front of his body and pointed the taser gun at the Plaintiff while still pointing his loaded pistol at the children. The Plaintiff backed away from the scene and, trying to calm her children, said "it's okay boys."

16. Then, out of the blue, Marzolf again yelled at the Plaintiff telling her to "get back!" The Plaintiff, who was several yards away from Marzolf, asked "where do you want me to go?" Marzolf said "I want you to go back to your house." The Plaintiff asked "are you serious?" "They are 12 and 14 years old." Marzolf said "and I'm looking for two kids about this age right now." "So get back in your house." Again, trying to calm her children, the Plaintiff told her children that they would be okay, and then she complied with Marzolf's command and went back to her house.

17. At this point, Marzolf was still holding the children at gunpoint while they were face down on the ground with their arms out to their sides. Marzolf then asked W.Y. and S.Y. if they had any "ID's." The children answered "no, sir" because, obviously, the

government does not typically issue "ID's" to children of this age.

18. Now, after having held these two children at gunpoint for several minutes, Marzolf finally asked dispatch to send another police unit his way.

19. At this point, the step-father of W.Y. and S.Y., who is also a Caucasian adult, arrived on scene and told Marzolf that the boys were his kids, that they all just left the boys' grandparents' house right up the road, and that the boys were walking behind his car as he drove home. He then told Marzolf that he also had witnesses if Marzolf would like to talk to them. Marzolf responded "that's fine; I just need to find out who these kids are right now." The step- father immediately told Marzolf again the names of the children. Now, despite the children not matching the description of the suspects in any way, despite knowing who the children are, what they were doing, where they were coming from, and where they were going, and despite having personally spoken with the mother and step-father of the children, Marzolf, instead of releasing the children to their parents, continued to detain the children at gunpoint.

20. Next, another officer arrived on scene to assist Marzolf. Marzolf and the other officer then approached the children with guns drawn, put their hands on the children, put the children's hands behind their back, and hand-cuffed the hands of both children behind their back, leaving them handcuffed and face down on the ground.

21. Then, after they were face down and in handcuffs, Marzolf and another officer searched the persons, clothing, and backpacks of W.Y. and S.Y.

22. Next, a sergeant with the Springdale Police Department arrived on scene. The sergeant immediately told dispatch that "these are white kids." The sergeant asked Marzolf if the kids were running, and Marzolf responded that they were walking. The sergeant then immediately said the kids were probably not who they were looking for, and Marzolf responded "probably not." In just a few seconds, the sergeant realized that the children were not the suspects they were looking for that night. Unfortunately, W.Y. and S.Y. were both still detained face down, and handcuffed. After the Grandfather of the boys showed up on scene and spoke with the sergeant, the sergeant finally ordered Marzolf to let the children go. Marzolf took off the handcuffs and let the boys go.

23. Due to the direct commands, actions, and decisions of Marzolf, W.Y. and S.Y. were both illegally stopped, detained, seized, searched, and arrested, were subjected to prolonged and illegal detention, seizure, and arrest, and were subjected to continued and prolonged, illegal, and excessive force. Marzolf continued his illegal and excessive stop, detention, seizure, and arrest of W.Y. and S.Y. for several minutes. In addition, Marzolf used continued, prolonged, illegal, and excessive force upon W.Y. and S.Y.

24. Due to the direct commands, actions, and decisions of Kirmer, W.Y. and S.Y. were both subjected to prolonged and illegal detention, seizure, and arrest,

were subjected to an illegal search and a prolonged and illegal stop, and were subjected to continued, prolonged, illegal, and excessive force.

25. Due to the direct commands, actions, and decisions of Marzolf, the Plaintiff was subjected to illegal and excessive force.

26. W.Y., S.Y., and the Plaintiff were never charged with any offense. During this entire event, W.Y., S.Y., and the Plaintiff completely and fully complied with all commands given to them by Marzolf as well as all other officers on scene.

27. In addition, during the entire incident involving W.Y. and S.Y., none of the police officers, including Marzolf and Kirmer, dealt with anyone other than Caucasians. W.Y., S.Y., their mother, their step-father, and their grandfather are all Caucasian. The police officers were looking for three Hispanic males, one by the name of Tomas Silva, and one female named Jennifer Price. Neither W.Y. nor S.Y. nor any of their family members on scene matched the description of any of these suspects. There was no one on scene and nothing that happened on scene that could even arguably have given rise to any suspicion that W.Y. and S.Y. were, in any way, connected with the suspects sought by the officers that night.

CAUSE OF ACTION #1
ILLEGAL SEIZURE OF W.Y. AND S.Y.

28. The actions of Marzolf and Kirmer, in stopping W.Y.'s and S.Y.'s freedom of movement and keeping

them stopped for an unnecessarily excessive period of time without a warrant, were a direct violation of the federal Fourth and Fourteenth Amendments to the United States Constitution. At no time did Marzolf and Kirmer have any legal authority to seize W.Y. or S.Y. There was no probable cause or reasonable suspicion to believe that W.Y. or S.Y. committed any crime, was committing any crime, or would commit any crime in the future. Marzolf and Kirmer were looking for three Hispanic males and one female. W.Y. and S.Y. clearly did not match the description in any way of the persons sought by the Springdale Police Department. Even after Marzolf discovered the names of W.Y. and S.Y., discovered that these kids were Caucasian and only 12 and 14 years old, spoke to the mother and step-father of W.Y. and S.Y., and realized that W.Y. and S.Y. had been at their grandparents' house and were simply walking home, Marzolf's and Kirmer's actions resulted in the continued, prolonged, illegal, and excessive seizure of both W.Y. and S.Y. The actions of Marzolf and Kirmer were in direct violation of Title 42 U.S.C. Sections 1983 & 1988 and the Fourth and Fourteenth Amendments to the United States Constitution.

CAUSE OF ACTION #2
ILLEGAL ARREST AND DETENTION OF W.Y. AND S.Y.

29. The actions of Marzolf and Kirmer resulted in the detention and arrest of W.Y. and S.Y. Though W.Y. and S.Y. were not formally arrested and taken to a jailhouse in the traditional sense, they were

placed face down on the ground, searched, had their hands handcuffed behind their back, and were held at gunpoint for several minutes. The actions of Marzolf and Kirmer in causing these events constituted an illegal arrest and detention of W.Y. and S.Y. and were a direct violation of the federal Fourth and Fourteenth Amendments to the United States Constitution. At no time did Marzolf and Kirmer have any legal authority to arrest and detain W.Y. or S.Y. There was no probable cause or reasonable suspicion to believe that W.Y. or S.Y. committed any crime, was committing any crime, or would commit any crime in the future. Marzolf and Kirmer were looking for three Hispanic males and one female. W.Y. and S.Y. clearly did not match the description in any way of the persons sought by the Springdale Police Department. Even after Marzolf discovered the names of W.Y. and S.Y., discovered that these kids were Caucasian and only 12 and 14 years old, spoke to the mother and step-father of W.Y. and S.Y., and realized that W.Y. and S.Y. had been at their grandparents' house and were simply walking home, Marzolf's and Kirmer's actions resulted in the continued, prolonged, illegal, and excessive detention and arrest of both W.Y. and S.Y. The actions of Marzolf and Kirmer were in direct violation of Title 42 U.S.C. Sections 1983 & 1988 and the Fourth and Fourteenth Amendments to the United States Constitution.

Appendix F

CAUSE OF ACTION #3
ILLEGAL SEARCH OF W.Y. AND S.Y.

30. The actions of Marzolf and Kirmer resulted in the illegal search of W.Y. and S.Y. The actions of Marzolf and Kirmer caused W.Y. and S.Y. to be placed face down on the ground with their hands handcuffed behind their back, and caused police officers to search W.Y.'s and S.Y.'s person, clothing, and backpacks. The actions of Marzolf and Kirmer caused the illegal search of W.Y. and S.Y. and were a direct violation of the federal Fourth and Fourteenth Amendments to the United States Constitution. At no time did Marzolf and Kirmer have any legal authority to search W.Y. or S.Y. There was no probable cause or reasonable suspicion to believe that W.Y. or S.Y. committed any crime, was committing any crime, or would commit any crime in the future. Marzolf and Kirmer were looking for three Hispanic males and one female. W.Y. and S.Y. clearly did not match the description in any way of the persons sought by the Springdale Police Department. The illegal search of W.Y. and S.Y. occurred after Marzolf discovered the names of W.Y. and S.Y., discovered that these kids were Caucasian and only 12 and 14 years old, spoke to the mother and step-father of W.Y. and S.Y., and realized that W.Y. and S.Y. had been at their grandparents' house and were simply walking home. At the time of the illegal search, no officer could reasonably believe that W.Y. or S.Y. was armed and constituted a danger to anyone. At the time of the search, there were multiple police officers on scene and both W.Y. and S.Y. were face down with their hands already handcuffed

behind their back. The actions of Marzolf and Kirmer were in direct violation of Title 42 U.S.C. Sections 1983 & 1988 and the Fourth and Fourteenth Amendments to the United States Constitution.

CAUSE OF ACTION #4
ILLEGAL USE OF EXCESSIVE FORCE UPON W.Y. AND S.Y.

31. The actions of Marzolf and Kirmer resulted in the illegal use of excessive force on W.Y. and S.Y. The actions of Marzolf and Kirmer caused W.Y. and S.Y. to be placed face down on the ground with their hands handcuffed behind their back, caused police officers to search W.Y.'s and S.Y.'s person, clothing, and backpacks, and caused W.Y. and S.Y. to be held at gunpoint for no legal reason for an extended period of time. The actions of Marzolf and Kirmer caused the illegal use of excessive force on W.Y. and S.Y. and were a direct violation of the federal Fourth and Fourteenth Amendments to the United States Constitution. At no time did Marzolf and Kirmer have any legal authority to use any force on W.Y. or S.Y. There was no probable cause or reasonable suspicion to believe that W.Y. or S.Y. committed any crime, was committing any crime, or would commit any crime in the future. Marzolf and Kirmer were looking for three Hispanic males and one female. W.Y. and S.Y. clearly did not match the description in any way of the persons sought by the Springdale Police Department. W.Y. and S.Y. never did anything to indicate they were armed or dangerous in any way. Marzolf immediately used illegal and excessive force upon

W.Y. and S.Y. when he exited his patrol car with his gun drawn and pointed at W.Y. and S.Y. W.Y. and S.Y. were continuously held at gunpoint even after Marzolf discovered the names of W.Y. and S.Y., discovered that these kids were Caucasian and only 12 and 14 years old, spoke to the mother and step-father of W.Y. and S.Y., and realized that W.Y. and S.Y. had been at their grandparents' house and were simply walking home. No reasonable officer could have ever believed that W.Y. or S.Y. was armed or constituted a danger to anyone. In addition, Marzolf used illegal and excessive force upon W.Y. and S.Y. by causing them to be face down, handcuffed, and searched. The actions of Marzolf and Kirmer were in direct violation of Title 42 U.S.C. Sections 1983 & 1988 and the Fourth and Fourteenth Amendments to the United States Constitution.

CAUSE OF ACTION #5
ILLEGAL USE OF EXCESSIVE FORCE
UPON PLAINTIFF

32. The actions of Marzolf resulted in the illegal use of excessive force on the Plaintiff. The actions of Marzolf, in pointing his taser gun at the Plaintiff, constituted the use of illegal and excessive force on the Plaintiff and was a direct violation of the federal Fourth and Fourteenth Amendments to the United States Constitution. At no time did Marzolf have any legal authority to use any force on the Plaintiff. There was no probable cause or reasonable suspicion to believe that the Plaintiff committed any crime, was committing any crime, or would commit any crime in the

future. The Plaintiff never did anything to indicate she was armed or dangerous in any way. No reasonable officer could have ever believed that the Plaintiff was armed or constituted a danger to anyone. The actions of Marzolf were in direct violation of Title 42 U.S.C. Sections 1983 & 1988 and the Fourth and Fourteenth Amendments to the United States Constitution.

33. As to all causes of action, all the injuries to W.Y., S.Y., and the Plaintiff were done while Marzolf and Kirmer acted under color of state laws, statutes, City of Springdale ordinances, regulations, policies, and usage of the State of Arkansas and the City of Springdale, Arkansas. Marzolf's and Kirmer's actions were intentional and deliberate unlawful acts amounting to a showing of deliberate indifference to the rights of W.Y., S.Y., and the Plaintiff under the Fourth and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. Sections 1983 & 1988.

DEMAND FOR JUDGMENT

34. The Plaintiff demands, on behalf of herself and on behalf of W.Y. and S.Y., judgment against Marzolf and Kirmer for the following relief:

A.) Compensatory damages;

B.) Punitive damages;

C.) Costs of this action;

Appendix F

D.) Necessary and reasonable attorney fees and expenses pursuant to Title 42 U.S.C. Section 1988, Federal Civil Rights Act; and

E.) Any and all other relief to which the Plaintiff, on behalf of W.Y. and S.Y., is entitled by law.

35. The Plaintiff, on behalf of herself and on behalf of W.Y. and S.Y. demands a jury trial on all issues.

Casondra Pollreis, on behalf of herself and on behalf of her minor children, W.Y. and S.Y.,
Plaintiffs

By: Doug Norwood
Doug Norwood, Ark. Bar No. 87-097

By: Jonathan D. Nelson
Jonathan D. Nelson, Ark. Bar No. 2011-017
Norwood & Norwood, P.A.
2001 South Dixieland Road
P.O. Box 1960
Rogers, Arkansas 72757
(479) 636-1262 P
(479) 636-7595 F
October 12, 2018

Appendix F

VERIFICATION

I, Casondra Pollreis, hereby verify that the above information in this Complaint is true and accurate to the best of my knowledge.

/s/ Casondra Pollreis
Casondra Pollreis
October 12, 2018

On this date, October 12th, 2018, Casondra Pollreis appeared before me and swore under oath, and under penalty of perjury, that the factual information contained in this Complaint is true and accurate to the best of her knowledge.

/s/ Maria Valdez
Maria Valdez, Notary Public
October 12, 2018