IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

JESUS GONZALEZ

Plaintiff, Case No. 09CV0384

v.

VILLAGE OF WEST MILWAUKEE,
CHARLES DONOVAN,
PATRICK KRAFCHECK,
CITY OF CHILTON, and
MICHAEL YOUNG,

Defendants.

BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BY VILLAGE OF WEST MILWAUKEE, CHARLES DONOVAN, PATRICK KRAFCHECK, CITY OF CHILTON and MICHAEL YOUNG

Village of West Milwaukee, Charles Donovan, Patrick Krafcheck, City of Chilton, and Michael Young, by their attorneys, Crivello Carlson, s.c., submit the following Brief in Response to Plaintiff's Motion for Summary Judgment.

INTRODUCTION

Both parties have moved for summary judgment. Plaintiff moves for "partial" summary judgment leaving only damages to be decided. These Defendants incorporate herein their Motion for Summary Judgment, Brief in Support, Proposed Findings of Fact and Affidavits.

LEGAL ANALYSIS

I. THE MUNICIPALITIES ARE ENTITLED TO SUMMARY JUDGMENT

Plaintiff focuses only on theories of liability against the individual defendants. He presents no theory of liability against the Village of West Milwaukee or the City of Chilton; the

municipal liability claims should be deemed waived. "Arguments that are not developed in any meaningful way are waived." ***Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.,* 181 F.3d 799, 808 (7th Cir. 1999)**; ***Colburn v. Trustees of Indiana University,* 973 F.2d 581, 593 (7th Cir.1992)** ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim").

Plaintiff has produced no evidence as to any custom or policy giving rise to any constitutional deprivation caused by the municipalities. Neither the Village of West Milwaukee nor the City of Chilton may be held responsible for the actions of its officers based on *respondeat superior*. ***Monell v. New York City Dept. of Soc. Serv.* 436 U.S. 658 (1978)**. Plaintiff has not shown that the constitutional deprivation resulted from an "official policy or custom." ***City of Oklahoma v. Tuttle,* 471 U.S. 808 (1985)**. Plaintiff's Motion for Summary Judgment states that it seeks a determination of liability, but neither the Motion, his Brief or supporting materials provide any evidence or any argument about municipal liability. To the extent Plaintiff seeks to establish municipal liability based on defacto *respondeat superior* that would require a holding contrary to this longstanding case law. Accordingly, the Village of West Milwaukee and the City of Chilton should be dismissed with prejudice.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AS A MATTER OF LAW BECAUSE IT FAILS TO DEMONSTRATE THAT THE DEFENDANTS VIOLATED CLEARLY ESTABLISHED LAW

For all his claims, Plaintiff's Motion focuses exclusively on the alleged constitutional violations and never once considers whether the law was "clearly established." It is Plaintiff's burden to show not only that the Defendants have committed a constitutional violation, but that the constitutional right was "clearly established" at the time. Accordingly, because Plaintiff only argues that the Defendants underlying acts were unconstitutional and ignores the "clearly

established" prong, Plaintiff has failed to satisfy his burden and his Motion for Summary Judgment must be denied. **See *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008)**.

Plaintiff has not successfully countered that qualified immunity is available to the officers. It is well-settled that qualified immunity provides complete protection for government officials if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)**. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." ***Malley v. Briggs*, 475 U.S. 335, 341 (1986)**. Even if Plaintiff protests his innocence, qualified immunity protects these officers because they acted with probable cause. **See *Anderer v. Jones* 385 F.3d 1043, 1049 (7th Cir. 2004)** (internal quotations omitted) ("[A]s long as a reasonably credible witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the culprit under arrest, and their actions will be cloaked with qualified immunity if the arrestee is later found innocent.").

A plaintiff may defeat a qualified immunity defense by "point[ing] to a clearly analogous case establishing a right to be free from the specific conduct at issue" or by showing that the "conduct [at issues] is so egregious that no reasonable person could have believed that it would not violate clearly established rights." ***Smith v. City of Chicago*, 242 F.3d 737, 742 (7th Cir. 2001)**.[1] To determine whether a right is clearly established, the Seventh Circuit looks first to controlling Supreme Court precedent and its own Circuit decisions on the issue. ***Cleveland-Purdue v. Brutsche*, 881 F.2d 427, 430 (7th Cir. 1989)**. Plaintiff does not point to such precedent. Although a litigant need not point to cases that are identical to the presently alleged constitutional violation, "the contours of the right must have been established so that the

[1] Plaintiff does not argue, and cannot show, that any of the officers' conduct was so egregious.

unlawfulness of the defendant's conduct would have been apparent in light of existing law." ***Brutsche,* 881 F.2d at 430**. In the absence of controlling precedent, the Seventh Circuit broadens its survey of case law to include all relevant case law in order to determine "whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of right by a controlling precedent was merely a questions of time." ***Id.* at 431**.

Here, the cases offered by Plaintiff (for both the Privacy Act and the Fourth Amendment claims) fail to show clearly established law. Indeed, the Fourth Amendment cases relied upon by Plaintiff (discussed in Section III(B)(4) below) cannot be considered as providing Officers Donovan and Krafcheck in May 2008 and Officer Young in April 2009 with clear direction. "[T]he touchstone of a qualified immunity inquiry is the clarity of the state of the law in relation to the defendant's conduct at the time the conduct occurred." ***Triad Assocs., Inc. v. Robinson,* 10 F.3d 492, 496 (7th Cir.1993)**. Many of the decisions offered by Plaintiff show at most hazy borders between firearm rights and state disorderly conduct statutes. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." ***Wilson v. Layne,* 526 U.S. 603, 618 (1999)**.

III. PLAINTIFF IS PRECLUDED FROM SUMMARY JUDGMENT ON THE FOURTH AMENDMENT CLAIM BY THE EXISTENCE OF AT LEAST ARGUABLE PROBABLE CAUSE

A. Plaintiff Abandons Any Alleged Violation Based on Noncompliance With *Terry*.

Plaintiff undertakes no analysis of the initial stop under ***Terry v. Ohio,* 392 U.S. 1 (1968)**. "After all, the purpose of a ***Terry*** stop is not to accuse, but to investigate." ***United States v. Raibley,* 243 F.3d 1069, 1074 (7th Cir. 2001)**. Otherwise-innocent behavior can add up to a reasonable suspicion; the relevant inquiry is "the degree of suspicion that attaches to particular types of noncriminal acts." ***United States v. Sokolow,* 490 U.S. 1, 9-10 (1989)** (internal quotation

marks and citation omitted). Indeed, "there could . . . be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." ***Reid v. Georgia,* 448 U.S. 438, 441 (1980)** (per curiam) (citing ***Terry,* 392 U.S. at 27-28**). Therefore, Defendants will not analyze the ***Terry***-issues further.

B. Plaintiff Cannot Establish that the Officers Lacked Probable Cause.

1. The Court Must Look Beyond the Existence of a Warrant.

Plaintiff argues that the officer acted without a warrant, which is *per se* unconstitutional. **Plaintiff's Brief p. 10-11, 21-22**. However, that is neither correct nor does it end the inquiry. The Fourth Amendment does not protect individuals from all seizures or warrantless arrest, only unreasonable seizures or arrests lacking probable cause. **See, e.g., *United States v. Sharpe,* 470 U.S. 675, 682 (1985)**. As set forth in Defendants' Brief in Support of Summary Judgment at page 46-48, probable cause for an arrest exists, if at the time of the arrests, the facts and circumstances within the police officer's knowledge were sufficient to warrant a reasonable belief that the suspects had committed, were committing or were about to commit a crime. Moreover, when a defense of qualified immunity has been raised, the Courts will review the claims to determine if the officer actually had probable cause or, if there was no probable cause, whether a reasonable officer could have mistakenly believed that probable cause existed. **See *Humphrey v. Staszac,* 148 F.3d 719, 725 (7th Cir. 1998)**. "Arguable" probable cause exists when "a reasonable police officer in the same circumstances and with the same knowledge … as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law." ***Id***. (Emphasis in original). "[I]f probable cause is lacking with respect to an arrest, despite an officer's subjective belief that he had probable cause, he is entitled to immunity as long as his subjective belief was objectively reasonable." ***Id***.

Probable cause is a flexible, common sense approach. It does not require that the officer's belief be correct or even more likely true than false, so long as it is reasonable. ***Wollin v. Gondert,* 192 F.3d 616, 623 (7th Cir. 1999)**. "'In recognition of the endless scenarios confronting police officer in their daily regiment, courts evaluate probable cause 'not on the facts as an omniscient observer would perceive them *but on the facts* as they would have appeared to a reasonable person in the position of the arresting officer – seeing what he saw, hearing what he he*ard*.'" ***Id***. (quoted source omitted). A law enforcement officer's probable cause determinations may not offend the Fourth Amendment even though they do not comport with state law. **See, e.g., *Virginia v. Moore*, 128 S.Ct. 1598 (2008)** (Virginia law requiring summons rather than arrest did not render arrest unconstitutional, where there was probable cause to believe violation had been committed).

2. Plaintiff presents a myopic argument that fails to account for the totality of facts and circumstances known by the officers.

Plaintiff argues that Officer Donovan applied an "arrest first, investigate later" approach. **Plaintiff's Brief p. 11-12**. However, neither Officer Donovan's deposition testimony nor the remaining undisputed material facts bolster this argument. A full reading of the pages relied upon by Plaintiff – pages 20-23 of Officer Donovan's depositions testimony – show that Officer Donovan's conduct cannot be characterized as an "arrest first, investigate later" approach. To the contrary, his deposition testimony (along with his report and affidavit and the testimony of the witnesses) establish that he received information from the Menards' Manager through Officer Krafcheck while at the station and again upon arrival. He then approached Plaintiff and asked several questions. Under all the circumstances, Officer Krafcheck investigated *before* the arrest.

Plaintiff next argues that West Milwaukee Officer Donovan and Chilton Officer Young lacked sufficient information to support a charge under the Disorderly Conduct Statute and that

"[d]istilling this case to its essence, Donovan arrested Plaintiff for carrying a firearm." **Plaintiff's Brief p. 12-16**. With regard to Donovan, Plaintiff says that Officer Donovan had no information pertaining to the substance of his argument in the store, that the officer had no information that Plaintiff refused to leave the store, and that "[n]ot all offensive or annoying conduct is disorderly[.]" **Plaintiff's Brief p. 13**.

The undisputed facts show that Officers Donovan did not arrest Plaintiff simply for carrying a firearm. It is undisputed that Plaintiff was argumentative in the store, that he refused to leave the store until requested to do so multiple times by management, and that he basically got "kicked out." **Gonzalez Dep. p. 93; Jensen Dep. p. 32; Donovan Dep. p. 12, 13-14, 18-19, 21-23**. Moreover, Plaintiff acknowledged himself to Officer Young as the individual in the store, Plaintiff admitted having the firearm in the store and Plaintiff admitted refusing to answer further questions about the location of the firearm. **Donovan Dep. p. 17-18; Gonzalez Dep. p. 95, 172**. In the Chilton incident, it is undisputed that Officer Young responded to calls from management that a man with a firearm was purchasing ammunition for a different weapon, that Officer Young arrived to find the manager anxious and nervous about the safety of her employees and customers, that steps were being taken by the manager to stall Plaintiff and to cordon off customers, and that one of Officer Young's observations included Plaintiff quickly handing his ID to another individual upon spotting Officer Young. **Young Dep. p. 17, 22, 24, 29, 72, 77-79; Gonzalez Dep. p. 158; Fairchild Dep. p. 8-9, 14, 16, 18-19, 23-27; Woelfel Dep. p. 15-16**. In each store, Plaintiff caused a disturbance. The officers were not simply responding to anonymous tipsters with shaky information but store managers concerned about the disruption to good order in their stores. The best evidence of this is that Plaintiff has openly carried his firearm in a West Milwaukee IHOP, in the Chilton Wal-Mart recently and in other

locations without arrests. **Gonzalez Dep. p. 13-15, 17, 20; Fairchild Dep. p. 35-36**. In those instances, managers and employees did not believe a disruption warranted police intervention. In this case, by contrast, the officers had probable cause because all these witnesses believed a disruption to the good order of their store had occurred that day.

Lastly, any argument that Officer Donovan lacked probable cause because he acted, in part, based on information he received from Officer Krafcheck lacks merit. **See Plaintiff's Brief p. 11; Plaintiff's Proposed Findings of Fact No. 10**. "A police officer need not personally witness the behavior giving rise to the probable cause-even if there must be personal observation according to a state statute-and can rely on another officer's direction or a reliable informant." ***Chathas v. Smith*, 884 F.2d 980, 987 (7th Cir. 1989)**. "'Effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.'" ***United States v. Hensley*, 469 U.S. 221, 231 (1985)**. An officer who stops, searches, or arrests a suspect on the basis of another officer's information must "act in objective reliance on the information received," ***United States v. Nafzger*, 974 F.2d 906, 911 (7th Cir.1992)**, which requires that "an objective evaluation of the information would allow a reasonable officer to believe that the action taken was appropriate." ***Id.* at 916**. Plaintiff has offered no evidence that Officer Donovan did not act as any reasonable officer in believing that the information he was receiving from Officer Krafcheck was trustworthy and sufficient to support probable cause. Based on all the facts and circumstances, it was objectively reasonable for Officer Donovan to believe that probable cause for the arrest existed.

3. The Wisconsin courts have rejected Plaintiff's view of the Disorderly Conduct Statute.

With regard to the first prong of the Disorderly Conduct Statute – whether his conduct falls within the enumerated conduct – Plaintiff looks only to the enumerated conduct and not the "catchall." **Plaintiff's Brief p. 12-13, 15-17**. Plaintiff cites ***State v. Givens,* 28 Wis.2d 109, 580 N.W.2d 340 (Ct. Apps. 1998)** and ***State v. Werstein,* 60 Wis.2d 668, 211 N.W.2d 437 (1973)**, but neither case supports the proposition that Plaintiff's conduct had to be violent, abusive, indecent, profane, boisterous, or unreasonably loud. Instead, the conduct may be "otherwise disorderly," meaning similar conduct "having a tendency to disrupt good order and to provoke a disturbance." ***Givens,* 28 Wis.2d at 115; Wis. Stat. § 947.01**. Section 947.01 proscribes conduct in terms of results which can reasonably be expected therefrom rather than attempting to enumerate the limitless number of acts a person could engage in that would disrupt public order. ***Id*. at 116-17**; **see also *Werstein,* 60 Wis.2d at 671-672**. Notably, the ***Givens*'** court cited with approval statements made by the legislative counsel's judiciary committee report:

> The crime of disorderly conduct is based upon the principle that in organized society one should conduct himself as not to unreasonably offend the senses or sensibility of others in the community. Subsection (1) embodies this principle in a form which is on the one hand sufficiently flexible to permit law enforcement officers to keep order in the community and on the other hand sufficiently definite to prevent abuses in administration. … [The enumerated words like violent, abusive, indecent, etc.] are not broad enough to take care of every situation generally considered to be disorderly … this is not intended to imply that all conduct which tends to annoy another is disorderly conduct. Only such conduct as unreasonably offends the sense of decency or propriety of the community is included. This is implicit in the phrase 'tends to disturb or annoy others.' The question is not whether a particular person was disturbed or annoyed but whether the conduct was of a kind which tends to disturb or annoy others. The section does not protect the hypersensitive from conduct which generally is tolerated by the community at large.

***Givens,* 28 Wis.2d at 116-117**.

Here, the unrebutted testimony of the retail managers and employees establish that Plaintiff unreasonably offended the sense or sensibilities of others in the community. While it is

true that the Disorderly Conduct Statute does not protect the hypersensitive, the fact that this case does not involve such hypersensitive persons is evidenced by the number of complaining managers/employees both at Menards (2 managers and 1 employee) and at the Chilton Wal-Mart (1 manager and at least 2 employees). Notably, the Wisconsin Attorney General believes that the Disorderly Conduct Statute may have some application to the carrying of a firearm. All these persons cannot be considered "hypersensitive."

Plaintiff's arguments also deviate from the emphasis placed by Wisconsin courts on "the importance of a coalescing of conduct and circumstances" when applying the Disorder Conduct Statute. ***City of Oak Creek v. King*, 148 Wis.2d 532, 542, 436 N.W.2d 285 (1989)**. Disorderly conduct often results from "'the inappropriateness of specific conduct because of the circumstances involved.'" ***Id.* at 543**. In many of the Wisconsin decisions, such as ***Givens*** and ***City of Oak Creek***, convictions for being "otherwise disorderly" resulted from the inappropriateness of the specific conduct given the circumstances in which it occurred. Wisconsin Courts recognized that "'what would constitute disorderly conduct in one set of circumstances, might not under some other.'" ***City of Oak Creek*, 148 Wis.2d at 542**.

Thus, Plaintiff's summary judgment motion inappropriately relies upon a few isolated facts and inappropriately considers his conduct in a vacuum. In this case, it is undisputed that nobody had previously engaged in such conduct. It is further undisputed that in the Menards incident Plaintiff was argumentative with management and refused to leave until the conversation with management became sufficiently "heated." In addition to all the other conduct specified in the Defendants' Proposed Findings of Fact, Plaintiff admitted being the individual in the store who had the firearm and he admitted refusing to answer the officer's questions about the location of the firearm. The witnesses (both Menards and Wal-Mart witnesses) all testified

that Plaintiff's conduct that day was reasonably offensive to the sense of decency or propriety of the community. Plaintiff has failed to show that the officers arrested him merely because some hypercritical individual of delicate sensibilities was annoyed or uncomfortable. The unrefuted testimony of many persons falls within the standard set by ***Givens***: "substantial intrusions which offend the normal sensibilities of the average persons or which constitutes significantly abusive or disturbing demeanor in the eyes of reasonable persons are cognizable under Wisconsin statute sec. 947.01(1)." ***Givens* 28 Wis.2d at 122**.

Realizing his conduct fell squarely within the Disorderly Conduct Statute, Plaintiff argues that he was exercising his fundamental federal and state right to bear arms. **Plaintiff's Brief p. 13-14**.[2] The Wisconsin Supreme Court in ***Givens*** followed those United States Supreme Court decisions which rejected Plaintiff's argument:

> Can it be said that the acts in the in case at bar were protected because the defendants were validly exercising their constitutional rights of freedom of speech, freedom of assembly, and freedom to petition for the redress of grievances? The answer is "No," and the reason is that such constitutional protections are not absolute.

***Givens*, 28 Wis.2d at 118** (citing ***Cox v. Louisiana*, 379 U.S. 536 (1965)**.[3] Indeed, the Supreme Court does not recognize the right to bear arms as a fundamental federal constitutional right that can be exercised absolutely outside the application of state laws. **See *Heller v. District of Colombia*, 128 S.Ct. 2783, 2799, 2816-2817 & n. 26 (2008)**. Here, these authorities establish that Plaintiff may not enter large retail stores with his firearm, cause a disturbance with impunity and then claim that it is his fundamental right if he has created a disturbance.

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[2] The federal right has no application here, per ***National Rifle Ass'n of America v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009)** (*cert. granted*, 77 U.S.L.W. 3691, 78 U.S.L.W. 3013 (U.S. Sept. 30, 2009) (No. 08-1521)).

[3] Notably, the Disorderly Conduct Statute has withstood constitutional challenges as being unconstitutionally vague or overbroad as to invade the area of protected freedoms. **See *Givens* 28 Wis.2d at 115-117** (rejecting vagueness challenge); ***State v. Becker*, 51 Wis.2d 659, 664-665, 188 N.W.2d 449 (1971)** (summarizing Wisconsin case law finding that the Wisconsin Disorderly Conduct Statute was not unnecessarily overbroad). **See also *Zwicker v. Boll*, 391 U.S. 353 (1968)** (upholding constitutionality of Wisconsin's Disorderly Conduct Statute).

Nor is there any authority for Plaintiff's argument that the officers violated the Fourth Amendment by failing to first warn him and given him a reasonable opportunity to comply. **Plaintiff's Brief p. 14**. His citation to ***Givens,* 28 Wis.2d at 121-122** does not support such proposition. What Plaintiff may be arguing is that his case, unlike other cases where persons committed crimes of disorderly conduct, did not involve any warnings from the officers. The fatal flaw in that argument, however, is that Plaintiff has cited no Wisconsin court that has ever required law enforcement to provide warnings as a prerequisite to the offense of disorderly conduct. Moreover, Plaintiff cites no Wisconsin decision that has ever said that the Disorderly Conduct Statute can be violated only after a person has failed to comply with warnings to cease his conduct. The Wisconsin authorities explain that every case is unique and that disorderly conduct depends upon the circumstances, irrespective of any particular fact or circumstance such as whether somebody received a warning. Lastly, Plaintiff's proposed rule essentially seeks to immunize his conduct as an absolute fundamental right, contrary to ***Givens***, ***Cox*** and ***Heller***.

With regard to the second element of the Disorderly Conduct Statute – whether his conduct provoked a disturbance – Plaintiff argues it cannot be established because: (1) Officer Krafcheck "talked [Menard's manager] Jensen into believing Plaintiff had committed the crime of disorderly conduct" (**Plaintiff's Brief p. 14-15)**; (2) Officer Krafcheck erroneously believed that any behavior that made someone nervous is disorderly (**Plaintiff's Brief p. 15)**; and (3) the bearing of arms, by itself, cannot be objectively offensive to others (**Plaintiff's Brief p. 16**). With regard to Officer Young, Plaintiff says the case is the same but with "one simplifying exception" – i.e., his innocent behavior. **Plaintiff's Brief p. 22**. Once again, these arguments cannot be reconciled with a full view of all the facts and circumstances known to the officers.

As to the first argument, it has several flaws. Plaintiff has failed to offer any evidence that Jensen believed Officer Krafcheck "talked him into believing" that the crime of disorderly conduct had taken place. To the contrary, Jensen's depositions testimony is replete with testimony that Plaintiff caused a disturbance. Just because a witness lacks an understanding of the statutory elements of a crime does not mean that a crime has not been committed. The fact that Officer Krafcheck asked clarifying or even leading questions of Manager Jensen does not mean that Plaintiff did not cause a disturbance. It was that disturbance which precipitated Manager Jensen's call to the police in the first instance. Moreover, if Plaintiff is arguing that Manager Jensen's statements were insufficiently trustworthy, he offers no evidence to support such a factual determination. Nor does Plaintiff offer clearly established law which establishes that a law enforcement officer may not treat a large retail store manager's reports as prima face trustworthy when there is no known reason for disbelieving the manager. Lastly, if Plaintiff suggests Jensen somehow changed his story, "officers may rely on the testimony of an eyewitness even when the eyewitness later changes his story." ***United States v. Hicks,* 531 F.3d 555, 560 (7th Cir. 2008)**.

As to the second argument, Plaintiff incorrectly presumes that it is necessary for an actual disturbance to public order to have resulted from his conduct. "It makes no difference under § 947.01 whether … alleged disorderly conduct actually causes a disturbance." **In re *Interest of Douglas D.*, 2001 WI 47, ¶ 29, 243 Wis.2d 204, 626 N.W.2d 725**. Rather, the law only requires that the conduct be of a type which tends to cause or provoke a disturbance. **See *City of Oak Creek*, 148 Wis.2d at 532**. In determining whether conduct satisfies this element, the courts look to both the actual effect and the potential effect that the conduct had on others. **See, e.g., *State v. Schwebke*, 2002 WI 55, ¶¶ 25, 27, 30, 253 Wis.2d 1, 644 N.W.2d 666** (conviction

under disorderly conduct statute upheld where he sent annoying private correspondence to several individuals; court rejected arguments that mailings did not disrupt public order). "[A]ll that we have required for a disruption is one that affects 'good order;' we have not specifically required a disruption to 'public order.'" ***Id.*, ¶ 26**.

Here, in the West Milwaukee incident, a full viewing of the record shows that the officers responded not simply because Plaintiff made someone nervous but because, among other reasons, Plaintiff initially refused to leave, was argumentative and caused a number of employees and managers to drop their normal routines and surround him in an effort to protect their customers and the good order of their store. In the Chilton incident, a full viewing of the record shows that Officer Young responded to reports of the manager who observed Plaintiff's firearm, observed the concern of at least one employee and who had concerns herself about the safety and good order of her customers and employees such that she called police and took steps to "stall" the situation and cordon off employees and customers.

Another weakness in Plaintiff's view of the second element is the failure to account for more recent applications of the statute. In addition to ***Schwebke*** above, in the ***Douglas D.*** case the Supreme Court determined that the content of an eighth grade creative writing assignment authored by a minor, which included threats against the teacher, constituted disorderly conduct even if it was purely written and even if it did not cause a disturbance. **2001 WI 47, ¶ 1-3, ¶ 4-6**. In finding that such written threats to a public school teacher tended to cause or provoke a disturbance, the Supreme Court considered how school violence "is all too prevalent in our schools today." ***Id.* at ¶ 28**. Similarly, in this case, Plaintiff cannot seriously mean to say that violence has never occurred in retail stores. With the daily news filled with violence, or threats of violence, in or around retail or commercial establishments, Plaintiff's conduct that day cannot

be simply summarized as making people nervous. As the ***Douglas D.*** court held, the conduct only need be the type of conduct that *tends* to disturb others, which is the result that should be reached in this case.[4]

Plaintiff's third argument – that the bearing of arms, by itself, cannot be objectively offensive since it is a fundamental right – is also unpersuasive for several reasons. This case is not about an individual simply bearing arms without surrounding circumstances, such as an individual bearing arms while on his own property or even standing on the sidewalk waiting for a bus. The undisputed facts show that the Menards' management and employees alerted the police not simply because Plaintiff carried a sidearm, but rather because he was argumentative and presented a safety risk to themselves and their customers. Moreover, Plaintiff's argument implies that these witnesses' perceptions are unfounded, but the Seventh Circuit has held that if police officers "arrest a person on the basis of a private citizen's complaint that if true would justify the arrest, and they reasonably believe it is true, they cannot be held liable for a violation of the Constitution merely because it later turns out that the complaint was unfounded." ***Rodgers v. Lincoln Towing Serv., Inc.*****, 771 F.2d 194, 200 (7th Cir. 1985**) (quoted source omitted). Lastly, if accepted, Plaintiff's argument would make the Disorderly Conduct Statute meaningless. Virtually anyone could avoid the application of the Disorderly Conduct Statute by arguing that their disruptive conduct cannot be considered objectively offensive as applied to

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[4] Plaintiff instead relies on ***State v. Werstein*****, 60 Wis.2d 668, 211 N.W.2d 437 (1973**), where the Supreme Court overturned the disorderly conduct convictions of several antiwar protesters who were at an Army induction center. ***Id.*** **at 677**. The protestors refused to leave after the commanding officer and police ordered them to do so. ***Id.*** **at 670**. Plaintiff, however, reads ***Werstein*** too narrowly, for he fails to observe that ***Werstein*** also states:

> If ... there had been some additional basis other than the defendants' mere presence upon which [the victim] based his fear ... we would not be moved to [reverse]. If the defendants had been ... so disorderly that their demeanor could be deemed abusive or disturbing *in the eyes of reasonable persons*, a different result would be reached.... Mere presence *absent any conduct which tends to cause or provoke a disturbance* does not constitute disorderly conduct.

Id. **at 674** (emphasis added).

their right to free speech, right to associate, etc. Such arguments have not prevented the Wisconsin courts from applying the Disorderly Conduct Statute.

"The reasonable person is a reasonable person in the circumstances." ***City of Madison v. Baumann*, 162 Wis.2d 660, 678, 470 N.W.2d 296 (1991)**. In construing the word "reasonably," the Wisconsin Supreme Court has stated that the test for a possible violator "is simply the time honored and time validated reasonable person test, i.e., what effect will my conduct … have upon persons in the vicinity under the circumstances." ***Id.* at 677-678**. In this case, it is clear that Plaintiff had no appreciation of what effect his conduct had upon persons in the vicinity under the circumstances that day.

4. Four cases relied upon by Plaintiff fail to establish violations in this case nor violations of clearly established law.

Plaintiff's final set of arguments unconvincingly tries to establish that the officers' conduct offended the Fourth Amendment based on ***Brown v. Milwaukee*, 288 F.Supp.2d 962 (E.D. 2003)**; ***Florida v. J.L.*, 529 U.S. 266 (2000)**; ***St. John v. McColley*, ___F.Supp.2d ____, 2009 WL 2949302 (D.N.M. Sept. 8 2009)**; and ***United State v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000)**. Although many of these cases focus on the ***Terry***-analysis rather than probable cause, and some involve different standards of review associated with direct challenges from convictions, they nevertheless cannot be considered outcome dispositive here because: (1) law enforcement officers lacked any information that the suspect committed or was about to commit any criminal activity or that he did anything unusual or suspicious; (2) law enforcement officers responded to anonymous informants; and (3) additional pertinent facts were either absent or present in those cases, such as outrageous conduct by law enforcement officers, the behavior of the suspect and variations in the gun laws between those states and Wisconsin.

In ***Florida v. J.L.*, 529 U.S. 266 (2000**), police frisked a man and found a gun after having received an anonymous call reporting that a black man wearing a plaid shirt at a particular bus stop had a gun. ***Id.* at 268**. The Supreme Court held that an anonymous tip must have indicia of reliability to justify a stop and concluded that because the tipster provided no "predictive information," the officers could not test the informant's knowledge or credibility so as to justify the stop and frisk. ***Id.* at 269-271**. The Court emphasized that the tip in ***J.L.*** was made by an unknown caller from an unknown location and provided no information that would allow the police to test the informant's credibility. ***Id* at 271**. More importantly, the ***J.L.*** Court did not treat the tip as one reporting an emergency. ***Id.* at 268**.[5]

This case differs from ***J.L.*** in several respects. The question before the Court in ***J.L.*** was whether the initial *stop* was justified and whether the tip was reliable. **529 U.S. at 274**. Here, Plaintiff does not contest the initial stop or the reliability of the tip. Moreover, factually the cases are inapposite. Officer Donovan and Krafcheck received information from a known witness (the Menards' Manager), who had moments earlier been involved in a heated conversation with a man with a gun while customers and employees were in the vicinity and who immediately called the police while Plaintiff was still in the parking lot and then waited for the police to arrive. Although Plaintiff did not involve himself in a "heated" argument in the Chilton Wal-Mart, Officer Young still had more information from trustworthy sources than the scant information in ***J.L***. Additionally, unlike the situation in ***J.L.,*** where police frisked J.L solely because the anonymous caller had said J.L. was carrying a gun, here the officers had more reason

[5] "Every circuit to consider the question, including this one, has distinguished ***J.L.*** when the tip is not one of general criminality, but of an ongoing emergency, **…** or very recent criminal activity….Courts, including our own, have distinguished ***J.L.*** when the tipster gives her name or other identifying information to the 911 operator." ***United States v. Hicks*, 531 F.3d 555, 558 (7th Cir. 2008). See also *United States v. Drake*, 456 F.3d 771, 774-775 (7th Cir. 2006)** (also distinguishing ***J.L.*** by noting that the reporting of an *ongoing* emergency presents special problems and obligations on the police; when the police respond to an emergency as a result of a 911 call, the exigencies of the situation do not require further pre-response verification of the caller's identity before action is taken.)..

to justify their conduct. Specifically, after the officers received credible information from the Menards' Manager about Plaintiff's disruption, the officers confirmed with Plaintiff that he was the individual in the store, that he had a firearm and that he refused to answer further questions. They found it suspicious that he refused to answer questions about the location of the firearm despite admitting openly carrying it in the Menards and identifying himself as the suspect. Even if Plaintiff contends he was peacefully loading his truck, this fact does not mean the officers lacked probable cause. **See *U.S. v. Booker,* 579 F.3d 835, 839 (7th Cir. 2009)** (noting that even if officers have arrived to a situation which may have evolved to a non-emergency, officers still need to investigate). "'[W]hen the police believe that a crime is in progress (or imminent), action on a lesser degree of probability, or with fewer procedural checks in advance, can be reasonable.'" ***Id.*** (quoted source omitted). In the Chilton matter, Officer Young may not have had information about heated arguments, but he received similar information that the manager was concerned about safety and that Plaintiff had caused employees to drop their work-related duties and "stall" him or help keep customers away.

In ***Ubiles***, a case arising out of the Virgin Islands, an elderly gentleman approached law enforcement during a carnival celebration to report that he had just seen a man in the crowd of revelers with a firearm in his possession. ***Ubiles,* 224 F.3d at 215**. Although the anonymous informant pointed towards Ubiles and described his clothing and appearance, he did not explain how he knew that Ubiles had a gun nor did he describe "anything suspect about the gun or anything unusual or suspicion about the man or his behavior." ***Id***. The informant did not provide any other information to the police. ***Id***. The officers approached the suspect and began talking to him. ***Id***. Ubiles did not exhibit any strange behavior or act in any suspicious way. ***Id***. Indeed, the Court found that Ubiles "was another celebrant lawfully exercising his right under

Virgin Island law to possess a gun in public." ***Id.* at 218**. While there were ways to possess a gun illegally in the Virgin Island Territories such as by possessing a gun with an altered serial number or by possessing an unlicensed gun, "the Virgin Island legislature has not enacted a criminal statute prohibiting gun possession in a crowd or at a carnival." ***Id***. Additionally, one of the law enforcement officers testified that when he approached Ubiles he could not tell whether he was carrying any type of weapon. ***Id*. at 215**. Nonetheless, he conducted a "pat down" search of Ubiles and found a machete and loaded firearm in his possession. ***Id***. The Court of Appeals held that the stop of Ubiles based solely on an anonymous tipster, was unsupported by reasonable suspicion in part because the officer's information regarding the defendant's likely possession of the gun gave him no reasonable basis for believing that Ubiles was also not authorized by law to have such firearm. ***Id*. at 217-218**. The court reasoned that, because the criminality in the local firearm statute was based on *unauthorized* possession of a firearm and not mere possession, an officer's reasonable suspicion must be based on articulable facts that the suspect is not licensed or is not among the classes of individuals who are otherwise authorized by law to possess a firearm. ***Id***.

By contrast, in this case, the officers acted on trustworthy information from a known source who actually observed events, not a mere tip from an anonymous informant who gratuitously offered the information. Moreover, unlike ***Ubiles,*** the information the West Milwaukee officers received included that Plaintiff had been argumentative with management, had refused to leave, and that he had made management and employees concerned about the safety of themselves and their customers and the good order of their store. Thus, in this case, unlike ***Ubiles***, the undisputed record shows that officers faced a situation with an initial report from one or more persons appropriately regarded as witnesses with first-hand information of the

suspect's actions, not with an anonymous tipster regarding mere possession of a firearm. Additionally, the police officers experienced first-hand Plaintiff's confirmation that he was the individual in the store with the firearm and that he refused to answer any further questions from the officers including the location of the firearm. Chilton Officer Young had similar information; while he may not have had information about an argument, he had other information like "stalling" Plaintiff, cordoning off Plaintiff and observing Plaintiff evasively hand his ID to another. Finally, it is significant that this case, unlike ***Ubiles***, involves vastly different gun laws and the absence of any reported decisions discussing the interplay between the Disorderly Conduct Statute and the 1998 passage of the right to bear arms. (Article I, sec. 25 of the Wisconsin Constitution was adopted in November 1998, several months after Ubiles' stop and detention).

This Court's decision in ***Brown v. City of Milwaukee*** is also distinguishable. There, a Milwaukee police officer broadcast a general dispatch report stating that a woman driving a two-tone maroon van north on North 35th Street possessed a gun. **277 F. Supp. 2d 962, 967**. "However, it is unclear from the record what, if anything, aside from possessing a gun, the women identified in the dispatch report actually did." ***Id***. A few minutes after the dispatch, two patrol officers identified the suspect, activated their emergency lights and pulled her over. ***Id.* at 967-968**. Fiver squad cars and ten officers subsequently came to the scene. ***Id.* at 968**. The officers blocked off the street and surround the van. ***Id***. They shined their lights at the lady in an effort to prevent her from seeing. ***Id***. They also pointed handguns, rifles and shotguns at her, and cocked their guns so that she could hear the clicking sound of guns being prepared for firing. ***Id***. Several officers simultaneously shouted profanity-laced commands at her, including over a public address system, such as "get your goddamn hands out and get out of the goddamn car,"

"get the fuck out of the vehicle," and "shut your fucking mouth or I'll shoot." ***Id***. The officers not only traumatized this lady but also caused physical injuries. ***Id***. In concluding that the stop was not reasonable, this Court stated: "even if [officer] Garcia had reason to believe that plaintiff was the individual described in the dispatch report, the report may not have conveyed information sufficient to establish reasonable suspicion that such individual committed or was about to commit a crime." ***Id.* at 971**. In finding that the seizure was not reasonably effected, this Court first found that the officers had no reason to suspect that she had committed an offense comparable in seriousness similar to another "show of force" case (i.e., ***United States v. Tilmon,* 19 F.3d 1221 (7th Cir. 1994)**). ***Id*. at 971-972**. Moreover, the Court observed that the officers' actions were "considerably more intrusive" by surrounding her car with guns drawn, by using the sensory overload tactic and by attempting to terrify and disorient plaintiff. ***Id.* at 972**. This Court also found it significant that the officers caused Plaintiff to suffer physical injury. ***Id***. On the issue of qualified immunity, this Court determined that the officer had qualified immunity from liability regarding the initial stop. ***Id.* at 975**. However, this Court found that the officer did not have immunity based on the manner in which he seized plaintiff: "Garcia and the other officers surrounded plaintiff, shined lights at her to prevent her from seeing, pointed weapons at her, cocked them and bombarded her with profanity-laced threats to shoot, based only on an anonymous tip that she had a gun." ***Id***. In rejecting qualified immunity for the seizure, significant facts included: (1) threatening the use of deadly force to apprehend the suspect; (2) the officers employed other highly intrusive tactics such as surrounding her, employing lights to blind her and screaming profanity-laced threats; and (3) cause plaintiff to suffer physical injury. ***Id*. at 975- 977**. "Further, as an objective matter, the force allegedly used here was so plainly

excessive that [officer]Garcia would have been on notice that he was violating the Fourth Amendment." ***Id.* at 979**.

Here, this case is very different from ***Brown*** for many of the same reasons that distinguish this case from ***Ubiles***. Unlike ***Brown***, which involved tips from anonymous informants, the officers here had information from trustworthy witnesses with personal knowledge. Also, as stated above, that information provided a reasonable, articulable suspicion that criminal activity was afoot. While in the ***Brown*** case it was "unclear from the record" what the woman did, in this case the record is not only clear but undisputed that Plaintiff caused a disturbance at each store. Further setting this case apart from ***Brown*** is the fact that Plaintiff cannot show that the officers traumatized him or physically injured him. Finally, ***Brown*** should not preclude qualified immunity in this case. The "plainly excessive" use of force used by the officers in the ***Brown*** case served as a significant basis to preclude qualified immunity. However, in this case, Plaintiff can only point to confusion in the state law about the interplay between the Disorderly Conduct Statute and the right to bears arms.

Plaintiff also points to the recent unpublished decision of ***St. John v. McColley*** as instructive. There, New Mexico police officers were dispatched to a movie theater in response to a call from the theater manager that St. John had entered the theater wearing a holstered. **2009 WL 294 9302, *1**. Upon arrival, the manager directed Officer McColley to the theater where St. John was watching a movie and requested that the Officer "pull him out" because St. John's firearm was making [his] customers upset." ***Id***. After the Officer approached St. John and confirmed that he was carrying a gun, he instructed St. John to "keep your hands where I can see them" and told St. John that he needed to accompany the officers out of the theater. ***Id***. The officers removed St. John from the theater "in an escort hold" by securing his left arm and his

right arm. ***Id***. In finding that St. John's seizure was unreasonable the court reasoned that the defendants lacked a justifiable suspicion that he had committed a crime, was committing a crime or was about to commit a crime. ***Id.* *4**. The officers conceded that they did not observe St. John committing any crimes and that he arrived at the theater with the suspicion that St. John was merely "showing a gun." ***Id***. The court also found that the undisputed facts showed St. John "was peacefully sitting through the previews for his second movie of the day." ***Id***. The court went on to find that qualified immunity would not be available in that case because St. John's openly carrying a firearm was clearly permissible in that state. ***Id*. * 7**.

Any similarity between ***St. John*** and this case is superficial. First, the record in this case is clear that Plaintiff caused a disturbance. For example, there is nothing in the ***St. John*** decision which indicates that management had any argument with St. John, whether St. John resisted management's request that he leave the theater, or whether St. John created concern among the managers and employees (apart from the customers). Second, there are additional pertinent facts in this case which were not present in ***St. John***, such as Plaintiff's refusal to answer the officers' questions about the location of the firearm or his evasive action in handing-off his ID. Third, unlike the case of ***St. John***, qualified immunity should be available to these officers because it cannot be said that Wisconsin law clearly established the non-application of the Disorderly Conduct Statute to Plaintiff. Although the Wisconsin Attorney General tried to clarify the law *after commencement of this lawsuit*, the decision in ***St. John*** – decided in September 2009 – fails to show clearly established law in Wisconsin at the time of these events in 2008 and early 2009.

In sum, the four cases relied upon by Plaintiff fail to show that the officers lacked probable cause or arguable probable cause or that they are not entitled to qualified immunity. ***J.L.*** does not address the issues here. ***Ubiles*** is inapposite and has not been applied in this

Circuit.[6] ***Brown*** is factually distinguishable and ***St. John*** cannot be considered as creating clearly established law since it was issued after these events.

C. The Fourth Amendment did not forbid Officer Krafcheck from searching the vehicle and seizing the firearm.

Plaintiff cannot establish a Fourth Amendment claim against Officer Krafcheck for searching the vehicle and seizing firearm.

As elsewhere, Plaintiff offers no legal analysis and this claim should be considered waived. Even if the claim is considered, it lacks merit.

The Fourth Amendment protects "against unreasonable searches and seizures." **U.S. Const. amend. IV**. Courts "evaluate the totality of the circumstances of each case, and we examine separately each stage in the encounter." ***Smith v. Ball State Univ.*, 295 F.3d 763, 768 (7th Cir. 2002)**. A search is unreasonable when it infringes on "an expectation of privacy that society is prepared to consider reasonable." ***United States v. Jacobsen*, 466 U.S. 109, 113 (1984)**. To challenge a search Plaintiff must show that he had both a subjective and objective expectation of privacy, but he has not done so. ***United States v. Haywood*, 324 F.3d 514, 515-16**

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[6] Westlaw reveals few cases in this Circuit adopting ***Ubiles*** (or any other case except ***J.L.***). ***Brown*** cited ***Ubiles*** only in passing. Even in its own Circuit the decision in ***Ubiles*** is not considered a bright-line. In ***United States v. Valentine*, 232 F.3d 350, 355-57 (3d Cir. 2000)**, the court was again confronted with a challenge based on its reasoning in ***Ubiles***. That case involved the defendant walking around 1:00 a.m. in a high-crime area known for shootings. Noting that the reliability of a tip is but one factor to be considered in evaluating whether there was reasonable suspicion for a stop based on a tip that a suspect is carrying a firearm, the ***Valentine*** Court stated: "If we focus on the content of the tip, (the appellant) can invoke our recent holding that, *in some contexts*, even if police officers have a reliable tip saying that someone is carrying a gun, that information alone will not provide enough evidence to support a ***Terry*** stop." ***Id.*** (citing ***Ubiles*, 224 F.3d 213**)(emphasis added). The court noted, however, that other facts pointing to illegal activity presented a "broader context" for consideration of the firearm issue, which distinguished that case from ***Ubiles***. ***Id***. The ***Valentine*** Court, reiterating its acknowledgment in ***Ubiles*** "that reasonable suspicion does not require that the suspect's acts must always be themselves criminal" before a lawful stop can be affected, noted:

> Indeed, given the large number of potential crimes and the danger posed by an armed criminal, we think that if the police officers had done nothing and continued on their way after receiving the informant's tip, the officers would have been remiss. ….As the Supreme Court said in ***Wardlow***, when the police learn of potentially suspicious conduct, officers can stop and question the suspects to resolve ambiguity about the suspects' conduct.

Id. (citing ***Wardlow*, 528 U.S. at 125-26**).

(7th Cir. 2003). For example, Plaintiff offers no evidence that he owned the vehicle. The evidence shows that he had no ownership or control of the vehicle but that a relative owned it. **Gonzalez Dep. p. 85; Aff. Krafcheck, Exh. 2 (p. 1)**.

Even if Plaintiff could show standing, there are several methods by which Officer Krafcheck's search comported with the Fourth Amendment. First, police may reasonably search without a warrant when a person with authority voluntarily consents to the search. **See *United States v. Mosby,* 541 F.3d 764, 767 (7th Cir. 2008)**. Here, Gonzalez's cousin gave consent and showed Officer Krafcheck the precise location of the firearm in the vehicle. **Gonzalez Dep. p. 102**. A third party has apparent authority when it "would appear to a reasonable person, given the information that law enforcement possessed," that the individual had "common authority over the property . . . ." ***United States v. James,* 571 F.3d 707, 714 (7th Cir. 2009)**. Second, "[u]nder the automobile exception to the warrant requirement, a law enforcement officer need not have a warrant to search a vehicle when there is probable cause to believe that the search will uncover contraband or evidence of a crime." ***United States v. Hines,* 449 F.3d 808, 814 (7th Cir.2006)**. Here, Officer Krafcheck had probable cause and requested that Gonzalez's cousin show him where in the vehicle the firearm had been placed. Once directed to its location, Officer Krafcheck retrieved the firearm as part of the evidence of the crime. "Where law enforcement agents have probable cause to search a vehicle, they may search all areas in the vehicle in which contraband or evidence of criminal activity might be found, including closed containers, packages, compartments, and trunks." ***United States v. Zahurski,* 580 F.3d 515, 523 (7th Cir. 2009)**. Third, under the search-incident-to-arrest exception, police may search a vehicle incident to a recent occupant's arrest "only if … it is reasonable to believe the vehicle contains

evidence of the offense of arrest." ***Arizona v. Gant,* 129 S.Ct. 1710, 1723-1724 (2009**). The Supreme Court in ***Gant*** also acknowledged that:

> Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, ***Michigan v. Long,* 463 U.S. 1032 (1983)**, permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." ….If there is probable cause to believe a vehicle contains evidence of criminal activity, ***United States v. Ross,* 456 U.S. 798, 820-821 (1982)**, authorizes a search of any area of the vehicle in which the evidence might be found. …..***Ross*** allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. …..These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search.

***Gant,* 129 S.Ct. at 1721**.

Plaintiff addresses none of this and also fails to address qualified immunity. Under the particular circumstances of this case, Officer Krafcheck should be shielded by qualified immunity. The claim should be denied.

IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH REGARD TO THE PRIVACY ACT CLAIM SHOULD BE DENIED BECAUSE IT FAILS TO STATE A CLAIM AND BECAUSE QUALIFIED IMMUNITY APPLIES

Plaintiff narrows the Privacy Act claim to a claim against only Officer Donovan and only with respect to Section 7(b) of the Privacy Act. **Plaintiff's Brief p. 6**. Still, it is a flawed claim.

First, Plaintiff fails to address the critical issues that doom his case from the start. **See Defendant's Brief in Support of Summary Judgment at p. 53-59**.

Second, Plaintiff fails to meet his burden to show that Officer Donovan violated clearly established law. Plaintiff offers no authority for the proposition that legislative perambulatory language or the testimony of Ms. Fagnoni before Subcommittee on Social Security creates

"clearly established" law in this Circuit. **See Plaintiff's Brief p. 8-9 & n. 2**. Plaintiff also relies on ***Schwier v. Cox*, 412 F.Supp.2d 1266 (N.D. Ga. 2005)**, but that case involves voter registrants challenging Georgia's voter registration procedure. Plaintiff then points to ***Doyle v. Wilson*, 529 F.Supp. 1343, 1347 (D.Del. 1982)**, a case dealing with a Delaware plaintiff who alleged that his right to privacy had been infringed when the Justice of the Peace Court refused to refund court imposed costs without disclosure of his social security number (which the Justice of the Peace Court needed to complete necessary forms for the State Treasurer). Unlike the booking forms in this case, the Delaware State Treasurer forms lacked the information required by Section 7(b). ***Id*. at 1350**. Despite finding noncompliance with the Privacy Act, the ***Doyle*** court found that the officials were entitled to qualified immunity because the right was not clearly established, a result which should be reached here. ***Id*. at 1351-1352**. Plaintiff's reliance on ***Wolman v. United States*, 910 F. Supp. 310, 312 (D. D.C. 1980)** [or possibly cited as **542 F. Supp. 84**] also fails to show clearly established law. There, the court held that the Selective Service System's practice of requiring draft registrants to supply their social security numbers did not violate the Privacy Act. That case has been cited only five times and never once in this Circuit. Similarly, Plaintiff points to ***Hobson v. Wilson*, 737 F.2d 1 (D. C. Cir. 1984)** to support his request for expunging his records, yet a Westlaw search revealed that the ***Hobson*** decision has plenty of negative history. The Seventh Circuit's decision in ***Scruggs v. United States*, 929 F.2d 305, 307 (7th Cir. 1991)**, although acknowledging ***Hobson***, declined to find that the law was well-settled. "None of these cases orders expunction, and only one cites the Privacy Act." ***Id***. The ***Scruggs*** court concluded that the individual was not entitled to expunction of an arrest record. Another Seventh Circuit decision rejecting Plaintiff's request is ***United States v. Janik*,**

10 F.3d 470, 472 (7th Cir. 1993), which held that federal courts are without jurisdiction to order the expunction of records of an executive branch agency.

Third, even if Plaintiff showed law in this Circuit addressing a local law enforcement officer's request for social security numbers pursuant to boilerplate state and federal booking forms, the analysis would be incomplete without considering this Circuit's constitutional treatment of privacy. The Seventh Circuit and other federal courts have declined to expand the constitutional right to cover the collection of social security numbers. **See *McElrath v. Califano,* 615 F.2d 434, 441 (7th Cir. 1980)**; ***Cassano v. Carb,* 436 F.3d 74, 75 (2nd Cir. 2006)**. In fact, ***Doyle,* 529 F. Supp. at 1348**, agreed with those cases which held that "mandatory disclosures of one's social security number does not so threaten the sanctity of individual privacy as to require constitutional protection."

V. THE DECLARATORY JUDGMENT CLAIM FAILS AS A MATTER OF LAW

In addition to those arguments presented in Defendants' Brief in Support of Summary Judgment at page 59-61, declaratory relief should be denied for the following reasons.

With regard to the alleged Fourth Amendment violations, a declaratory judgment is not a remedy available to Plaintiff in this case because it is designed to apply prospectively to prevent or mandate reasonably certain, future conduct. **See *Medlmmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 126 (2007)** (stating that the remedy created by the federal Declaratory Judgment Act applies only to justiciable controversies that are "definite and concrete," not "hypothetical," "academic or moot") (quoted source omitted). Ripeness considerations are applicable where, as here, any future violation will almost certainly not take the form of the alleged past actual or threatened violation. Because the nature of any future violation is uncertain, the nature of any possible relief this Court could order is also uncertain. These events have already occurred and

Plaintiff does not allege or show that the events are reasonably likely to recur in the future. Plaintiff's firearm has been returned in each instance and he has subsequently carried his firearm since these events elsewhere in West Milwaukee (i.e., IHOP restaurant) and in the Chilton Wal-Mart (and very likely elsewhere in the State), all without incident. Based on the circumstances of this case, granting declaratory relief would not clarify ongoing relations between the parties, eliminate future legal uncertainties or serve any purpose other than to render an impermissible advisory opinion. **See e.g., *Brennan v. Rhodes*. 423 F.2d 706 (6th Cir. 1970)** (where plaintiff did not allege that he was in danger of being prosecuted for violating challenged sections of the Ohio Code for owning a weapon in violation of those sections, lawsuit for declaration that sections of Ohio Code were unconstitutional did not present case or controversy); ***Spriggs v. Wilson,* 467 F.2d 382 (C.A.D.C. 1972)** (where defendant was acquitted of all charges that were not dismissed by the government and he could not again be placed in position of one facing a lineup without first giving the government probable cause to issue new charges against him, as to him, his case for declaratory judgment concerning various aspects of police lineup procedures in District of Colombia was mute); and ***Smith v. Montgomery County,* 573 F.Supp. 604 (D.C.M.D. 1983)** (former detainee who alleged that she had been stripped searched without probable cause before being incarcerated but who could not credibly allege that she would be again arrested and subject to a strip search without probable cause did not have standing to seek declaratory relief with respect to the constitutionality of the strip search).

With regard to the alleged Privacy Act violation, the Seventh Circuit in ***Janik*** rejected Plaintiff's sought-after relief. **10 F.3d at 472**. Although there may be limited exceptions to the general rule that federal courts are without authority to order an Executive Branch agency to expunge records, ***id.***, Plaintiff offers no analysis of the issue and the issue should be considered

abandoned. Additionally, ***Scruggs*** stated that "[m]aintaining the record of an unlawful arrest is not independently unconstitutional." **929 F.2d at 307**.

CONCLUSION

For these reasons, it is respectfully requested that this Court deny Plaintiff's Motion for Summary Judgment, grant Summary Judgment in favor of the Village of West Milwaukee, Charles Donovan, Patrick Krafcheck, City of Chilton, and Michael Young, and dismiss the Plaintiff's Complaint on its merits.

Dated this 30th day of December, 2009.

Attorneys for Village of West Milwaukee, Charles Donovan, Patrick Krafcheck, City of Chilton, and Michael Young,

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