IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIM RHEIN and DAVID RHEIN, Plaintiffs, v. AGENT STEVEN PRYOR, Star Number 4816, an Illinois State Police Officer, in his individual capacity; AGENT FREDDIE SUMMERS, Star Number 5706, an Illinois State Police Officer, in his individual capacity; LIEUTENANT JOHN COFFMAN, an Illinois State Police Officer, in his individual capacity; HIRAM GRAU, Illinois State Police Director, in his official capacity; and LISA MADIGAN, Illinois Attorney General, in her official capacity, Defendants.	)	No. 13 C 843 JUDGE FEINERMAN MAGISTRATE JUDGE KIM

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Illinois State Police Director Hiram Grau, Sergeant Steven Pryor and Special Agent Freddie Summers, and Lt. John Coffman, by their attorney Lisa Madigan, the Illinois Attorney General, move this Honorable Court to dismiss the Complaint of Plaintiffs David and Kim Rhein pursuant to Federal Rule of Civil Procedure 12(b)(6). In support, Defendants state as follows:

1. Plaintiffs allege that the Defendants violated their constitutional rights by revoking Mr. Rhein's Firearm Owner's Identification ["FOID"] card and then subsequently seizing his firearms from his home. Plaintiffs argue that the revocation provision of the FOID card statute is unconstitutionally vague, does not provide pre- and post-deprivation remedies, and

violates their rights under the Second Amendment and the Equal Protection Clause of the United States Constitution. Plaintiffs also allege that the Defendants violated their constitutional rights by seizing Mr. Rhein's firearms from their home.

2. Pursuant to 430 ILCS 65/8(f), the Department of State Police revoked Mr. Rhein's FOID Card based upon perceived threats he made to a government official. The statute permits the State Police to revoke a FOID Card if the individual has a state of mind manifested by violent, suicidal, threatening, or assaultive behavior that is of such a nature that it poses a clear and present danger to himself, another person, or the community. Id. Shortly after a revocation letter was issued, State Police officers took possession of his firearms.

3. Contrary to Plaintiffs' allegations, the term "clear and present danger" is easily defined and not unconstitutionally vague as people of ordinary intelligence need not guess at its meaning.

4. The statute explicitly provides for adequate post-deprivation procedures, which include administrative and judicial *de novo* review. Further, a pre-deprivation hearing is not required for FOID Card revocations as pre-deprivation hearings could result in irreparable harm to the individual or others during the pendency of such proceedings and the risk of erroneous deprivation is minimized by the post-deprivation remedies.

5. The limited basis for revocation, *i.e.*, clear and present danger to the individual or others, does not prohibit responsible, law-abiding citizens from owning firearms and thus does not violate Second Amendment protections. Further, because the provision does not categorically prohibit firearm possession by responsible, law-abiding citizens, only intermediate scrutiny would apply. As the provision furthers the State's objective of promoting public safety

by keeping firearms out of the hands of those who might harm themselves or others, it survives intermediate scrutiny.

6. For purposes of the Equal Protection Clause, the Court should apply the rational basis standard. Because the provision survives intermediate scrutiny, it necessary survives rational basis review.

7. Mere speculation that the Department could revoke Mr. Rhein's FOID card in response to subsequent perceive threats is insufficient to confer standing.

8. Due to exigent circumstances, a warrant would not be required to seize Mr. Rhein's firearms.

9. Because there was no underlying constitutional violation, there could be no supervisory liability.

For the reasons stated above and set forth in greater detail in the accompanying memorandum of law in support of their motion for dismissal of Plaintiffs' Complaint, Defendants respectfully request this Court dismiss with prejudice all claims against them, and provide any other relief this Court deems just and proper.

LISA MADIGAN
Attorney General of Illinois

Respectfully submitted,

/s/ *Thor Y. Inouye*

Thor Y. Inouye
Assistant Attorney General
Office of the Illinois Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 814-4450

CERTIFICATE OF SERVICE

I, Sunil Bhave, hereby certify that I have caused true and correct copies of the above and foregoing Memorandum of Law in Support of Motion to Dismiss Plaintiffs' Complaint to be sent via e-filing to all counsel of record on May29, 2013, in accordance with the rules on electronic filing of documents.

/s/ *Thor Y. Inouye*
Thor Y. Inouye
Assistant Attorney General

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KIM RHEIN and DAVID RHEIN, Plaintiffs, v. AGENT STEVEN PRYOR, Star Number 4816, an Illinois State Police Officer, in his individual capacity; AGENT FREDDIE SUMMERS, Star Number 5706, an Illinois State Police Officer, in his individual capacity; LIEUTENANT JOHN COFFMAN, an Illinois State Police Officer, in his individual capacity; HIRAM GRAU, Illinois State Police Director, in his official capacity; and LISA MADIGAN, Illinois Attorney General, in her official capacity, Defendants.	)	No. 13 C 843 JUDGE FEINERMAN MAGISTRATE JUDGE KIM

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Illinois State Police Director Hiram Grau, Sergeant Steven Pryor and Special Agent Freddie Summers, and Lt. John Coffman, by their attorney Lisa Madigan, the Illinois Attorney General, move this Honorable Court to dismiss the Complaint of Plaintiffs David and Kim Rhein pursuant to Federal Rule of Civil Procedure 12(b)(6). In support, Defendants state as follows:

BACKGROUND

Plaintiffs Kim and David Rhein allege that the Illinois State Police Officers violated their rights by revoking Mr. Rhein's Firearm Owner's Identification ("FOID") card and subsequently seizing firearms from their home. (Doc. 1, Pls. Comp., attached hereto as Exhibit A).[1] Lt. Coffman wrote a letter advising Mr. Rhein that the Department had revoked his FOID card[2], pursuant to section 8(f) of the Illinois FOID Card Act.[3] 430 ILCS 65/8(f) (2010). Plaintiffs argue that there was no reasonable basis to conclude that Mr. Rhein had a mental condition falling within the purview of section 8(f).[4] However, Plaintiffs admit that Mr. Rhein had made perceived threats to a locally elected government official.[5] Shortly after the letter was issued, , Pryor and Summers entered Plaintiffs' home and seized Plaintiffs' firearms.[6] After court proceedings on the issue, the Illinois State Police returned the firearms and FOID card to Plaintiffs.[7]

Plaintiffs' claims against Director Grau are solely official capacity claims for purposes of challenging the constitutionality of section 8(f) of the FOID Card Act. (Id., ¶ 33). Plaintiffs seek

[1] The facts contained in this motion are derived from the allegations set forth in Plaintiffs' Complaint as required under Rule 12(b)(6). Reger Dev., LLC v. Nat'l City Bank, 592 F.3d 759, 763 (7th Cir. 2010). Defendants neither admit nor deny Plaintiffs' factual assertions at this time and incorporate Plaintiffs' facts in this motion solely for the purpose of Defendants' motion to dismiss.
[2] Ibid. ¶¶ 12-13.
[3] Ibid. ¶ 14.
[4] Ibid. ¶¶ 23, 31.
[5] Ibid. ¶ 35.
[6] Ibid. ¶¶ 15-16.
[7] Ibid. ¶ 18.

a declaration that 8(f) is unconstitutionally vague and does not provide for pre- and post-deprivation remedies.[8] Plaintiffs also seek a declaration that section 8(f) violates the Second Amendment and the Equal Protection Clause and seek to have the Court enjoin the enforcement of the statute.[9] Plaintiffs also claim that Agents Pryor and Summers violated their Second and Fourth Amendment rights by searching their home and seizing their firearms and that Lt. Coffman, in his supervisory capacity, "approved . . . and/or condoned the illegal search and seizure/Second Amendment violation . . . ."[10]

STATUTORY SCHEME

No person in Illinois "may possess any firearm within this State without having in his or her possession a [FOID] Card previously issued in his or her name by the Department . . . " 430 ILCS 65/2 (2010). The Illinois General Assembly has vested in the Department of State Police the authority to revoke an individual's FOID card upon finding that the individual is "[a] person whose mental condition is of such a nature that it poses a clear and present danger to" himself or herself, any other person or persons, or the community. Id. The legislature defined "mental condition" as "a state of mind manifested by violent, suicidal, threatening, or assaultive behavior." Id.

If an individual's FOID card is revoked by the Department pursuant to section 8(f), the Department must provide the individual with "written notice from the Department . . .stating specifically the grounds . . . upon which his [FOID card] has been revoked." 430 ILCS 65/9 (2010). The individual "may appeal to the Director of [the Department] for a hearing upon revocation or seizure" of the FOID card. 430 ILCS 65/10 (a) (2010). If the individual appeals,

[8] Ibid. ¶¶ 27-29.
[9] Ibid. ¶¶ 24, 33.
[10] Ibid. ¶¶ 16-17.

> The Director shall grant the relief if it is established by a preponderance of the evidence that the person will not be likely to act in a manner dangerous to public safety and that granting relief would not be contrary to the public interest. In making this determination, the Director shall receive evidence concerning (i) the circumstances regarding the firearms disabilities from which relief is sought; (ii) the petitioner's mental health and criminal history records, if any; (iii) the petitioner's reputation, developed at a minimum through character witness statements, testimony, or other character evidence; and (iv) changes in the petitioner's condition or circumstances since the disqualifying events relevant to the relief sought. If relief is granted under this subsection . . ., the Director shall as soon as practicable but in no case later than 15 business days, update, correct, modify, or remove the person's record in any database that the Department of State Police makes available to the National Instant Criminal Background Check System and notify the United States Attorney General that the basis for the record being made available no longer applies.

430 ILCS 65/10(f) (2010). Finally, an adverse, final administrative decision of the Director of the Department is also subject to *de novo* review by the Illinois circuit court. 430 ILCS 65/11(b) (2010). During circuit court review, "any party may offer evidence that is otherwise proper and admissible without regard to whether that evidence is part of the administrative record." Id.

ARGUMENT

PLAINTIFFS' OFFICIAL CAPCITY CLAIMS

Plaintiffs' official capacity claims—seeking declaratory and injunctive relief—allege that section 8(f) of the FOID Card Act is unconstitutional on its face under (1) the Fourteenth Amendment's Due Process Clause; (2) the Second Amendment; and (3) the Equal Protection Clause.

I. Section 8(f) Of The FOID Card Act Does Not Violate Due Process.

To plead a procedural due process claim, a plaintiff must allege a cognizable property interest, a deprivation of that interest, and a denial of due process. Palka v. Shelton, 623 F.3d 447, 452 (7th Cir. 2010). For purposes of this motion only, Defendants assume that Plaintiffs have a cognizable property interest in both their firearms and Mr. Rhein's FOID card, and that

they were deprived of those interests. However, contrary to Plaintiff's argument, (1) the statute is not vague, (2) a pre-deprivation hearing is not required under these circumstances, and (3) there is an adequate post-deprivation remedy.

A. Section 8(f) Is Not Vague.

In determining whether a statute is unconstitutionally vague, the question is whether a person of ordinary intelligence must guess at its meaning. Harris v. City of Chicago, 665 F. Supp. 2d 935, 953 (N.D. Ill. 2009) (citing Penny Saver Pubs. v. Vill. of Hazel Crest, 905 F.2d 150, 155 (7th Cir. 1990)). Statutory terms are not unconstitutionally vague simply because they do not provide "meticulous specifics" or "mathematical precision." Berg v. Health & Hosp. Corp. of Marion County, Ind., 865 F.2d 797, 805 (7th Cir. 1989). A statute need only articulate terms with a "reasonable degree of clarity" to pass the void-for-vagueness test under the Due Process Clause. Gresham, 225 F.3d at 907.

Here, the term "clear and present danger" is clear. The Department is authorized to revoke an individual's FOID card if that individual possesses a "mental condition . . . of such a nature that it poses a clear and present danger to the applicant, any other person or persons or the community." The legislature specifically defined "mental condition" as "a state of mind manifested by violent, suicidal, threatening, or assaultive behavior." 430 ILCS 65/8(f) (2010). Thus, any ambiguity that may have existed with the meaning of "mental condition" was clarified by the specific definition given to that term.

Although the term "clear and present danger" is easily defined, even without resorting to outside sources, the dictionary defines "clear" as "plain or evident to the mind; unmistakable" or "free from doubt or confusion; certain." AMERICAN HERITAGE DICTIONARY 279 (2d C. ed. 1982). "Present" is "[b]eing, pertaining to, or occurring at a moment or period in time

[perceptible as intermediate between past and future; now]." *Id*. at 979. And, "danger" is "exposure or vulnerability to harm or risk" or "a source or instance of risk or peril." *Id*. at 365. Combined, the dictionary defines a "clear and present danger" as an unmistakable or certain exposure to harm or risk, now.

B. A Pre-Deprivation Hearing Is Not Constitutionally Required.

Because providing a pre-deprivation hearing prior to revocation of a FOID card pursuant to section 8(f) of the FOID Card Act would be impracticable, the lack of a pre-deprivation hearing does not violate due process. Procedural due process is a flexible concept which "calls for such procedural protections as the particular situation demands." Buttitta v. City of Chicago, 9 F.3d 1198, 1201 (7th Cir. 1993) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). The Due Process Clause does not compel a pre-deprivation hearing where impracticable, such as where quick action by the State is necessary. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). Where a pre-deprivation remedy is impracticable due to the necessity of quick action by the State, due process may be satisfied with the availability of an adequate post-deprivation remedy. See Zinermon v. Burch, 494 U.S. 113, 132 (1990). Thus, courts have upheld summary action without a pre-deprivation hearing where necessary to protect the environment and public safety, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 298-303 (1981), to protect the integrity of horse racing and protect the public, Barry v. Barchi, 443 U.S. 55, 64-65 (1979), and to avoid the importation of illegal guns, Gun South, Inc. v. Brady, 877 F.2d 858, 867-68 (11th Cir. 1989).

In determining whether a pre-deprivation hearing is constitutionally required, the Supreme Court has developed a three-part analysis that balances the following: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of that interest; and (3) the

government's interest in taking its action, including the burdens any additional procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

Beginning with the third factor, the State has a very strong interest in regulating the use of firearms as mandated by section 8(f) of the FOID Card Act. The threat to public safety posed by those with violent, suicidal, threatening, or assaultive behavior is obvious. To hold pre-deprivation hearings in such cases could result in irreparable harm during the pendency of the hearing. See Waltier v. N.Y. Police Dep't, 856 F. Supp. 196, 200 (S.D.N.Y. 1994). Moreover, as discussed in the next section and contrary to the assertions in the complaint, the FOID Card Act provides for adequate post-deprivation procedures to ensure that an erroneous permanent deprivation will be avoided. See 430 ILCS 65/10-11 (2010).

Finding that the absence of a pre-deprivation hearing is constitutionally permissible here is consistent with Waltier, 856 F. Supp. 196. There, the state revoked the plaintiff's permit after he was arrested for shooting another individual. Id. The court held that, after analyzing the Mathews factors, a pre-deprivation hearing was unnecessary. Id. at 200-01. The court stressed that the significant governmental interest in ensuring public safety outweighed the plaintiff's interest in his permit, especially given the minimal risk of a permanent deprivation due to adequate post-deprivation procedures. Id. Because quick action by the State was necessary to dispossess a potentially dangerous firearms owner of the weapon, the court held that a pre-deprivation hearing was not constitutionally required. See id. at 200.

C. The FOID Card Act Provides Adequate Post-Deprivation Procedures.

Section 10(a) of the FOID Card Act, 430 ILCS 65/10(a) (2010), states that "whenever . . . a [FOID] Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of the State Police for a hearing upon such . . . revocation or seizure."

Under section 10(f), "[a]ny person who . . . was determined to be subject to the provisions of subsection[] . . . (f) . . . of Section 8 of this Act may apply to the Department of State Police requesting relief from that prohibition." 430 ILCS 65/10(f) (2010). Furthermore, the statute explicitly provides that the Director shall reverse the decision if it is established by a preponderance of the evidence that the person will not be likely to act in a manner dangerous to the public safety and granting the relief is not contrary to the public interest. Id. Thus, section 10 of the FOID Card Act provides a plaintiff with adequate administrative and judicial review procedures to challenge the revocation of his or her FOID card.

Section 11(b) of the FOID Card Act, 430 ILCS 65/11(b) (2010), provides that "[a]ny final administrative decision by the Director of the State Police to deny a person's application for relief under subsection (f) of Section 10 of this Act is subject to *de novo* judicial review by the circuit court." And during the circuit court proceedings, "any party may offer evidence that is otherwise proper and admissible without regard to whether that evidence is part of the administrative record." Id. As set forth in the complaint, Plaintiff David Rhein exercised his post-deprivation remedies to have his FOID Card returned. (Doc. 1, ¶ 18).

II. Section 8(f) Of The FOID Card Act Does Not Violate The Second Amendment.

Historically, the right to keep and bear arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." District of Columbia v. Heller, 554 U.S. 570, 626 (2008). A two-pronged analysis is used to determine whether governmental regulation violates the Second Amendment. See Ezell v. City of Chicago, 651 F.3d 684, 702-04 (7th Cir. 2011); see also United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010). First, this court should ask whether section 8(f) of the FOID

Card Act "regulates activity falling outside the scope of the Second Amendment." See id. at 703-04. If so, then the analysis can stop, for the regulated activity is categorically outside of Second Amendment protection. Id. at 704.

On the other hand, if section 8(f) regulates activity within the Second Amendment's scope, then this court should apply some form of heightened scrutiny. See Ezell, 651 F.3d at 708. While the level of scrutiny applied to Second Amendment analysis is an open question, see United States v. Skoien, 614 F.3d 638, 641-42 (7th Cir. 2010), something more than intermediate scrutiny applies only where the burden imposed by the law severely limits the core of Second Amendment rights, that is, possession of firearms by "law-abiding, responsible citizens," compare Ezell, 651 F.3d at 708 ("a more rigorous showing" than intermediate scrutiny, "if not quite 'strict scrutiny,'" applied where law prohibited all law-abiding, responsible citizens from engaging in target practice at firing ranges); with Skoien, 614 F.3d at 641-42 (intermediate scrutiny applied to law prohibiting firearm possession by domestic violence misdemeanants).

Like the domestic violence misdemeanant in Skoien, those who possess a mental condition presenting a clear and present danger as manifested by violent, suicidal, threatening, or assaultive behavior, do not enjoy the core rights provided by the Second Amendment. See Heller, 554 U.S. at 626-27 (noting that laws prohibiting possession of firearms by mentally ill presumptively valid under Second Amendment); United States v. Miranda, 505 F.3d 785, 795 (7th Cir. 2007); Nat'l Rifle Assoc. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 205-07 (5th Cir. 2012). Where core Second Amendment rights are not implicated (that is, the right of "law-abiding, responsible citizens" to possess firearms), the firearm prohibition is tested against only intermediate scrutiny. See Ezell, 651 F.3d at 708; see also Nat'l Rifle Assoc. of Am., Inc., 700 F.3d at 205-07. Here, because those individuals with a

mental condition described in section 8(f) of the FOID Card Act do not fall within the core of Second Amendment protection—that is, they are not "responsible citizens" for purposes of firearm possession, see Nat'l Rifle Assoc. of Am., Inc., 700 F.3d at 205-07, at most intermediate scrutiny applies to section 8(f).

A. Section 8(f) Of The FOID Card Act Is Outside Scope Of Second Amendment.

Section 8(f) of the FOID Card Act essentially prohibits those with a mental condition presenting a clear and present danger from possessing a FOID card, and in turn, from possessing a firearm. In Heller, the Supreme Court identified several historical limitations on the Second Amendment that were "presumptively valid." Heller, 554 U.S. at 626-27. The Court stated that,

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the *mentally ill*, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. (emphasis added). Thus, in Heller, the Court recognized that the mentally ill categorically do not enjoy the right to possess firearms. Id.; see also Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 374, 413 (2009).

Here, section 8(f) of the FOID Card Act categorically excludes those who present a clear and present danger by displaying violent, suicidal, threatening, or assaultive behavior from possessing firearms. 430 ILCS 65/8(f) (2010). This exclusion is supported by Heller, 554 U.S. at 626-27, as well as the Seventh Circuit's pre-Heller interpretation of the Second Amendment, see Miranda, 505 F.3d at 795; see also United States v. Emerson, 270 F.3d 203, 226 n.21 (5th Cir. 2001) (noting that "lunatics" and "those of unsound mind" historically were prohibited from firearm possession). Because section 8(f) excludes from possession of firearms those who have no right to such possession, section 8(f) regulates activity falling outside of the scope of the

Second Amendment. Accordingly, Plaintiffs' Second Amendment claim should be dismissed with prejudice.

B. Alternatively, Section 8(f) Survives Intermediate Scrutiny.

Assuming for the sake of argument that this court reaches the second prong of the Second Amendment analysis, it nonetheless should dismiss Plaintiffs' Second Amendment claim because section 8(f) is substantially related to an important governmental objective. See Skoien, 614 F.3d at 642. In codifying section 8(f) of the FOID Card Act, the legislature narrowly tailored the restriction on FOID card possession to those who possess a mental state that presents a clear and present danger by manifesting violent, suicidal, threatening, or assaultive behavior. 430 ILCS 65/8(f) (2010). This restriction furthers the government objective of promoting public safety by keeping firearms out of the hands of those who might harm themselves or others. See Skoien, 614 F.3d at 642.

III. Section 8(f) Of The FOID Card Act Does Not Violate The Equal Protection Clause.

In equal protection cases, strict scrutiny applies only where a legislative classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976). For the reasons stated in the preceding section, there is no impermissible interference with Plaintiffs' Second Amendment rights. Accordingly, the rational basis standard applies. See Nat'l Rifle Assoc. of Am., Inc., 700 F.3d at 211-12 (5th Cir. 2012).

In National Rifle Association, the Fifth Circuit first examined the plaintiff's Second Amendment challenge to a federal law prohibiting the sale of guns to minors under intermediate scrutiny. Id. at 207-11. After holding that there was no unconstitutional infringement of any Second Amendment rights, the court proceeded to analyze the plaintiff's equal protection

challenge to the same statute under rational basis review. Id. at 211-12. The First Circuit followed the same approach in a Second Amendment case in Hightower v. City of Boston, 693 F.3d 61, 83 (1st Cir. 2012), as did the Ninth Circuit sitting *en banc* in Nordyke v. King, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012), and the Fourth Circuit in United States v. Carpio-Leon, 701 F.3d 974, 982 (4th Cir. 2012).

This court therefore should apply rational basis scrutiny to Plaintiffs' equal protection challenge, as well. A statute satisfies a rational basis inquiry if there is a rational relationship between the treatment under the statute and a legitimate governmental purpose. Srail v. Vill. of Lisle, 588 F.3d 940, 946 (7th Cir. 2009). This is an "onerous burden" for plaintiffs that requires plaintiffs to disprove the existence of any conceivable set of facts that could provide a rational basis for the classification and the government is permitted to make generalizations under this standard even when it results in an imperfect means-end fit. Id.

IV. Complaint Fails To Show Likelihood Of Future Injury.

Plaintiffs' injunctive relief claim fails for another, independent reason—the complaint does not allege facts sufficient to show that there is any likelihood that the Department will revoke Plaintiffs' FOID cards pursuant to section 8(f) of the FOID Card Act in the future. A plaintiff lacks standing to raise an injunctive relief claim unless he or she can show that there exists a "real and immediate danger that alleged harm" will occur in the future. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not itself show a present case for injunctive relief."). Injunctive relief will not issue where a plaintiff has pleaded only conjectural or hypothetical harm. Id. at 102.

In Lyons, the plaintiff sued the City of Los Angeles and several of its police officers, alleging that the officers, without provocation, applied a chokehold when they stopped him for a

traffic violation. The plaintiff sought damages and injunctive relief barring the use of chokeholds except in deadly situations. The Court held that, while the plaintiff had standing to seek damages for a past-wrong—improper use of a chokehold—he lacked standing to bring an injunctive relief claim because he could not establish a real threat that an officer would choke him again. Id. at 105-06. Similarly, though Plaintiff may have standing to bring a damages action against the individual officers for an alleged past-wrong, the failure to adequately allege that their FOID cards will be revoked pursuant to section 8(f) of the FOID Card Act in the future is fatal to their injunctive relief claim. See Lyons, at 105-06.

Nor is Plaintiffs' allegation that their political commentary will put them at risk of being labeled mentally unstable—with their FOID cards at risk of revocation under section 8(f)—sufficient to establish standing for the injunctive relief claim. See Sierakowski v. Ryan, Palmer v. City of Chicago, 223 F.3d 440, 444 (7th Cir. 2000); 755 F.3d 560, 570 (7th Cir. 1985). Plaintiffs allege nothing about the nature of their purported political commentary that would indicate any likelihood of a real and immediate threat of revocation of their FOID cards. Further, there is a distinction between "political comments" and specific threats of violence, and there is no allegation that the state police are unable to distinguish between the two. There is no allegation that the Department has even considered revoking Plaintiff David Rhein's FOID card again and there is no allegation that Plaintiff Kim Rhein ever had her FOID card revoked.[11] The bare speculation of future revocation is insufficient to state a claim for injunctive relief. See Lyons, 461 U.S. at 101-02; see also McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011).

[11] Although not explicitly set forth in the complaint, Plaintiff Kim Rhein has no standing to assert the rights of her husband, so her claims are necessarily limited to the search of the home. She has no claim under the Second Amendment, Equal Protection, or Due Process.

PLAINTIFFS' INDIVIDUAL CAPACITY CLAIMS

Plaintiffs' individual capacity claims are brought under the Fourth Amendment against Sergeant Pryor and Special Agent Summers and their supervisor, Lt. Coffman. Plaintiffs allege that Agents Pryor and Summers illegally searched their home and seized their firearms, and Lt. Summers approved such conduct. (Doc. 1, Pls. Comp., ¶¶ 16-17).

I. Due to Exigent Circumstances, A Warrant Was Not Required.

Plaintiffs' Fourth Amendment claim—alleging that Pryor and Summers entered their residence without a warrant or consent and seized their firearms—fails because exigent circumstances allowed them to bypass the warrant requirement.[12] Police generally need a warrant to enter a home. United States v. Jenkins, 329 F.3d 579, 581 (7th Cir. 2003). But "warrantless searches will be allowed when police have a reasonable belief that exigent circumstances require immediate action and there is no time to secure a warrant." United States v. Lenoir, 318 F.3d 725, 730 (7th Cir. 2003). One example of exigent circumstances is where police reasonably fear for the safety of others. See Jenkins, 329 F.3d at 581; United States v. Hardy, 52 F.3d 147, 149 (7th Cir. 1995). And in determining whether the circumstances justified a warrantless entry, this court should ask whether the entry was objectively reasonable based on what the police knew at the time. United States v. Huddleston, 593 F.3d 596, 601 (7th Cir. 2010).

Courts have held that, where police have knowledge that an individual possesses firearms within a home and presents a danger to others, exigent circumstances exist. See, e.g., United States v. Bates, 84 F.3d 790, 795 (6th Cir. 1995) ("The presence of a weapon creates an exigent circumstance, provided the government is able to prove they possessed information that the

[12] Defendants dispute that the seizure was non-consensual but, for purposes of this motion, assume the facts as alleged in the Complaint.

suspect was armed and likely to use a weapon and become violent."); Huddleston, 593 F.3d at 600 (holding that exigent circumstances existed where police had knowledge armed individual who previously threatened another was inside home); United States v. Rogers, 924 F.2d 219, 222-23 (11th Cir. 1991) (holding that exigent circumstances existed where police saw handguns on suspect, a convicted felon, who was not allowed to possess guns). Requiring a warrant under such circumstances would be unreasonable because "[i]f officers are forced to obtain a warrant in situations where a suspect is believed to be armed, they 'risk a gun battle' once the warrant is obtained." Ortiz v. City of Chicago, 2010 WL 3833962, *6 (Sept. 22, 2010 N.D. Ill.) (Dow, J.) (attached hereto as Exhibit B).

According to Plaintiffs' complaint, the Department revoked Mr. Rhein's FOID card based upon his mental state that presented a clear and present danger to himself and others by manifesting violent, suicidal, threatening, or assaultive behavior. (See Doc. 1, Pls. Comp., ¶¶ 12-14, 31). Thus, the Department knew that Mr. Rhein possessed firearms in his residence, that he no longer had a valid FOID Card, and had evidence that he possessed a mental state that could place him or others in immediate risk of harm. Under these circumstances, it was reasonable for them to believe that a warrantless search and seizure of Plaintiffs' firearms was necessary. See Lenoir, 318 F.3d at 730; see also Waltier, 856 F. Supp. at 200 (holding that quick action by State is necessary to dispossess potentially dangerous firearms owner of weapon). Given the exigent circumstances in this case, neither Plaintiffs' consent nor a warrant was required prior to the alleged search and seizure. See Lenoir, 318 F.3d at 730.

II. The Supervisory Liability Claim Against Lt. Coffman Should Be Dismissed Because Plaintiffs Have Not Adequately Pleaded An Underlying Constitutional Violation.

Plaintiffs' failure to adequately plead a constitutional claim against Agents Pryor and Summers requires dismissal of the supervisory claim against Lt. Coffman.[13] Although supervisory liability may attach under § 1983 where the supervisor "know[s] about the [unconstitutional] conduct [of subordinates] and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye for fear of what [he or she] might see," Matthews v. City of East St. Louis, 675 F.3d 703, 708 (7th Cir. 2012), a condition precedent is that there be an underlying constitutional violation committed by the supervisor's subordinate, Estate of Phillips v. City of Milwaukee, 123 F.3d 586, 597 (7th Cir. 1997); Ross v. Daley, 2006 WL 2460614, at *2 (Aug. 23, 2006 N.D. Ill.) (Hibbler, J.) (attached hereto as Exhibit C). Moreover, Plaintiffs have not adequately alleged a Fourth Amendment violation committed by Agents Pryor or Summers. Because there is no underlying constitutional violation, Plaintiffs' supervisory liability claim against Lt. Coffman should be dismissed.

CONCLUSION

Wherefore, Defendants Director of Illinois State Police Hiram Grau, Agents Steven Pryor and Freddie Summers, and Lieutenant John Coffman respectfully request that this Court dismiss with prejudice all claims against them, and provide any other relief this Court deems just and proper.

[13] Defendants dispute that Lt. Coffman was the supervisor of Agents Pryor and Summers. However, for purposes of this motion only, Defendants assume the facts as alleged in the complaint.

LISA MADIGAN
Attorney General of Illinois

Respectfully submitted,

/s/ *Thor Y. Inouye*
Thor Y. Inouye
Assistant Attorney General
Office of the Illinois Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 814-4450

CERTIFICATE OF SERVICE

I, Thor Inouye, hereby certify that I have caused true and correct copies of the above and foregoing Memorandum of Law in Support of Motion to Dismiss Plaintiffs' Complaint to be sent via e-filing to all counsel of record on May 29, 2013, in accordance with the rules on electronic filing of documents.

/s/ *Thor Y. Inouye*
Thor Y. Inouye
Assistant Attorney General

LIST OF ATTACHED EXHIBITS

EXHIBIT A

Plaintiffs' Complaint, (Doc. 1), 2/1/13

EXHIBIT B

Ortiz v. City of Chicago, 2010 WL 3833962, *6 (Sept. 22, 2010 N.D. Ill.)

EXHIBIT C

Ross v. Daley, 2006 WL 2460614, at *2 (Aug. 23, 2006 N.D. Ill.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIM RHEIN and DAVID RHEIN, Plaintiffs, v. AGENT STEVEN PRYOR, Star Number 4816, an Illinois State Police Officer, in his individual capacity; AGENT FREDDIE SUMMERS, Star Number 5706, an Illinois State Police Officer, in his individual capacity; LIEUTENANT JOHN COFFMAN, an Illinois State Police Officer, in his individual capacity; HIRAM GRAU, Illinois State Police Director, in his official capacity; and LISA MADIGAN, Illinois Attorney General, in her official capacity, Defendants.	)	No. 13 C 843 JUDGE FEINERMAN MAGISTRATE JUDGE KIM

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that I have filed Defendant Defendants' Motion for Dismissal of Plaintiffs' Complaint and Memorandum in Support of the Motion to Dismiss this day with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division. A copy of said documents is attached hereto and herewith served upon you.

PLEASE TAKE FURTHER NOTICE that I shall appear before the Honorable Judge Feinerman or before such other Judge sitting in his stead, on the 11th day of July, 2013 at 9:00 a.m., or as soon thereafter as counsel may be heard, and then and there present the attached motion and memorandum.

DATED at Chicago, Illinois this 29th day of May, 2013.

LISA MADIGAN
Attorney General of Illinois

Respectfully submitted,

/s/ *Thor Y. Inouye*
Thor Y. Inouye
Assistant Attorney General

Office of the Illinois Attorney General
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 814-4450

CERTIFICATE OF SERVICE

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/s/ *Thor Y. Inouye*
Thor Y. Inouye
Assistant Attorney General

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

KIM RHEIN,
DAVID RHEIN,

Plaintiffs,

vs.

AGENT PRYOR, Star Number 4816,
an Illinois State Police Officer, in his
individual capacity;
AGENT SUMMERS, Star Number 5706,
An Illinois State Police Officer, in his
individual capacity;
LIEUTANANT JOHN COFFMAN,
an Illinois State Police Officer, in his
individual capacity;
HIRAM GRAU, Illinois State Police Director;
in his official capacity;
LISA MADIGAN, Illinois Attorney General,
in her official capacity,

Defendants.

COMPLAINT AT LAW

Jurisdiction/Venue

1. The search and seizure in this case occurred on or about February 5, 2011 in Sauk Village, Cook County, Illinois, located in the Northern District of Illinois.
2. The jurisdiction of this Court is invoked pursuant to the Civil Rights Act, 42 U.S.C. § 1983, § 1988, the judicial code 28 U.S.C. § 1331 and § 1343(a); the Constitution of the United States, and pendent jurisdiction, as provided under U.S.C. § 1367(a).

Parties

3. At all relevant times pertaining to this occurrence, Plaintiff Kim Rhein was residing

in the Northern District of Illinois, with her husband, David Rhein, at their home in Sauk Village, Cook County, Illinois.

4. At all relevant times pertinent to this occurrence, Defendants (Illinois State Police Agent Pryor, Star Number 4816, Illinois State Police Agent Summers, Star Number 5706, and Illinois State Police Lieutenant John Coffman) ("Defendant Officers") were acting within the course and scope of their employment with the Illinois State Police, and they were acting under color of law. These Defendant Officers are being sued for damages, described below.
5. Defendant Lisa Madigan is the Attorney General of the State of Illinois, the highest law enforcement officer in Illinois, and Hiram Grau is the Director of the Illinois State Police, which is the state agency ostensibly in charge of enforcement of 430 ILCS 65/8(f).
6. Madigan and Grau are not being sued for damages, but are instead being sued as Defendants in a declaratory and injunctive relief action.

Facts

7. On February 5, 2011, the Plaintiffs were in their home.
8. On this date, the Plaintiffs were not committing any violation of any law, statute or ordinance.
9. Inside their home, the Plaintiffs lawfully possessed firearms.
10. Kim was the owner of one or more of these firearms, and David was the owner of the rest.
11. As of this date, Plaintiff Kim Rhein owned a valid FOID card, and there was never any attempt to take away this FOID card, and she still possesses it to this date.

12. On February 3, 2011, Coffman wrote a letter purporting to attempt to revoke David Rhein's valid FOID card.
13. On February 4, 2011, Coffman or someone at the Illinois State Police mailed that letter.
14. The attempt to revoke Plaintiff David Rhein's FOID card was allegedly pursuant to 430 ILCS 65/8(f).
15. David Rhein did not receive Coffman's letter in the mail until February 7, 2011.
16. On February 5, 2011, Defendants Pryor and Summers, without a warrant, the Plaintiffs' valid and voluntary consent, or any other legal justification, entered the Plaintiffs' home, and illegally searched the Plaintiffs' home, and, once inside, Pryor and Summers illegally seized the Plaintiffs' firearms, some and/or all of which the Plaintiffs used for personal protection, hunting, investment and/or enjoyment.
17. Pryor and Summers took their actions with the approval of their supervisor, Lieutenant Coffman, who knew the search and seizure was unlawful, in violation of the Fourth and Second Amendments, yet Coffman approved it and/or condoned the illegal search and seizure/Second Amendment violation anyway.
18. The Plaintiffs were required to pay and hire an attorney to obtain their firearms and for David Rhein to get his FOID card back, and eventually, as the result of a court action, in the summer of 2012, the Plaintiffs were able to have the firearms returned to them.
19. As a result of the actions of the Defendant Officers, the Plaintiffs suffered damages.
20. The acts of the Defendants violated the Plaintiffs' Second, Fourth, Fifth, and Fourteenth Amendment rights.

21. The Defendant Officers took their actions ostensibly pursuant to 430 ILCS 65/8(f).

22. The actions of the Defendant Officers in conducting the illegal search and seizure and illegally seizing the Plaintiffs' firearms in no way was justified under this statute.

23. Not only was there no reasonable basis to conclude David Rhein had a mental condition that presented a clear and present danger to himself or anyone else, Section 65/8 does not even apply to persons who already own FOID cards; it applies only to applicants for FOID cards.

24. Additionally and/or alternatively, this statute violates the Due Process and Equal Protection Clauses of the United States Constitution, and the statute also violates the Second Amendment to the United States Constitution.

25. Section 65/8 provides no definition or method for determining whether someone has a "mental condition" that is "of such a nature that it poses a clear and present danger to the applicant, any other person or persons or the community."

26. The statute does not state who is to make this determination, nor does it give any standards for making this determination.

27. The statute is vague.

28. Section 65/8 provides no pre-seizure due process remedy.

29. Section 65/8 provides no post-seizure due process remedy.

30. At no time did any law enforcement official allege that Kim Rhein had a mental condition or was a danger in any way.

31. While Coffman alleged in his letter that David Rhein had such a mental condition, this is totally without merit, Coffman had no reasonable basis for making this conclusion, and Plaintiff David Rhein had no way of challenging such a conclusion.

32. The actions of the Defendant Officers violated the Second Amendment, the Fourth Amendment, as well as the Due Process and Equal Protection Clauses of the United States Constitution.

33. Additionally, the Plaintiffs seek declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, and 28 U.S.C. § 2201, *et. seq.*, against Madigan and Grau from enforcement of 430 ILCS 65/8(f), as this statute violates the Second Amendment, as well as the Due Process and Equal Protection Clauses of the United States Constitution.

34. The Plaintiffs, who both own valid FOID cards allowing them to possess the firearms in their home, are now again in lawful possession of their firearms, but they have a reasonable fear that Section 65/8(f) will be used again against one or both of them, to either revoke one or more of the Plaintiffs' valid FOID cards and/or seize their lawfully possessed firearms.

35. The actions taken against David Rhein, upon information and belief, were done because of his political comments to a locally elected official some time before the illegal search and seizure that concerned David Rhein's views about Americans' Second Amendment rights that either the representative, someone in that representative's office, and/or one of the Defendant Officers somehow construed as evidence that David Rhein had a mental condition that made him dangerous.

36. Both David and Kim Rhein plan on continuing to engage in political commentary supporting the Second Amendment.

37. The Plaintiffs fear their political commentary will put them at risk of being labeled as mentally unstable and dangerous, even though this is, in fact, not the case, and thus

they have legitimate concern that Section 65/8(f) will be used against them in a manner that would deprive them of their Constitutional rights, as described more fully above.

WHEREFORE, the Plaintiffs respectfully request compensatory and punitive damages against the Defendant Officers, and declaratory and injunctive relief against Defendants Madigan and Grau in that Plaintiffs seeks a declaration that 430 ILCS 65/8(f) is unconstitutional, and that Defendants should be temporarily, then permanently, enjoined from enforcing this statute.

PLAINTIFFS DEMAND TRIAL BY JURY.

Respectfully submitted,

By: s/ Richard Dvorak

Attorney for the Plaintiffs.

Richard Dvorak
THE LAW OFFICES OF RICHARD DVORAK
18W140 Butterfield Road, 15th Floor
Oakbrook Terrace, IL 60181
(312) 593-7146 (phone)
(312) 276-4868 (fax)
richard_dvorak@civilrightdefenders.com

EXHIBIT B

Not Reported in F.Supp.2d, 2010 WL 3833962 (N.D.Ill.)
(Cite as: 2010 WL 3833962 (N.D.Ill.))

H

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Daniel ORTIZ, Sr., Plaintiff,
v.
CITY OF CHICAGO, et al., Defendants.

No. 09–cv–2636.
Sept. 22, 2010.

Gregory E. Kulis, David Steven Lipschultz, Ronak D. Patel, Shehnaz I. Mansuri, Gregory E. Kulis and Associates, Ltd., Chicago, IL, for Plaintiff.

Andrew M. Hale, Avi T. Kamionski, Christina M. Liu, Jonathan M. Boulahanis, Andrew M. Hale & Associates, LLC, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

ROBERT M. DOW, JR., District Judge.

***1** Plaintiff, Daniel Ortiz, Sr., filed this civil rights lawsuit on April 30, 2009. His complaint names as Defendants several City of Chicago police officers (the "Individual Defendants") and the City of Chicago (the "City"). The Individual Defendants are D. Edwards, A. Hicks, and C. Hall. The complaint alleges that Edwards, Hicks, and Hall, armed with a search warrant for Plaintiffs *son's* apartment—but not Plaintiff's apartment, which was located immediately above his son's apartmen—"forcefully entered Plaintiff's second floor residence." Plaintiff alleges that the officers entered unlawfully, falsely arrested him, and used excessive force in effecting his arrest. Before the Court is Defendants' motion for summary judgment [48]. For the reasons set forth below, Defendants' motion is granted in part and denied in part.

I. Facts

On summary judgment, the record evidence is viewed in the light most favorable to the non-moving party—in this instance, Plaintiff. The Court takes the relevant facts primarily from the parties' Local Rule ("L.R.") 56.1 statements: Defendants' Statement of Facts ("Def.SOF") [50], Plaintiff's Response to Defendants' Statement of Facts ("Pl.Resp.Def.SOF") [57], Plaintiff's Statement of Additional Facts ("Pl.SOAF") [58], and Defendants' Response to Plaintiffs Statement of Additional Facts ("Pl.Resp.Def.SOAF") [61].[FN1] The Court notes that Plaintiff responded "neither admits nor denies" to several of Defendants' fact statements; those fact statements—unless they collided with other properly supported fact statements in Plaintiff's L.R. 56.1 Statement of Additional Facts—have been deemed admitted.

FN1. L.R. 56.1 requires that statements of fact contain allegations of material fact, and that the factual allegations be supported by admissible record evidence. See L.R. 56.1; *Malec v. Sanford*, 191 F.R.D. 581, 583–85 (N.D.Ill.2000). The Seventh Circuit teaches that a district court has broad discretion to require strict compliance with L.R. 56.1. See, *e.g.*, *Koszola v. Bd. of Educ. of the City of Chicago*, 385 F.3d 1104, 1109 (7th Cir.2004); *Curran v. Kwon*, 153 F.3d 481, 486 (7th Cir.1998) (citing *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1317 (7th Cir.1995) (collecting cases)). Where a party has offered a legal conclusion or a statement of fact without offering proper evidentiary support, the Court will not consider the statement. See, *e.g.*, *Malec*, 191 F.R.D. at 583. Additionally, where a party improperly

denies a statement of fact by failing to provide adequate or proper record support for the denial, the Court deems admitted that statement of fact. See L.R. 56.1(a), (b)(3)(B); see also *Malec*, 191 F.R.D. at 584. The requirements for a response under Local Rule 56.1 are "not satisfied by evasive denials that do not fairly meet the substance of the material facts asserted." *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528 (7th Cir.2000). In addition, the Court disregards any additional statements of fact contained in a party's response brief but not in its L.R. 56.1(b) (3)(B) statement of additional facts. See, *e.g.*, *Malec*, 191 F.R.D. at 584 (citing *Midwest Imports*, 71 F.3d at 1317). Similarly, the Court disregards a denial that, although supported by admissible record evidence, does more than negate its opponent's fact statement—that is, it is improper for a party to smuggle new facts into its response to a party's Rule 56.1 statements of fact. See, *e.g.*, *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 643 (7th Cir.2008).

A. Entry of the 5240 Building's Upstairs Unit

On December 5, 2007, Defendant Hall obtained a valid search warrant for 5240 W. Addison Street, Basement Apartment, Chicago, Illinois (the "5240 Building"). The search warrant authorized the "Area 4 Gun Team" to search the entrance-way and basement apartment of the 5240 Building. Daniel Ortiz, Jr. ("Ortiz Junior"), who is Plaintiff's son, was the target of the search warrant, and the warrant also called for Ortiz Junior's person to be searched. The items to be seized under the warrant were a chrome .380 semi-automatic handgun, ammunition, and documents establishing proof of residency. Pl. Resp. Def. SOF ¶¶ 4–6; Def. SOF, Ex. C.

On the same night that the search warrant was signed, December 5, 2007, the Area 4 Gun Team executed the warrant. The Individual Defendants—Hicks, Hall, and Edwards—were positioned at the rear of the 5240 Building. Pl. Resp. Def. SOF ¶ 8. After knocking, announcing, and ramming down the door, the Individual Defendants entered the rear of the 5240 Building's basement apartment. Pl. Resp. Def. SOF ¶ 11; Hall Dep. at 73–74.[FN2]

FN2. Another officer indicated that officers came in the side entrance. Rittorno Dep. at 37. But there is no disconnect in the evidence, because a diagram for the basement apartment indicates that the "rear entrance" is located on the side of the building. See Def. SOF, Ex. M, at 5 (5240 W. Addison Basement Apartment Diagram).

As the Individual Defendants were entering the rear of the 5240 Building's basement, Officer Karen Rittorno was positioned at the front of the 5240 Building. Pl. Resp. Def. SOF ¶ 9. According to Defendants, as the breach team entered the 5240 Building's basement, Rittorno called out over the radio that "somebody was running out the front up some stairs." Pl. Resp. Def. SOF ¶ 12; Hall Dep. at 8. However, although Plaintiff does not highlight the fact, Rittorno's deposition testimony of what she saw is more equivocal. Rittorno was positioned in the front of the house for safety reasons and to ensure that if evidence were tossed out of windows, she would be able to see what was occurring. Rittorno Dep. at 33. The front door of the basement apartment had windows near the top. Through those windows, Rittorno says that she saw "the side of the forehead and the top of a head." Rittorno Dep. at 35. The image she saw was a silhouette. Rittorno Dep. at 35. According to Rittorno, she called out "movement" on the radio.

***2** Nonetheless, Plaintiff does not dispute that Rittorno made a call on the radio that the target of the warrant was running upstairs. PL Resp. Def. SOF ¶ 14.[FN3] Likewise, Plaintiff does not dispute that Hicks, Hall, and Edwards heard that radio transmission. Pl. Resp. Def. SOF ¶ 15; Hall Dep. at 79 ("[A] radio

transmission came through our radios saying that somebody was running out the front up some stairs"); Hicks Dep. at 69 ("The outside security units radioed that there was someone running up the stairs from the basement apartment."); Edwards Dep. at 57, 60 ("[The officer on the radio] said someone is running upstairs—well, target is running upstairs."). Defendant Hicks ran through the 5240 Building's basement unit and up the front stairs to the second floor apartment. Pl. Resp. Def. SOF ¶ 16; Hicks Dep. at 70.

FN3. Plaintiff responded that he "neither admits nor denies" the fact statement, which the Court has deemed admitted. Rittorno said in her deposition testimony that it is "quite possible" that she was on the radio when she saw the silhouette upstairs, although she only ever says for certain—in part because of Plaintiffs counsel's questioning—that she made an initial call of "movement" over the radio. Rittorno Dep. at 36, 38. However, the Individual Defendants all testified that the radio call they heard said that the target of the warrant was running upstairs. *E.g.*, Hall Dep. at 79 ("[A] radio transmission came through our radios saying that somebody was running out the front up some stairs").

Defendant Edwards says that he went into the 5240 Building's basement at almost exactly the same time as Defendant Hicks went to the upstairs apartment. Edwards Dep. at 60. Edwards testified at his deposition that he remained in the basement for "a minute or so," securing two individuals who were in the unit (one male and one female, neither of whom was Ortiz Junior).[FN4] At that point, Edwards' sergeant directed him to go upstairs in response to yelling. Pl. Resp. Def. SOF ¶ 17. When Edwards reached the upstairs apartment, he saw Defendant Hicks and Plaintiff on the ground and Defendant Hicks putting handcuffs on Plaintiff. Pl. Resp. Def. SOF ¶ 18.[FN5]

FN4. These individuals were Ortiz Junior's friend and girlfriend.

FN5. Plaintiff has denied this fact statement but does not cite any evidence that refutes Edwards's version of events, for example by offering witness testimony that pins Edwards to the location sooner than his testimony claims. Instead, Plaintiff contends that the form of the statement calls for speculation and that "Plaintiff has no way of knowing what Defendant Edwards saw or did not see." As to the first point, the objection is not well taken, even if Plaintiff was referring to the underlying deposition questioning rather than the form of the fact statement. The second point—essentially acknowledging that Plaintiff does not have evidence that refutes Defendants' version of events—simply is a basis for deeming admitted the fact statement in question.

As for Defendant Hall, while Plaintiff was being arrested upstairs, Hall remained in the basement with another officer as well as two individuals who were in the downstairs unit when the Area 4 Gun Team entered—Alberto Garcia (a friend of Ortiz Junior) and Maria Hernandez (Ortiz Junior's girlfriend). Def. SOF ¶ 19. Plaintiff denies that Hall remained downstairs and for that denial cites the deposition testimony of Rittorno. Yet the cited deposition testimony supports only the conclusion that Hall knew what had happened inside the residence—namely that Plaintiff "was being placed in custody for obstructing." Rittorno Dep. 52. As Defendants point out, the statement attributed to Hall shows only his knowledge of why Plaintiff was being arrested, not that he had any part in the events that took place in the upstairs unit. Moreover, Rittorno stated in her deposition that it might have been someone other than Hall who made the statement. Rittorno offered that it might have been Hicks—who the record shows *was* upstairs—who made the statement. Rittorno Dep. at 53. Plaintiff has not cited testimony, from the many eye witnesses in the upstairs

unit, placing Defendant Hall in the upstairs unit. Therefore, Plaintiff has failed to offer admissible record evidence that Hall left the 5240 Building's basement apartment, and Defendants' fact statement that Hall never entered the upstairs unit has been deemed admitted.

Plaintiff's version of the events surrounding the entry of the upstairs unit at the 5240 Building differs from Defendants' version of events, but focuses on the actual location of Ortiz Junior rather than whether Rittorno radioed that someone fled from the basement apartment to the upstairs unit. According to Plaintiff, Ortiz Junior was among the people who were upstairs when the search warrant was executed. Pl. SOAF ¶ 4. (The fact is disputed, but Plaintiff has supported it with admissible record evidence). The two people downstairs were a friend of Ortiz Junior, and Ortiz Junior's girlfriend. Def. Resp. Pl. SOAF ¶ 5; see also, *e.g.*, Rebecca Ortiz Dep. at 46; Gabrielle Ortiz Dep. at 38. According to Plaintiff, no one else was in the basement apartment and no one ran up to the upstairs apartment. See Pl. SOAF ¶¶ 5–6. After the police knocked on the door of the second floor residence, Plaintiff opened the door and the police officers pushed their way inside. Pl. SOAF ¶ 8. Still, Plaintiff "neither admits nor denies" whether Rittorno made the radio call to the other officers that someone was fleeing from the basement unit to the upstairs unit, and Plaintiff similarly "neither admits nor denies" whether Defendants heard the radio call. Pl. Resp. Def. SOF ¶¶ 14–15. Again, those fact statements have been deemed admitted.

B. The Arrest of Plaintiff

***3** Viewed in the light most favorable to Plaintiff, these are the circumstances surrounding Plaintiff's arrest. After hearing loud noises (presumably the entry of officers into the basement), Plaintiff moved toward the front of the residence. Someone from outside yelled "Open the goddamn door. This is the Chicago police, the police." Pl. Resp, Def. SOF ¶ 25. Plaintiff did not block the officers from entering the second floor residence, nor did Plaintiff push the officers when they entered. Pl. SOAF ¶ 9–10. Plaintiff repeatedly asked for a warrant but was told to get on his knees with his face down. Def. Resp. Pl. SOAF ¶¶ 26–28. At this point, Ortiz Junior was standing behind Plaintiff, within arm's reach. Pl. Resp. Def. SOF ¶ 31. Ortiz Junior was already handcuffed. Pl. SOAF 8.5; Pl. Dep. at 64–65. According to Plaintiff's deposition testimony,[FN6] after an officer told Plaintiff that they did not need a warrant to be in Plaintiff's apartment, Officer Hicks grabbed Plaintiff and pinned him to the floor facing up. Along the way, "the back of [Plaintiff] hit the glass table that was there in the living room." PI. Dep. at 67; see also Hicks Dep. at 101–02 (establishing that Hicks was the officer who arrested Plaintiff).[FN7] The record evidence is not entirely harmonious as to whether putting Plaintiff on the floor was a matter of design or whether Plaintiff tripped. Therefore, the Court will assume that Plaintiff was intentionally taken down by Officer Hicks. See also Def. SOF, Ex. J (arrest report stating that arresting officer "used emergency takedown" on Plaintiff). After Plaintiff was handcuffed, he complained that his handcuffs were too tight, but the officers did not loosen them. Pl. SOAF ¶ 15.[FN8]

FN6. Because the parties disagree over how properly to characterize Plaintiff's deposition testimony, the Court refers directly to that deposition testimony.

FN7. Although Plaintiff states that "Defendant Officers"—apparently all of them—rushed and tackled him, Plaintiff has not pointed to record evidence that any Defendant other than Hicks had physical contact with Plaintiff. There is also a dispute about whether Plaintiff fell or was taken down by Hicks intentionally. For summary judgment purposes, the Court presumes that Plaintiff was taken down by Hicks intentionally.

FN8. Defendants object to the statement

> based on deposition testimony by Plaintiff that is not without ambiguity. Because there is disputed evidence on the point, it must be viewed in the light most favorable to Plaintiff.

As a result of the incident, Plaintiff contends that his wrist and back were injured and that he suffered bruises and cuts. Def. Resp. Pl. SOAF ¶ 17. As another officer, Matthew Little, walked Plaintiff out of the apartment, the officer allegedly tightened Plaintiff's handcuffs and twisted his wrists, causing pain. Pl. Resp. Def. SOF ¶¶ 37. Officer Little, like Officer Rittorno, is not a named Defendant in this case.

II. Legal Standard

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). Factual disputes that are irrelevant to the outcome of the suit "will not be counted." *Palmer v. Marion County*, 327 F.3d 588, 592 (7th Cir.2003) (quotation marks and citations omitted). In determining whether there is a genuine issue of fact, the Court "must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party." *Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir.2004). To avoid summary judgment, the opposing party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks and citation omitted).

***4** A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is proper against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In other words, the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252.

III. Analysis

A. Entry of the 5240 Building's Upstairs Unit

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures; it provides that "no Warrants shall issue, but upon probable cause" and that warrants must "particularly describ[e] the place to be searched, and the person or things to be seized." U.S. Const. amend. IV. Entering a house without a warrant is presumed to be unreasonable, and therefore unconstitutional. *United States v. Venters*, 539 F.3d 801, 806 (7th Cir.2008) (circumstances justified warrantless entry into home where officer knew that children were living in a dangerous environment, including possible exposure to noxious, methamphetamine-making chemicals); *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 627 (7th Cir.2008) (discussing protective sweeps in accordance with *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)). Nonetheless, a "warrantless entry by criminal law enforcement officials may be legal where there is a compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *Mason v. Godinez*, 47 F.3d 852, 856 (7th Cir.1995). This is known as the exigent circumstances exception to the

warrant requirement. The Seventh Circuit teaches that an officer may enter a house without a warrant where there is (1) probable cause supporting the entry; and (2) exigent circumstances. *Venters*, 539 F.3d at 806–07. Plaintiff questions only whether there were exigent circumstances at the time the officers entered the upstairs apartment of the 5240 Building, not whether the probable cause prong is satisfied.[FN9]

> FN9. Police have probable cause to conduct a search "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). To the extent that Plaintiff is arguing that there was no probable cause because there were no exigent circumstances, the argument merely collapses both prongs and does not address the radio report by Rittorno. See *Hanson v. Dane County, Wis.*, 608 F.3d 335, 338 (7th Cir.2010) (probable cause means "a good reason to act; it does not mean certainty"). In making a probable cause determination, it is reasonable for police officers to rely on reports of other law enforcement officers. *United States v. Spears*, 965 F.2d 262 (7th Cir.1992). Therefore, the Court, like Plaintiff, takes up only the exigent circumstances inquiry in detail.

The existence of exigent circumstances *vel non* is not the analytical lodestar: rather, the question, on which the government bears the burden of proof, is whether the police "had an objectively reasonable belief that exigent circumstances existed at the time of their warrantless entry into [Plaintiff's] residence." *United States v. Fiasche*, 520 F.3d 694, 698 (7th Cir.2008) (officers reasonably concluded that exigent circumstances justified warrantless entry in a case where criminal defendants may have been trying to destroy drug evidence). The situation is analyzed from the perspective of the officers on the scene. *Leaf v. Shelnutt*, 400 F.3d 1070, 1081 (7th Cir.2005). The subjective motivations of the officers are irrelevant. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

***5** In this case, the information regarding the presence of a gun combined with information regarding Ortiz Junior's flight provides the critical elements in establishing that exigent circumstances justified entry into the upstairs unit. According to the search warrant that police obtained, there was probable cause to believe that a chrome .380 semiautomatic pistol with ammunition was located in Ortiz Junior's basement apartment. Def. SOF, Ex. C, at 4 (Warrant to search Ortiz Junior and the 5240 Building basement unit). When police breached the rear entrance of the 5240 Building's basement unit, Officer Rittorno radioed to the other officers that a suspect had fled to the upstairs unit. Pl. Resp. Def. SOF ¶¶ 14–15.

Given the knowledge that a semiautomatic handgun might have been present on the scene and possibly on Ortiz Junior's person—indeed, Ortiz Junior himself was subject to the search warrant—Defendant Hicks acted reasonably in pursuing someone, reported to be the target, who fled the basement unit. When a handgun is semiautomatic, such as the one that the police were attempting to locate, that means that each time the trigger is depressed, a shot is fired and a new round is automatically chambered. The weapon's classification as a handgun, in addition to its action, made the situation dangerous. As the Supreme Court observed in *District of Columbia v. Heller*, —— U.S. ——, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), handguns offer advantages to one wishing to repel home invaders. Although the Court was writing about self-defense, the reasons that make handguns desirable for the citizen defending his property also make handguns dangerous for officers who arrive to execute a search warrant at a place where a handgun is present. A handgun "is easier to store in a location that is readily accessible in an

emergency; it cannot easily be redirected or wrestled away * * *; it is easier to use for those without the upper-body strength to lift and aim a long gun; [and] it can be pointed at [someone] with one hand" while leaving the other hand free. *Heller*, 128 S.Ct. at 2818. The advantages of the weapon as a means of home defense underscore the danger faced by police officers who arrive at a residence to execute a search warrant where guns are present, particularly when the officers receive information that the target of the warrant has fled to the periphery of the area where the officers appeared.

And although Plaintiff contends that when he opened the door, he appeared to be the proverbial calm in the storm, the Fourth Amendment analysis generally disfavors hindsight bias and Plaintiff has not cited factual support for the contentions regarding his mien in any event. Moreover, a gun close at hand can be "suddenly transmogrified" from a passive instrument "into an offensive weapon" with essentially no warning. *United States v. Phelps*, 895 F.2d 1281, 1288 n. 4 (9th Cir.1990) (Kozinksi, J., dissenting from denial of rehearing en banc); see also *Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) ("[A]s experience demonstrates, [a gun] can be converted instantaneously from currency to cannon."); *United States v. Bailey*, 123 F.3d 1381, 1385 n. 3 (11th Cir.1997) (referring to automatic and semiautomatic weapons as "especially dangerous firearms" and noting that commerce in them is strictly regulated). The fact that Hicks received a report that the potentially armed target of a search warrant had fled into a superjacent apartment—rather than Plaintiff's demeanor when the door to that apartment was opened—created the exigent circumstances.

***6** As a leading Fourth Amendment commentator has explained, "Delay in arrest of an armed felon may well increase danger to the community * * * or to the officers at the time of arrest. This consideration bears materially on the justification for warrantless entry." Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(f), at 311–12 (2004). If officers are forced to obtain a warrant in situations where a suspect is believed to be armed, they "risk a gun battle" once the warrant is obtained. *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir.1987) (circumstances were "sufficiently exigent to justify a warrantless arrest" where officers had reason to believe that a suspect was armed, had committed a crime earlier that day, and was located in a hotel, rather than "wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby, or other public area of the fully occupied hotel"); *United States v. Williams*, 612 F.2d 735, 739 (3d Cir.1979) ("The officers had reasonable cause to believe from the informant-information [sic] that appellant had just been involved in a very serious crime, that he had fired his weapon at a witness in escaping the scene and that he was going to get his affairs together and go south, from all of which the officers were more than justified in believing that armed flight was imminent."). The fact that the entry into the upstairs unit occurred as part of a continuous sequence with little time lag also supports the conclusion that exigent circumstances were present. See *Mason*, 47 F.3d at 856 (timing of events was consistent with exigent circumstances where officers took immediate steps to secure a house and proceed through it in search of a suspect).

In sum, the facts of this case, at least as developed by the parties, fall squarely within the exigent circumstances exception. Numerous other cases are in accord with that conclusion. See *United States v. Soto–Beniquez*, 356 F.3d 1, 36 (1st Cir.2004) ("[A]n officer who is looking for a fleeing suspect and has a reasoned basis to think that he has found the suspect is justified in pursuing the suspect into a house."); *United States v. Weems*, 322 F.3d 18, 23 (1st Cir.2003) (exigent circumstances justified entry into third party's residence where arrestee was known to be armed and dangerous, had a history of assault, was trying to escape, and had the opportunity to destroy or hide his gun); *United States v. Rico*, 51 F.3d 495, 501

(5th Cir.1995) (exigent circumstances justified entry into residence where arrest was made in driveway of residence that police had "a reasonable belief" contained armed individuals); *United States v. Lopez*, 989 F.2d 24, 25–26 (1st Cir.1993) (exigent circumstances justified warrantless entry into apartment where the defendant, who fit the description of an armed suspect, fled into a building after being told to halt); *United States v. Lindsey*, 877 F.2d 777, 781–82 (9th Cir.1989) (exigent circumstances justified warrantless entry where police arresting a departing drug dealer learned of the presence of bombs in residence and guns with which to defend that residence, although seemingly indicating that the presence of bombs played a larger role in the analysis). Hicks was in hot-pursuit of someone whom he reasonably thought to be an armed (fleeing) target of a search warrant. Edwards responded to shouting upstairs after Hicks made that entry. There is no evidence that Hall ever entered the upstairs unit.

***7** Plaintiff's argument regarding exigent circumstances loses sight of the critical inquiry. According to Plaintiff, the Court can either accept Defendants' version that exigent circumstances existed on the night of December 5, or accept Plaintiff's version that there were no exigent circumstances. Plaintiff offers evidence that Officer Rittorno could not possibly have seen anyone run upstairs, because Ortiz Junior already was upstairs. Therefore, construing the evidence in the light most favorable to him, Plaintiff maintains that summary judgment cannot be entered against him. See Pl. Mem. at 3–4. But for the reasons discussed above, that argument must fail. Exigent circumstances exist for Fourth Amendment purposes where the police had "an objectively reasonable belief that exigent circumstances existed at the time of their warrantless entry into [Plaintiff's] residence." *United States v. Fiasche*, 520 F.3d 694, 698 (7th Cir.2008). Officers are generally entitled to rely on the accounts of their fellow officers in making their judgments. See, *e.g.*, *United States v. Spears*, 965 F.2d 262 (7th Cir.1992).

The more interesting aspect of the case, as to which Plaintiff did not bring a claim and as to which the facts are not fully developed, is whether it was permissible to conduct a full-blown search of the upstairs apartment or whether officers could have done no more than secure the apartment and its occupants until a second warrant was obtained. See LaFave § 6.5(c), at 425; *cf. Illinois v. McArthur*, 531 U.S. 326, 337–38, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (Souter, J., concurring) (suggesting that the changing contours of exigent circumstances may require law enforcement to alter their conduct as the situation unfolds and not undertake actions without a warrant); *United States v. Limares*, 269 F.3d 794 (7th Cir.2001).

In order to stave off summary judgment, the Federal Rules of Civil Procedure, the Supreme Court's summary-judgment case law, and our adversary system required Plaintiff to specify which facts create a genuine issue of material fact. Plaintiff has not attempted to argue that probable cause was fabricated in this case or otherwise show that it was objectively unreasonable for Hicks and Edwards to conclude that exigent circumstances existed when they made their warrantless entry into Plaintiff's apartment. Moreover, Plaintiff has failed to show that Hall ever entered the upstairs unit. Therefore, the Court grants Defendants' motion for summary judgment on Plaintiff's unlawful entry claim.

B. False Arrest Claim

The Court grants in part and denies in part Defendants' motion for summary judgment on Plaintiff's false arrest claim. The motion is granted with respect to Defendants Hall and Edwards. The motion is denied with respect to Defendant Hicks.

A police officer has probable cause to effect an arrest "when the facts and circumstances that are known to him reasonably support a belief that the

individual has committed, is committing, or is about to be commit a crime." *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 679 (7th Cir.2007). Plaintiff was arrested for violating 720 ILCS 5/31–1(a). That law provides that a person commits a Class A misdemeanor if he "knowingly resists or obstructs" the performance of "any authorized act" within the officer's official capacity, so long as the person knows that the person being resisted is a police officer. The only authority that Defendant cites for arresting Plaintiff actually indicates that officers did not have probable cause to arrest him. See *People v. Hilgenberg*, 223 Ill.App.3d 286, 165 Ill.Dec. 784, 585 N.E.2d 180, 183–84 (Ill.App.Ct.1991) (discussing *People v. Stoudt*, 198 Ill.App.3d 124, 144 Ill.Dec. 466, 555 N.E.2d 825 (Ill.App.Ct.1990)). In *Hilgenberg*, the Illinois Appellate Court held that refusal to answer the door to permit entry of the sheriff, at least on the facts of that case, did not constitute obstruction. 165 Ill.Dec. 784, 585 N.E.2d at 184. In *Stoudt*, the court agreed that failing to comply with an officer's order to move did not constitute obstruction. 144 Ill.Dec. 466, 555 N.E.2d at 826 (refusal to cooperate, without more, does not constitute obstruction). The authorities cited by Defendants indicate that if officers had made a physical move to take Plaintiff into custody—and Plaintiff had resisted or even "gone limp" at that point—then Defendant Hicks would have committed obstruction. Although Defendants cite a contrary Seventh Circuit ruling, the case cited by Defendants is unpublished and Defendants misstate the facts of that case. More to the point, the Seventh Circuit stated unambiguously in *Payne v. Pauley*, 337 F.3d 767, 776 (7th Cir.2003), a published opinion, that "the resistance must be physical" and that "mere argument will not suffice" in order to fall under 720 ILCS 5/31–1.[FN10] Finally, and although the Supreme Court's holding in *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), means that Defendants could have prevailed if they had probable cause to make an arrest for a crime other than the one with which they charged Plaintiff, Defendants have relied primarily on their obstruction theory and have not supported that theory with favorable case law.[FN11] As to Defendant Hicks, at least, Defendants' motion must be denied.

FN10. The Court notes that Defendants cited extensively from unpublished Seventh Circuit opinions. Although Defendants contend that they merely cite the cases to make reference to district court rulings that have been affirmed, Defendants obviously and extensively rely on the cases for their analyses. That practice is to be avoided.

FN11. Defendants' argument that portions of the Illinois Code that give officers authority to detain people and use reasonable force to bring the scene of a warrant's execution under control are inapt for three reasons. First, those provisions (see 725 ILCS 5/108–6–9) deal with the execution of a warrant rather than a warrantless entry. Second, the provisions by their terms appear to authorize detentions but not full-blown arrests in order to ensure officer safety. Third, an Illinois statute that authorized officers, without a search warrant, to enter a residence and arrest residents would run afoul of the Constitution's Supremacy Clause.

***8** However, the undisputed facts are that Hall remained downstairs while Hicks effected Plaintiffs arrest. The undisputed facts also show that Edwards arrived on the scene as Plaintiff was being handcuffed by Hicks—Edwards's mere presence at the scene fails to provide the requisite personal involvement to support a false arrest claim. See *Morfin v. City of East Chicago*, 349 F.3d 989, 1000–10001 (7th Cir.2003) (officer who transported arrestee was custodian not subject to suit for false arrest); *Rodriguez v. Cirilo–Garcia*, 115 F.3d 50, 52 (1st Cir.1997) (plaintiff must show that defendant was cause-in-fact of the alleged constitutional injury); *Maltby v. Winston*, 36 F.3d 548 (7th Cir.1994) (personal responsibility may

be shown if an officer "acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent"); *Burke v. Town of Walpole*, 2004 WL 507795, at *22 (D.Mass. Jan.22, 2004) (inaction may satisfy cause-in-fact component of Section 1983 action where inaction was a substantial factor in producing the harm).

Because Plaintiff has not shown sufficient personal involvement by Edwards or Hall, Defendants' motion for summary judgment on the false arrest claim is granted as to those two Defendants. The motion for summary judgment is denied with respect to Defendant Hicks.

C. Excessive Force and Failure to Intervene

Defendants' motion for summary judgment on Plaintiff's excessive force and failure to intervene claim is similarly granted in part and denied in part. The motion is granted with respect to Hall and Edwards, against whom Plaintiff makes a failure to intervene argument. The motion is denied with respect to Hicks, against whom Plaintiff makes an excessive force argument.[FN12]

> FN12. Plaintiff does not actually individuate his analysis, lumping all Defendants together as if they were a single unit—and charging all of them with both excessive force and failure to intervene. Because the record evidence indicates that only Hicks effected the arrest of Plaintiff, the Court has construed Plaintiff's claim as (1) an excessive force claim against Hicks and (2) a failure to intervene claim against Edwards and Hall.

Claims of excessive force are analyzed under an objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The absence of physical injury is an important indicator that excessive force was not used but is not talismanic. See *McNair v. Coffey*, 279 F.3d 463, 468–69 (Cudahy, J., concurring). Courts have, for instance, found that police may be held to have used excessive force based on frightening displays of force. See, *e.g.*, *Sharrar v. Felsing*, 128 F.3d 810, 821 (3d Cir.1997) (no excessive display of force when police arrested four men suspected of domestic assault by "calling over twenty police officers to the scene, including a SWAT team armed with machine guns and an FBI hostage negotiator"). The amount of force that is constitutionally permitted decreases as the threat of danger posed decreases, See, *e.g.*, *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir.1993). Where physical injuries are present, even minor injuries may support an excessive force claim. See, *e.g.*, *Holmes*, 511 F.3d at 687. It is not the case, as Defendants contend in their citation to a non-precedential Seventh Circuit opinion and a necessarily non-precedential district court opinion, that officers must intend to cause Plaintiff injury in order to maintain a Fourth Amendment excessive force claim. *Richman v. Sheahan*, 512 F.3d 876, 882 (7th Cir.2008) ("The officers' intent in using force is irrelevant in a Fourth Amendment case.").

***9** Defendants contend that the record evidence shows unequivocally that Plaintiff tripped of his own accord during the arrest. Not so. Hicks' own arrest report in the case states that he used an "emergency takedown" on Plaintiff. In *Chelios v. Heavener*, 520 F.3d 678, 689 (7th Cir.2008), the arresting officers tackled the less than "docile and cooperative" plaintiff after failing to tell the plaintiff that he was under arrest. Although Plaintiff was less than docile, because he did not immediately abide by Hicks's command to drop to the floor and instead questioned the police as to why they had entered his home, Defendant has not argued that forcing Plaintiff to the ground in the manner that he did was objectively reasonable. The Court will not make the argument—as to which, because the argument went unmade, Plaintiff has not had the opportunity to respond. The Seventh Circuit

teaches that the excessive force inquiry is based on the totality of the circumstances. *E.g.*, *Gonzales v. City of Elgin*, 578 F.3d 526, 539 (7th Cir.2009). In the absence of briefing on those circumstances, the Court will not enter summary judgment. Moreover, the Court notes that at the time that Plaintiff was arrested, there is record evidence that Ortiz Junior had already been subdued, and Defendants have not pointed to evidence that Plaintiff was told that he was under arrest before being taken down.

Although summary judgment must be denied with respect to Defendant Hicks, Plaintiff has not marshaled evidence that any Defendant other than Hicks used force in effecting Plaintiff's arrest (or otherwise participated in that arrest). Instead, Plaintiff seemingly maintains that Defendants Hall and Edwards should be held liable on a failure to intervene theory. In order to prevail on a failure to intervene theory in a Section 1983 case, Plaintiff must show that the non-intervening officers "had reason to know excessive force was being used and had a realistic opportunity to prevent the harm from occurring." *Montano v. City of Chicago*, 535 F.3d 558, 569 (7th Cir.2008). In *Montano*, the Seventh Circuit affirmed summary judgment in favor of a police officer who was "not even involved" in the plaintiff's arrest and as to whom the "scant record materials" did not describe the officer's conduct—like Hall, whom Plaintiff has not placed at the scene of the arrest. 535 F.3d at 569. Likewise, the Seventh Circuit affirmed summary judgment in favor of an officer who was a passenger in a van, where the plaintiff in the case was being abused by another officer in the van's rear. The Seventh Circuit reasoned that the passenger officer's mere presence in the van "does not by itself permit the inference that he was informed of the facts that establish a constitutional violation and had the ability to prevent it." *Id.* at 569. See also *Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 478 (7th Cir.1997) (complaint dismissed where force used by arresting officer occurred quickly, so that there was no realistic opportunity for other officer to intervene).

***10** Under the failure-to-intervene framework, Plaintiff cannot prevail on a claim against Defendant Edwards or Hall, though Edwards presents the slightly trickier case. As to the force used initially in effecting the arrest, the only record evidence highlighted by the parties indicates that Edwards arrived on the scene *after* Plaintiff was put on the floor with an "emergency takedown" move. That means that Edwards could not have observed the facts preceding the encounter (such as Plaintiff's conduct), which may have made Hicks's use of force reasonable or unreasonable. And of course, even if Edwards had been there to observe the takedown, liability could not be imposed unless Edwards had an opportunity to alter the course of events. See *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir.2005) ("This Court has implied that a realistic opportunity to intervene may exist whenever an officer could have called for a backup, called for help, or at least cautioned the excessive force defendant to stop.") (quotation marks and alterations omitted); *Wilson v. Town of Mendon*, 294 F.3d 1, 14 (1st Cir.2002) (no liability for an attack that is "over in a matter of seconds").

Plaintiff, however, has highlighted evidence supporting an inference that Edwards was aware of excessive force after Plaintiff was taken down—specifically, Ortiz Junior testified that before Plaintiff was removed from upstairs apartment, he complained about the tightness of his handcuffs. Pl. SOAF ¶ 15; Ortiz Junior Dep. at 112.[FN13] Neither party describes the factual scene with great detail, but the record evidence indicates not only that Plaintiff complained about the handcuffs but that Edwards remained present for any complaint. Edwards Dep. at 100–01. As a general matter, an excessive force claim may be based on overly tight handcuffs, at least where the arrestee complains to the arresting officers about the tightness of the handcuffs. *Lyons v. City of Xenia*, 417 F.3d 565, 576 (6th Cir.2005). That, however, does not end the matter.

> FN13. Defendant counters the pertinent fact statement by citing a portion of Plaintiff's deposition testimony in which Plaintiff, answering questions about his conversations as he was being placed into a cell, acknowledges that he did not complain about injuries prior to being placed in the cell. Pl. Dep. at 105. The context of the conversation makes it unclear if Plaintiff was answering questions only about his conversations with officers at the police station. Moreover, the brief portion of the deposition that was provided does not refute the testimony that Plaintiff complained that the handcuffs were too tight.

The Seventh Circuit's holding in *Tibbs v. City of Chicago*, 469 F.3d 661, 665–66 (7th Cir.2006), is squarely on point and leads to judgment in favor of Edwards. In *Tibbs*, the Seventh Circuit noted that it has "on occasion recognized valid excessive force claims based on overly tight handcuffs" (*id.* at 666) but emphasized that passing complaints about handcuff tightness will not support an excessive force claim:

> In *Herzog v. Village of Winnetka*, 309 F.3d 1041 (7th Cir.2002), we held the plaintiff was entitled to a jury trial on her excessive force claim where she produced evidence that the arresting officer lacked probable cause for the arrest, shoved her to the ground even though she was not resisting, cracked her tooth by forcing a breath-screening device into her mouth, waited over an hour to loosen handcuffs she complained were too tight, and subjected her to blood and urine testing at a hospital, even though she had passed all field sobriety tests and had registered a 0.00 Breathalyzer reading. *Id.* at 1043–44. *See also Lester v. City of Chi.*, 830 F.2d 706, 714 (7th Cir.1987) (a properly instructed jury could have found excessive use of force if it believed plaintiff's testimony that even though she did not resist arrest, officers threatened to punch her, kneed her in the back, dragged her down a hallway, and handcuffed her so tightly her wrists were bruised).

***11** * * * The plaintiff in *Payne* told the officers her hands were numb and ultimately underwent two surgeries because of wrist injuries caused by the too-tight handcuffs. *Payne*, 337 F.3d at 774–75, 780–81. Here, Tibbs complained only once to Officer Kooistra, gave the officers no indication of the degree of his pain, experienced minimal (if any) injury, and sought no medical care. The plaintiffs in *Herzog* and *Lester* experienced tight handcuffing more akin to the discomfort Tibbs alleges, but the decisions in those cases were hardly based on overly tight handcuffs alone. The *Herzog* and *Lester* plaintiffs presented evidence they had suffered numerous additional injuries, including a cracked tooth, plainly gratuitous blood and urine testing, being kneed in the back, and being dragged down a hallway. *Herzog*, 309 F.3d at 1043–44; *Lester*, 830 F.2d at 714.

Tibbs, 469 F.3d at 666 (summary judgment appropriate even where handcuffs were applied "somewhat too tightly" and there was only a single complaint to officers about the tightness of the handcuffs). As in *Tibbs*, there is minimal evidence that Plaintiff complained about the tightness of his handcuffs, no evidence that he "elaborated" on the injury, no evidence that the injuries proved more than mild, and no evidence of other "numerous" injuries along the lines of those in *Herzog* and *Lester*.[FN14] The only evidence that Plaintiff complained at all came from Ortiz Junior during his deposition:

> FN14. Plaintiff indicated in his deposition testimony that his wrists were in pain while he was at the police station (Pl. Dep. at 101), but Plaintiff has not identified evidence that speaks to the severity of pain or injuries that he suffered. He did indicate, however, that he had some scrapes and bruises (somewhere on his person) on December 8 and never missed work. Pl. Dep. at 114–15

> Q. Okay. You didn't hear your dad complain about the handcuffs being too tight, right?
>
> * * *
>
> A. Yeah, he was actually saying that like towards the end a little bit, that his arm—his—his hands were hurting, could they loosen the cuffs?
>
> Ortiz Junior Dep. at 112. That evidence—which is all that Plaintiff highlights—hardly establishes more than mild discomfort. In addition to the evidence that the complaints were minimal and would not have put an officer on notice that the handcuffs were too tight for constitutional purposes, Plaintiff has not offered other evidence (for example evidence of observable discoloration in his hands) that might have put Edwards or anyone else on notice that the handcuffs were too tight. See *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593–94 (7th Cir.1997); see also *Stainback v. Dixon*, 569 F.3d 767, 773 (7th Cir.2009) (generalized complaints, without more, insufficient to maintain excessive force claim based on overly tight handcuffs).

Therefore, the Court grants Defendants' motion for summary judgment on Plaintiff's excessive force/failure to intervene claim as to Defendant Edwards. Likewise, the motion is granted as to Defendant Hall, whom the record evidence indicates remained in the basement apartment. The motion is denied as to Defendant Hicks.

D. Due Process Claim

Because Plaintiff states in his response brief that he is abandoning his due process claim (Pl. Mem. at 13), Defendants' motion for summary judgment on that claim is denied as moot,

E. Qualified Immunity

***12** Qualified immunity "protects government officials from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Viilo v. Eyre*, 547 F.3d 707, 709 (7th Cir.2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Qualified immunity is immunity from suit rather than merely a defense to liability. *Scott v. Harris*, 550 U.S. 372, 376 n. 2, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). The qualified immunity analysis comprises a two-part inquiry: (i) "whether the facts alleged show that the state actor violated a constitutional right," and (ii) "whether the right was clearly established." *Hanes v. Zurich*, 578 F.3d 491, 493 (7th Cir.2009). "[L]ucid and unambiguous dicta concerning the existence of a constitutional right can * * * make the right 'clearly established' for purposes of qualified immunity." *Hanes*, 578 F.3d at 496 (quoting *Wilkinson v. Russell*, 182 F.3d 89, 112 (2d Cir.1999) (Calabresi, J., concurring)).

Defendants' briefing on qualified immunity—which at this point relates only to the false arrest and excessive force claims against Hicks—is not adequate. As to the false arrest claim, Defendants misapprehend the case law on when an officer has probable cause to make an arrest under 720 ILCS 5/31–1. Indeed, the case law that Defendants' cite establishes that an individual must do more than just fail to cooperate in order to be charged under the statute. See *People v. Hilgenberg*, 165 Ill.Dec. 784, 585 N.E.2d at 183–84; *People v. Stoudt*, 144 Ill.Dec. 466, 555 N.E.2d at 826. And Defendants' argument that the exigent circumstances faced by officers produced "ambiguity in assessing how much of an obstructionist plaintiff was being" lands wide of mark: the case law is clear that physical conduct by the Plaintiff is *the* essential ingredient in an obstruction charge, *Payne*, 337 F.3d at 776 ("the resistance must be physical"; "mere argument will not suffice"). The law was sufficiently well established under Illinois law such that a reasonable officer would have been aware of it.

Narducci v. Moore, 572 F.3d 313, 318 (7th Cir.2009) (citing *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). (Moreover, the record evidence is mixed on whether the exigent circumstances had in fact abated, because Plaintiff testified that Ortiz Junior already was in custody when Plaintiff was arrested.)

As to the excessive force claim, Defendants contend in their briefs only that Plaintiff tripped and therefore that the amount of force used by Hicks was reasonable. That contention, at least when the evidence is viewed in the light most favorable to Plaintiff (as the Court must), is belied by the current state of the evidentiary record. Defendants never briefed the question of whether the specific use of force in conducting an "emergency takedown" was reasonable under the circumstances of this case. Thus, even accepting Defendants' argument that officers may "secure the premises and protect themselves by pointing weapons at the occupants, putting them on the floor, and handcuffing them" (Def. Br. at 12), there is a fact question as to whether Plaintiff's account that he was "thr[own], pushed, and tackled as he was handcuffed" (*id.*) was an appropriate or excessive way for Officer Hicks to "secure the premises and protect [the officers]."

***13** The upshot is that qualified immunity on the excessive force claim is not available—at least *at this time*—based on a murky factual picture and underdeveloped briefing. As in *Malec v. Sanford*, 191 F.R.D. 581, 588 (N.D.Ill.2000), in which Judge Castillo set out useful guidance to litigants, Defendants did little more than cite cases that stand "for the general proposition that qualified immunity exists and then conclusorily assert that they are entitled to it," A party must do more than gesture in the general direction of the record and make conclusory assertions about what the record shows. "[J]ust as a district court is not required to scour the record looking for a factual dispute, it is not required to scour the party's various submissions to piece together appropriate arguments. A court need not make the lawyer's case." *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir.1995). In this case, the facts appear sufficiently similar to those in *Chelios*, where the Seventh Circuit held that additional factual development was necessary in order to determine if the defendant-officer's force was "so plainly excessive that a reasonable police officer would have been on notice that such force is violative of the Fourth Amendment." See also *Clash v. Beatty*, 77 F.3d 1045, 1048 (7th Cir.1996) ("It is clear * * * that police officers do not have the right to shove, push, or otherwise assault innocent citizens without any Provocation whatsoever."); *id.* (noting that additional factual development at trial would "concern the relationship between the [police officer's] shove and the harm that [the plaintiff] may have presented").

For the foregoing reasons, Defendants' motion for summary judgment based on qualified immunity is denied at this time. Defendants, of course, remain free to renew their qualified immunity defense should the case proceed to trial. [FN15]

> FN15. The Court notes that Defendants have never presented arguments on whether the police were justified, at least initially, in "taking down" Plaintiff as part of a protective sweep under *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), and its progeny.

IV. Conclusion

For the reasons set forth above, Defendants' motion for summary judgment is granted in part and denied in part. As to Defendants Hall and Edwards, the summary judgment motion is granted in its entirety. As to Defendant Hicks, the motion is granted as to the unlawful entry claim, but denied as to the false arrest and excessive force claims. In light of Plaintiffs decision to abandon his due process claim, Defendant's motion for summary judgment on that claim is denied as moot.

N.D.Ill.,2010.
Ortiz v. City of Chicago
Not Reported in F.Supp.2d, 2010 WL 3833962 (N.D.Ill.)

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EXHIBIT C

Not Reported in F.Supp.2d, 2006 WL 2460614 (N.D.Ill.)
(Cite as: 2006 WL 2460614 (N.D.Ill.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.
Timothy ROSS, Plaintiff,
v.
Richard M. DALEY, Mayor of the City of Chicago, Illinois, et al., Defendants.

No. 05 C 3665.
Aug. 23, 2006.

Timothy Ross, Chicago, IL, pro se.

Nathalina A. Hudson, Stacy Ann Benjamin, Department of Law, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER
HIBBLER, J.

***1** Timothy Ross ("Ross"), a *pro se* prisoner, filed a complaint pursuant to 42 U.S.C. § 1983 alleging that Chicago Police Superintendent Phillip J. Cline ("Cline") violated his civil rights by failing to train the defendant police officers under his command. The officers allegedly used excessive force during the course of Ross's arrest and incarceration and failed to provide him with medical treatment during the course of and following his arrest on March 11, 2005.[FN1] Ross has brought this suit against Cline in both his individual and official capacities.

FN1. This case has been stayed as to the police officers pending resolution of Ross's underlying state criminal case. (Dkt. No. 38.)

Cline has moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Ross has filed his response.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a complaint, or any portion of a complaint, shall be dismissed for failure to state a claim upon which relief can be granted. Fed.R.Civ.P.12(b)(6). Pursuant to Rule 12(b)(6), a motion to dismiss tests the legal sufficiency of the complaint, and not the merits of a case. *Gibson v. Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990). A court will grant a motion to dismiss only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In reviewing a motion to dismiss, a court must treat all well-pleaded allegations as being true and draw all reasonable inferences in the light most favorable to the plaintiff. *Henderson v. Sheahan*, 196 F.3d 839, 845 (7th Cir.1999); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir.1996)("For the purposes of a motion to dismiss, the court accepts all well-pleaded allegations as true and draws all reasonable inferences in favor of the plaintiff."). "Allegations of a *pro se* complaint are held 'to less stringent standards than formal pleadings drafted by lawyers ...' " *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir.2001)(*quoting Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972))(per curiam). Courts therefore liberally construe *pro se* complaints. *Alvarado*, 267 F.3d at 651 (citation omitted); *see also Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir.1996)("It is, by now, axiomatic that district courts have a special responsibility to construe *pro se* complaints liberally").

Cline moves to dismiss Ross's complaint asserting that Ross has failed to allege that he either took part in arresting Ross or that he had any knowledge that Ross had ever been arrested by the defendant

police officers. (Def.'s Mem. at 3.) Next, Cline asserts that Ross has failed to allege that he had knowledge of any unconstitutional conduct on the part of the defendant police officers or that he, at some point, had an opportunity to intervene in Ross's case, but failed to do so. (*Id.*) Accordingly, Cline avers that Ross's complaint fails to state a claim for relief under § 1983 because the only allegation in Ross' complaint which implicates him is that he failed to properly train the defendant police officers under his command who allegedly violated Ross's constitutional rights. (*Id.*)

***2** Ross has responded to Cline's motion to dismiss asserting that Cline had personal knowledge that the police officers at the Chicago Police Department's ("CPD") 18th District were using excessive force on detainees because there have been prior complaints against both the 18th District as well as Cline. (Pl.'s Resp. at 1.) Ross further contends that because Cline had knowledge of the unconstitutional conduct and did nothing about it, he, in essence, was personally involved in the conduct because he both permitted and tolerated the use of excessive force on the part of the police officers at CPD's 18th District. (*Id.*) Ross also asserts that Cline has the authority to promulgate police department policy setting forth the rules for police officer conduct which included establishing disciplinary measures. (*Id.* at 1-2.) Ross therefore claims that Cline's failure to properly train the defendant police officers amounts to deliberate indifference on the part of Cline, in light of the fact that Cline knew about the CPD's 18th District's police officers' history of the use of excessive force. (*Id.* at 2.) Accordingly, Ross contends that he has established liability under § 1983 given that Cline's failure to implement corrective measures resulted in a constitutional violation of his rights. (*Id* .)

A section 1983 claim for supervisory liability, whether in an individual or official capacity, requires an underlying constitutional violation by an officer who was subject to the defendant's supervision. *See Higgins v. Correctional Med. Servs. of Ill., Inc.*, 178 F.3d 508, 513-14 (7th Cir.1999); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596-97 (7th Cir.1997). An official capacity claim is, in essence, a claim against the governmental entity that employs the defendant. *See Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Chortek v. Milwaukee*, 356 F.3d 740, 748 n. 4 (7th Cir.2004). A local governmental entity is liable for damages only if a plaintiff can show that the alleged constitutional violation or deprivation occurred as a result of an official policy, custom, or practice. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Chortek*, 356 F.3d at 748. Liability may be demonstrated in three ways: "(1) by an express policy that, when enforced, causes a constitutional deprivation; (2) by a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law; or (3) by a showing that the constitutional injury was caused by a person with final policymaking authority." *Franklin v. City of Evanston*, 384 F.3d 838, 843 (7th Cir.2004); *see also Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 735 (7th Cir.1994).

There are only a limited number of circumstances in which a failure to train will be characterized as a municipal policy under § 1983. *Robles v. City of Fort Wayne*, 113 F.3d 732, 735 (7th Cir.1997) (citations omitted). Inadequate police training may support a § 1983 claim only where the failure to train amounts to deliberate indifference of the rights of persons with whom the police come into contact. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). The standard is met where, in light of the specific police officer's duties, the need for more or different training is "obvious," and the existing inadequacy is likely to result in a constitutional violation. *Id.* at 390. The municipality would have to possess actual or constructive notice that such a failure to train would likely result in constitutional deprivations. *Robles*, 113 F.3d at 735. Such notice could be established through learning of a pattern of constitu-

tional violations, or where a clear constitutional duty is implicated in recurrent situations that a particular police officer is likely to face. *Id.* (citations omitted).

***3** The Court finds that Ross has established a failure to train claim against Cline in his official capacity because he has sufficiently pled that Cline had notice of prior complaints against both the CPD's 18th District as well as Cline regarding excessive use of force against detainees. Thus, Ross has alleged that Cline had a custom or practice of permitting and tolerating the use of excessive force on the part of the police officers at the 18th District. Accordingly, Ross's complaint sufficiently alleges that Cline's failure to train the defendant police officers may amount to deliberate indifference of detainee rights given that Cline knew or should have known about the CPD's 18th District's police officers' history of the use of excessive force.

Next, with regard to individual liability of a supervisor, "[t]he doctrine of *respondeat superior* cannot be used to impose § 1983 liability on a supervisor for the conduct of a subordinate violating a plaintiff's constitutional rights." *Lanigan v. Village of E. Hazel Crest*, 110 F.3d 467, 477 (7th Cir.1997) (citations omitted). Thus, in order "to be liable for the conduct of subordinates, a supervisor must be personally involved in that conduct." *Id.* (*citing Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988); *see also Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir.1983) (citation omitted)("[A]n individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation"). Accordingly, "supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable ... The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Jones*, 856 F.2d at 992-93.

Ross has established a failure to train claim against Cline in his individual capacity because he has alleged that Cline had personal knowledge of the unconstitutional use of excessive force by the defendant police officers on prisoner detainees at the CPD's 18th District since there were prior complaints against both the 18th District as well as Cline. Accordingly, Ross has alleged that Cline was personally involved in the constitutional deprivations because he knew about the use of excessive force on the part of the police officers and acted with deliberately indifference because he permitted and tolerated the unconstitutional conduct.

The Court finds that, when viewing Ross' allegations as being true and drawing all reasonable inferences in the light most favorable to him, he has pled a failure to train claim against Cline in both his official and individual capacities.

CONCLUSION

In view of the foregoing, Cline's motion to dismiss is denied.

N.D.Ill.,2006.
Ross v. Daley
Not Reported in F.Supp.2d, 2006 WL 2460614 (N.D.Ill.)

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