

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WILLIAM G. CLARK, )  
 )  
 Defendant. )  
 )

CASE NO. ST-09-CR-F020

JURY TRIAL DEMANDED

2010 FEB 26 PM 4:26  
CLERK OF THE COURT

**MOTION AND BRIEF TO DISMISS INFORMATION  
WITH PREJUDICE BASED ON SUPREMACY CLAUSE IMMUNITY**

Pursuant to Superior Court Rule 7 and Federal Rule of Criminal Procedure 12(b), Defendant William G. Clark, by and through his counsel, respectfully moves this Court to dismiss, with prejudice, the Information filed against him because he is immune from prosecution pursuant to the Supremacy Clause of the United States Constitution. U.S. Const. art VI, cl. 2. In support of this motion, Defendant asserts that the conduct at issue was authorized by federal law and was reasonably necessary and proper. Due process and case law mandate that his federal immunity defense be adjudicated promptly, *i.e.*, at the earliest pre-trial stage. In further support of this motion, Defendant states the following:

**I. INTRODUCTION**

Federal officers facing state prosecution may raise, by motion to dismiss, the defense of Supremacy Clause immunity. It is well-established that based on the Supremacy Clause of the United States Constitution and *In re Neagle* and its progeny, federal officers are shielded from state or territorial prosecution for acts they reasonably

believe to be within the authority granted to them by federal law. The Supremacy Clause additionally protects federal officers' due process right to fair warning before being subject to criminal sanction for conduct they reasonably believe to be within their authority.

In this case, the Virgin Islands Attorney General charged William G. Clark, a special agent with the United States Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), with territorial criminal offenses. The charged offenses arise from an incident on September 7, 2008, when Special Agent Clark, in accordance with federal law enforcement authority, intervened in a violent domestic dispute in order to protect a woman who was being publicly threatened and assaulted by her intoxicated male partner. In response to a perceived threat of great bodily harm to himself and the woman, Special Agent Clark discharged his ATF-issued weapon in order to protect himself and the woman, resulting in the death of the attacker. Special Agent Clark's actions were authorized by federal law and his actions were necessary and proper under the circumstances. Consequently, pursuant to the Supremacy Clause of the United States Constitution, Special Agent Clark is immune from territorial prosecution and the Information must be dismissed. *See* U.S. Const. art VI, cl. 2.

## **II. STATEMENT OF FACTS**

Since 2001, William G. Clark has been a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), a law enforcement agency within the United States Department of Justice. In January 2008, Special Agent Clark was

assigned to St. Thomas, United States Virgin Islands.<sup>1</sup> (Ex. A. at ¶ 1.)

In April 2008, Special Agent Clark moved into the Mahogany Run condominium complex on St. Thomas. The condominium building is a three level, three unit building. Special Agent Clark's unit was on the lower level. The level immediately above Special Agent Clark was occupied by Marguerite Duncan and Marcus Sukow. Ms. Duncan and Mr. Sukow knew that Special Agent Clark was a law enforcement officer with the ATF. (Ex. A. at ¶¶ 2-3, 7.)

Mr. Sukow and Ms. Duncan had a history of loud, heated disputes and public drunkenness.<sup>2</sup> (Ex. A. at ¶¶ 4-5; Ex. B. at ¶ 2-3.) On at least two occasions, Ms. Duncan pleaded for Special Agent Clark to come to her aid during the course of altercations between herself and Mr. Sukow. (Ex. A. at ¶ 5.) On another occasion, in July 2008, Special Agent Clark arrived home to find two marked Virgin Islands Police Department ("VIPD") vehicles departing from the front of his condominium building. Mr. Sukow, who was bleeding from a facial wound, was trying to drag Ms. Duncan out from the driver's side of his vehicle by forcibly pulling on her left arm while Ms. Duncan was attempting to free herself. Special Agent Clark asked if everything was all right. Mr. Sukow responded that Ms. Duncan was drunk, and Ms. Duncan's son had smashed him in the face with a rock. The parties both appeared to be under the influence of alcohol and/or drugs. Special Agent Clark offered Ms. Duncan assistance, but she declined. (*Id.*)

On the morning of September 7, 2008, Special Agent Clark left his apartment and

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<sup>1</sup> See Declaration of William Clark, attached hereto as Exhibit A.

<sup>2</sup> See Declaration of witness Martha Hale, attached hereto as Exhibit B.

saw Ms. Duncan standing near the carport. Ms. Duncan was crying and trembling. When she saw Special Agent Clark, Ms. Duncan began pleading for his help. (Ex. A. at ¶ 6.) Mr. Sukow, a large man, was standing outside completely naked, and clearly under the influence of drugs and/or alcohol.<sup>3</sup> He was pounding on Ms. Duncan's vehicle with his fists, and had broken off the side view mirror to Ms. Duncan's car. He was yelling at Ms. Duncan, "Bitch, get back in the house." When Mr. Sukow saw Special Agent Clark, Mr. Sukow stopped striking Ms. Duncan's vehicle and went inside their condominium. (*Id.*)

Special Agent Clark then walked towards his own vehicle, which was parked across the narrow street from their condominium unit. Special Agent Clark observed Mr. Sukow standing behind his closed screen door, still naked, staring at Special Agent Clark. Mr. Sukow yelled at Special Agent Clark, "You want a piece of me, bitch?" (Ex. A. at ¶ 7.) Mr. Sukow then disappeared from view, and emerged from the house wearing only a pair of shorts. Mr. Sukow approached Special Agent Clark, who asked if everything was alright. Mr. Sukow responded by threatening, "I have a gun in the house and I'm going to get it and blow this bitch's head off." (*Id.*) Mr. Sukow then turned his attention back to Ms. Duncan, and resumed yelling obscenities at her and screaming at her to get back in the house. Special Agent Clark suggested to Ms. Duncan that she should get in her car and drive away. Mr. Sukow said that Ms. Duncan was not going anywhere, and threatened Special Agent Clark by saying, "Will, you're a big boy, but I'm going to give you a country ass kicking." (*Id.*)

Mr. Sukow's violent actions drew the attention of neighbors who witnessed Mr.

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<sup>3</sup> According to the Medical Examiner's report, Mr. Sukow was 5'11" and 260 pounds.

Sukow's attack of Ms. Duncan and Agent Clark.<sup>4</sup> (Ex. B at ¶ 3; Ex. C at ¶¶ 3-4.) At one point during the incident, Mr. Sukow began picking up large landscaping rocks off of the condominium property and hurling them. (Ex. A at ¶ 8; Ex. C at ¶ 5.) As he did so, he continued shouting obscenities at Ms. Duncan and ordering her back into the house. When Mr. Sukow was momentarily distracted, Ms. Duncan ran into her vehicle and attempted to drive away. (Ex. A at ¶ 9.) Upon seeing this, Mr. Sukow removed a large, heavy Maglite flashlight from his vehicle and quickly positioned himself in front of Ms. Duncan's vehicle, where he stood blocking her only avenue of exit from the area. He began pounding on Ms. Duncan's hood, causing large dents in her vehicle. As he stood pounding on her car with the Maglite, he was yelling profanities at her, including, "Bitch, get back in the house." (Ex. A at ¶ 10; Ex B at ¶ 4; Ex. C at ¶ 4.) When Special Agent Clark saw that Ms. Duncan could not safely get away from the area, he remained on the scene. Based on Ms. Duncan's plea for help, the violent and out of control behavior of Mr. Sukow, and the overall totality of the circumstances, Special Agent Clark believed that Ms. Duncan was in grave danger and believed that as a federal law enforcement officer, he had an obligation to protect her. (Ex. A at ¶ 10, 16.)

A private security guard and a jogger arrived on the scene. Mr. Sukow momentarily diverted his attention from Ms. Duncan towards the jogger and security guard. He moved aggressively towards them, yelling at them and waving the Maglite around in a threatening manner. (Ex. A at ¶ 11; Ex. B at ¶ 5-6; Ex. C at ¶ 6-7.) In addition to other profanities and derogatory statements, Mr. Sukow yelled at the security

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<sup>4</sup> See Exhibit C, Declaration of witness Alexander J. Rankin.

guard and neighbor to "get the fuck out of here." They retreated away from Mr. Sukow towards the dead end of the road. (Ex. A at ¶ 11; Ex. B at ¶ 5-6; Ex. C at ¶ 6.) When Mr. Sukow was distracted by the private security guard and neighbor, Ms. Duncan ran to and got into the passenger side of Special Agent Clark's vehicle. Special Agent Clark was sitting on the driver's seat with the door open and his left foot out of the vehicle. (Ex. A at ¶ 12; Ex. B at ¶ 6; Ex. C at 7.) When Mr. Sukow saw that Ms. Duncan tried to flee to Special Agent Clark's vehicle, he rushed towards Special Agent Clark yelling at Ms. Duncan and waving the Maglight in a threatening manner. (Ex. A at ¶ 13; Ex. B at ¶ 7; Ex. C at ¶ 8.) As Mr. Sukow charged towards Special Agent Clark, he raised the Maglight, prepared to strike, and lunged at Special Agent Clark. (*Id.*) Special Agent Clark fired his weapon at Mr. Sukow. Mr. Sukow stood still for several seconds, he turned around and walked towards his residence before collapsing. (Ex. A at ¶ 13; Ex. C at ¶ 9.) Mr. Sukow died sometime later.

In the crucial seconds leading up to the shooting, Special Agent Clark saw that Mr. Sukow was intoxicated and appeared to be under the influence of drugs; he was belligerent, violent, and behaving unpredictably, erratically, and dangerously. Mr. Sukow's violence towards Ms. Duncan and Special Agent Clark continued to rapidly escalate despite his knowledge that Special Agent Clark was a law enforcement officer. Mr. Sukow verbally threatened to cause serious bodily harm to Ms. Duncan and Special Agent Clark; and Mr. Sukow obtained a deadly weapon and brandished it against Ms. Duncan and two other persons, and attempted to strike Special Agent Clark. When Mr. Sukow charged at Special Agent Clark with the Maglite, Special Agent Clark believed that Mr. Sukow was using the Maglite as a deadly weapon. Fearing significant imminent

bodily harm to himself and Ms. Duncan, Special Agent Clark fired his weapon, consistent with his ATF training, in order to stop the threat. *See* Ex. A. Special Agent Clark had no motivation other than to do his job under the circumstances as they appeared to him, and he had an honest and reasonable belief that what he did was necessary. *Id.*

Following the incident, the Department of Justice requested that an investigative team from the ATF Miami Field Office thoroughly investigate the occurrence of September 7, 2008.<sup>5</sup> (Ex. D at ¶ 5.) The ATF investigative team conducted its investigation and concluded that Special Agent Clark acted with prudence and restraint, and that he resorted to the use of deadly force only in response to an imminent and deadly threat to his safety and the safety of others. (*Id.*) The ATF investigative team also concluded that Special Agent Clark acted in full compliance with the established policies of the Department of Justice. (*Id.*) *See also* Ex. E, ATF Use of Force and Weapons Policy and ATF Directive at Chapter C, Section 31.

### **III. PROCEDURE FOR DETERMINING IMMUNITY**

Entitlement to immunity under the Supremacy Clause is properly raised in a motion to dismiss under Federal Rule of Criminal Procedure 12(b).<sup>6</sup> Upon being raised, the issue of Special Agent Clark's immunity must be adjudicated promptly. Precedent establishes that "when the Supremacy Clause is raised as a defense by a federal officer charged with a state crime, the court has a duty to make a prompt ruling on that issue."

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<sup>5</sup> *See* Exhibit D, Declaration of Eduardo M. Halley, Supervisory Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

<sup>6</sup> *See*, Advisory Committee Note to Rule 12(b); Fed. R. Civ. P. 12(d); *Long*, 837 F.2d 750; *Connecticut v. Marra*, 528 F. Supp. 381, 387 (D. Conn. 1981).

*Long*, 837 F.2d 750.<sup>7</sup> Additionally, claims of immunity fall within the collateral order doctrine and are therefore subject to interlocutory appeal prior to trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 527-30 (1985) (denials of a claim of qualified immunity are subject to the collateral order doctrine); *In re City of Philadelphia Lit.*, 49 F.3d 945, 956 (3<sup>rd</sup> Cir. 1995) (same). For this additional reason, Mr. Clark's immunity defense must be decided before trial.

Once a colorable assertion of immunity is made by the defendant, it is the state that bears the evidentiary burden. "[W]hen a threshold defense of federal immunity is raised to meet a state criminal prosecution . . . the state . . . must come forward with an evidentiary showing sufficient at least to create a *genuine* factual issue whether the federal officer was acting pursuant to the laws of the United States and was doing no more than was necessary and proper for him to do in the performance of his duties." *See Long*, 827 F.2d at 752 (emphasis in original). *See also Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10<sup>th</sup> Cir. 2006) ("[O]nce a defendant raises the defense of Supremacy Clause immunity the burden shifts to the state to supply -sufficient evidence to raise a '*genuine* factual issue' that is supported by more than mere allegations.")

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<sup>7</sup> *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings . . . . Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' . . . As a result, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" (citations omitted)). *See also, Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial") (emphasis in original); *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988) (the purpose of federal officer immunity is "not only to avoid the possibility of conviction of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure.").

#### IV. LEGAL STANDARD

The Supremacy Clause of the United States Constitution prohibits states from impeding or interfering with the actions of federal executive officials when they are acting under federal authority. See *Ohio v. Thomas*, 173 U.S. 276 (1899); *In re Neagle*, 135 U.S. 1 (1890); *Tennessee v. Davis*, 100 U.S. 257 (1879). As explained in *Tennessee v. Davis*:

[The federal government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess . . . the operations of the general government may at any time be arrested at the will of one of its members.

*Tennessee v. Davis*, 100 U.S. at 263.

In the landmark case, *In re Neagle*, 135 U.S. 1 (1890), the United States Supreme Court articulated standards for federal officer immunity from state criminal prosecution under the Supremacy Clause. In *Neagle*, the State of California prosecuted a Deputy United States Marshal for murder when the Marshal killed a man he suspected was attempting to draw a knife to attack Justice Stephen Field. Although it was later learned that the assailant did not have a knife, the Supreme Court affirmed the district court's grant of *habeas corpus*, and concluded that Mr. Neagle could not be held to answer to the state for an act done pursuant to the laws of the United States:

[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do so, he cannot be guilty of a crime under the laws of the State of

California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court.

*Id.* at 75.

Since *Neagle*, courts have continued to apply the Supreme Court's two-part standard that a federal officer is immune from prosecution for an alleged violation of a state's criminal code when: (1) the federal officer was performing an act which he was authorized to do by the law of the United States; and (2) in performing that act, the federal officer did what was necessary and proper for him to do. *See, Wyoming v. Livingston*, 443 F.3d 1211, 1221-22 (10<sup>th</sup> Cir. 2006); *New York v. Tanella*, 374 F.3d 141, 147 (2<sup>nd</sup> Cir. 2004); *Whitehead v. Senkowski*, 943 F.2d 230, 234 (2<sup>nd</sup> Cir. 1991); *Long*, 837 F.2d at 744l; *Clifton v. Cox*, 549 F.2d 722, 724 (9<sup>th</sup> Cir. 1977). If both conditions exist, then the federal officer is entitled to immunity under the Supremacy Clause and the state is barred from prosecuting the federal officer.

**A. An Officer Acts Within the Scope of His Duties if He Reasonably Believes he is Authorized to Act, Even if the Authority is Not Explicit or is Exceeded.**

Even in cases where federal officers have been found to violate internal agency regulations or have exceeded their express authority, or where the legality of the individual officer's mission is questionable, the courts have held that federal agents are immune from state prosecution so long as the officer reasonably believes he is authorized to act.

In *Clifton*, 549 F.2d 722 (9<sup>th</sup> Cir. 1977), the Ninth Circuit upheld a district court's

grant of immunity to a federal officer prosecuted by the State of California for second-degree murder and involuntary manslaughter. Clifton was a Special Agent of the Bureau of Narcotics and Dangerous Drugs within the United States Department of Justice, and part of a special task force executing a warrant on suspects believed to be armed and dangerous. After landing by helicopter at a suspected drug manufacturing location, Clifton's partner tripped and fell as they emerged from the helicopter. *Id.* at 724. Clifton, mistakenly thinking his partner had been shot, rushed the cabin believed to be the drug manufacturing facility and kicked in the door. Clifton made no effort or attempt to identify himself as a law enforcement agent. *Id.* Upon Clifton's entry, a man ran out of the cabin towards a nearby wooded area. Clifton yelled twice at the man to halt, then fired his gun at the fleeing man, hitting him in the back and resulting in his death. *Id.* The State of California charged Clifton with second degree murder and involuntary manslaughter. *Id.* The district court granted Clifton a writ of habeas corpus after finding that he shot the suspect because he honestly and reasonably believed that the suspect would pose a danger to the lives of pursuing officers if he succeeded in reaching the woods. *Id.* The Ninth Circuit affirmed.

In considering whether Clifton was acting within the scope of his authority as a federal agent, the Ninth Circuit held that an error of judgment by the officer in what he perceived to be his duty does not suffice to create criminal responsibility for his conduct. Indeed, the Ninth Circuit went even further and held that "even though his acts may have *exceeded* his express authority, this did not necessarily strip the petitioner of his lawful power to act under the scope of authority given to him under the laws of the United States." *Id.* at 728 (emphasis added). Thus, although the officer's actions were not

expressly required by law or a directive of his supervisor, and even though the agent may have even exceeded his express authority, the Ninth Circuit held that he was acting within the scope of his authority under the laws of the United States as long as the challenged act occurred in the scope of his regular duties and employment. *Id.* at 728 n.12.

There does not need to be an explicit grant of authority pursuant to federal law. In *Livingston*, for example, United States Fish and Wildlife Service (USFWS) agents were charged by the State of Wyoming with criminal trespassing and other crimes. The USFWS agents had been entering private property while engaged in a program to control the gray wolf population, which included tracking wolves, tranquilizing wolves, and tagging/collaring wolves in order to monitor them. *Livingston*, 443 F.3d at 1213-16. The USFWS agents moved to dismiss based upon Supremacy Clause grounds. In addressing whether the agents had federal authorization for their acts, the Tenth Circuit noted that the federal regulations at issue did not contain an explicit grant of authority for USFWS officials to trespass, and the regulations were silent on the issue of whether agents were required to seek the permission of landowners prior to operating on their land. *Id.* at 1227. The court noted that “Supremacy Clause immunity does not require that the federal law explicitly authorize a violation of state law. . . . The question is not whether federal law expressly authorizes violation of state law, but whether the federal official’s conduct was reasonably necessary for the performance of his duties.” *Id.* at 1227-28.

**B. “Necessary and Proper” Conduct Requires: (A) That the Officer Employ Means that He Honestly Consider Reasonable; and (B) That He Not Act out of Malice or Criminal Intent.**

In determining whether conduct is “necessary and proper,” it is essential to

determine “whether the official employed means which he cannot honestly consider reasonable in discharging his duties or otherwise acts out of malice or with some criminal intent.” *Clifton*, 549 F.2d at 728. “Proper application of this standard does not require a petitioner to show that his action was in fact necessary or in retrospect justifiable, only that he reasonably thought it to be.” *Id.* “If . . . petitioner shows . . . that he had an honest and reasonable belief that what he did was necessary in the performance of his duty . . . then he is entitled to the relief he seeks.” *In re McShane*, 235 F. Supp. 262, 274 (N.D. Miss. 1964).

In *Long*, 837 F.2d 727 (6<sup>th</sup> Cir. 1988), the Sixth Circuit affirmed a district court’s dismissal of a burglary indictment against an FBI agent who had violated internal FBI regulations regarding the documentation of contacts with informants, but had not participated in criminal activity. The Sixth Circuit held that the federal agent’s motion to dismiss the state charges was properly granted when it was undisputed that the agent had no motive other than to discharge his duty under the circumstances as it appeared to him and that he had an honest and reasonable belief that what he did was necessary to the performance of his duty. *See id.* at 750. Likewise, in *Baucom v. Martin*, 677 F.2d 1346, 1350 (11<sup>th</sup> Cir. 1982), a federal agent who used undercover operations in connection with the investigation of possible federal crimes was held immune from state prosecution for attempted bribery pursuant to the Supremacy Clause because he did not act because of “any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it.” In fact, in *Baucom*, the federal agent was entitled to Supremacy Clause immunity even though the agent was involved in a federal law enforcement scheme that included the planned, deliberate, and intentional violation of state law. *Id.* at

**C. The Supremacy Clause Must be Liberally Applied, Even Where an Officer Exercises Poor Judgment or Exceeds His Authority.**

Federal officers are entitled to immunity even when the legality of their mission is questionable. For instance, in *In re Lewis*, 83 F. 159 (D. Wash. 1897) the court found that there could be no state prosecution of a federal marshal who wrongfully seized private papers while executing a search warrant. “[W]here an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority . . . where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government.” *Id.* at 160. In *In re Fair*, 100 F. 149 (D. Neb. 1900), it was held that a state may not prosecute an infantry soldier who, following orders, shot and killed an escaping prisoner when the order to halt was not obeyed, even though the order to shoot was of questionable legality according to Infantry Regulations. *See also Long*, 837 F.2d at 745 (“a mistake in judgment or a ‘botched operation,’ so to speak, will not of itself subject a federal agent to state court prosecution.”).

The Supremacy Clause has even been extended to those working with federal officers. In the case of *Connecticut v. Marra*, 528 F.Supp. 381 (D. Conn. 1981), an FBI informant successfully had state bribery charges dismissed on Supremacy Clause grounds. The informant, who was working with FBI agents, honestly believed his actions were necessary to his assigned mission, even though he exceeded his specific authorization out of nervousness or bad judgment, but without criminal intent. “[E]ven though defendant may have technically exceeded his express authority, he continued to

act under the authority of the United States government.” *Id.* at 386.

## V. LEGAL ARGUMENT

Federal officers acting within the scope of their employment are immune from state prosecution for actions taken that the officer reasonably believes is necessary and proper to the performance of their federal functions. Special Agent Clark acted within the scope of his authority as a federal officer on September 7, 2008 when, in the course of intervening in a violent domestic dispute, he discharged his weapon in order to stop the imminent danger threat posed by Mr. Sukow.

### A. **Special Agent Clark Was Acting Within the Scope of His Federal Authority**

ATF special agents have statutory authority to carry weapons, and ATF policy provides that special agents are “authorized to be armed *at all times*.” 18 U.S.C. § 3051; *See* Ex. D at ¶ 3 (*citing* Ex. E, Chapter C, Section 31 of the ATF Use of Force and Weapons Policy) (emphasis added.) ATF special agents are empowered to make arrests for any felony under the laws of the United States, and ATF directs its special agents that they have authority to intervene when they witness a violation of state law. 18 U.S.C. § 3051; Ex. D at ¶ 4 (*citing* Chapter E, Section 55.a. of ATF Directive Number 3210.7C) (“[S]pecial agents may intervene in exigent State offenses under the authority vested in them by State law as either statutorily recognized peace officers or as private citizens.”)

Mr. Sukow committed multiple federal felonies in Special Agent Clark’s presence, including assaulting/resisting/interfering with a federal officer (18 U.S.C. § 111); attempted killing of a federal officer (18 U.S.C. § 1114); willful injury or

degradation against United States property (18 U.S.C. § 1361). Mr. Sukow also committed multiple state law felonies in Special Agent Clark's presence, including but not limited to assault and battery (14 V.I.C. § 297); reckless endangerment (14 V.I.C. § 625); intimidation (14 V.I.C. § 707(a)); and false imprisonment (14 V.I.C. § 1051). At the request of the United States Department of Justice, an investigative team from the ATF Miami Field Office investigated this incident. The ATF investigative team concluded that Special Agent Clark acted with prudence and restraint, and only resorted to the use of deadly force in response to an imminent and deadly threat to his safety and the safety of others, and acted in compliance with the established policies of the Department of Justice. (Ex. D at ¶ 5.)

Courts have found that federal law enforcement officers who encounter apparent violations of state law and intervene pursuant to agency policies are acting within the scope of their official duties as federal law enforcement officers, including when those officers are off-duty. For example, in *United States v. Hoy*, 137 F.3d 726 (2<sup>nd</sup> Cir. 1998), a federal marshal on his way to a grocery store encountered a woman lying on the sidewalk, crying and screaming, while a drunk man stood over the woman holding her purse. Pursuant to an unwritten policy of the United States Marshals Service authorizing its deputy marshals to intervene when they observe the commission of state law crimes involving a threat of physical harm to another citizen, the federal marshal intervened. The man struck the marshal and was charged with assaulting a federal officer. The Second Circuit held that the marshal was engaged in the performance of his official duties when he intervened in this matter. *Id.* at 731.

In *United States v. Reid*, 517 F.2d 953 (2<sup>nd</sup> Cir. 1975), an off-duty agent with the

United States Drug Enforcement Agency ("DEA") was in the process of having his hair cut when he heard a commotion at the store next door. He investigated and discovered a robbery in progress. While attempting to protect the store owner and apprehend the robbers, he was shot by one of the robbers. The Second circuit held that the DEA special agent was acting within the scope of his official duties. *Id.* at 964. The Court specifically noted that pursuant to DEA policy, agents who witness a state law felony or violent misdemeanor are expected to take reasonable action to prevent the crime and/or apprehend the violator. *Id.* at 960.

There can be no serious issue that Special Agent Clark was performing an act authorized by federal law and departmental policy when he intervened in the violent assault of Ms. Duncan by Mr. Sukow, both of whom knew that Special Agent Clark was a federal law enforcement officer. During the course of his daily activities at his own apartment complex, Special Agent Clark was confronted with a situation in which it appears that an innocent person was facing grave and imminent danger from a man who is acting irrationally and violently. (Ex. A.) Special Agent Clark knew that his duties as an agent require him to intervene if he observes law violations in progress or if he observes a citizen in danger. (Ex. A at ¶ 16.) Special Agent Clark approached the situation with caution by trying to assist the victim and calm the attacker. Ultimately, however, the attacker wielded a weapon which he used to damage property and then turned that weapon on Special Agent Clark and the victim by lunging at them with the weapon. At that point, Special Agent Clark had no choice but to act quickly and swiftly to subdue the man who threatened both him and the victim with death or serious bodily harm. Indeed, for Special Agent Clark not to have acted decisively in this situation would

have breached his duties as a federal law enforcement officer. (Ex. A.) Special Agent Clark acted for no reason other than to protect a member of the public, and himself, from a violent crime. He was, therefore, acting pursuant to his authority as a federal law enforcement officer.

**B. Special Agent Clark Could Reasonably Conclude that His Actions Were Necessary and Proper**

The circumstances in this case compel the conclusion that Agent Clark honestly and reasonably believed that his actions were necessary and proper. *See*, Ex. A, Special Agent Clark's Declaration. The law entitles him to immunity.

A federal officer need not show that his actions were *in fact* necessary or in retrospect justifiable; only that he reasonably thought them to be. *Clifton*, 549 F.2d at 728. Even a mistaken belief, an error in judgment, or a violation of agency regulations would not be sufficient to deny a federal officer immunity from state prosecution for conduct committed during the performance of his federal duties. *Id.* at 727; *In re McShane*, 235 F. Supp. at 274 ("If . . . the petitioner shows without dispute that he had no motive other than to discharge his duty under the circumstances as they appeared to him and that he had an honest and reasonable belief that what he did was necessary in the performance of his duty to see to the execution of [the law] then he is entitled to the relief he seeks. This is so even though his belief was mistaken or his judgment poor."). As long as the federal officer did not act out of "any personal interest, malice, actual criminal intent, or for any other reason than to do his duty as he saw it," *Baucom*, 677 F.2d at 1350, the officer is entitled to immunity from state prosecution under the *Neagle* standard.

As the Supreme Court explained in *Graham v. Connor*, 490 U.S. 386 (1989), in excessive force cases, the circumstances must be “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396. Moreover, “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Id.* at 396-97. Although *Graham* is a qualified immunity case, the same considerations have been held to apply in Supremacy Clause immunity cases. In Supremacy Clause cases, the standard by which the officer’s action is to be measured “must take into account the circumstances existing at the time . . . as they appeared to him, and the reasonableness and integrity of his conclusion that such action was necessary.” *In re McShane*, 235 F. Supp. at 273 (emphasis added).

As set forth in Special Agent Clark’s affidavit, Ms. Duncan actively sought the assistance of Agent Clark, whom she and Mr. Sukow knew to be a law enforcement officer, when she found herself to be in physical danger at the hands of Mr. Sukow. The violent and threatening behavior by Mr. Sukow continued to escalate, eventually leading him to attack Agent Clark and Ms. Duncan with a deadly weapon. Agent Clark was confronted with exigent circumstances that required him to make a split-second decision in order to protect himself and Ms. Duncan from imminent bodily harm. (Ex. A.) However one views the situation in hindsight, the fact is that Mr. Sukow demonstrated to Special Agent Clark at the time - through his nakedness, intoxication, and his violence - that he was irrational and volatile and that he perceived no constraints to his aggressive behavior. When he wielded a heavy flashlight and made clear he was prepared to use it

as a weapon (as evidenced by bashing in the car), Agent Clark could reasonably perceive that he was being confronted with deadly force and that he was justified in using deadly force in return to protect himself and Ms. Duncan. He used deadly force only as a last resort, and his actions were justified. (Ex. A.) Agent Clark's conduct in this case readily meets the standard of reasonableness given the circumstances, as was specifically found by the United States Department of Justice. The investigative team concluded that Special Agent Clark acted with prudence and restraint, only resorted to the use of deadly force in response to an imminent and deadly threat to his safety and the safety of others, and acted in compliance with the established policies of the Department of Justice. (Ex. D at ¶ 5.)

The prosecutor is not permitted to second-guess a federal officer's exercise of judgment. In *Neagle* and *Clifton*, the federal officers' intentional use of deadly force was based on perceptions that turned out to be mistaken. Those mistakes did not prevent the Supreme Court and Ninth Circuit, respectively, from concluding that *Neagle* and *Clifton*'s conduct was necessary and proper to the performance of their duties as federal offices. For the purposes of this motion, whether Agent Clark's perception that Mr. Sukow was intending to strike him in the head with a large, baton-type Maglite flashlight was in fact accurate is irrelevant, because that perception was reasonable. As *Neagle* and *Clifton* make clear, what matters is the reasonableness of Agent Clark's perception under the circumstances as they appeared to him at the time.

The use of deadly force is constitutionally reasonable and legally justifiable where the officer has probable cause to believe that the suspect poses an imminent threat of serious physical harm, either to the officer or to others. *See Tennessee v. Garner*, 471

U.S. 1, 11 (1985). Immunity provides even broader protection to officers, so that under certain circumstances a federal officer can have immunity for conduct that is deemed to constitute unconstitutional excessive force. "Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force,' and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (citations omitted). The qualified immunity inquiry "has a further dimension" from the excessive force inquiry because the immunity inquiry acknowledges "that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* at 205. The doctrine of qualified immunity shields government officials from liability and the burdens of civil litigation unless the official's conduct is so patently violative of the Constitution that no reasonable official would think that his conduct was constitutional in light of preexisting law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Supremacy Clause immunity is at least as protective because it protects federal agents from the severity of being criminally convicted and having to face state criminal sanctions. Agent Clark's conduct was reasonable, and falls well within the *Neagle* standard for Supremacy Clause immunity. Under all the circumstances, the conclusion that Agent Clark had an honest and reasonable belief that his actions were necessary and proper is inescapable. The law entitles him to immunity.

**C. Agent Clark has a Due Process Right to Fair Warning Prior to Being Subject to State Criminal Law.**

The Due Process Clause of the United States Constitution provides that all criminal statutes provide fair warning of what the law intends. *See McBoyle v. United*

*States*, 283 U.S. 25 (1931). Much like the manner in which the Ex Post Facto Clause prohibits the legislature from applying a new criminal statute to past acts, courts may not apply unanticipated, unforeseeably expansive interpretations of existing statutes in order to reach past conduct that reasonably appeared lawful at the time. Pursuant to the Due Process Clause of the Fifth Amendment, officers must have fair warning before being subject to criminal sanction for conduct they reasonably believe to be within their authority. U.S. Const. amend. V. "It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Rose v. Locke*, 423 U.S. 48, 49 (1975) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). See *United States v. Lanier*, 520 U.S. 259, 266 (1997). Here, Special Agent Clark had no fair warning that he could be subject to criminal prosecution for his actions which he reasonably believed to be authorized by law, and application of the state criminal laws to a federal officer under these circumstances is prohibited by the Due Process Clause. Here, Special Agent Clark reasonably believed that his conduct was lawful, and the investigation requested by the Department of Justice resulted in the conclusion that Special Agent Clark acted lawfully in the discharge of his duties. Special Agent Clark had no notice that the lawful execution of his duties as a federal law enforcement officer might subject him to prosecution under the criminal laws of the Virgin Islands. Supremacy Clause immunity protects the due process rights of federal officers by ensuring that the fair warning requirement of the Due Process Clause is met.

VI. CONCLUSION

A local criminal prosecution of a federal officer has a profound impact on the ability of the federal government to perform its functions and to protect its citizens. The Supremacy Clause does not permit such a crippling limitation on law enforcement. This case presents precisely the kind of circumstances for which the Supremacy Clause was intended: to provide immunity to federal officers, like Special Agent Clark, acting within the scope of his duties, with no motive other than the performance of those duties.

WHEREFORE, Defendant respectfully requests that this Honorable Court enter an order scheduling an evidentiary hearing on this matter, granting this Motion to Dismiss and awarding any other relief deemed appropriate.

Respectfully submitted,

Date: February 8, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 8<sup>TH</sup> day of February, 2010, I caused to be served a true and correct copy of the foregoing Motion to Dismiss, via first class mail, postage prepaid, upon the following counsel:

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