03-1589

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, **Appellant,** **-against-** **JUDE TANELLA,** **Defendant-Appellee.**	**Docket Number** **03-1589**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

AND SPECIAL APPENDIX

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January 16, 2004

TABLE OF AUTHORITIES

Pages

Cases

TABLE OF AUTHORITIES (cont'd)

Pages

Constitutions, Statutes, and Rules

TABLE OF AUTHORITIES (cont'd)

Pages

Web Sites

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APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

The basis for jurisdiction in the district court was 28 U.S.C. § 1442(a)(1), which authorizes that court to remove to federal court civil actions and criminal prosecutions commenced in state court against federal officers for acts committed under the color of office.

The basis for jurisdiction in this Court is 28 U.S.C. § 1291 and New York Criminal Procedure Law § 450.20(1). Where a case has been removed from state court to federal court, 28 U.S.C. § 1291 permits a state to appeal if it is authorized to do so by state law. Arizona v. Manypenny, 451 U.S. 232, 249-50 (1981). New York Criminal Procedure Law § 450.20(1) authorizes the People of the State of the New York to appeal from an order dismissing an indictment. People v. Coppa, 45 N.Y.2d 244, 248, 408 N.Y.S.2d 365, 367 (1978).

The judgment of the district court, dismissing Kings County Indictment Number 3070/2002, was filed September 9, 2003. The People filed a notice of appeal from the judgment on September 22, 2003.

STATEMENT OF THE ISSUES

1. Whether it was error for the district court to dismiss a state indictment, which charged a federal officer with the crime of Manslaughter in the First Degree, where the evidence, viewed in the light most favorable to the People, showed that the federal officer shot an unarmed suspect in the back as the suspect was attempting to flee and that, at the time of the shooting, the suspect did not pose an imminent threat of death or serious physical injury to anyone.

2. Whether it was error for the district court to credit the federal officer's claim that he subjectively believed that it was necessary and proper to shoot the suspect and for the district court to conclude that the officer's belief was objectively reasonable, even though the federal officer's account of the shooting was contradicted by the testimony of several eyewitnesses, and even though a rational trier of fact, viewing the evidence in the light most favorable to the People, could find that the federal officer did not actually believe that the shooting was necessary and proper to the performance of his federal duty or that, even if the federal officer had that subjective belief, the belief was not objectively reasonable.

STATEMENT OF THE CASE

The People of the State of New York appeal from a judgment of the United States District Court for the Eastern District of New York (Garaufis, J.), filed September 9, 2003, dismissing Kings County Indictment Number 3070/2002, on the ground that the state prosecution of defendant Jude Tanella, a special agent of the United States Drug Enforcement Administration, was barred by the Supremacy Clause of the United States Constitution. See New York v. Tanella, 281 F. Supp. 2d 606 (E.D.N.Y. 2003).

Kings County Indictment Number 3070/2002 was filed in the New York State Supreme Court, Kings County, on October 29, 2002, and charged defendant with one count of Manslaughter in the First Degree (N.Y. Penal Law § 125.20[1]). By decision and order dated January 13, 2003, the United States District Court (Garaufis, J.) granted defendant's petition to remove this criminal prosecution from state court to federal court. New York v. Tanella, 239 F. Supp. 2d 291 (E.D.N.Y. 2003).

Defendant is at liberty.

STATEMENT OF FACTS

Introduction

On May 1, 2002, defendant Jude Tanella was a special agent of the United States Drug Enforcement Administration. He was assigned to a Drug Task Force operation which was supposed to effect the arrest of Egbert Dewgard, a suspected drug seller. During the course of the operation, in the vicinity of 1419 New York Avenue, in Brooklyn, New York, defendant shot the unarmed Dewgard once in the back and killed him.

A New York State grand jury, sitting in Brooklyn, New York, investigated the death of Dewgard. After hearing from numerous witnesses, including defendant, the grand jury found that defendant's use of force was unjustified and charged defendant, by Kings County Indictment Number 3070/2002, with one count of Manslaughter in the First Degree (N.Y. Penal Law § 125.20[1]).

By decision and order dated January 13, 2003, the United States District Court for the Eastern District of New York granted defendant's motion to remove this prosecution from state court to federal court. By judgment filed September 9, 2003, the district court granted defendant's motion to dismiss the state indictment. The district court held that the Supremacy Clause of the United States Constitution barred the People from prosecuting defendant.

The People appeal from the judgment dismissing the indictment.

The State Grand Jury Proceeding

The Kings County District Attorney's Office commenced an investigation into the death of Egbert Dewgard before a New York State grand jury sitting in Brooklyn, New York. The grand jury heard evidence from August to October of 2002 (Affidavit in Opposition to Motion to Dismiss, dated Apr. 10, 2003 [hereinafter "Affid."] at para. 4).

The grand jury heard conflicting evidence as to what occurred immediately prior to the shooting. Some civilian eyewitnesses testified that the unarmed Dewgard had turned and started to move away from defendant when defendant shot him in the back. Defendant alleged that Dewgard had been reaching for defendant's gun when defendant shot him. None of defendant's law enforcement colleagues observed the shooting.

During the litigation in the district court of defendant's motion to dismiss the indictment on Supremacy Clause grounds, defendant and the People submitted to the district court portions of the grand jury minutes. This evidence is summarized below.

The Investigation Prior to May 1, 2002

Defendant Jude Tanella was an agent of the United States Drug Enforcement Administration (hereinafter "DEA") (Johnson: 265; Herbel: 310; W. Murray: 366).[1] At the time of the shooting, he was assigned to Group D-24 of the New York Field Division of the Drug Enforcement Task Force (Johnson: 265; Herbel: 310; W. Murray: 366).

Group D-24 consisted of approximately sixteen to eighteen law enforcement officers from the DEA and the New York City Police Department (Reyes: 199-201). The supervising agent in charge of Group D-24 was Special Agent RAFAEL REYES of the DEA (Reyes: 197, 199, 209). Also assigned to Group D-24, in addition to defendant and Special Agent Reyes, were Special Agents LEONARD JOHNSON, SCOTT HERBEL, and ROBERT ZACHARIASIEWICZ of the DEA, and Detectives PEDRO COLON, EDWARD CORCORAN, and KENNETH ROBBINS, and Sergeant WILLIAM MURRAY of the New York City Police Department (Colon: 243; Corcoran: 395; Johnson: 265, 271-72; W. Murray: 364; Zachariasiewicz: 297; Robbins: 287-88; Herbel: 309-10).

In April of 2002, as a result of a DEA investigation in another state, an individual was arrested in New York (Colon:

[1] Unless otherwise indicated, numbers in parentheses refer to pages of the appendix. Numbers preceded by "SPA" refer to pages of the special appendix, which is attached to this brief. Names preceding page numbers refer to the witnesses whose testimony is being cited.

245-47; Reyes: 209-10).[2] This individual became a confidential informant (Colon: 246-47; Johnson: 266-67). The confidential informant identified Egbert Dewgard as a person who had supplied him in the past with approximately twenty-five to thirty kilograms of cocaine (Colon: 246-47).

Special Agent Reyes assigned Special Agent Johnson and Detective Colon to be the case agents jointly conducting the investigation into Dewgard (Colon: 244-45; Johnson: 266; Reyes: 210-11). The confidential informant provided Agent Johnson and Detective Colon with Dewgard's home address, Dewgard's place of business, Dewgard's cell phone numbers, Dewgard's home telephone number, a description of Dewgard's car, and the addresses of Dewgard's relatives (Colon: 247). Detective Colon confirmed that Dewgard lived at 1740 East 53rd Street in Brooklyn; that Dewgard owned a printing shop, B & A Printing Company, at 653 Flatbush Avenue in Brooklyn; and that the vehicle the informant had described was registered to the address of Dewgard's parents on East 58th Street in Brooklyn (Colon: 248; Johnson: 271).

On April 27, 2002, the confidential informant contacted Detective Colon and said that Dewgard had just called him and had asked if the informant was interested in purchasing "white t-shirts" (Colon: 248-49). White t-shirts referred to kilograms

[2] Detective Colon testified that this other state was Ohio (Colon: 245). Agent Reyes testified that this other state was West Virginia (Reyes: 209-10).

of cocaine (Colon: 249). Dewgard had also asked the informant if he had any of those "things," meaning guns (Colon: 249). The informant told Dewgard that he was interested in purchasing kilograms of cocaine, but that he had no weapons, and that he, the informant, would call back Dewgard later in the week (Colon: 249).

On April 30, 2002, the confidential informant was brought to the New York Field Division Office of the DEA (Colon: 249, 251). The informant placed two telephone calls to Dewgard, which Detective Colon monitored (Colon: 249-51). During the course of these telephone conversations, the informant agreed to purchase three kilograms of cocaine from Dewgard for a certain price (Colon: 250-51; Johnson: 267). The informant attempted to negotiate the price down, but Dewgard informed him that he could not alter the price because the cocaine was not his (Colon: 250-51). The informant and Dewgard agreed that the informant would call Dewgard the following day to arrange the time and place of the transaction (Colon: 251).

After the telephone conversations between the informant and Dewgard, Agent Johnson and Detective Colon prepared a "tact plan," which described how they intended to arrest Dewgard (Reyes: 212-13; Colon: 251-52; Johnson: 267-68, 272). Defendant and ten other members of Group D-24 were chosen to participate in this operation (Reyes: 213; Johnson: 271-72). According to

the plan, on the morning of May 1, 2002, the field team would establish surveillance on Dewgard's home and at Dewgard's printing shop (Reyes: 212-13; Colon: 252-53). The confidential informant would call Dewgard to set up a time and place for the exchange (Colon: 253; Johnson: 267; Reyes: 213-14). Agent Johnson and Detective Colon instructed the informant to try to set up the exchange in a borough other than Brooklyn, because they believed that it would be safer to arrest Dewgard outside his own neighborhood (Colon: 253; Reyes: 214). The field team would follow Dewgard on his way to the exchange (Reyes: 215). Once the field team determined that Dewgard was in possession of the three kilograms of cocaine, the field team would stop Dewgard's car and arrest him (Reyes: 215; Johnson: 268). Agent Johnson and Detective Colon hoped to arrest Dewgard before he reached the agreed-upon location for the exchange (Reyes: 215; Johnson: 268).

On the night of April 30, 2002, the agents and detectives who were to be part of the field team were advised of their assignments for the following day (Colon: 252; Herbel: 314-15, 320, 347-48, 361-62; Reyes: 216; Johnson: 272-73; W. Murray: 365-68; Corcoran: 396).

The Events of May 1, 2002

The Surveillance and the Car Stop

On the morning of May 1, 2002, defendant and other members of the field team began their surveillance of Dewgard's home at 1740 East 53rd Street and Dewgard's printing shop at 653 Flatbush Avenue (Colon: 253; Corcoran: 398; Herbel: 314-16, 319; Reyes: 215-16; Johnson: 274; Robbins: 288; W. Murray: 369-70). The agents and detectives were dressed in plain clothes and they were driving unmarked government cars (Reyes: 201, 204, 206-07, 216-17, 224, 229; Corcoran: 396-98; Herbel: 318-19; Johnson: 274; W. Murray: 373-74). The unmarked government cars were equipped with DEA radios, so that the agents and detectives could remain in constant radio contact (Reyes: 207-08; Corcoran: 397-98; Herbel: 321; Johnson: 275; Robbins: 288; W. Murray: 371). The agents and detectives were armed with .40 caliber semi-automatic pistols (Reyes: 201-02).

At about 7:15 or 7:30 a.m., a member of the field team saw Dewgard leave his home, enter a white car, and drive away (Reyes: 219). Dewgard drove to his parents' home, picked up his son, and drove his son to school (EGBERT DEWGARD, SR.: 175-76).[3]

The field team next saw Dewgard at his printing shop at 653 Flatbush Avenue (Reyes: 220). Defendant and the other members

[3] Egbert Dewgard, Sr., was the father of the deceased (Dewgard: 175).

of the field team who were conducting surveillance at Dewgard's home at East 53rd Street were ordered to join the surveillance at Dewgard's printing shop (Corcoran: 399; W. Murray: 371).

In Queens, New York, Detective Colon and Agent Zachariasiewicz met with the confidential informant (Colon: 253; Zachariasiewicz: 297-98; Reyes: 218). They listened in as the confidential informant made three telephone calls to Dewgard at the printing shop to arrange the time and place for the drug transaction (Colon: 253-55; Zachariasiewicz: 298-99; Reyes: 218). During these telephone calls, the informant attempted to persuade Dewgard to make the transaction in Queens County, but Dewgard refused (Colon: 254-55; Reyes: 219). The informant eventually agreed to meet Dewgard at Dewgard's home (Colon: 255-56; Zachariasiewicz: 299). Dewgard mentioned that he would need a little time because he had to pick up the drugs before the exchange (Colon: 256; Zachariasiewicz: 299; Reyes: 219). The time of the exchange was set for 11:00 or 11:30 a.m. (Colon: 256).

Detective Colon notified the field team of the time and place of the exchange (Colon: 256).

At around 10:30 a.m., members of the field team saw Dewgard leave his printing shop, enter a green Nissan Maxima, and drive away (Corcoran: 399-400; Colon: 257; Herbel: 321; Johnson: 275-

76; Reyes: 220; W. Murray: 372). Agent Reyes ordered the field team to follow Dewgard's car (Herbel: 321; Reyes: 220).

Dewgard drove to an apartment building located at 787 East 46th Street, at the corner of East 46th Street and Avenue D, and parked (Corcoran: 400-01; Colon: 257; Johnson: 276; W. Murray: 374). A man left the apartment building and approached Dewgard's car, carrying a black plastic bag (Corcoran: 402; Colon: 257; Reyes: 221). The man delivered the bag to Dewgard (Corcoran: 402; Colon: 257; Reyes: 221). There was a brief conversation between the two men (Corcoran: 402). The man walked away and Dewgard drove off (Corcoran: 402). Agent Reyes instructed the field team to continue to follow Dewgard (Reyes: 221).

Dewgard turned onto Avenue D and drove east (Corcoran: 402-03). Dewgard made a right turn onto Utica Avenue and stopped at a red light on Utica Avenue at the corner of Farragut Road (Corcoran: 403-04; Herbel: 322-24; Reyes: 222; W. Murray: 375-76).

Special Agents Peterson and Herbel were together in a car directly behind Dewgard's car (Corcoran: 403; Herbel: 315-16, 322-23, 325). Defendant and Detective Corcoran were in separate cars nearby (Herbel: 324; Corcoran: 403).

Supervising Agent Reyes ordered Agents Peterson and Herbel to conduct a car stop and to arrest Dewgard (Corcoran: 404;

Herbel: 322-23; Johnson: 277; Reyes: 221-22; W. Murray: 375).[4] Detective Corcoran drove around the cars in front of him and turned in front of Dewgard's car, so that the side of his car prevented Dewgard's car from moving forward (Corcoran: 404-05; Herbel: 324-25, 327). Agent Peterson placed a flashing red light on the dashboard of his car and he and Agent Herbel began to get out of the car (Herbel: 317-18, 324-26; Reyes: 207).

Dewgard looked in his rearview mirror and over his right shoulder, where Agents Peterson and Herbel were (Corcoran: 405). Dewgard's car started to roll slowly (Corcoran: 405; Herbel: 324, 326). Dewgard then turned his steering wheel to the right and pressed the accelerator, striking the right front bumper of Detective Corcoran's car and rolling up onto the sidewalk (Corcoran: 405-06; Herbel: 324-27; W. Murray: 375). Dewgard sped down Farragut Road at a high rate of speed (Corcoran: 405-06; Herbel: 325, 327).

The field team immediately began pursuing Dewgard (Corcoran: 406; Herbel: 327). Detective Corcoran's car was initially leading the pursuit (Corcoran: 406; Herbel: 328). However, because Detective Corcoran did not have lights or sirens in his car, he pulled his car over to the side of the

[4] Although Sergeant Murray testified that he gave the order to stop the car (W. Murray: 375), Agents Reyes and Herbel and Detective Corcoran testified that it was Agent Reyes who ordered the car stop (Reyes: 221-22; Herbel: 323; Corcoran: 404).

road (Corcoran: 405-06; Herbel: 328). Defendant, whose lights and sirens were on, started to lead the pursuit (Corcoran: 406, 408; Herbel: 327-28).

The other members of the field team lost sight of defendant's and Dewgard's cars (Herbel: 328-29; Johnson: 277-78; Corcoran: 406-07; Robbins: 289; Reyes: 222-23). Defendant was on the radio, calling out the directions of the pursuit to the other members of the field team (Corcoran: 407; Herbel: 328-29; Robbins: 289; W. Murray: 376, 385-86; Zachariasiewicz: 301).

The Civilian Witnesses' Account of the Foot Chase and the Shooting

At about 11:00 a.m., on Farragut Road, ANGELA FRITH was pushing a stroller in which her three-year-old daughter, Ashley, was seated (Frith: 5-6). As she approached New York Avenue, Frith heard the sound of a squealing tire (Frith: 6-7). She suddenly saw a car driving straight up Farragut Road at a high rate of speed (Frith: 7). The car swerved up onto the sidewalk and was stopped by a fire hydrant and a pole (Frith: 7-8). The car came within about twelve feet of Frith and her daughter (Frith: 8). Frith picked up the stroller containing her daughter and ran to the other side of Farragut Road (Frith: 8).

The occupant of the car that swerved onto the sidewalk -- Dewgard -- got out of the car and started running down New York

Avenue (Frith: 9). Dewgard was carrying a black plastic bag in his hands (Frith: 9).

Defendant drove up to Dewgard's car and got out of his car (Frith: 9-10). Defendant ran down New York Avenue in pursuit of Dewgard (Frith: 10).

SYNTHIA BOBBIT and BARBARA GURLY were walking on opposite sides of New York Avenue, between Farragut Road and Foster Avenue (Bobbit: 53-57; Gurly: 96, 104, 109). They both saw defendant chasing Dewgard down New York Avenue (Bobbit: 55-56; Gurly: 98-100).

BENJAMIN SHURIN parked his van on New York Avenue, between Farragut Road and Foster Avenue (Shurin: 15-16). When Shurin opened the door of his van, Dewgard ran past him, carrying the black bag in his hands (Shurin: 16-17; Bobbit: 56). Defendant was following Dewgard, shouting at Dewgard to get down (Shurin: 17-18). Defendant had a badge hanging from his neck and he was holding a gun in his hand (Shurin: 17, 28-29).

Dewgard crossed New York Avenue and continued running down the street (Shurin: 18; Bobbit: 56-58). Defendant also crossed New York Avenue, managing to gain ground on Dewgard as he did so (Shurin: 18; Bobbit: 58).

Dewgard tried to duck in between two vehicles that were parked at the curb, but Dewgard slipped and fell (Bobbit: 58-59;

Shurin: 19, 26). Defendant jumped on top of Dewgard (Shurin: 18-19, 29).

Shurin ran across New York Avenue and stood about one or two feet away from defendant and Dewgard (Shurin: 18-19, 25, 29-30). Bobbit was standing about two big car lengths away from defendant and Dewgard (Bobbit: 61). Gurly was across the street from defendant and Dewgard (Gurly: 104, 108-09).

EDWARD JOHN, who was standing outside the gate of the Vandeveer housing project on New York Avenue, and BENJAMIN MURRAY, who was carrying garbage to the curb of New York Avenue, also started watching defendant and Dewgard (John: 33-34, 47; B. Murray: 73-74). John was close to defendant and Dewgard (John: 38).[5] Murray was about three or four feet from defendant and Dewgard (B. Murray: 78).

Defendant was sitting on Dewgard, who was face down to the ground (John: 35-37, 46-47; Bobbit: 59; Shurin: 19; B. Murray: 77, 79). Defendant had his gun in his left hand (John: 35).

Defendant tried to hold Dewgard down and handcuff him, but Dewgard kept moving around, trying to get up and push defendant off of him (Bobbit: 58-60; John: 36-37, 46; Shurin: 19; B.

[5] John had glaucoma in one eye, but he had 20/20 vision in the other eye (John: 49). He described his vision as good (John: 49).

Murray: 74-78).[6] Defendant told Dewgard, "Stay down, don't move. Freeze, freeze" (John: 34-37, 46-47; Shurin: 29; B. Murray: 78, 86-87). Defendant warned Dewgard that if he did not stop moving, defendant would shoot him (John: 34, 46). At one point, defendant punched Dewgard's face, saying, "I told you not to move" (John: 36). Dewgard ignored defendant's commands (John: 37, 46-47). Defendant called for backup and said, "Help me" (John: 37-38, 46; Bobbit: 60).

Dewgard managed to crawl to the nearby car, pull himself up, and push defendant off of him (Bobbit: 59, 62; John: 39, 48; Shurin: 19-20).

At about this time, JEWEL WALLACE, who was on the fifth floor of a nearby apartment building, and DAVID TAYLOR, who was approaching the scene from an apartment building about seventy feet away, started watching the struggle between defendant and Dewgard (Taylor: 145-47, 164-66, 170; Wallace: 115, 117-18, 134-36).

Dewgard was standing up against the car (John: 39, 48; Wallace: 118, 120-21; Taylor: 148-49, 153). Defendant was not standing upright, but he was still in physical contact with Dewgard, pulling at Dewgard (Bobbit: 62; Shurin: 21; John: 48;

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[6] Doctor Macajoux, who performed the autopsy on Dewgard's body, testified that Dewgard was about 6'2" tall and weighed 200 pounds (Macajoux: 183). Defendant was about 5'8" or 5'9" tall, weighed approximately 170 to 175 pounds, and "work[ed] out all the time" (W. Murray: 379; Reyes: 233-34).

Wallace: 119-24, 126, 129, 138; Taylor: 148, 150; Gurly: 102, 111).[7] Defendant said, "I have a gun, I'm going to shoot you" (John: 40, 46, 48; Gurly: 97, 100-01, 106; Wallace: 124). At that point in time, defendant's gun was pointed straight up in the air (John: 39, 46, 48).

Dewgard pushed defendant away from him and turned to run (John: 39-40, 48-49; Wallace: 120-22, 126; Shurin: 20; Bobbit: 63; Taylor: 148, 151-53). As Dewgard started to move away from defendant, defendant shot Dewgard in the back (John: 40-41, 45, 48; Wallace: 121-22, 126-27; Shurin: 20-21; Taylor: 148, 152-53; B. Murray: 80-83, 93; Gurly: 106). Dewgard fell to the ground (John: 41; Bobbit: 64; Shurin: 20-22; Wallace: 122; Taylor: 153-54, 169; B. Murray: 83; Gurly: 104, 107).[8]

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[7] Murray and Taylor testified that defendant was standing upright (B. Murray: 80, 82; Taylor: 152), but their testimony on this issue is inconsistent with the testimony of Wallace and Shurin (Wallace: 123-24; Shurin: 21).

[8] In the grand jury, the eyewitnesses described the shooting as follows: John testified that Dewgard pushed away from defendant and moved two, three, or four steps away before defendant shot him (John: 40, 48-49). Shurin said that Dewgard tried to run and was shot (Shurin: 20-21). Taylor said that Dewgard pushed defendant away from him and turned to run before he was shot (Taylor: 148, 151-52). Wallace said that Dewgard pushed off of defendant and turned to run before he was shot (Wallace: 121-22, 126-27). Murray testified that Dewgard took one step with his left foot "like he [was] ready to run" (B. Murray: 81-82). Bobbit said that Dewgard leaned toward defendant and then defendant drew the gun back and shot him (Bobbit: 63-64).

The Arrival of the Rest of the Field Team

When Special Agents Herbel and Peterson arrived at the corner of New York Avenue and Farragut Road, they found Dewgard's car on the sidewalk and defendant's car on the street near Dewgard's car (Herbel: 330-31). No one was in the cars (Herbel: 331).

Agents Herbel and Peterson ran up New York Avenue (Herbel: 331-32). Agent Herbel heard a gunshot (Herbel: 333). About thirty or forty seconds later, they found defendant and Dewgard (Herbel: 333-34, 345-46; Shurin: 23).

Dewgard was on his back, lying on the ground between two parked vehicles, with his hands outstretched in front of him (Herbel: 334-35, 345, 348, 353-54).[9] Defendant was straddling Dewgard (Herbel: 334-35). Agents Herbel and Peterson immediately handcuffed Dewgard's hands in front of his chest (Herbel: 335-36, 343-45, 348-49, 355-56; Shurin: 24).[10]

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[9] Agent Herbel testified that when he arrived, Dewgard and defendant were struggling with each other (Herbel: 345). However, none of the civilian witnesses mentioned any kind of struggle after the shooting.

[10] Murray testified that defendant had managed to handcuff Dewgard before the shooting, and Bobbit and Taylor testified that defendant had handcuffed Dewgard immediately after the shooting (B. Murray: 79-80; Bobbit: 68; Taylor: 154, 169). But the People concede that the testimony of Murray, Bobbit, and Taylor is mistaken with respect to this issue and that Shurin and Agent Herbel correctly testified that Agents Herbel and Peterson handcuffed Dewgard immediately upon their arrival at the scene (Shurin: 24; Herbel: 335-36, 343-45, 348-49, 355-56).

Agent Reyes arrived at the scene (Reyes: 226). Defendant was on his knees in front of Dewgard, breathing heavily (Reyes: 226-27; Herbel: 336; Corcoran: 410; Shurin: 22). Defendant looked physically drained (Herbel: 336; W. Murray: 379). Agent Reyes assisted in lifting up defendant and escorting him to a government car (Reyes: 227-28; Shurin: 24; Zachariasiewicz: 305). Agent Reyes took defendant's gun (Reyes: 229-30).

Agent Reyes summoned emergency medical assistance, requested backup from the New York City Police Department, and notified the DEA of the shooting (Reyes: 227).

The black plastic bag was underneath one of the tires of a parked van, near Dewgard's foot (Reyes: 228; Herbel: 336; Robbins: 291-93; Zachariasiewicz: 303; Shurin: 24). Detective Robbins pulled out the bag from under the tire and opened up the bag (Robbins: 291-92).[11] Inside the bag were three square-shaped objects, which were covered in tape (Robbins: 291; 414). Detective Robbins locked the black plastic bag and its contents inside the trunk of his car (Robbins: 292, 294).

At the scene, defendant made statements to three of his colleagues. Defendant approached Agent Johnson and told him

[11] Agent Reyes testified that a brick-shaped object was protruding from the plastic bag (Reyes: 228-29, 234). However, no one else noticed anything protruding from the bag. On the contrary, Detective Robbins testified that the black plastic bag was closed when he removed the bag from underneath the van (Robbins: 292).

that defendant had to shoot Dewgard (Johnson: 280). Defendant said that he and Dewgard had been struggling over the gun; that defendant had told Dewgard to stop resisting; and that Dewgard had responded that defendant was just going to have to shoot him (Johnson: 280). Defendant told Sergeant Murray, "I was wrestling with the guy and he went for my gun and I had to shoot him" (W. Murray: 379). Defendant told Agent Zachariasiewicz that Dewgard "went for my gun" (Zachariasiewicz: 304-05).

The Forensic Evidence

On May 3, 2002, Doctor MARIE MACAJOUX, the acting Deputy Chief Medical Examiner of Kings County and an expert in forensic pathology, performed an autopsy on the body of Egbert Dewgard (Macajoux: 180, 183; E. Dewgard, Sr.: 176-78). Doctor Macajoux concluded that the cause of Dewgard's death was a gunshot wound to the back with injuries to Dewgard's kidney, aorta, blood vessels, liver, stomach, heart, and lung (Macajoux: 188-89).

Doctor Macajoux observed that the entry wound was on the right side of Dewgard's back (Macajoux: 184). The bullet traveled through Dewgard's body from right to left and upwards (Macajoux: 185). The bullet perforated Dewgard's kidney, aorta, liver, stomach, lung, and heart (Macajoux: 185). Doctor Macajoux recovered the bullet from the front left side of Dewgard's chest (Macajoux: 184-85).

Doctor Macajoux determined that the gun had been pointed upwards, at a 30° angle, at the time of the shooting (Macajoux: 194-95). Given the location of the entry wound and the path of the bullet, the shooter could not have been facing Dewgard when the shot was fired (Macajoux: 185-86, 188). However, the location of the entry wound and the path of the bullet could be explained if the shooter was holding the gun in his left hand and either: (1) Dewgard was turning away from the shooter when the shot was fired (Macajoux: 193); or (2) Dewgard was reaching toward the shooter, moving the right side of his body towards the shooter, and turned his body just before the shot was fired (Macajoux: 186-88, 193-94).

Doctor Macajoux did not see any soot or stippling on Dewgard's skin or clothes (Macajoux: 192). The absence of soot or stippling generally means that the muzzle of the gun was more than twelve to eighteen inches from the victim when the gun was fired (Macajoux: 192).

The black plastic bag and its contents were examined by a forensic chemist and a fingerprint specialist (413-16). The three square-shaped objects in the plastic bag contained cocaine and weighed a total of approximately three kilograms (413-14). Dewgard's fingerprints were found on the contents of the black plastic bag (415-16).

Defendant's Testimony

Defendant JUDE TANELLA testified that he had been working for the DEA since March of 1998 and that he had been assigned to Group D-24 since August of 1998 (Tanella: 423, 503). He said that, on April 30, 2002, Sergeant Murray had ordered him to conduct surveillance at Dewgard's home starting at 7:00 a.m. the following day (Tanella: 432-37). Defendant had been told that a cooperating informant was going to order three kilograms of cocaine from Dewgard and that they were going to arrest Dewgard (Tanella: 436). Defendant stated that, because he was merely assisting on this case and was not actually assigned to it, he "really didn't know the particulars, what we were doing" (Tanella: 436). He did not recall being told anything about Dewgard and guns (Tanella: 503).

In his testimony, defendant described the surveillance of Dewgard and the aborted car stop on the morning of May 1, 2002 (Tanella: 437-61). Defendant said that the purpose of the car stop was to request Dewgard's consent to search the black bag (Tanella: 454).

Defendant testified that, because he had an emergency light and siren, he became the lead car in pursuit of Dewgard after the unsuccessful car stop (Tanella: 461). Defendant said that Dewgard's car was traveling at a high rate of speed and that Dewgard's car repeatedly swerved onto the sidewalk and returned

to the street (Tanella: 462-63). At the intersection of Farragut and New York Avenues, a school bus blocked the street (Tanella: 464). Dewgard swerved onto the sidewalk, almost striking a woman with a stroller (Tanella: 464-65, 487). Dewgard's car skidded and became wedged between a telephone pole and a fence (Tanella: 465).

Defendant testified that Dewgard got out of his car and ran down New York Avenue, with the black plastic bag in his hands (Tanella: 465-66). Defendant, who was wearing a police shield on a chain underneath his plainclothes, pulled out his shield and followed Dewgard on foot (Tanella: 440, 466-68). Defendant drew his .40 caliber semi-automatic pistol and was carrying it in his left hand (Tanella: 430-31, 467, 469, 487). Defendant shouted at Dewgard, "Police, stop, police, stop, freeze" (Tanella: 467-68, 470).

Dewgard attempted to cut between a van and a car that were parked on New York Avenue (Tanella: 470). Dewgard tripped and fell to the ground (Tanella: 470-71). The black plastic bag slid underneath the rear bumper of the van (Tanella: 470-71).

Defendant testified that he knelt down next to Dewgard's body and pushed him down (Tanella: 471-72). Defendant said that Dewgard started punching him with both hands (Tanella: 472, 474-75, 477, 492, 510-11). Defendant said that with his left hand, he held his gun against the left side of his body, away from

Dewgard, and that with his right hand, he tried to hold down Dewgard and to stop Dewgard from hitting him (Tanella: 473, 477). Defendant testified that he yelled at Dewgard, "[P]olice, stop resisting, police, stop resisting, you're under arrest," and that he yelled to the civilians nearby to call 911 because he needed help (Tanella: 474-75). Defendant testified that Dewgard said, "[F]uck you, shoot me" (Tanella: 475).

Defendant said that Dewgard pushed defendant off of him, causing defendant to go down on his hands and knees (Tanella: 475-76, 478-79, 514). Defendant said that, at this point, Dewgard was seated on the ground, only an arm's reach away from defendant (Tanella: 476, 478-79, 485, 515-16). Defendant alleged that, with his right hand, Dewgard lunged for defendant's weapon (Tanella: 476, 478-79, 482, 483). Defendant asserted that, as Dewgard reached for defendant's weapon, defendant shot him in the torso (Tanella: 476, 478-79, 481-82, 506-07, 509, 516). Defendant said that he feared that if Dewgard had gotten defendant's gun, Dewgard would have killed him (Tanella: 478-80, 489, 500, 509).

Defendant said that, after he fired the shot, Dewgard yelled and fell backwards to the ground (Tanella: 483, 484, 486, 502). Defendant stated that, although he was physically exhausted, he got on top of Dewgard (Tanella: 480, 482-86, 508-09). A crowd of civilians began screaming at defendant, "[W]hy

did you do that, why did you do that" (Tanella: 483, 486). Defendant testified that, about fifteen to twenty seconds after he fired the shot, Agents Peterson and Herbel arrived, lifted defendant off of Dewgard, and handcuffed Dewgard (Tanella: 483-84, 486, 493, 508).

The prosecutor asked defendant whether, prior to the shooting, he had told Dewgard that he would shoot him if he did not stop resisting (513). Defendant answered that he did not do so (Tanella: 513). Defendant explained, "You don't use it as a warning, you don't fire warning shots" (Tanella: 513). The prosecutor asked defendant why he did not pick up the abandoned drugs and wait for backup to arrive before attempting to seize Dewgard (Tanella: 512). Defendant said that it was his job to arrest Dewgard "to make the city safer" (Tanella: 512).

The Grand Jury Charge and Decision

After the presentation of the evidence, a prosecutor instructed the grand jury on the New York law governing the use of deadly physical force in defense of a person (N.Y. Penal Law § 35.15) and the use of deadly physical force in making an arrest or in preventing an escape (N.Y. Penal Law § 35.30) (Affid. at para. 6).

The grand jury concluded that there was legally sufficient evidence and reasonable cause to believe that defendant was not

justified in shooting Dewgard. The grand jury returned a true bill on the charge of Manslaughter in the First Degree (N.Y. Penal Law § 125.20[1]) (Affid. at para. 6).

On October 29, 2002, the grand jury filed Kings County Indictment Number 3070/2002, charging defendant with one count of Manslaughter in the First Degree (Affid. at para. 7).

The Removal of the Case to Federal Court

On November 1, 2002, defendant was arraigned on the indictment in the New York State Supreme Court, Kings County, and pled not guilty (Affid. at para. 8).

By application dated November 8, 2002, defendant petitioned the United States District Court for the Eastern District of New York for removal of his case from state court pursuant to 28 U.S.C. § 1442(a)(1). By decision and order dated January 13, 2003, the district court granted defendant's petition. New York v. Tanella, 239 F. Supp. 2d 291 (E.D.N.Y. 2003).

Defendant's Motion to Dismiss the Indictment

By motion dated March 6, 2003, defendant moved, pursuant to Federal Rule of Criminal Procedure 12(b), to dismiss the indictment on the ground that his prosecution was barred by the Supremacy Clause of the United States Constitution. In his motion, defendant argued that it was necessary and proper to the performance of his federal duty for him to kill Dewgard, because

Dewgard had been reaching for defendant's gun. In the alternative, defendant argued that, even assuming that he had been mistaken about Dewgard's reaching for the gun, defendant was still immune from state prosecution, because he reasonably believed that Dewgard had been reaching for the gun.

By answer dated April 10, 2003, the People opposed defendant's motion to dismiss the indictment. The People argued that defendant was not immune from prosecution because the evidence, when viewed in the light most favorable to the People, was sufficient to establish that defendant's shooting of Dewgard violated the Fourth Amendment of the Constitution and the United States Justice Department's policy on the use of deadly force by law enforcement officers. The People contended that, to the extent that there were disputed issues of fact concerning the shooting, those disputed issues of fact should be resolved at a trial, and not in a pretrial motion.

By memorandum and order dated September 3, 2003, the district court dismissed the indictment with prejudice (SPA 1-35). New York v. Tanella, 281 F. Supp. 2d 606 (E.D.N.Y. 2003). The district court held that, even assuming that the People's witnesses were correct that Dewgard had turned and had been moving away from defendant at the time of the shooting, defendant was immune from prosecution (SPA 18, 25-30). 281 F. Supp. 2d at 616, 620-23. The district court credited

defendant's grand jury testimony that he had subjectively believed that Dewgard had been reaching for his gun and the district court found that belief to be objectively reasonable (SPA 25-30). 281 F. Supp. 2d at 620-23. The district court also ruled that the shooting of Dewgard was constitutional. The district court suggested that defendant had the right to kill Dewgard, because Dewgard might have harmed someone had the chase continued (SPA 30-34). 281 F. Supp. 2d at 623-25.

The People appeal from the judgment of the district court dismissing the indictment.

SUMMARY OF ARGUMENT

The district court erred by dismissing the State's indictment on Supremacy Clause grounds. Defendant, a federal officer, shot an unarmed suspect, Egbert Dewgard, in the back, killing him. There was conflicting evidence as to how the shooting occurred. However, when viewed in the light most favorable to the People, the evidence was sufficient to establish that defendant did not reasonably believe that Dewgard posed a significant threat of death or serious physical injury to defendant or anyone else at the time of the shooting. Under these circumstances, the district court erred by concluding that defendant was immune, as a matter of law, from state prosecution. The indictment should be reinstated, so that a jury is given the opportunity to resolve the disputed issues of fact and to determine whether the shooting was necessary and proper to the performance of defendant's federal duty.

ARGUMENT

THE INDICTMENT SHOULD BE REINSTATED BECAUSE DEFENDANT DID NOT ESTABLISH THAT HE WAS IMMUNE AS A MATTER OF LAW FROM STATE PROSECUTION.

The district court erred by concluding that defendant was immune, as a matter of law, from state prosecution. A federal officer is immune from state prosecution for acts performed in the course of the officer's duties only where the acts were necessary and proper to the performance of the officer's duty. If there are disputed issues of fact that are relevant to the determination of the immunity defense, then these disputed issues of fact should be resolved at a trial, and not in a pretrial motion.

In this case, there were starkly conflicting accounts of what occurred immediately before defendant shot the unarmed suspect, Egbert Dewgard, in the back. But there was testimony which, if credited and if viewed in the light most favorable to the People, was sufficient to establish that the shooting of Dewgard violated both the Fourth Amendment of the Constitution and the United States Justice Department's policy on the use of deadly force. Under these circumstances, it was improper for the district court to dismiss the indictment prior to a trial.

Therefore, the indictment should be reinstated and the case should proceed to trial.

A. Scope of Review

The district court's dismissal of the indictment is subject to de novo review because the dismissal of the indictment raises questions of law or mixed questions of law and fact. See United States v. Alfonso, 143 F.3d 772, 775 (2d Cir. 1998) (de novo review is mandated whenever the dismissal of an indictment raises questions of law); United States v. Gonzalez-Roque, 301 F.3d 39, 44 (2d Cir. 2002) (de novo review is mandated whenever the dismissal of an indictment entails mixed questions of law and fact).

B. The Evidence, When Viewed In the Light Most Favorable to the People, Was Sufficient to Establish that Defendant Was Not Immune as a Matter of Law From State Prosecution.

A federal agent who improperly uses deadly force is not immune from state prosecution under the Supremacy Clause of the United States Constitution. Viewed in the light most favorable to the People, the evidence submitted by the People in response to defendant's motion to dismiss the indictment was sufficient to establish that defendant improperly used deadly force against Egbert Dewgard.

The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The purpose of this provision is to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

The United States Supreme Court has held, on the basis of the Supremacy Clause, that a state does not have jurisdiction to prosecute a federal agent for conduct in violation of state law if (1) the federal agent was performing an act that he was authorized to do by the law of the United States; and (2) in performing that authorized act, the federal agent did no more than what was necessary and proper for him to do. In re Neagle, 135 U.S. 1, 75 (1890); see Whitehead v. Senkowski, 943 F.2d 230, 234 (2d Cir. 1991), cert. denied, 502 U.S. 1106 (1992); Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988). For an act to be necessary and proper for purposes of the Supremacy Clause, the federal agent must subjectively believe that the act was necessary and proper, and the agent's subjective belief must be objectively reasonable. Whitehead v. Senkowski, 943 F.2d at 234; Kentucky v. Long, 837 F.2d at 745.

The People have never disputed that defendant was performing an act that he was authorized to do by the laws of the United States. Defendant had probable cause to arrest Dewgard for possession of a controlled substance. See United States v. Ginsberg, 758 F.2d 823, 828 (2d Cir. 1985).

But viewing in the light most favorable to the People the evidence submitted by the People in response to defendant's motion to dismiss the indictment, it was not necessary or proper for defendant to use deadly force against Dewgard. On the contrary, defendant's use of deadly force violated both the Fourth Amendment of the Constitution and the official policy of the Justice Department on the use of deadly force by federal law enforcement officers.

In Tennessee v. Garner, 471 U.S. 1 (1985), the Supreme Court held that the Fourth Amendment permits a law enforcement officer to use deadly force to prevent a suspect's escape only where the officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3. The Supreme Court explained:

> It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a

> suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

471 U.S. at 11. Accordingly, in the absence of evidence that the suspect poses a significant threat of death or serious physical injury to the officer or others, the use of deadly force to prevent the escape of a fleeing felon is unconstitutional.

In 1995, the Justice Department established an official policy on the use of deadly force by federal law enforcement officers. Under that policy, a federal officer may use deadly force to prevent the escape of a fleeing suspect only if there is probable cause to believe: (1) that the suspect has committed a felony involving the infliction or threatened infliction of serious physical injury or death; and (2) that the escape of the suspect would pose an imminent danger of death or serious physical injury to the officer or to another person (1-2). See U.S. Department of Justice, Resolution 14, Use of Deadly Force, available at www.usdoj.gov. The commentary to this policy explains:

> [T]he touchstone of the Department's policy regarding the use of deadly force is necessity. . . . The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have

> failed or would be likely to fail. Thus, employing deadly force is permissible when there is no safe alternative to using such force, and without it the officer or others would face imminent and grave danger.

See Commentary Regarding the Use of Deadly Force in Non-Custodial Situations, available at www.usdoj.gov (emphasis in original).

In this case, in response to defendant's motion to dismiss the indictment, the People submitted transcripts of testimony that had been given before the state grand jury. In assessing whether the district court correctly dismissed the indictment prior to trial, the People's evidence should be viewed in the light most favorable to the People. See United States v. Yashar, 166 F.3d 873, 880 (7th Cir. 1999) (on motion to dismiss an indictment, facts must be viewed in light most favorable to government); Morgan v. California, 743 F.2d 728, 733 (9th Cir. 1984) (in determining whether pretrial habeas petition should be granted on Supremacy Clause grounds, evidence should be viewed in light most favorable to the State); cf. Saucier v. Katz, 533 U.S. 194, 201 (2001) (in assessing whether civil case should be dismissed on qualified immunity grounds, evidence must be viewed in light most favorable to plaintiff).

When viewed in the light most favorable to the People, the grand jury testimony established the following: On April 30, 2002, defendant, a special agent of the Drug Enforcement

Administration, was assigned to be a member of a field team that was supposed to effect the arrest of Egbert Dewgard, a suspected drug seller, the following day. On May 1, 2002, the field team tried to surround Dewgard's car while Dewgard's car was stopped at a red light at the intersection of Utica Avenue and Farragut Road in Brooklyn, New York. Dewgard hit the right front bumper of Detective Edward Corcoran's car, drove up onto the sidewalk, and sped away on Farragut Road at a high rate of speed. Defendant followed him in his car.

At the intersection of Farragut Road and New York Avenue, Dewgard drove up onto the sidewalk and collided with a fire hydrant and a pole, coming within twelve feet of Angela Frith and her daughter. Dewgard fled his car on foot. Defendant got out of his car and followed Dewgard on foot.

Dewgard tripped and fell to the ground between two parked vehicles on New York Avenue. Defendant jumped on top of Dewgard. Dewgard struggled to prevent defendant from handcuffing him. Defendant told Dewgard that if he did not stop moving, defendant would shoot him. Dewgard managed to pull himself upright and pushed defendant off of him. Defendant fell to the ground. Defendant grabbed at Dewgard and said, "I have a gun. I'm going to shoot you." Dewgard pushed defendant away and turned to run. According to one witness, Dewgard managed to

get two or more steps away from defendant when defendant shot Dewgard in the back, killing him. Dewgard had been unarmed.

This evidence shows that, at the time of the shooting, Dewgard did not pose an immediate threat of death or serious physical injury to defendant. On the contrary, at the time of the shooting, the unarmed Dewgard had turned away from defendant and was trying to run away. See Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991) (evidence was sufficient to establish that officer's use of deadly force was unconstitutional where evidence showed that suspect "did not point the gun at the officers and apparently was not facing them when they shot him the first time"), cert. denied, 506 U.S. 972 (1992); Davis v. Little, 851 F.2d 605, 607-08 (2d Cir. 1988) (use of deadly force was unconstitutional where unarmed suspect was trying to run away from police officers).

Dewgard's physical struggle with defendant immediately prior to the shooting did not provide any justification for defendant's use of deadly force. In Sullivan v. Gagnier, 225 F.3d 161 (2d Cir. 2000), this Court held that, to be lawful, a law enforcement officer's use of force must be reasonably related to the force used by the suspect. This Court stated:

> The fact that a person whom a police officer attempts to arrest resists, threatens, or assaults the officer no doubt justifies the officer's use of some degree of force, but it does not give the officer

> license to use force without limit. The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer.

225 F.3d at 165-66 (emphasis in original).

In this case, the evidence, when viewed in the light most favorable to the People, established that defendant's use of deadly force was not "reasonably related" to the force being used by Dewgard. Although Dewgard had thwarted defendant's efforts to handcuff him and had pushed defendant away, Dewgard never used or threatened to use deadly force against defendant. Therefore, Dewgard's conduct did not justify defendant's use of deadly force against Dewgard.[12] See Davis v. Little, 851 F.2d at 607-08 (police officer violated Fourth Amendment by using deadly force against a fleeing felon, even though the felon had allegedly punched and shoved the police officer and his partner in his attempt to escape).

Furthermore, the evidence submitted to the grand jury did not suggest that Dewgard posed a significant risk of death or serious physical injury to anyone else. Prior to the shooting,

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[12] In his testimony before the grand jury, defendant alleged that Dewgard lunged for defendant's gun (Tanella: 476, 478-79, 482, 483). But, in determining this motion to dismiss the indictment, defendant's allegation that Dewgard lunged for the gun should not be considered, because the evidence should be viewed in the light most favorable to the People. See United States v. Yashar, 166 F.3d at 880; Morgan v. California, 743 F.2d at 733.

as part of his effort to escape the field team, Dewgard had driven his car recklessly, hitting Detective Corcoran's right front bumper and almost hitting Angela Frith and her daughter. But Dewgard's car had become wedged between a pole and a fence and, as a result, he had abandoned the car long before the shooting occurred. Consequently, at the time of the shooting, there was no risk that Dewgard was recklessly going to hit someone with his car. See generally Haugen v. Brosseau, 339 F.3d 857, 868-73 (9th Cir. 2003); Vaughan v. Cox, 343 F.3d 1323, 1326, 1330-31 (11th Cir. 2003).[13]

Defendant's knowledge that Dewgard had agreed to sell three kilograms of cocaine to an informant did not make it necessary or proper for defendant to kill him. A suspect's commission of drug crimes does not justify a law enforcement officer's use of deadly force against the suspect. See Haugen v. Brosseau, 339 F.3d at 864 ("Under [Tennessee v.] Garner, the fact that [Officer] Brosseau believed Haugen had committed drug crimes and a burglary is not sufficient to justify deadly force").

[13] In Haugen v. Brosseau and Vaughan v. Cox, the Courts of Appeals for the Ninth and Eleventh Circuits discussed when deadly force may be used against a motorist who is driving recklessly. At no point did either court suggest that officers may use deadly force against a motorist after the motorist has left the car. See Haugen v. Brosseau, 339 F.3d at 868-73; Vaughan v. Cox, 343 F.3d at 1330-31. In fact, in Vaughan, the Eleventh Circuit held that an officer did not have the right to use deadly force against a suspect while the suspect was still driving his truck, even though the suspect had hit a police car and was driving 80 to 85 miles an hour in his effort to escape arrest. See Vaughan v. Cox, 343 F.3d at 1326, 1330-31.

Although the drug trade is often associated with violence, the possession or sale of a narcotic drug does not, by itself, pose an immediate threat of death or serious physical injury to anyone.

In its decision, the district court relied upon the fact that the confidential informant had told Detective Pedro Colon that Dewgard had expressed an interest in purchasing guns (SPA 29 n.18; Colon: 249). New York v. Tanella, 281 F. Supp. 2d at 622 n.18. However, in assessing whether a law enforcement officer's use of deadly force was proper, a court may consider only the information that was known to that particular officer. Davis v. Little, 851 F.2d at 608. In this case, defendant testified before the grand jury that the only information he had been given about Dewgard was that Dewgard had agreed to sell three kilograms of cocaine to an informant (Tanella: 436). Defendant did not recall being told anything about Dewgard and guns (Tanella: 436, 503).

In any event, even if defendant had been told about Dewgard's alleged interest in purchasing guns, this information would not have justified the use of deadly force, in the absence of a reasonable belief on the part of defendant, at the time of the shooting, that Dewgard was using or about to use a gun. "[T]he mere presence of a weapon does not justify the use of deadly force, let alone the potential presence of a weapon."

Haugen v. Brosseau, 339 F.3d at 865 (emphasis in original; citations omitted); see Curnow v. Ridgecrest Police, 952 F.2d at 323, 325 (evidence was sufficient to establish that defendant's use of deadly force was improper, even though the suspect had access to a gun, because the evidence showed that suspect was not pointing the gun at the officers at the time of the shooting).

Indeed, the Ninth Circuit Court of Appeals has held that the use of deadly force against a visibly armed suspect was unconstitutional, even though the suspect had engaged in a shoot-out with law enforcement officers the previous day and may have been responsible for the death of a law enforcement officer. Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998). The Ninth Circuit concluded that neither the suspect's possession of a weapon nor the suspect's commission of a violent crime in the very recent past justified the use of deadly force, in the absence of evidence that the suspect posed an immediate threat to someone's safety. 126 F.3d at 1203-04; see also Curnow v. Ridgecrest Police, 952 F.2d at 323-24.

The facts of this case are comparable to those in Davis v. Little, 851 F.2d 605 (2d Cir. 1988). In Davis, Connecticut Police Officers David Little and Louis Scozzafava received a report that a felon was escaping. Officers Little and

Scozzafava spotted the felon, Robert Davis, running towards them. The officers stopped their car and took positions near the front of their car, with their service revolvers drawn. According to the officers, Davis punched Officer Little, shoved Officer Scozzafava, and then ran around the officers towards the back of the car. Officer Little repeatedly fired at Davis, hitting him four times. Id. at 606-07. A magistrate judge held that Officer Little's use of deadly force violated the Fourth Amendment. Id. at 607. On appeal, this Court affirmed the decision of the magistrate judge. This Court explained that Officer Little's use of deadly force violated the Fourth Amendment because Officer Little had no reason to believe that Davis posed a significant threat to his safety or the safety of third parties. Id. at 607-08.

Similarly, here, viewing the evidence in the light most favorable to the People, the evidence established that, although Dewgard had committed serious crimes prior to the shooting, defendant had no reason to believe at the time of the shooting that Dewgard posed an imminent threat of death or serious physical injury to defendant or anyone else. On the contrary, like Davis in Davis v. Little, Dewgard were merely trying to run away. While "[i]t is no doubt unfortunate when a suspect who is in sight escapes" (Tennessee v. Garner, 471 U.S. at 11), a law enforcement officer may not use deadly force solely to prevent a

suspect's escape. When viewed in the light most favorable to the People, the People's evidence in this case establishes that defendant's use of deadly force violated both the Fourth Amendment and Justice Department policy.

Under these circumstances, a rational trier of fact could conclude that defendant's shooting of Dewgard was not necessary and proper to the performance of defendant's federal duty. A rational trier of fact could find that defendant -- a trained federal officer -- did not subjectively believe that the use of deadly force was necessary and proper, given that defendant's use of deadly force violated well-established constitutional and Justice Department standards. See Clem v. Corbeau, 284 F.3d 543, 553 (4th Cir. 2002) (holding that rules regarding use of deadly force were clearly established by 1998).

Moreover, even assuming that defendant had subjectively believed that his use of deadly force was necessary and proper, a rational trier of fact could find that such a belief was not objectively reasonable. A trier of fact could find that it is not objectively reasonable for a federal officer to conclude that it is necessary and proper to use deadly force that violates the Constitution and Justice Department policy. See Whitehead v. Senkowski, 943 F.2d at 234 (to be immune from state prosecution, federal officer's subjective belief must be

objectively reasonable); Kentucky v. Long, 837 F.2d at 745 (same).

The grand jury's decision to indict defendant supports the conclusion that a rational trier of fact could find that defendant did not reasonably believe that the shooting was necessary and proper to the performance of his duty. After hearing from all of the witnesses, including defendant, the grand jury was charged on the New York law governing the use of deadly physical force in defense of a person (N.Y. Penal Law § 35.15[2]) and the use of deadly physical force in making an arrest or in preventing an escape (N.Y. Penal Law § 35.30). These defenses provide that a law enforcement officer may use deadly physical force if: (1) the officer subjectively believes that a suspect is using or is about to use deadly physical force against the officer or a third party and (2) that belief is objectively reasonable.[14] See N.Y. Penal Law §§ 35.15(1), (2)(a), 35.30(1)(c); People v. Goetz, 68 N.Y.2d 96, 115, 506 N.Y.S.2d 18, 29-30 (1986). The grand jury concluded that there was reasonable cause to believe that the shooting of Dewgard was not justified. Thus, the grand jury found reasonable cause to believe that, at the time of the shooting, defendant did not

[14] Under New York law, "'[d]eadly physical force' means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." N.Y. Penal Law § 10.00(11).

honestly believe that Dewgard was using or was about to use deadly physical force against defendant or anyone else or, even if defendant had that belief, that belief was not objectively reasonable.

Because the evidence, when viewed in the light most favorable to the People, was sufficient to establish that the shooting of Egbert Dewgard was not necessary and proper to the performance of defendant's duty, defendant was not immune as a matter of law from state prosecution for that shooting. Under these circumstances, the district court erred by dismissing the indictment prior to a trial.

C. The Grounds on Which Defendant and the District Court Relied Do Not Establish that Defendant Was Immune as a Matter of Law from State Prosecution.

Defendant in his motion and the district court in its decision advanced three arguments in support of the dismissal of the indictment, but none of these arguments has any merit.

First, defendant argued that he was immune from state prosecution because, at the moment of the shooting, Dewgard had been reaching for defendant's gun. See Defendant's Memorandum of Law in Support of Motion to Dismiss Indictment at 17. Defendant based this claim on his own testimony before the grand jury.

Defendant's argument provided no basis to dismiss the indictment prior to a trial. Defendant's grand jury testimony was contradicted by the testimony of several civilian eyewitnesses, who testified that Dewgard had turned and had been moving away from defendant when defendant shot Dewgard in the back. Where there are disputed issues of fact that are relevant to the determination of an immunity defense, those disputed issues of fact should be resolved at a trial, not in a pretrial motion to dismiss the indictment. See United States ex rel. Drury v. Lewis, 200 U.S. 1, 7-8 (1906) (request for pretrial habeas relief was properly denied because factual question concerning whether soldiers shot suspect before or after he surrendered should be determined at trial); Morgan v. California, 743 F.2d 728, 733-34 (9th Cir. 1984) (order granting pretrial habeas petition was reversed because disputed issues of fact concerning whether DEA agents were performing a federal duty at time of incident and whether DEA agents had acted properly should be determined at trial); Kentucky v. Long, 837 F.2d 727, 752 (6th Cir. 1988) (motion to dismiss pursuant to Rule 12(b) should be denied where there is a genuine factual dispute concerning whether federal officer's conduct was necessary and proper); United States v. Aleman, 286 F.3d 86, 91 (2d Cir. 2002) (it is improper to hold pretrial hearing on

immunity issue, where immunity issue concerns the ultimate factual issue at trial).[15]

Second, the district court held that, even assuming that the People's witnesses were correct that Dewgard had turned from defendant and was attempting to flee at the time of the shooting, defendant was still immune from prosecution, because, according to the district court, defendant reasonably believed that Dewgard had been reaching for defendant's gun (SPA 18, 25-30). New York v. Tanella, 281 F. Supp. 2d at 616, 620-23. But there is reason to question defendant's self-serving allegation that he had believed that Dewgard was reaching for defendant's gun. Furthermore, even if defendant had such a belief, the evidence does not establish, as a matter of law, that this belief was reasonable. After all, witness Edward John testified that Dewgard had taken two or more steps away from defendant before defendant shot Dewgard in the back (John: 40, 48-49). On the basis of John's testimony, a rational trier of fact could

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[15] See also United States v. Alfonso, 143 F.3d 772, 777 (2d Cir. 1998) (defendant's motion to dismiss for lack of jurisdiction was properly denied, because jurisdictional fact, which was also an element of the crime, should be decided at trial); United States v. Doe, 63 F.3d 121, 125 (2d Cir. 1995) (claim that federal government had breached an agreement should not be determined in a pretrial motion, where claim could be raised as a defense at trial); cf. Curry v. City of Syracuse, 316 F.3d 324, 334-35 (2d Cir. 2003) (in civil cases, issue of immunity should not be decided in a pretrial motion if there are disputed issues of fact); Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002) (same); Robison v. Via, 821 F.2d 913, 924 (2d Cir. 1987) (same).

conclude that defendant was not telling the truth when he testified in the grand jury that he had believed that Dewgard was reaching for defendant's gun or that, even if he was telling the truth, it was objectively unreasonable for defendant to have thought that Dewgard was reaching for defendant's gun. In light of the evidence that Dewgard was moving away from defendant when defendant shot him in the back, a rational trier of fact could conclude that the reason that defendant shot Dewgard was to prevent Dewgard from escaping, rather than because of an alleged belief that Dewgard was reaching for defendant's gun.

Given the conflicting evidence, these questions of fact and credibility should be decided at a trial. See United States ex rel. Drury v. Lewis, 200 U.S. at 7-8; cf. United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998) (in criminal cases, courts defer to the jury's determination of the credibility of witnesses and to the jury's choice of the competing inferences to be drawn from the evidence); Liston v. County of Riverside, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (in civil excessive force cases, "the reasonableness of force used is ordinarily a question of fact for the jury"); People v. Sullivan, 68 N.Y.2d 495, 499, 510 N.Y.S.2d 518, 520 (1986) (evidence was legally sufficient to support grand jury's decision to charge police officer with manslaughter, on the basis of one witness's estimate about the time between the officer's two shots, even

though the testimony of most of the witnesses corroborated the officer's account).

Indeed, one trier of fact has already concluded that there was reasonable cause to believe that defendant did not reasonably believe that Dewgard was reaching for defendant's gun. After hearing from all of the witnesses, the state grand jury voted to indict defendant for killing Dewgard. Thus, the state grand jury found reasonable cause to believe either that defendant was not telling the truth when he described the shooting or that, even if he was telling the truth, his belief was not objectively reasonable. The state grand jury's decision should be entitled to some deference, since the grand jury -- unlike the district court -- saw and heard the witnesses. See generally Cullen v. United States, 194 F.3d 401, 405-07 (2d Cir. 1999) (district court may not summarily reject credibility findings of magistrate judge, where magistrate judge saw and heard the witnesses and district court did not).

In re Neagle, 135 U.S. 1 (1890), and Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977), which are cited by the district court in its decision, are not to the contrary. In those cases, the undisputed facts clearly established an objectively reasonable basis to believe that the suspects were armed and were about to use deadly physical force against someone. In Neagle, the suspect, who had previously threatened to attack Supreme Court

Justice Stephen J. Field, struck Justice Field twice on the face and then "turned his hand to thrust it in his bosom" as if he intended to draw a bowie knife. 135 U.S. at 46, 52. In Clifton v. Cox, a federal agent, who was pursuing a fleeing suspect, heard what sounded like gunshots and saw a fellow agent fall abruptly to the ground. 549 F.2d at 729.

In this case, by contrast, the evidence, when viewed in the light most favorable to the People, showed that, at the time of the shooting, Dewgard was merely trying to run away. On the basis of this evidence, a rational trier of fact could conclude either that defendant did not subjectively believe that the use of deadly force was necessary and proper to the performance of his duty or that such a belief was not objectively reasonable. Therefore, the district court erred by dismissing the indictment on the basis that, at the time of the shooting, defendant allegedly believed that Dewgard was reaching for defendant's gun.

Finally, in its decision, the district court suggested that, even without considering defendant's testimony, the evidence established that it was constitutional for defendant to kill Dewgard because, had the chase continued, it was possible that Dewgard might have harmed someone in order to effect his escape (SPA 30-34). New York v. Tanella, 281 F. Supp. 2d at 624 (use of force was constitutional because Dewgard "displayed an

unwavering single-mindedness to avoid capture at any cost"). But for two reasons, this theory fails to establish that defendant is immune from prosecution. First, defendant never alleged that he subjectively believed that the use of deadly force was justified by the risk that Dewgard might harm someone if the chase continued. On the contrary, in the grand jury, defendant testified that he decided to use deadly force solely because Dewgard was allegedly reaching for defendant's gun (Tanella: 478-80, 489, 500, 509). Therefore, the court's theory does not satisfy the subjective prong of the immunity defense.

Furthermore, this theory also fails to satisfy the objective prong of the immunity defense. "[T]he chase itself cannot create the danger that justifies shooting a suspect who, under [Tennessee v.] Garner, may not otherwise be shot." Haugen v. Brosseau, 339 F.3d 857, 876 (9th Cir. 2003) (Reinhardt, J., concurring).

In Haugen v. Brosseau, 339 F.3d 857 (9th Cir. 2003), a police officer shot and wounded a drug and burglary suspect, who had been about to flee in a jeep. The Ninth Circuit rejected the notion that the police officer had the right to use deadly force against the suspect in order to avoid the potential risks inherent in a high-speed car chase. The Ninth Circuit explained:

> At the time Brosseau shot Haugen, it was clear that [Haugen] intended to flee in his Jeep and that a number of non-lethal measures had failed to prevent him from doing so. But it is equally clear that Brosseau and her fellow officers did not need to kill Haugen in order to avoid a dangerous high-speed chase. They could either have discontinued a chase if it became too dangerous, or could have forgone a chase entirely. . . . The cost to society of allowing criminals to flee is great, but the Supreme Court has held that this cost does not always justify deadly force.

339 F.3d at 869. Similarly, here, if defendant had believed that continuing to chase Dewgard would lead to a highly dangerous situation, then defendant should have abandoned the chase, not killed Dewgard. Although "[t]he cost to society of allowing criminals to flee is great" (id.), "[i]t is not better that all felony suspects die than that they escape." Tennessee v. Garner, 471 U.S. at 11.

D. Conclusion

The power of a federal court, under the Supremacy Clause, to enjoin a state prosecution "should be sparingly exercised." Morgan v. California, 743 F.2d 728, 731 (9th Cir. 1984). The use of such power tramples on a State's sovereign authority to enforce its criminal law and undermines the fundamental precept that no one is above the law.

In this case, the district court erred by dismissing the state indictment prior to a trial. On the basis of the evidence submitted to the grand jury, a rational trier of fact could find that the shooting of Egbert Dewgard was not necessary and proper to the performance of defendant's federal duty. To the extent that there were disputed issues of fact concerning the shooting, those disputed issues of fact should be decided at a trial.

For these reasons, the district court's judgment should be reversed and the indictment should be reinstated.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENT SHOULD BE REINSTATED.

Dated: Brooklyn, New York
January 16, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and (a)(7)(C)(i), I, Ann Bordley, certify that this brief was prepared using the Microsoft Word 97 word-processing system, and that, according to the word count of that word-processing system, this brief contains 12,075 words, not counting the Table of Contents and the Table of Authorities.

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