No. 03-1589

United States Court of Appeals
for the
Second Circuit

State of New York
v.
Jude Tanella

Brief Amici Curiae
of
Americans For Effective Law Enforcement, Inc., and the International Association of Chiefs of Police, Inc., In Support of the Appellee, For Affirmance of the Judgment Below.

TABLE OF CONTENTS*

TABLE OF AUTHORITIES . . . . iii-v

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT

I. EFFECTIVE LAW ENFORCEMENT REQUIRES THE COMBINED RESOURCES OF ALL LEVELS OF GOVERNMENT—FEDERAL, STATE AND LOCAL—AND CANNOT BE UNDERMINED BY RULES WHICH UNDULY RESTRICT THE UNIQUE CAPABILITIES OF THE UNITED STATES 6

II. FEDERAL AGENTS ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT ARE IMMUNE FROM STATE CRIMINAL PROSECUTIONS FOR ANY ACTION TAKEN THAT THEY REASONABLY BELIEVE IS NECESSARY AND PROPER TO THE PERFORMANCE OF THEIR DUTY 9

III. DEA SPECIAL AGENT TANELLA'S ACTIONS WERE A REASONABLE RESPONSE TO THE CIRCUMSTANCES HE FACED 19

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 26

*This brief is filed pursuant to Rule 29, Fed. R. App. P. Consent to file has been granted by Counsel for the parties and the letters of consent have been filed with the Clerk of this Court. This brief was authored for the *Amici* by Wayne W. Schmidt,

Counsel of Record, with the supervised assistance of James P. Manak, an Active Member of the Illinois Bar and Retired Member of the New York Bar, Gene Voegtlin, an Active Member of the Virginia Bar, and Jeffrey Higginbotham, an Inactive Member of the Utah Bar (acting as a Legal Assistant to the Counsel of Record). No other persons authored this brief. Mr. Schmidt is an Active Member of the Illinois and New York Bars and was admitted to practice before this Court on July 21, 1975. Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc. have or will compensate counsel and pay the administrative costs for the preparation and submission of this brief, without financial support, directly or indirectly, from any other source.

TABLE OF AUTHORITIES

Cases **Page**

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 16

Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977) 13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16

In re McShane, 235 F.Supp. 262 (N.D.Miss. 1964) 13

In re Neagle, 135 U.S. 1 (1890) . . . . *passim*

Locurto v. Safir, 264 F.3d 154 (2d Cir. 2001) 17

McCulloch v. Maryland, 17 U.S. 316 (1819) 16

New York v. Tanella, 239 F.Supp.2d 291 (E.D.N.Y. 2003) 4

New York v. Tanella, 281 F.Supp.2d 606 (E.D.N.Y. 2003) . . . . *passim*

Saucier v. Katz, 533 U.S. 194 (2001) 18

Tennessee v. Davis, 100 U.S. 257 (1879) 11

Whitehead v. Senkowski, 943 F.2d 230 (2nd Cir. 1991) . . . . *passim*

Constitution & Statute

U.S. Const. Article I, Sec. 8, Clause 18 15

U.S. Const. Article VI . . . . *passim*

42 U.S.C. § 1983 16

Report/News Release/Periodicals

FBI 2002 Uniform Crime Report 6

Department of Justice News Release, 12-11-03. Viewable at:
http://www.fbi.gov/dojpressrel/pressrel03/projectsafe121803.htm 7

DEA Fiscal Year 2003 Staffing. Viewable at:
http://www.usdoj.gov/dea/agency/staffing.htm 8

DEA Field Capability. Viewable at:
http://www.usdoj.gov/dea/agency/domestic.htm#caribbean 8

"What Kind of Immunity? Federal Officers, State Criminal Law and the
Supremacy Clause," 112 *Yale Law Journal* 2195 (2003). 12

"What You Need To Tell the Prosecutor in Your Next Use-of-Force Case,"
Weeg, Joe, Assistant County Attorney, Polk County, Des Moines,
Iowa, *The Police Marksman*, May/June 2002 [Vol. 27, No. 3] at p. 46,
col. 2; ISSN 0164-8365. Viewable at:
www.ultimateperformancetraining.com/articles/tellyourprosecutor.pdf 20, 21

"Why Is the Suspect Shot in the Back?," Lewinski, Prof. William, Ph.D.,
The Police Marksman, Nov./Dec. 2000 [Vol. 25, No. 6] at p. 26, col.
2; ISSN 0164-8365. Viewable at:
www.ultimateperformancetraining.com/articles/shotinback.pdf 21, 22

"Is Your Shooting Clean?," Lewinski, Prof. William, Ph.D., and Grossi, Dave, *The Police Marksman*, Sep./Oct. 1999 [Vol. 24, No. 5] at p. 24, col. 1; ISSN 0164-8365. Viewable at: www.ultimateperformancetraining.com/articles/isyourshootingclean.pdf . . . 22

"The Biomechanics of Lethal Encounters," Lewinski, Prof. William, Ph.D. *The Police Marksman*, Nov./Dec. 2002 [Vol. 27, No. 6] at p. 19, col. 2, item 16; ISSN 0164-8365. Viewable at: www.ultimateperformancetraining.com/articles/biomechanics.pdf 23

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world. Founded in 1893, the IACP, with more than 19,000 members in 100 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law enforcement issues.

Amici are national associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility

of developing and supervising police policies and operations; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policy.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this court.

STATEMENT OF THE CASE

A task force consisting of law enforcement officers from the federal Drug Enforcement Administration (DEA) and the New York City Police Department identified Egbert Dewgard as a suspect engaged in the illegal trafficking of drugs. On May 1, 2002, based on physical surveillance and assistance of a confidential informant, the task force developed probable cause to believe Dewgard was in possession of several kilograms of cocaine.

The task force supervisor made a tactical decision to stop the car Dewgard was driving and arrest him. He ordered four members of the task force to make the arrest. DEA Special Agent Jude Tanella was one of the task force officers ordered to arrest Dewgard.

As Dewgard stopped his car at a red light, the four members of the task force attempted to arrest Dewgard by positioning their vehicles to block his car from both front and back. Dewgard, however, abruptly accelerated, rammed the task force car that had maneuvered in front of his car, drove onto the adjacent sidewalk, then onto the roadway and sped away. Special Agent Tanella began a pursuit that continued for approximately fifteen blocks at high speeds. Dewgard often swerved his car into oncoming traffic and onto the sidewalk. Dewgard's vehicle stopped when he swerved onto the sidewalk, almost striking a woman and her baby, and became wedged between a telephone pole and a fire hydrant.

Dewgard then left his car on foot, carrying a black plastic bag that contained the suspected drugs. Special Agent Tanella pursued on foot, shouting repeatedly that he was a law enforcement officer and ordering Dewgard to stop. Special Agent Tanella finally caught up with Dewgard. Dewgard refused to surrender, however, and Special Agent Tanella was forced to engage in a violent personal struggle with him. During the struggle, Special Agent Tanella contends that Dewgard reached for his service weapon. Concerned that Dewgard would gain possession of the weapon, Tanella fatally shot Dewgard. The State of New York, through the Office of the Kings County District Attorney, indicted Special Agent Tanella with one count of Manslaughter in the First Degree.

On January 13, 2003, based on the motion of Special Agent Tanella's counsel, the case was removed to federal court. *See*, *New York v. Tanella*, 239 F.Supp.2d 291 (E.D.N.Y. 2003). Special Agent Tanella then filed a motion to dismiss the indictment, claiming immunity based on the Supremacy Clause of the United States Constitution. On September 3, 2003, the motion was granted by the District Court. The District Court concluded that immunity from state criminal charges is appropriate where a federal officer reasonably perceives (or even misperceives) a danger to himself and does no more than what is necessary and proper in the discharge of his duty. *See*, *New York v. Tanella*, 281 F.Supp.2d 606, 623 (E.D.N.Y. 2003). The District Court held that "federal law bars the prosecution of a federal law enforcement agent who demonstrated restraint, sound judgment and courage in the proper exercise of his sworn duty to the public." 281 F.Supp.2d at 625.

SUMMARY OF ARGUMENT

Effective law enforcement requires the combined resources of all levels of government. The federal government's law enforcement capability is unique because of its resources and budget, its ability to allocate resources according to national priorities, and its ability to move resources to address existing or emerging crime problems. Because of limitations inherent in the sovereignty of States and local governments, those law enforcement components cannot match the federal

government's response capabilities. Accordingly, it is the combined policies and resources of all levels of government that are necessary to provide police services to all jurisdictions and communities within the United States. Federal law enforcement must not be thwarted in the application of its policies and resources. To do so, seriously undermines the combined law enforcement effort needed to protect our citizens in their life, liberties, and property.

The law has long recognized that federal law enforcement agents acting within the scope of their authority are immune from state prosecution for acts that were reasonable in the performance of duty. While the Supreme Court has not clearly articulated the precise application of that immunity, *Amici* contend that immunity for federal officers is appropriate so long as the officer acted within the scope of his duty, reasonably believed that his action was necessary, and did not contravene any clearly established constitutional standard. *Amici* believe that the District Court properly applied the law to the facts when it concluded that Special Agent Tanella ". . . did no more than what was necessary and proper in the discharge of his duty, and [] is therefore immune from prosecution." 281 F.Supp.2d at 623.

ARGUMENT

I. EFFECTIVE LAW ENFORCEMENT REQUIRES THE COMBINED RESOURCES OF ALL LEVELS OF GOVERNMENT—FEDERAL, STATE AND LOCAL—AND CANNOT BE UNDERMINED BY RULES WHICH UNDULY RESTRICT THE UNIQUE CAPABILITIES OF THE UNITED STATES.

According to the Federal Bureau of Investigation's (FBI) 2002 Uniform Crime Report,[1] a crime is committed somewhere within the United States every 2.7 seconds. Crime in the United States, 2002, Section 1, p. 6. In the aggregate, 11,877,218 crimes in the categories of murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft and arson were reported to the FBI.[2] *Id.* at Section 2, p. 9.

Such shocking numbers make obvious the need for the most effective law enforcement response that can be marshaled. While there are thousands of police agencies in the United States, as indicated by the membership of *Amicus* IACP, crime is so pervasive that it requires the combined application of law enforcement resources at every level of government to provide safety and security to the citizens and

[1] The FBI's 2002 Uniform Crime Report is the most recent year for which complete records are available.

[2] Other crimes that are not included in the FBI's Uniform Crime Report are not quantified, but certainly push the total crime in the United States to higher, even more staggering levels.

residents of our communities, locales, and States. That each level of government is working closely with the others is no accident and is illustrative of the policies that law enforcement authorities employ to combat crime. *See*, *e.g.*, United States Department of Justice News Release, December 11, 2003, "L.A. LAW ENFORCEMENT OFFICIALS ROLL-OUT PROJECT SAFE NEIGHBORHOODS COMPREHENSIVE LAW ENFORCEMENT PROGRAM BRINGS TOGETHER FEDERAL AND LOCAL AUTHORITIES TO TARGET GUN VIOLENCE," which announces the cooperative agreement of officials from the Los Angeles Police Department, the Los Angeles County Sheriff's Office, the Los Angeles City Attorney's Office, the Los Angeles County District Attorney's Office, the Los Angeles County Probation Department's Specialized Enforcement Operations, the United States Attorney's Office, the DEA, the FBI, the Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service—Criminal Investigation, the Small Business Administration's Office of Inspector General, the Department of Housing and Urban Development's Office of Inspector General, the Department of Agriculture's Office of Inspector General, the Bureau of Customs and Immigration Enforcement, and the Social Security Administration's Office of Inspector General.[3]

[3] Viewable at http://www.fbi.gov/dojpressrel/pressrel03/projectsafe121803.htm

A major component of the law enforcement response necessary to combat crime is the federal government. It brings unique capabilities. For example, for fiscal year 2003, the DEA was authorized by Congress staffing of 9,629 employees and was appropriated nearly $1.9 billion.[4]

To effectively and responsibly utilize such resources, the DEA, like its other federal law enforcement colleagues, is organized to ensure a substantial field capability throughout the United States. DEA has 237 domestic offices, and is represented in every state.[5] The law enforcement policies and priorities of the federal government are dependent on its ability to place its resources within the States. Ultimately, the placement of its resources within the States reflects the informed judgment of the leadership of the federal law enforcement agencies and the will of Congress which authorizes and appropriates those resources.[6]

Such policy decisions would be significantly undermined if federal agents acting consistent with their federal duties were subjected to state criminal

---

[4] *See*, http://www.usdoj.gov/dea/agency/staffing.htm

[5] *See*, http://www.usdoj.gov/dea/agency/domestic.htm#caribbean

[6] *Amici* note that the ability swiftly to move personnel from location to location in the United States is another attribute unique to federal law enforcement authorities. This capability takes on added importance as our Nation faces threats of terrorism within our borders.

prosecutions. All federal law enforcement personnel are, of course, expected to conform their conduct to the law and are bound by their oath of office to uphold the Constitution of the United States. But, federal law enforcement agents cannot be subjected to the rules of law of 50 States and untold numbers of local jurisdictions where such laws are in conflict with the superior law of the United States Constitution.

A contrary rule would allow a State or local jurisdiction to impede or thwart the policy of the United States, as it is established and implemented through its deployment of its officials and employees, by the filing of criminal charges against federal agents. Moreover, it would significantly diminish the effectiveness of law enforcement and erode the ability of federal law enforcement agencies to combine resources with State and local law enforcement to effectively combat crime. Any such attempt to do so, when the federal agent was acting within the scope of his or her duty and doing no more than is reasonable, must not stand.

II. FEDERAL AGENTS ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT ARE IMMUNE FROM STATE CRIMINAL PROSECUTIONS FOR ANY ACTION TAKEN THAT THEY REASONABLY BELIEVE IS NECESSARY AND PROPER TO THE PERFORMANCE OF THEIR DUTY.

The law has long recognized that when a federal agent is acting within the scope of his or her duty and does those things necessary and proper to carry out that

duty, no state criminal charges can lie. Over 110 years ago, the Supreme Court, in the seminal case of *In re Neagle*, 135 U.S. 1 (1890), refused to allow the State of California to try a federal Marshal who shot and killed a man he believed was about to injure a Supreme Court Justice for whom the Marshal was acting as a security guard. The Court, relying on the Supremacy Clause of the Constitution[7] ruled that

> if 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 a 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, he cannot be guilty of a crime under the law 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. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. 135 U.S. at 75.

Even earlier, the Court had suggested this result when it discussed the ability of a federal agent to remove State criminal charges lodged against him to federal

---

[7] Article VI of the United States Constitution provides, in pertinent part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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."

court. In *Tennessee v. Davis*, 100 U.S. 257 (1879), the Supreme Court held that 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, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. *Id.* at 263.

Importantly, this Circuit has also recognized the principle of federal agent immunity from state criminal charges based on the Supremacy Clause. *See*, *Whitehead v. Senkowski*, 943 F.2d 230 (2nd Cir. 1991). The *Whitehead* panel described the rule as a two-prong test:

> *Neagle* established a two-part test for determining whether a state court has jurisdiction to prosecute a federal official for his conduct that is in violation of state law. Under *Neagle*, a state court has no jurisdiction if (1) the federal agent was performing an act which 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.[8] 943 F.2d at 234.

---

[8] The District Court in *Tanella* noted that the first prong of this test was not contested by the State: "In this case, there is no dispute that Tanella was acting pursuant to federal law." 281 F.Supp.2d 614. Accordingly, *Amici* direct our argument to the second-prong of the test.

The *Whitehead* panel noted, however, "The *Neagle* test, however, is not always easily applied." *Id.* This is, in part, because the Supreme Court's use of the phrase "necessary and proper" in *Neagle* was not completely defined by the Court, except as it was illustrated through its application to the facts. Thus, determining when a federal agent's actions were "necessary and proper" permits at least three different interpretations,[9] and it is here that *Amici*'s interest in the development of the law is most acute.

The most rigorous test from the standpoint of the federal agent seeking Supremacy Clause-based immunity is an objectively reasonable standard. Under this theory, Supremacy Clause immunity is unavailable when the federal agent's conduct is objectively unreasonable, and a federal agent's conduct is never objectively reasonable when it violates State law. *Amici* contend that such a standard is contrary to the Court's precedent and would risk the defeat of federal law enforcement policy through the filing of State criminal prosecutions against federal agents.

That such a standard is contrary to established precedent is evident by a review of the facts in *In re Neagle*. There, a deputy United States Marshal shot and killed a person he perceived to be a threat to the Supreme Court Justice he was guarding. He

[9] "What Kind of Immunity? Federal Officers, State Criminal Law and the Supremacy Clause," 112 *Yale Law Journal* 2195 (2003).

did so knowing that the man was a dissatisfied litigant who had previously publicly threatened the Justice. The man was seen approaching the Justice in a menacing manner and ignored the order of the Marshal to stop. When the man then reached inside his coat, the Marshal shot and killed the suspected attacker. After his death, it was determined that the would-be attacker was unarmed. Even though the deputy United States Marshal incorrectly perceived the would-be attacker as armed, the Supreme Court still applied the Supremacy Clause immunity, implicitly acknowledging that his inaccurate assumption was nonetheless reasonable and his actions still necessary and proper.

The Court's analysis and reasoning in *Neagle* is wholly inconsistent with an interpretation that denies immunity simply because the federal agent violated state law by reason of his actions predicated upon mistaken facts. Further, it is an approach specifically rejected by several lower courts. *See*, *In re McShane*, 235 F.Supp. 262, 274 (N.D. Miss. 1964) ("If, as here, 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 . . . then he is entitled to his relief. This is so even though his belief was mistaken or his judgment poor."); *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977) (an officer need not "show that his action was in fact necessary

or in retrospect justifiable . . . ”). Moreover, such an interpretation would jeopardize the effectiveness of law enforcement in America by its overly permissive ability to bring State charges against federal agents.

At the other end of the spectrum is an interpretation of “necessary and proper” that would grant immunity so long as the federal agent was acting within the scope of his or her authority; those acts, *ipso facto*, being necessary and proper to the performance of duty.[10] *Amici* believe that this interpretation is also inappropriate. It effectively abrogates the Court’s intentional inclusion of a “necessary and proper” prong. In addition, it creates an unjust balance in favor of federal agents in their accountability for their actions.[11]

---

[10] Under this theory, any lesser protection subverts the interests of federal government by subjecting it to a patchwork of law created by the variations in the statutes of the 50 states.

[11] This is illustrated by a hypothetical where a federal agent is working alongside a State law enforcement officer. When confronted by a perceived threat to their safety which, in hindsight, is mistaken, both the agent and the officer respond with deadly force. The interpretation of “necessary and proper” that would grant immunity so long as the federal agent was acting within the scope of his or her authority would, thus, present the anomalous result where the federal agent was entitled to immunity, but the State officer would have no such defense available if charges were lodged against him by the State. *Amici* note, however, that if the State officer was cross-designated as a federal law enforcement officer, as often is the case in federal-State task forces such as the one in the instant case, a strong argument would exist to treat the State officer as a federal agent. Because that is not the issue before this court, however, it need not be decided here.

The third interpretation lies in the middle, and, in the view of *Amici,* is the appropriate test for courts to apply: federal agents acting within the scope of their authority are immune from State criminal prosecutions for any action reasonably believed, both subjectively and objectively, to be necessary and proper to the performance of their duty.

It is also the law of this Circuit. "[I]f a court determines that a defendant charged with a state law violation was a federal agent, performing authorized acts, and doing no more than necessary to perform his tasks at the time of the charged improper conduct, a writ of habeas corpus may issue to release the defendant from state custody. This holds true as long as the defendant reasonably believed that his actions were necessary to perform that job . . . and had no motive other than to do his job . . . Thus the agent must have a subjective belief that his conduct was justified, and that belief must be objectively reasonable." *Whitehead v. Senkowski*, 943 F.2d at 234. (citations omitted.) *Amici* contend that this interpretation will not unduly interfere with federal policy and will allow all governmental law enforcement resources to be used effectively to suppress crime.

Two other principles support the application of this standard. First, *Neagle's* use of the term "necessary and proper" has a parallel in Article I, Section 8, Clause 18 of the United States Constitution. There, Congress is given the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Under our system of federalism, while Congress is an institution of limited powers, it must have leeway to conduct those actions which are "necessary and proper," without a showing of actual necessity.[12] By parallel, then, in the context of federal agent immunity under the Supremacy Clause, the "necessary and proper" requirement impels no actual necessity, but rather imposes only a reasonable belief standard, and acknowledges that in some cases, a federal agent's actions may be based on mistaken beliefs, but still are necessary and proper.

Secondly, the application of this reasonable belief standard to claims of Supremacy immunity is entirely consistent with the standard for qualified immunity in federal civil rights litigation.[13] In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) the Supreme Court established that federal employees are immune from civil suit ". . .

---

[12] In *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819), the seminal case on federal versus State powers, the Court interpreted the Necessary and Proper Clause to permit legislation the Congress believed was "convenient, or useful" and did not require a showing of literal necessity.

[13] Civil claims against federal agents alleging a violation of constitutional rights are parallel to claims under 42 U.S.C. §1983. *See*, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Qualified immunity is a legal principle that has been widely litigated and applied. It ". . . strikes a balance between the need, on one hand, to hold responsible public officials exercising their power in a wholly unjustified manner and, on the other hand, to shield officials responsibly attempting to perform their public duties in good faith from having to explain their actions to the satisfaction of a jury." *Locurto v. Safir*, 264 F.3d 154, 162-63 (2d Cir. 2001) (internal quotation marks omitted).

This is exactly the balance, *Amici* submit, that should be struck with regard to claims of Supremacy Clause-based immunity. Effective law enforcement can and should be accomplished under circumstances where officers are held accountable and responsible for their conduct. No one should be allowed to denigrate the law in the name of enforcing it. Yet, at the same time, law enforcement officials are too often faced with facts requiring instantaneous decisions that affect the lives of the officers, suspects and citizens. The quietude of a law office or a judge's chamber often allow clarity from hindsight into a police officer's decisions that is simply impossible at the time the officer must act.

For that reason, the principle of qualified immunity acknowledges that law enforcement officers sometimes err. In those lamentable instances, the Supreme Court has instructed:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense. *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

Amici submit that where the law allows no civil liability for the actions of a law enforcement agent, neither should there be the risk of criminal prosecution. Application of the subjective and objective reasonableness standard to claims of immunity based on the Supremacy Clause is the better approach because it ". . . balance[s] carefully the interest in enforcing federal laws and protecting those who enforce the federal laws with the desire to minimize interference in the enforcement of state laws." *Whitehead v. Senkowski*, 934 F.2d at 235.

III. DEA SPECIAL AGENT TANELLA'S ACTIONS WERE A REASONABLE RESPONSE TO THE CIRCUMSTANCES HE FACED.

The application of the subjective and objective reasonableness test still requires an analysis of Special Agent Tanella's decision to shoot Egbert Dewgard. The District Court below concluded that subjectively, Special Agent Tanella perceived a threat to his personal safety in Dewgard's movement to take away Tanella's gun. The District Court then also concluded that Agent Tanella's belief that Dewgard was attempting to take Agent Tanella's gun was reasonable, even if mistaken:

> In this case, the proper focus of inquiry for Supremacy Clause purposes is whether Dewgard made a movement, not what that movement in fact turned out to be. 281 F.Supp.2d at 621.

The court below reached that conclusion because the record contained multiple indicia of Dewgard's propensity toward violence and dangerous conduct and reasoned that ". . . based on all of the factors . . . it was reasonable for Tanella to perceive (or even misperceive) Dewgard's movement as reaching for his weapon." *Id.* at 623.

The fact that the fatal bullet entered Mr. Dewgard's back is not inconsistent with Agent Tanella's testimony. There is a natural response time between the recognition of danger, the decision to shoot, and the firing of a weapon. In that

interim period, because of the dynamics of a confrontation, one or both parties often arc in different positions to one another.

Mr. Dewgard was shot in close proximity to Agent Tanella, which is fully consistent with the assertion of acting in self-defense. The fact that only a single shot was fired, also supports a finding that deadly force was used, as a last resort, to prevent Mr. Dewgard from forcibly taking Agent Tanella's weapon.

Professional literature supports the District Court's conclusion. Subjective perceptions of threats and the use of deadly force in response have been the subject of academic research and publication. An Iowa prosecutor of 20 years' experience has noted:

> If a victim is shot in the back, the police officer's use of deadly force or defense of self appears irrational. It is common sense, according to the typical grand juror, that there is no danger to the officer if the victim has turned or is turning away.[14]

The author then cites scientific studies conducted by Professor William Lewinski, Ph.D., a police psychologist on the faculty at Minnesota State University (Makato):[15]

---

[14] "What You Need To Tell The Prosecutor in Your Next Use-of-Force Case," Weeg, Joe, Assistant County Attorney, Polk County, Des Moines, Iowa, *The Police Marksman*, May/June 2002 [Vol. 27, No. 3] at p. 46, col. 2; ISSN 0164-8365. Viewable at: www.ultimateperformancetraining.com/articles/tellyourprosecutor.pdf

[15] Professor Lewinski is the founding director of the University's Center for the Study of Human Performance in Extreme (Lethal Force) Encounters. In March

> Experiments by Dr. Lewinski appear to demonstrate that shots in the subject's back should be the norm, rather than the exception for a shooting and fleeing subject because of the relatively quick body dynamics of the subject (from 00/100ths of a second to 14/100ths of a second to turn, fire and disengage) and the relatively slow reaction by the police officer (25/100ths of a second to 33/100ths of a second.)
>
> * * *
>
> Dr. Lewinski's studies, however, draw into question our common assumptions regarding those facts and shape the training that must be given to officers. No longer can a grand juror assume that a shot in the back means that the officer gunned down the victim in cold blood.[16]

In a November 2000 article, Professor Lewinski noted that "the average time for the subject to turn 90 degrees was 32/100th of a second with the fastest being 18/100ths of a second."[17] For a 180 degree turn, "the time was 89/100ths of a second with the fastest being 50/100ths of a second." The fastest time for a complete turn

---

2003, he presented a session on the "Biomechanics of Lethal Force Encounters, Officer's and Subject's Movement and Speed" at the Academy of Criminal Justice Sciences meeting in Boston, MA (with Tamara Wilkins Ph.D.). He also has served as a litigation consultant in numerous civil actions.

[16] *Supra*, note 14, at p. 47.

[17] "Why Is the Suspect Shot in the Back?," Lewinski, Prof. William, Ph.D., *The Police Marksman*, Nov./Dec. 2000 [Vol. 25, No. 6] at p. 26, col. 2; ISSN 0164-8365. Viewable at: www.ultimateperformancetraining.com/articles/shotinback.pdf

was 60/100ths of a second done by a subject who traversed about 4 feet as he did the 360 degree turn. The average was just under a second.[18]

Professor Lewinski also noted

> By studying the "dynamic" rotation, while the subjects were doing a 90, 180 or 360 degree turn, not only can we see that the subjects would be shot in the back if they were actually in a street encounter, and the officer was to really "react," also the subjects would be shot at quite a distance from where the officer said they were when the officer made the decision to fire. This study makes it very clear that regardless of the best intentions of the officer, given what the suspect is doing, and how quickly he can do it, the suspect will be shot in the back in some situations.[19]

Professor Lewinski pointed out in a 1999 article, that the time it takes for an officer to process visual stimuli and then to react to a person's threat, is a longer period than the suspect's turning actions. He wrote:

> Previous studies conducted by the faculty at the Smith & Wesson Academy and one earlier joint study conducted by Dr. Martin Fackler and Ernest Tobin . . . have shown that once an officer perceives a threat . . . it will take a minimum of 1/3 second (.33 second) up to 1.5-2.0 seconds for that officer's brain to process the information, complete his reaction, and fire his weapon in self defense.[20]

---

[18] *Id.* at p. 27, col. 1 & 2.

[19] *Id.* at p. 28, col. 1.

[20] "Is Your Shooting Clean?," Lewinski, Prof. William, Ph.D., and Grossi, Dave, *The Police Marksman*, Sep./Oct. 1999 [Vol. 24, No. 5] at p. 24, col. 1; ISSN 0164-8365.

In an article published in 2002, Prof. Lewinski wrote that to draw and fire one round, with an officer's hand near his holster, the time ranged from 1.61 seconds to 2.00 seconds, depending on the type of holster.[21] If a person can turn 180 degrees, and move several feet away from an officer in a period from 50/100ths of a second to 89/100ths of a second, and the officer takes 1.5 to 2.0 seconds to react and fire, the suspect not only can turn around 180 degrees, but be at a distance of several feet away at the time a single shot is fired.[22]

Amici submit that the District Court below properly concluded that Special Agent Tanella's subjective belief that his life was threatened was objectively reasonable.

Viewable at: www.ultimateperformancetraining.com/articles/isyourshootingclean.pdf

[21] "The Biomechanics of Lethal Force Encounters," Lewinski, Prof. William, Ph.D., *The Police Marksman*, Nov./Dec. 2002 [Vol. 27, No. 6] at p. 19, col. 2, item 16; ISSN 0164-8365. Viewable at: www.ultimateperformancetraining.com/articles/biomechanics.pdf

[22] In presenting this information, *Amici* are not attempting to unilaterally introduce scientific evidence supporting the propriety of Agent Tanella's shooting of Egbert Dewgard. Expert testimony should be subject to cross-examination and challenged by opposing opinions, if any. We refer to these studies only to suggest that the perception that a shooting must be improper, because the deceased was shot in the back, is an unjustified and simplistic assumption.

CONCLUSION

Federal policy and resources are necessary components of the national response to crime that directly strikes millions of people every year, and indirectly affects every person in the United States. The protection of life, liberty and property cannot be as effective without an unfettered federal law enforcement capability. A state cannot be permitted to defeat or hinder that federal policy by lodging criminal charges against federal agents for actions taken within the scope of their authority and which are subjectively and objectively reasonable to accomplish their federal duties.

The Supremacy Clause provides an immunity to federal agents against State prosecutions that was announced more than a century ago in the Supreme Court's *In re Neagle* decision. The appropriate test to be applied when such an immunity claim is asserted by a federal agent is whether the federal agent was acting within his authority and whether he has a subjective belief that his conduct was justified, and that belief is also objectively reasonable. The District Court correctly employed the law of the Second Circuit. It also correctly applied that law to the facts confronting Special Agent Tanella at the time he shot and killed Egbert Dewgard.

Accordingly, *Amici* respectfully request this Court affirm the District Court's decision to dismiss the State's indictment against Special Agent Tanella.

Respectfully submitted,

Wayne W. Schmidt, Esq.

Counsel for Amici Curiae

WAYNE W. SCHMIDT, ESQ.
Counsel of Record

Americans for Effective
Law Enforcement, Inc.
841 West Touhy Avenue
Park Ridge, Illinois 60068
Tel: 1-800-763-2802
E-mail: aele@aol.com

Of Counsel

GENE VOEGTLIN, ESQ.
International Association of
Chiefs of Police, Inc.
515 North Washington Street
Alexandria, Virginia 22312

JAMES P. MANAK, ESQ.
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137