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CHRISTOPHER DEEDY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII,	)	CR. NO.
)	
Plaintiff,	)	Cir. Court No. 11-1-1647
)	
v.)	
	)	NOTICE OF REMOVAL;
CHRISTOPHER DEEDY,	)	MEMORANDUM IN SUPPORT OF
	)	REMOVAL; DECLARATION OF
Defendant.	)	BROOK HART; CERTIFICATE OF
_____	)	SERVICE

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1442(a)(1), Christopher Deedy, a special agent with the Bureau of Diplomatic Security, the law enforcement arm of the United States Department of State, hereby removes the above-captioned criminal action commenced in the Circuit Court of the First Circuit, State of Hawaii.

The removing party, Special Agent Deedy, was arraigned in the Circuit Court on Monday, November 21, 2011. In his Motion for Order Granting Defendant Leave to File Notice

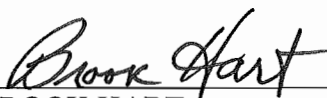
EXHIBIT A

of Removal Special Agent Deedy has shown good cause for not filing this Notice of Removal within thirty-days after arraignment. 28 U.S.C. § 1446(c)(1).¹

A copy of the Indictment, which the Prosecutor's Office served on Special Agent Deedy on November 21, 2011, is attached hereto. A Memorandum in Support of this Notice of Removal, setting forth in detail the grounds warranting removal, and the Declaration of Brook Hart are submitted herewith and incorporated herein by reference.

DATED: Honolulu, Hawaii, June 26, 2012.

Respectfully submitted,



BROOK HART
MARGARET NAMMAR
Attorneys for Defendant
CHRISTOPHER DEEDY

¹ "Subject to certain conditions, amendments made by Title I of Pub.L. 112-63, shall take effect upon the expiration of the 30-day period beginning on Dec. 7, 2011, and shall apply to any action or prosecution commenced on or after such effective date, see Pub.L. 112-63, § 105(d), set out as a note under 28 U.S.C.A. § 1332." Because this case was indicted on November 16, 2011, 28 U.S.C. § 1446(c)(1) applies. For cases commenced on or after January 6, 2012, 28 U.S.C. § 1455 is now applicable to the removal of criminal cases. Note, however, that no substantive changes were made to the criminal statute.

IN THE UNITED STATES DISTRICT COURT

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MEMORANDUM IN SUPPORT OF REMOVAL

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Pub. L. No. 106-58, Title VI, § 623, 113 Stat. 471 (1999). 12

The defendant, United States Department of State Special Agent Christopher Deedy (“Special Agent Deedy”), by and through his undersigned counsel, hereby submits this memorandum in support of his removal to this court of the above-captioned criminal case from the Circuit Court of the First Circuit, State of Hawaii; indictment filed on November 16, 2011.

Federal agents facing prosecution commenced in state courts have a statutory right to remove such prosecutions to federal court pursuant to 28 U.S.C. § 1442(a)(1). Removal is proper where a federal law enforcement officer acting within the scope of his authority asserts a colorable federal defense to such prosecution.

I. OVERVIEW

A. Procedural Background

On November 16, 2011, the State of Hawaii indicted Special Agent Deedy on two charges: murder in the second degree, in violation of H.R.S. §§ 707-701.5¹ and 706-656, and carrying or use of firearm in the commission of a separate felony, in violation of H.R.S. § 134-21.² On November 21, 2011, Special Agent Deedy appeared in the Circuit Court of the First

¹ § 707-701.5. Murder in the second degree reads:

(1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

² § 134-21. Carrying or use of firearm in the commission of a separate felony reads:

(a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection when the separate felony is:

- (1) A felony offense otherwise defined by this chapter;
- (2) The felony offense of reckless endangering in the first degree under section 707-713;
- (3) The felony offense of terroristic threatening in the first degree under section 707-716(1)(a), 707-716(1)(b), or [707-716(1)(e)]; or

Circuit, State of Hawaii, and was arraigned on the charges. Special Agent Deedy pleaded “not guilty” to both counts. Trial is currently scheduled to commence on September 10, 2012.

B. Factual Background

On November 4, 2011, Special Agent Deedy arrived in Honolulu, Hawaii, for a State Department special mission dignitary protection assignment for the Asia-Pacific Economic Cooperation (“APEC”). Decl. of Brook Hart at ¶ 2. After an official meeting of State Department personnel, Special Agent Deedy met with two of his friends who reside in Honolulu, Adam Gutowski (“Gutowski”) and Jessica West (“West”). Id. The three spent the evening together socializing at various locations in downtown Honolulu and in Waikiki. Id.

Also on that Friday evening and Saturday morning of November 4 and 5, 2011, Kollin Elderts (“Elderts”) and his friend Shane Medeiros (“Medeiros”) had been partying with their friends in downtown Honolulu and in Waikiki.³ Id. at ¶ 3.

As shown on the multiple-camera McDonald’s silent security surveillance video recording seized by the police after this incident, at approximately 2:30 a.m., on November 5, 2011, Special Agent Deedy, Gutowski, and West entered the McDonald’s restaurant, located at 2237 Kuhio Avenue in Waikiki. Decl. of Brook Hart at ¶ 5. Gutowski ordered food. Id. The three sat in a booth located on the Ewa side of the restaurant near the highchairs and the toy display. Id. As they were eating their meal, Special Agent Deedy observed three males at the

(4) The felony offenses of criminal property damage in the first degree under section 708-820 or criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

(b) A conviction and sentence under this section shall be in addition to and not in lieu of any conviction and sentence for the separate felony; provided that the sentence imposed under this section may run concurrently or consecutively with the sentence for the separate felony.

(c) Any person violating this section shall be guilty of a class A felony.

³ Special Agent Deedy and his friends and Elderts and his friends did not know each other and did not have any contact or interaction at any time prior to the incident at the McDonald’s. Decl. of Brook Hart at ¶ 4.

McDonald's cashier counter: Elderts, Medeiros, and Michel Perrine ("Perrine"). Id. Elderts and Medeiros had entered the restaurant together. Id. Perrine had entered the establishment alone, approximately two minutes after Elderts and Medeiros. Id. While at the cashier counter, Elderts began to verbally harass Perrine using racial slurs. Id. Perrine asked Elderts to leave him alone, not to single him out, and stated words to the effect that he was a "local." Id. The McDonald's staff also intervened and asked Elderts to leave Perrine alone. Id.

After ordering their food, Elderts and Perrine sat at separate tables. Decl. of Brook Hart at ¶ 6. Perrine sat on the Diamond Head side of the restaurant, which was opposite of where Special Agent Deedy, West, and Gutowski were sitting, about eighteen feet away. Id. Elderts sat at a central aisle table facing the cashier counter, about ten feet from where Special Agent Deedy was seated. Id. Special Agent Deedy observed Elderts and Medeiros continue to speak to Perrine in an aggressive and threatening manner. Id. Upon rising from his table, and as West and Gutowski went off to deposit refuse in the trash container and exit the restaurant, Special Agent Deedy stood and asked Perrine if he was all right. Id. Medeiros, who was about ten or eleven feet from Perrine, moved closer to where Elderts was seated and asked Perrine if he had an eye problem. Id. Medeiros pointed at Perrine and told Perrine that he better stop eyeing them up. Id. As he said this, a female McDonald's security guard, Rosalinda Soriano ("Soriano"), who had been standing next to the cashier counter during the initial exchange between Elderts and Perrine, approached and told them "no more troubles here . . . if you make troubles, you can leave." Id. Having observed this, Special Agent Deedy sensed that the interaction between Elderts, Medeiros, and Perrine was being escalated by Medeiros and Elderts, that a physical confrontation was imminent, and that Perrine was in danger. Id. Concerned for Perrine's safety

and the consequences of a possible attack by Elderts and Medeiros, Special Agent Deedy calmly attempted to prevent this from happening. Id.

At this point, Medeiros and Elderts directed their aggression at Special Agent Deedy. Decl. of Brook Hart at ¶ 7. Special Agent Deedy attempted to reason with Elderts and Medeiros and deescalate the situation, saying that no one wanted trouble and suggesting that everyone should just drop the matter. Id. Both men were unreasonable, combative, and threatening toward Special Agent Deedy and reacted with an escalating level of aggression that was entirely inconsistent with Special Agent Deedy's calm tone and manner. Id. Based on his training and experience, Special Agent Deedy believed that Elderts and Medeiros were intoxicated and under the influence of drugs.⁴ Id. In a non-confrontational manner, Special Agent Deedy said that the two men were causing a scene and should calm down. Id. At about this time, Soriano attempted to intercede once again. Id. Also, another male, Alexander Byrd ("Byrd"), who had been near the cashier counter, turned and approached Medeiros. Id. After a brief exchange of words with Medeiros, Byrd returned to the cashier counter. Id.

Elderts, still seated, aggressively addressed Special Agent Deedy using the derogatory and racist term "haole." Decl. of Brook Hart at ¶ 8. Elderts threatened Special Agent Deedy by saying: "eh, fuckin' haole, you like beef?" or words to that effect. Id. Special Agent Deedy, responding to the verbal threat of violence, further attempted to deescalate the situation by identifying himself as a law enforcement officer and showing Elderts and Medeiros his credentials and gold badge. Id. West, who had been on her way out of the restaurant, returned and was standing next to Special Agent Deedy as he took out his credentials and badge. Id. Shortly thereafter, Gutowski approached the group. Id. Special Agent Deedy advised that

⁴ Post incident analysis revealed that Elderts had a .127 blood alcohol level, along with metabolites of cocaine and marijuana in his system.

starting a fight was never in anyone's interest and that fights often lead to people getting hurt or arrested. Id.

Elderts became even more irate and verbally threatening after Special Agent Deedy identified himself as a law enforcement officer and attempted to deescalate the situation. Decl. of Brook Hart at ¶ 9. Elderts' affect was aggressive, his speech was slurred and loud, and his language was inappropriate. Id. Elderts asserted that he would not be arrested and challenged Special Agent Deedy by asking "are you going to shoot me?" Id. Having displayed his credentials and having made no reference to a firearm, Special Agent Deedy asked, "shoot you?" Id. Elderts repeated himself. Id.

As Elderts challenged Special Agent Deedy, Elderts stood up from his table and reached toward his waistband. Decl. of Brook Hart at ¶ 10. Elderts told Special Agent Deedy that he would need to shoot Elderts first, or else Elderts would "get" (or "gut") him. Id. Alarmed and concerned for his safety and the safety of others, Special Agent Deedy moved West out of the way. Id. After Elderts made these comments and stood up, Soriano and Byrd approached again and attempted to stop Elderts from advancing on Special Agent Deedy. Id.

As Elderts' level of aggression increased, he again asked Special Agent Deedy if he would shoot him. Decl. of Brook Hart at ¶ 11. Elderts again told Special Agent Deedy that he would "get" (or "gut") Special Agent Deedy. Id. As Elderts spoke, Special Agent Deedy saw him reach with his right hand and grab at his waistband again, as if to retrieve a weapon; at the same time Elderts pushed past Byrd with his other hand, fist clenched, while advancing menacingly around the table barrier and towards Special Agent Deedy. Id.

As Elderts aggressively moved on Special Agent Deedy, Special Agent Deedy stepped back and reached for, but did not draw or display his firearm, which was in a holster on his right

hip. Decl. of Brook Hart at ¶ 12. Elderts temporarily stopped advancing toward Special Agent Deedy. Id. West and Byrd then stepped between Special Agent Deedy and Elderts. Id. Elderts was yelling at Special Agent Deedy, saying things like “oh you have a gun?” “shoot ‘em then,” and telling Special Agent Deedy he better not be bluffing, because Special Agent Deedy would regret it, or words to that effect. Id. Special Agent Deedy continued to watch Elderts’ movements for signs of a weapon and further advancement. Id. Despite his knowledge that Special Agent Deedy was a law enforcement officer, Elderts suddenly went around West and Byrd, and rushed at Special Agent Deedy. Id. As he did so, Elderts violated 18 U.S.C. § 111, assaulting, resisting, or impeding [a federal officer].⁵ Id. Special Agent Deedy employed a front kick to Elderts’ leg, a defensive technique used against an assailant who suddenly attacks an officer in close range. Id. This technique was utilized by Special Agent Deedy to stop the aggressor and to create space. Id. In the process Special Agent Deedy’s slipper came off of his right foot. Id. Special Agent Deedy then stepped back to create more space between him and Elderts, minimize the possibility for further assaults, and allow Special Agent Deedy to again attempt to assess and deescalate the situation. Id.

⁵ 18 U.S.C. § 111. Assaulting, resisting, or impeding certain officers or employees reads:

(a) In general. --Whoever--

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person’s term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.--Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

Gutowski, who had been behind Special Agent Deedy, placed himself between Elderts and West. Decl. of Brook Hart at ¶ 13. Elderts and Gutowski put their hands on each other as West turned to Special Agent Deedy. Id. As West started to speak, Special Agent Deedy saw Gutowski being assaulted, first by a blow to his head from Elderts and then by punches and kicks from both Elderts and Medeiros. Id. Fearing for West's safety, Special Agent Deedy directed her to stand back and he took a step towards Elderts, Medeiros, and Gutowski while yelling at them to stop. Id. Elderts, who had been at the threshold of the handicap exit door, suddenly turned and charged at Special Agent Deedy, grabbing his leg and striking him in the face. Id. This caused Special Agent Deedy to fall backwards against and knock over the metal-based hand sanitizer. Id. Special Agent Deedy struck the back of his head as he fell to the floor next to the cashier counter. Id. Elderts then rejoined Medeiros to further assault Gutowski. Id.

Special Agent Deedy arose from the floor and saw Gutowski at the threshold of the now open handicap door being beaten and kicked by Elderts and Medeiros. Decl. of Brook Hart at ¶ 14. Special Agent Deedy saw Gutowski bleeding profusely from his head and face; Special Agent Deedy then raised both arms, outstretched, in front of him, palms forward, and yelled again for them to stop. Id. Elderts turned, clenched his fists, and aggressively advanced towards Special Agent Deedy. Id. Stepping back to preserve a reactionary gap (and unsure of what instrument had been used to cause the wound to Gutowski), Special Agent Deedy began to draw his gun (a Glock 26), as he told Elderts to freeze. Id. Special Agent Deedy raised his outstretched left arm with his palm facing forward. Id. Elderts continued to advance towards Special Agent Deedy with his fist cocked back preparing to hit Special Agent Deedy in the face a second time. Id. Elderts charged Special Agent Deedy to the point where Elderts ran into Special Agent Deedy's outstretched left palm. Id. Initially, Special Agent Deedy had placed his

index finger straight along the side of the trigger housing, i.e., not engaged on the trigger, in an effort to have Elderts submit. Id. But Elderts reached for Special Agent Deedy's gun in an attempt to take it. Id. With his left hand, Elderts grabbed Special Agent Deedy's right hand, which was holding the gun, and with his right hand Elderts grabbed Special Agent Deedy's left shoulder, pushing him across the room towards the toy display, a distance of approximately ten to fifteen feet. Id. As Elderts tried to take possession of Special Agent Deedy's gun, shots were fired. Id.

Elderts continued his assault on Special Agent Deedy by pushing him backwards and down onto the floor near the toy display. Decl. of Brook Hart at ¶ 15. While on the floor, Elderts was on top of Special Agent Deedy and punched him in the face with his right fist at the same moment that he was trying with his left hand to take Special Agent Deedy's gun from him. Id. During the course of the attack on Special Agent Deedy and in response to an imminent threat of serious bodily injury or death to himself and others, Special Agent Deedy was compelled to discharge his gun, resulting in the death of Elderts. Id. Subsequent analysis detected gunshot residue on Elderts hands. Id. HPD Examination of Special Agent Deedy's gun found a spent cartridge case remaining in the gun, consistent with interference with the slide and case ejection process at the time of the third shot. Id.

After Special Agent Deedy stopped the assault by Elderts, he extracted himself from his position underneath Elderts, secured his weapon and then searched Elderts for weapons. Decl. of Brook Hart at ¶ 16. Special Agent Deedy arose and although he had heard the security guard previously say that she was calling the police, he instructed other bystanders to do so. Id. Special Agent Deedy ascertained that Medeiros had left the scene and that there was no further threat. Id. Shortly thereafter, a bystander, Charles Maisch, who had entered McDonald's after

the shots were fired, began to record the events on his cell phone video camera. Id. The “Maisch” cell phone video was obtained by both the prosecution and the defense and disclosed by both parties in discovery. Id. After getting his bearings, Special Agent Deedy then immediately began to administer aid to Elderts in an attempt to save his life. Id. In doing so, Special Agent Deedy used his pocketknife to cut away Elderts’ undershirt to determine the number and location of gunshot wounds and to render aid until assistance arrived. Id. Special Agent Deedy continued to render aid as police (“HPD”) and paramedics arrived on the scene, doing everything he could to save Elderts. Id. Special Agent Deedy did not stop rendering aid until paramedics took over. Id. As Special Agent Deedy stood up from his efforts to render aid HPD officers detained him. Id. Special Agent Deedy told them that he had done the shooting, and where the weapon was holstered on his person. Id.

Immediately following the incident, West took Gutowski to their nearby residence to examine and clean his wounds. Decl. of Brook Hart at ¶ 17. Shortly thereafter, West drove Gutowski to the emergency room at Queens Medical Center (“QMC”). Id. Gutowski’s injuries included a large laceration to his scalp and contusions and hematoma to his forehead and face. Id. Special Agent Deedy was taken to QMC by HPD following the incident. Id. According to the medical records from QMC, in the incident Special Agent Deedy suffered a broken nose, trauma and abrasions to his face, and reported pain to his jaw and ear. HPD photographs taken at the hospital also show abrasions on Special Agent Deedy’s back and elbows. Id.

II. THE APPLICABLE LEGAL STANDARD

The federal officer removal statute, 28 U.S.C. § 1442, provides, in pertinent part, that:

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) . . . any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

The federal officer removal statute serves “to protect the integrity of federal governmental operations by providing a federal forum in the first instance for cases wherein federal officials must raise defenses arising from their official duties.” Willingham v. Morgan, 395 U.S. 402, 405 (1969); accord Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1252 (9th Cir. 2006); Arizona v. Manypenny, 451 U.S. 232, 241 (1981). “One of the primary purposes of the removal statute — as its history clearly demonstrates — was to have such defenses litigated in the federal courts.” Willingham, 395 U.S. at 407. The Supreme Court read the statute broadly to effectuate this intended purpose. See id. (opining that because “Congress has decided that federal officers . . . require the protection of a federal forum,” this policy, which underlies § 1442(a)(1), “should not be frustrated by a narrow, grudging interpretation of [that statute]”); United States v. Penn. Env. Hearing Bd., 377 F. Supp. 545, 553 (M.D. Pa. 1974) (federal officer removal statute “must be liberally construed[,] [o]therwise, federal officers may be prevented from having their cases heard in a federal forum . . .”).

To establish jurisdiction, the Supreme Court requires that defendants removing under 28 U.S.C. § 1442(a)(1) allege a colorable federal defense. Mesa v. California, 489 U.S. 121, 129 (1989). “By raising a colorable federal defense in his removal petition, the defendant-official transforms the otherwise nonremovable state law action into one that falls within the federal court’s ‘arising under’ jurisdiction.” Jamison v. Wiley, 14 F.3d 222, 239 (4th Cir. 1994). This requirement, however, does not oblige a federal officer to prove that he will prevail on his federal defense in order to be entitled to removal. Willingham, 395 U.S. at 407 (“The officer

need not win his case before he can have it removed.”); United States v. Todd, 245 F.3d 691, 693 (8th Cir. 2001) (“For a defense to be considered colorable, it need only be plausible”); Torres v. CBS News, 854 F. Supp. 245, 247-48 (S.D.N.Y. 1994) (averment of immunity is sufficient for removal even though the bulk of authority weighs against the success of the defense). Indeed, one of the primary purposes of the federal officer removal statute is to protect federal officers by allowing them to have the validity of the federal defense of immunity determined in a federal court. Willingham, 395 U.S. at 407.

A party asserting a plausible entitlement to Supremacy Clause immunity presents a colorable federal defense. City of Jackson v. Jackson, 235 F. Supp. 2d 532 (S.D. Miss. 2002); Puerto Rico v. Torres Chaparro, 738 F. Supp. 620, 622-23 (D.P.R. 1990).

III. SPECIAL AGENT DEEDY IS ENTITLED TO REMOVAL

As a matter of law, Special Agent Deedy is entitled to removal if he can show that he is a federal officer, he is being prosecuted for an act that was performed under color of office, and he alleges a colorable federal defense. All of the conditions for removal are satisfied here.

Therefore, removal of this case is proper.

A. Special Agent Deedy is a Federal Officer

There can be no dispute that Special Agent Deedy is an officer of the United States, as contemplated in the federal officer removal statute. He is employed as a special agent of the Bureau of Diplomatic Security, the law enforcement arm of the United States Department of State, and has been so employed since June of 2009. Decl. of Brook Hart at ¶ 18. He is, therefore, an “officer of the United States.”

B. Special Agent Deedy was Acting Under Color of Office

As set forth *supra* in the Factual Background, the circumstances conclusively demonstrate that Special Agent Deedy is being prosecuted for actions taken under color of office.

Department of State special agents have statutory authority to carry firearms, and the Bureau of Diplomatic Security has an off-duty and secondary firearms policy, as well as a 24-hour firearms carry policy. See 18 U.S.C. § 926B; 22 U.S.C. § 2709(a)(4). Special agents are also empowered to make arrests for any felony under the laws of the United States committed in their presence.⁶ 22 U.S.C. § 2709(a)(5). Furthermore, DS agents' training includes instruction on the "Federal Law Enforcement Officers' Good Samaritan Act" and the Department of State has commended its special agents for intervening when they witness acts threatening violence.⁷ See Federal Tort Claims Act, Pub. L. No. 105-277, § 101(h) [Title VI, § 627], 112 Stat. 2681-519, (1998); Pub. L. No. 106-58, Title VI, § 623, 113 Stat. 471 (1999); 28 U.S.C. § 2671 Advisory Notes.

[A] law enforcement officer shall be construed to be acting within the scope of his or her office or employment, if the officer takes reasonable action, including the use of force, to --

- (1) protect an individual in the presence of the officer from a crime of violence;
- (2) provide immediate assistance to an individual who has suffered or who is threatened with bodily harm; or
- (3) prevent the escape of any individual who the officer reasonably believes to have committed in the presence of the officer a crime of violence.

⁶ Elderts' and Medeiros' violence towards Gutowski violated Hawaii criminal law. See H.R.S. §§ 707-711 (assault in the second degree, a felony). Elderts' conduct toward Special Agent Deedy would also appear to violate federal criminal law 18 U.S.C. § 111 (assaulting/resisting/impeding a federal officer).

⁷ In this case agency policy is reflected in a 2010 e-mail from the DS Special Agent in Charge to Special Agent Deedy and others in the Washington Field Office commending fellow WFO Special Agent Dave Meyer for having interceded in a domestic dispute/burglary while off-duty in a housing complex. Special Agent Meyer also received a department level honor award for his actions in this situation. Decl. of Brook Hart at ¶ 19.

Id. The term “crime of violence” means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

Here, Special Agent Deedy was authorized by federal law when he responded to Elderts’ and Medeiros’ aggressive actions and threats towards Perrine. Special Agent Deedy approached the situation calmly and reasonably in an effort to protect Perrine from circumstances portending violence. Special Agent Deedy attempted to appeal to reason and common sense by asking Elderts to leave Perrine alone and then identifying himself as law enforcement. In response, and knowing that Special Agent Deedy was a law enforcement officer, Elderts assaulted Special Agent Deedy. Special Agent Deedy responded to address crimes of violence (felonious assaults) that were committed first on himself and then on Gutowski. Special Agent Deedy attempted to provide immediate assistance to Gutowski who had suffered significant bodily injury. After having been personally assaulted twice by Elderts, Special Agent Deedy began to draw his gun, in an attempt to subdue Elderts, and yelled for Elderts to freeze. Instead of complying, Elderts continued his assault on Special Agent Deedy, charging towards Special Agent Deedy and raising his fist to throw a punch. When Elderts attempted to wrest Special Agent Deedy’s gun from his hand, Special Agent Deedy was compelled to defend himself from further bodily injury or death. Special Agent Deedy acted with prudence and restraint; he only resorted to the use of deadly force in response to an imminent and deadly threat to his safety and the safety of others, after all intermediate attempts to use lesser force were unsuccessful.

Courts have found that federal law enforcement officers who encounter apparent violations of state law and intervene pursuant to agency policies act within the scope of their official duties as federal law enforcement officers. For example, in United States v. Hoy, 137 F.3d 726 (2d Cir. 1998), a federal marshal on his way to a grocery store encountered a woman lying on the sidewalk, crying and screaming, while a drunk man stood over the woman holding her purse. Pursuant to an unwritten policy of the United States Marshals Service authorizing its deputy marshals to intervene when they observe the commission of state law crimes involving a threat of physical harm to another citizen, the federal marshal intervened. The man struck the federal marshal, and was charged with assaulting a federal officer, in violation of 18 U.S.C. § 111. The Second Circuit held that the marshal was engaged in the performance of official duties. Id. at 731. It further noted that the Marshals Service policy authorizing its personnel to intervene in such circumstances posed no threat to local law enforcement. Id.

In United States v. Reid, 517 F.2d 953 (2d Cir. 1975), an off duty agent with the United States Drug Enforcement Agency (“DEA”) was in the process of having his hair cut when he heard a commotion at the store next door. He investigated and discovered a robbery in progress. While attempting to protect the store owner and apprehend the robbers, he was shot by one of the robbers. The Second Circuit held that the DEA special agent was acting within the scope of his official duties. Id. at 964. The court specifically noted that pursuant to DEA policy, agents who witness a state law felony or violent misdemeanor are expected to take reasonable action to prevent the crime and/or apprehend the violator. Id. at 960.

Cases discussing the conduct of police officers in actions brought under 42 U.S.C. § 1983 are also instructive because, in such cases, the plaintiff must show that the officer was acting under color of law. As those cases recognize, “the fact that a police officer is on or off duty, or

in or out of uniform is not controlling. It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law.” Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975) (citation and internal quotation marks omitted) (off duty police officer who shot three individuals after intervening in a barroom brawl was acting under color of state law); see also Revene v. Charles County Commiss., 882 F.2d 870, 873 (4th Cir. 1989) (internal citations and quotations omitted) (“[e]ven when off duty . . . [the officer] retain[ed] authority to conduct official police action, and any action purportedly taken pursuant to this authority would be under color of state law, whether [he] hew[ed] to the line of [his] authority or overstep[ped] it.”); Bouye v. Marshall, 102 F. Supp.2d 1357, 1359 (N.D. Ga. 2000) (off duty officer working as security guard, who confronted and searched a private citizen, was acting under color of state law because he was performing a police function in patrolling the apartment complex and investigating suspicious behavior).

Moreover, in State of Hawaii v. Daniel Moore, CR. No. 11-00925 KSC, Doc. 37 (D. Hawaii Nov. 18, 2011), this Court found that removal of Special Agent Moore’s case to federal court was appropriate. Magistrate Judge Kevin S.C. Chang found that Special Agent Moore had established that he was a federal law enforcement officer with the DEA. He further found that Special Agent Moore was acting under color of office when he “intervened to moderate or prevent a violent confrontation . . . at a public park which could have resulted in physical injury to one or more persons[,]” and that he “was aware of the presence of illegal drugs . . . and possible drug use by Ms. Abellira.” And in the course of detaining Ms. Abellira, Special Agent Moore had identified himself as a law enforcement officer. Finally, Magistrate Judge Chang

found that Special Agent Moore asserted a ‘colorable federal defense’ – Supremacy Clause Immunity. Accordingly, the court denied the state’s motion to remand to state court.

Just as the agents in Hoy and Reid were acting pursuant to agency policy, Special Agent Deedy was also acting pursuant to agency policy. And, just as in Moore, where Special Agent Moore intervened as a law enforcement officer to moderate or prevent a violent confrontation at a public park which could have resulted in physical injury to one or more persons, Special Agent Deedy also intervened as a law enforcement officer to prevent the escalation of a confrontation portending violence in a public restaurant. Special Agent Deedy did not act for any reason other than to protect himself and others from the violent and felonious actions of Elderts and Medeiros. He was, therefore, acting pursuant to his authority as a federal law enforcement officer. Indeed, intervention to prevent or disrupt violent crime is precisely what federal law enforcement officers are trained to do.

C. Special Agent Deedy has Raised a Colorable Federal Defense

The federal defense upon which Special Agent Deedy relies to establish removal jurisdiction under 28 U.S.C. § 1442(a)(1) is the doctrine of Supremacy Clause immunity. At this juncture, the Court must only assess whether Supremacy Clause immunity is a colorable defense.

For over 100 years, the federal courts have recognized that the Supremacy Clause of the United States Constitution protects federal officers from state prosecution for conduct performed in the course of their official duties. Under In re Neagle, 135 U.S. 1 (1890), and its progeny, a federal officer is immune from state prosecution when (1) the federal officer was performing an act that he was authorized to do by the law of the United States, and (2) in performing that act, the federal officer did what was necessary and proper for him to do. Kentucky v. Long, 837 F.2d 727, 744 (6th Cir. 1988). The conduct need not be in fact necessary or even in retrospect

justifiable. The second step of the analysis is satisfied so long as the federal officer had an honest belief that the act was necessary to the performance of his duty and the action he took was reasonable under the circumstances as they appeared to him. Clifton v. Cox, 549 F.2d 722, 728-29 (9th Cir. 1977). “[F]ederal officers have long been held immune from state prosecutions for actions reasonable and necessary in the discharge of their federal responsibilities.” Wyoming v. Livingston, 443 F.3d 1211, 1217 (10th Cir. 2006) (citing In re Neagle, 135 U.S. at 75; Ohio v. Thomas, 173 U.S. 276, 284 (1899)).

Applying Neagle and Clifton, courts have held that federal agents are immune from state prosecution even where their conduct violates internal agency regulations⁸ or exceeds their specific authority,⁹ and even where the legality of the mission in connection with which the individual officer was acting is questionable.¹⁰ While there is no allegation that Special Agent Deedy’s intervention to protect Perrine, Gutowski and himself exceeded his authority, the fact that state prosecutions have been precluded in such cases demonstrates the breadth of the immunity to which federal officers are entitled under the Supremacy Clause.

Special Agent Deedy had an honest belief that the conduct on which the criminal charges in this case are based was necessary to the performance of his law enforcement duties and that the actions he took were reasonable under the circumstances as they appeared to him. At this stage, however, the Court need not decide whether Special Agent Deedy is ultimately entitled to immunity from state prosecution. The issue now is whether Special Agent Deedy has raised a colorable federal defense for purposes of removal. There can be no question but that he has.

⁸ See, e.g., Kentucky v. Long, 837 F.2d 727, 733 (6th Cir. 1988).

⁹ See, e.g., Connecticut v. Marra, 528 F. Supp. 381, 386 (D. Conn. 1981).

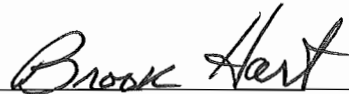
¹⁰ See, e.g., In re Lewis, 83 F. 159, 160-61 (D. Wash. 1897).

IV. CONCLUSION

For the foregoing reasons, removal of this criminal case from the Circuit Court of the First Circuit, State of Hawaii, to this Court is proper.

DATED: Honolulu, Hawaii, June 26, 2012.

Respectfully submitted,



BROOK HART
MARGARET NAMMAR
Attorneys for Defendant
CHRISTOPHER DEEDY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII,	)	CR. NO.
)	
Plaintiff,	)	Cir. Court No. 11-1-1647
)	
v.)	
)	
CHRISTOPHER DEEDY,)	
)	
Defendant.)	
_____	)	DECLARATION OF BROOK HART

DECLARATION OF BROOK HART

1. I am an attorney for Defendant United States Department of State Special Agent Christopher Deedy (“Special Agent Deedy”) in the above-entitled case.

I set forth the following facts upon information and belief as learned from witnesses, the McDonald’s security surveillance video recording and Maisch iPhone video which were both turned over in discovery:

2. On November 4, 2011, Special Agent Deedy arrived in Honolulu, Hawaii, for a State Department special mission dignitary protection assignment for the Asia-Pacific Economic Cooperation (“APEC”). After an official meeting of State Department personnel, Special Agent Deedy met with two of his friends who reside in Honolulu, Adam Gutowski (“Gutowski”) and Jessica West (“West”). The three spent the evening together socializing at various locations in downtown Honolulu and in Waikiki.

3. Also on that Friday evening and Saturday morning of November 4 and 5, 2011, Kollin Elderts (“Elderts”) and his friend Shane Medeiros (“Medeiros”) had been partying with their friends in downtown Honolulu and in Waikiki.

4. Special Agent Deedy and his friends and Elderts and his friends did not know each other and did not have any contact or interaction at any time prior to the incident at the McDonald's.

5. As shown on the multiple-camera McDonald's silent security surveillance video recording seized by the police after this incident, at approximately 2:30 a.m., on November 5, 2011, Special Agent Deedy, Gutowski, and West entered the McDonald's restaurant, located at 2237 Kuhio Avenue in Waikiki. Gutowski ordered food. The three sat in a booth located on the Ewa side of the restaurant near the highchairs and the toy display. As they were eating their meal, Special Agent Deedy observed three males at the McDonald's cashier counter: Elderts, Medeiros, and Michel Perrine ("Perrine"). Elderts and Medeiros had entered the restaurant together. Perrine had entered the establishment alone, approximately two minutes after Elderts and Medeiros. While at the cashier counter, Elderts began to verbally harass Perrine using racial slurs. Perrine asked Elderts to leave him alone, not to single him out, and stated words to the effect that he was a "local." The McDonald's staff also intervened and asked Elderts to leave Perrine alone.

6. After ordering their food, Elderts and Perrine sat at separate tables. Decl. of Brook Hart at ¶ X. Perrine sat on the Diamond Head side of the restaurant, which was opposite of where Special Agent Deedy, West, and Gutowski were sitting, about eighteen feet away. Elderts sat at a central aisle table facing the cashier counter, about ten feet from where Special Agent Deedy was seated. Special Agent Deedy observed Elderts and Medeiros continue to speak to Perrine in an aggressive and threatening manner. Upon rising from his table, and as West and Gutowski went off to deposit refuse in the trash container and exit the restaurant, Special Agent Deedy stood and asked Perrine if he was all right. Medeiros, who was about ten

or eleven feet from Perrine, moved closer to where Elderts was seated and asked Perrine if he had an eye problem. Medeiros pointed at Perrine and told Perrine that he better stop eyeing them up. As he said this, a female McDonald's security guard, Rosalinda Soriano ("Soriano"), who had been standing next to the cashier counter during the initial exchange between Elderts and Perrine, approached and told them "no more troubles here . . . if you make troubles, you can leave." Having observed this, Special Agent Deedy sensed that the interaction between Elderts, Medeiros, and Perrine was being escalated by Medeiros and Elderts, that a physical confrontation was imminent, and that Perrine was in danger. Concerned for Perrine's safety and the consequences of a possible attack by Elderts and Medeiros, Special Agent Deedy calmly attempted to prevent this from happening.

7. At this point, Medeiros and Elderts directed their aggression at Special Agent Deedy. Special Agent Deedy attempted to reason with Elderts and Medeiros and deescalate the situation, saying that no one wanted trouble and suggesting that everyone should just drop the matter. Both men were unreasonable, combative, and threatening toward Special Agent Deedy and reacted with an escalating level of aggression that was entirely inconsistent with Special Agent Deedy's calm tone and manner. Based on his training and experience, Special Agent Deedy believed that Elderts and Medeiros were intoxicated and under the influence of drugs. In a non-confrontational manner, Special Agent Deedy said that the two men were causing a scene and should calm down. At about this time, Soriano attempted to intercede once again. Also, another male, Alexander Byrd ("Byrd"), who had been near the cashier counter, turned and approached Medeiros. After a brief exchange of words with Medeiros, Byrd returned to the cashier counter.

8. Post incident analysis revealed that Elderts had a .127 blood alcohol level, along with metabolites of cocaine and marijuana in his system.

9. Elderts, still seated, aggressively addressed Special Agent Deedy using the derogatory and racist term "haole." Elderts threatened Special Agent Deedy by saying: "eh, fuckin' haole, you like beef?" or words to that effect. Special Agent Deedy, responding to the verbal threat of violence, further attempted to deescalate the situation by identifying himself as a law enforcement officer and showing Elderts and Medeiros his credentials and gold badge. West, who had been on her way out of the restaurant, returned and was standing next to Special Agent Deedy as he took out his credentials and badge. Shortly thereafter, Gutowski approached the group. Special Agent Deedy advised that starting a fight was never in anyone's interest and that fights often lead to people getting hurt or arrested.

10. Elderts became even more irate and verbally threatening after Special Agent Deedy identified himself as a law enforcement officer and attempted to deescalate the situation. Elderts' affect was aggressive, his speech was slurred and loud, and his language was inappropriate. Elderts asserted that he would not be arrested and challenged Special Agent Deedy by asking "are you going to shoot me?" Having displayed his credentials and having made no reference to a firearm, Special Agent Deedy asked, "shoot you?" Elderts repeated himself.

11. As Elderts challenged Special Agent Deedy, Elderts stood up from his table and reached toward his waistband. Elderts told Special Agent Deedy that he would need to shoot Elderts first, or else Elderts would "get" (or "gut") him. Alarmed and concerned for his safety and the safety of others, Special Agent Deedy moved West out of the way. After Elderts made

these comments and stood up, Soriano and Byrd approached again and attempted to stop Elderts from advancing on Special Agent Deedy.

12. As Elderts' level of aggression increased, he again asked Special Agent Deedy if he would shoot him. Elderts again told Special Agent Deedy that he would "get" (or "gut") Special Agent Deedy. As Elderts spoke, Special Agent Deedy saw him reach with his right hand and grab at his waistband again, as if to retrieve a weapon; at the same time Elderts pushed past Byrd with his other hand, fist clenched, while advancing menacingly around the table barrier and towards Special Agent Deedy.

13. As Elderts aggressively moved on Special Agent Deedy, Special Agent Deedy stepped back and reached for, but did not draw or display his firearm, which was in a holster on his right hip. Elderts temporarily stopped advancing toward Special Agent Deedy. West and Byrd then stepped between Special Agent Deedy and Elderts. Elderts was yelling at Special Agent Deedy, saying things like "oh you have a gun?" "shoot 'em then," and telling Special Agent Deedy he better not be bluffing, because Special Agent Deedy would regret it, or words to that effect. Special Agent Deedy continued to watch Elderts' movements for signs of a weapon and further advancement. Despite his knowledge that Special Agent Deedy was a law enforcement officer, Elderts suddenly went around West and Byrd, and rushed at Special Agent Deedy. As he did so, Elderts violated 18 U.S.C. § 111, assaulting, resisting, or impeding [a federal officer]. Special Agent Deedy employed a front kick to Elderts' leg, a defensive technique used against an assailant who suddenly attacks an officer in close range. This technique was utilized by Special Agent Deedy to stop the aggressor and to create space. In the process Special Agent Deedy's slipper came off of his right foot. Special Agent Deedy then

stepped back to create more space between him and Elderts, minimize the possibility for further assaults, and allow Special Agent Deedy to again attempt to assess and deescalate the situation.

14. Gutowski, who had been behind Special Agent Deedy, placed himself between Elderts and West. Elderts and Gutowski put their hands on each other as West turned to Special Agent Deedy. As West started to speak, Special Agent Deedy saw Gutowski being assaulted, first by a blow to his head from Elderts and then by punches and kicks from both Elderts and Medeiros. Fearing for West's safety, Special Agent Deedy directed her to stand back and he took a step towards Elderts, Medeiros, and Gutowski while yelling at them to stop. Elderts, who had been at the threshold of the handicap exit door, suddenly turned and charged at Special Agent Deedy, grabbing his leg and striking him in the face. This caused Special Agent Deedy to fall backwards against and knock over the metal-based hand sanitizer. Special Agent Deedy struck the back of his head as he fell to the floor next to the cashier counter. Elderts then rejoined Medeiros to further assault Gutowski.

15. Special Agent Deedy arose from the floor and saw Gutowski at the threshold of the now open handicap door being beaten and kicked by Elderts and Medeiros. Special Agent Deedy saw Gutowski bleeding profusely from his head and face; Special Agent Deedy then raised both arms, outstretched, in front of him, palms forward, and yelled again for them to stop. Elderts turned, clenched his fists, and aggressively advanced towards Special Agent Deedy. Stepping back to preserve a reactionary gap (and unsure of what instrument had been used to cause the wound to Gutowski), Special Agent Deedy began to draw his gun (a Glock 26), as he told Elderts to freeze. Special Agent Deedy raised his outstretched left arm with his palm facing forward. Elderts continued to advance towards Special Agent Deedy with his fist cocked back preparing to hit Special Agent Deedy in the face a second time. Elderts charged Special Agent

Deedy to the point where Elderts ran into Special Agent Deedy's outstretched left palm. Initially, Special Agent Deedy had placed his index finger straight along the side of the trigger housing, i.e., not engaged on the trigger, in an effort to have Elderts submit. But Elderts reached for Special Agent Deedy's gun in an attempt to take it. With his left hand, Elderts grabbed Special Agent Deedy's right hand, which was holding the gun, and with his right hand Elderts grabbed Special Agent Deedy's left shoulder, pushing him across the room towards the toy display, a distance of approximately ten to fifteen feet. As Elderts tried to take possession of Special Agent Deedy's gun, shots were fired.

16. Elderts continued his assault on Special Agent Deedy by pushing him backwards and down onto the floor near the toy display. While on the floor, Elderts was on top of Special Agent Deedy and punched him in the face with his right fist at the same moment that he was trying with his left hand to take Special Agent Deedy's gun from him. During the course of the attack on Special Agent Deedy and in response to an imminent threat of serious bodily injury or death to himself and others, Special Agent Deedy was compelled to discharge his gun, resulting in the death of Elderts. Subsequent analysis detected gunshot residue on Elderts hands. HPD Examination of Special Agent Deedy's gun found a spent cartridge case remaining in the gun, consistent with interference with the slide and case ejection process at the time of the third shot.

17. After Special Agent Deedy stopped the assault by Elderts, he extracted himself from his position underneath Elderts, secured his weapon and then searched Elderts for weapons. Special Agent Deedy arose and although he had heard the security guard previously say that she was calling the police, he instructed other bystanders to do so. Special Agent Deedy ascertained that Medeiros had left the scene and that there was no further threat. Shortly thereafter, a bystander, Charles Maisch, who had entered McDonald's after the shots were fired, began to

record the events on his cell phone video camera. The "Maisch" cell phone video was obtained by both the prosecution and the defense and disclosed by both parties in discovery. After getting his bearings, Special Agent Deedy then immediately began to administer aid to Elderts in an attempt to save his life. In doing so, Special Agent Deedy used his pocketknife to cut away Elderts' undershirt to determine the number and location of gunshot wounds and to render aid until assistance arrived. Special Agent Deedy continued to render aid as police ("HPD") and paramedics arrived on the scene, doing everything he could to save Elderts. Special Agent Deedy did not stop rendering aid until paramedics took over. As Special Agent Deedy stood up from his efforts to render aid HPD officers detained him. Special Agent Deedy told them that he had done the shooting, and where the weapon was holstered on his person.

18. Immediately following the incident, West took Gutowski to their nearby residence to examine and clean his wounds. Shortly thereafter, West drove Gutowski to the emergency room at Queens Medical Center ("QMC"). Gutowski's injuries included a large laceration to his scalp and contusions and hematoma to his forehead and face. Special Agent Deedy was taken to QMC by HPD following the incident. According to the medical records from QMC, in the incident Special Agent Deedy suffered a broken nose, trauma and abrasions to his face, and reported pain to his jaw and ear. HPD photographs taken at the hospital also show abrasions on Special Agent Deedy's back and elbows.

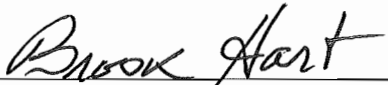
19. Special Agent Deedy is employed as a special agent of the Bureau of Diplomatic Security, the law enforcement arm of the United States Department of State, and has been so employed since June of 2009.

20. In this case agency policy is reflected in a 2010 e-mail from the DS Special Agent in Charge to Special Agent Deedy and others in the Washington Field Office commending

fellow WFO Special Agent Dave Meyer for having interceded in a domestic dispute/burglary while off-duty in a housing complex. Special Agent Meyer also received a department level honor award for his actions in this situation.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING FACTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Executed on: June 26, 2012.



BROOK HART
Attorney for Defendant
CHRISTOPHER DEEDY