

FOR PUBLICATION

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

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

v.

WILLIAM G. CLARKE,

Defendant.

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Criminal No. 2009-09
re: Super. Ct. Crim. No. F20/09

ATTORNEYS:

Brenda Scales, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Kerry E. Drue, Esq.
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court is the motion of the People of the Virgin Islands (the "Government") to remand the above-captioned matter to the Superior Court of the Virgin Islands, Division of St. Thomas and St. John (the "Superior Court").

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I. FACTS¹

On the morning of September 7, 2008, Defendant William G. Clarke ("Clarke"), a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, observed Marguerite Duncan ("Duncan") and Marcus Sukow ("Sukow") arguing loudly outside of Clarke's condominium at the Mahogany Run Condominium complex, in St. Thomas, U.S. Virgin Islands. Duncan and Sukow had been drinking. At some point during their argument, Duncan left her condominium, got into her vehicle, and attempted to reverse out of her parking space. Clarke was leaving his condominium and walking toward his vehicle when he saw Sukow yelling at Duncan. Clarke asked Sukow and Duncan if everything was alright. Thereafter, Sukow retrieved a steel flashlight, approximately twelve inches in length, from his car. Sukow struck the hood of Duncan's vehicle with the flashlight. Sukow then stood in the middle of the street, preventing Duncan from driving away. Thereafter, Duncan asked Clarke for a ride. While Sukow was distracted by a neighbor, Duncan got out of her vehicle and got into Clarke's vehicle. A security guard heard Sukow ask Clarke to let Duncan out of the vehicle. Duncan heard Clarke say, "Marcus buddy go inside." Sukow approached Clarke and Duncan, who were seated in Clarke's vehicle. Sukow then struck Clarke's

¹ The parties have stipulated to the facts set forth below.

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car with the flashlight. Clarke thereafter shot and killed Sukow.

On January 13, 2009, the Government filed a four-count information against Clarke in the Superior Court. Count One of the information charges Clarke with second degree murder for Sukow's death, in violation of title 14, sections 921 and 922 of the Virgin Islands Code ("Section 921" and "Section 922"). Count Two charges Clarke with using a dangerous weapon during the commission of a second degree murder, in violation of title 14, section 2251(a)(2)(B) of the Virgin Islands Code ("Section 2251(a)(2)(B)"). Count Three charges Clarke with committing voluntary manslaughter, in violation of title 14, section 924 of the Virgin Islands Code ("Section 924"). Count Four charges Clarke with using a dangerous weapon during the commission of a voluntary manslaughter, in violation of Section 2251(a)(2)(B).

On January 15, 2009, Clarke was arraigned on the charges in the information in the Superior Court.

On February 13, 2009, Clarke filed a notice of removal of the matter to this Court, along with a supporting memorandum of law. On March 13, 2009, the Government filed an opposition to the notice of removal, along with a motion to remand the matter to the Superior Court. Clarke timely opposed the motion to remand.

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An evidentiary hearing on the motion to remand was conducted on April 1, 2009, in accordance with 28 U.S.C. § 1446(c)(5).²

II. ANALYSIS

At the outset, the Court notes that this case presents a unique issue in the context of removal of criminal prosecutions – one which is not easily resolved. Indeed, there is not a wealth of cases involving similar circumstances to those presented in the case at bar.

Clarke has removed this matter pursuant 28 U.S.C. § 1442(a)(1) ("Section 1442(a)(1)"), which provides:

A civil action or criminal prosecution commenced in a State court against 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) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any

² Pursuant to Section 1446(c)(5), when a notice of removal has been filed in a criminal prosecution,

[i]f the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

28 U.S.C. § 1446(c)(5).

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agency thereof, sued in an official or individual capacity for 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.

28 U.S.C. § 1442(a)(1).³

To show that removal jurisdiction is appropriate under Section 1442(a)(1), a defendant must establish that: (1) he is a "person" within the meaning of the statute; (2) he acted under color of federal office, and there is a causal nexus between the charges against him and the acts performed under color of federal office; and (3) he raises a colorable federal defense. See *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998) (citing *Mesa v. California*, 489 U.S. 121, 129, 109 S.Ct. 959, 965, 103 L.Ed.2d 99 (1989); and *Willingham v. Morgan*, 395 U.S. 402, 409, 89 S.Ct. 1813, 1817, 23 L.Ed.2d 396 (1969)). The Supreme Court of the United States has explained that "the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of [Section] 1442(a)(1).'" *Arizona v. Manypenny*, 451 U.S. 232, 242,

³ "[T]his Court is a 'district court' as that term is used in the federal removal statutes [such as Section 1442], and, correlatively, the [Superior] Court is a 'state court' for purposes of removal." *Paradise Motors, Inc. v. Murphy*, 892 F. Supp. 703, 707 (D.V.I. 1994).

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101 S.Ct. 1657, 68 L.Ed.2d 58 (1981) (quoting *Willingham v. Morgan*, 395 U.S. at 409).

The Government does not dispute that Clarke, as an ATF special agent, is a "person" within the meaning of Section 1442(a)(1).⁴ Rather, the Government argues that Clarke was not acting under color of federal office, and has not raised a colorable federal defense.

1. Under Color of Federal Office

In order to remain in federal court, Clarke must establish that the act complained of – the shooting and killing of Sukow with a gun on September 7, 2008 – was done under color of federal office. See 28 U.S.C. § 1442(a)(1). The color of office test has repeatedly been interpreted to require a "causal connection between the charged conduct and asserted official authority." *Com. of Pa. v. Newcomer*, 618 F.2d 246, 249 (3d Cir. 1980) (quotation omitted). To satisfy this requirement, the defendant must show that the prosecution arises out of the acts done by him under color of federal authority. See *Maryland v. Soper*, (No. 1), 270 U.S. 9, 33, 46 S.Ct. 185, 189, 70 L.Ed. 449 (1926). Section 1442(a)(1) "does not require that the prosecution must be for the

⁴ The Government conceded that Clarke was a "person" within the meaning of Section 1442(a)(1) during the April 1, 2009, hearing, as well as in its motion to remand. See (Mot. to Remand 1, Feb, 2, 2009.)

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very acts which the officer admits to have been done by him under federal authority." *Id.* at 33. Rather, "[i]t is enough that [the defendant's] acts or presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution." *Id.*

Black's Law Dictionary defines acts taken under "color of office" as acts that are "vested with, or appear to be vested with, the authority entrusted to that office." Black's Law Dictionary (8th ed. 2004). Indeed, as the Supreme Court has explained, the term "'color of office,' . . . suggests a kind of holding out and means appearance, semblance, or simulacrum, but not necessarily the reality." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 211, 90 S.Ct. 1598, 1630-31 (1970) (quotation omitted). Thus, an act performed by a federal officer may be considered to be "under color of office" so long as the officer acted under the guise of his official authority, even if he did not actually have the authority to perform the act in question. See *id.*; see also *Maryland Cas. Co. v. McCormack*, 488 S.W.2d 347, 352 (Ky. 1972) ("An act under color of office is an act of an officer who claims authority to do the act by reason of his office when the office does not confer upon him any such authority."); *Pontiac Trust Co. v. Newell*, 254 N.W. 178, 181 (Mi. 1934) ("Color of office is a pretense of official right to do an act made by one who has no

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such right; a claim or assumption of right to do an act by virtue of an office made by a person who is legally destitute of any such right.").

Clarke argues that the shooting was performed under color of federal office because it was within his authority as an ATF agent to intervene when he witnessed the dispute between Sukow and Duncan. He points to 18 U.S.C. § 3051,⁵ which authorizes ATF agents to carry firearms and to make warrantless arrests for federal crimes.

At the April 1, 2009, removal hearing, Clarke indicated to the Court an inclination to proceed without putting on any evidence. At the beginning of the hearing, the Court engaged in the following exchange with the defense attorney:

⁵ The statute provides:

Special agents of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, as well as any other investigator or officer charged by the Attorney General with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of the laws of the United States, may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

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THE COURT: All right. This is a 1442 matter.
Does counsel have a position on burden and
procedure?

. . .

[DEFENSE ATTORNEY]: It's our position
that in terms of where we are at this point, and
what we should be doing, we do not believe, for
example, that an evidentiary hearing is
necessary. . . .

. . .

THE COURT: Just, procedurally, your position
is that no evidentiary hearing is required, and,
at most, just a hearing -

[DEFENSE ATTORNEY]: Absolutely.

THE COURT: -- on the papers.

[DEFENSE ATTORNEY]: Absolutely.

(Hr'g Tr. 5-6, Apr. 1, 2009.)

During the hearing, the Court made repeated efforts to
remind Clarke of the need to satisfy his burden of proof as to
removal. For instance, the Court asked the defense attorney:

THE COURT: [D]o you wish to present any
evidence at this hearing?

[DEFENSE ATTORNEY]: We don't. . . .

THE COURT: All right. Well, then, let me ask you
about 28 USC [§] 1446(c). Tell me if that section
requires an evidentiary hearing. And I guess I'm
reading one section of it that says that . . . it
suggests that, (c)(5), that:

. . . if the United States District Court
does not order the summary remand of such

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prosecution, it shall order an evidentiary hearing to be held promptly.

[DEFENSE ATTORNEY]: Yes.

THE COURT: So it seems that if the government doesn't prevail, at least in the first instance, and get a summary remand, then does the statute not require that you place some evidence on the record?

(*Id.* at 11.) Shortly thereafter, the Court again stated:

THE COURT: [A]s I understand it, I think there's no disagreement that at least if there isn't a summary remand, the burden would seem to be on the defendant. I don't think there's any dispute about that.

[DEFENSE ATTORNEY]: I think that's correct --

THE COURT: All right. And so to the extent that's the case, and to the extent the language in the statute, "shall hold an evidentiary hearing," is mandatory language, and not permissive language, I'm just wondering if, with an abundance of caution, the defense wouldn't want to present this matter, you know, present some evidence, so that the record could be very clear.

(*Id.* at 13.)

Eventually, Clarke called one witness to the stand: Agent Ari Shapira, the ATF resident agent in charge of violent crimes. Agent Shapira stated that according to ATF policy, special agents are expected to be armed at all times in order to protect the public in the event of a threat. Indeed, the ATF Use of Force and Weapons Policy, ATF O 3020.1 (the "Weapons Policy"), entered into evidence at the hearing, states:

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Special agents are considered available for duty 24 hours a day, 7 days a week in a standby or on-call status. For this reason, special agents will be armed at all times while on duty. Leave status does not suspend special agents' authority to carry firearms. Accordingly, special agents are authorized to be armed at all times, and expected to protect themselves and the public subject to the rules in this chapter.

ATF O 3020.1, Ch. C, § 31(b) (Dec. 8, 2005).

Furthermore, the ATF Investigative Priorities, Procedures and Techniques, ATF O 3210.7C (the "Investigative Procedures"), also entered into evidence at the hearing, provides:

A special agent may witness a State violation, either on or off duty. Although no specific Federal authority exists allowing federal agents to make arrests for other than Federal violations, the Bureau takes the position that special agents are not totally without authority or responsibility in this area. Bureau special agents may intervene in exigent State offenses under the authority vested in them by State law either as statutorily recognized peace officers or as private citizens. . . .⁶

⁶ The Investigative Procedures also warns that

Special agents should be aware that certain potential risks exist when they act in the capacity of a private citizen with regard to civil lawsuits and any rendered pecuniary judgment. Special agents shall not arrest or detain individuals for traffic or other minor violations unless compelling circumstances exist causing them to believe that injury or death to others would be likely if action were not immediately taken. . . .

ATF O 3210.7C, Ch. E, § 55(a) (Feb. 25, 1999).

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ATF O 3210.7C, Ch. E, § 55(a) (Feb. 25, 1999).⁷

In light of these policies, Clarke argues that the shooting was undertaken under color of federal office. The evidence in the record on which he relies for support is remarkably sparse. Against this backdrop, the Court must determine whether the evidence presented in this case is sufficient to support removal.

In *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), the Supreme Court addressed the issue of the evidence required to support removal under Section 1442(a)(1). In that case, a federal inmate sued two prison officials in state court, alleging that they inoculated him, then assaulted and tortured him. The defendants removed the case under Section 1442(a)(1), and the district court upheld the removal. The United States Court of Appeals for the Tenth Circuit reversed, holding that Section 1442(a)(1) permits removal only where the

⁷ Additionally, Clarke has submitted a declaration of Eduardo M. Halley ("Halley"), an ATF supervisory special agent assigned to the office with authority over the Virgin Islands. In his declaration, Halley avers that, after the shooting,

[t]he ATF investigative team concluded that Special Agent Clarke acted with prudence and restraint, only resorted to the use of deadly force in response to an imminent and deadly threat to his safety and the safety of others, and acted in compliance with the established policies of the United States Department of Justice.

(Ex. A. to Mot. in Support of Removal, Halley Decl. 2 ¶ 5, Feb. 20, 2009.)

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defendant "exclude[s] the possibility that the suit is based on acts or conduct not justified by his federal duty." *Morgan v. Willingham*, 383 F.2d 139, 141 (1967). The court noted that "[t]he only undisputed evidence was that the only contact the appellees had with the appellant occurred within the walls of the penitentiary." *Id.* at 141-42. Based on its reading of Section 1442(a)(1), the Tenth Circuit found such evidence to be insufficient to support removal.

The Supreme Court rejected the Tenth Circuit's narrow reading of Section 1442(a)(1). See *Willingham*, 395 U.S. at 407 (holding that "[t]he federal officer removal statute is not 'narrow' or 'limited'" (quotation omitted). The Supreme Court explained that

[t]he position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words 'under color of * * * office.' In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.

Id. The Court further noted that, "[i]f the question raised is whether they were engaged in some kind of 'frolic of their own' in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to

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accomplish." *Id.* at 409. In light of this broad reading of Section 1442(a)(1), the Supreme Court found that the evidence in the record was sufficient to support removal. See *id.* at 409-10.

Significantly, however, *Willingham* was a civil case. In addressing the showing required to support removal under Section 1442(a)(1), the *Willingham* Court noted that, "[w]ere this a criminal case, a more detailed showing might be necessary because of the more compelling interest in conducting criminal trials in the state courts." *Id.* at 409 n.4. In making this distinction, the Court cited to the criminal cases of *Maryland v. Soper*, (No. 1), 270 U.S. 9, 46 S.Ct. 185, 189, 70 L.Ed. 449 (1926), and *Colorado v. Symes*, 286 U.S. 510, 52 S.Ct. 635, 76 L.Ed. 1253 (1932).

In *Maryland v. Soper*, federal prohibition agents were indicted for murder in Maryland state court. The agents filed a petition for removal to federal district court, asserting that the acts for which they were charged, "which charge they all denied, were done in the discharge of their official duties as prohibition agents, and as officers of the internal revenue in the discharge of their duty." See *Soper*, 270 U.S. at 22. The district court entered an order of removal. The state of Maryland moved to rescind the order. The defendants moved for, and obtained, leave to amend their removal petition. The amended

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petition contained far more detail than the original. In the amended petition, the agents averred that, on the night in question, they had been directed to investigate "the alleged unlawful production of intoxicating liquor on a farm[.]" *Id.* at 23. The agents encountered a number of men carrying a still, at which time the men dropped the still and fled. After unsuccessfully pursuing the still operators, the agents destroyed the still. On the way back to their car, the agents came across a fatally wounded and dying man. *See id.* at 23-24. The district court granted the amended petition, finding that removal was appropriate. The State of Maryland petitioned the Supreme Court for a writ of mandamus requiring the district court judge to remand the case to state court, arguing that the amended petition set forth insufficient facts to entitle the defendants to removal.

The Supreme Court granted the state's petition for a writ of mandamus. It rejected the defendants' amended petition for removal because the averments therein were "not sufficiently informing and specific to make a case for removal," *id.* at 34, as they amounted "to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties." *Id.* Specifically, the defendants "[did] not negative the possibility

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that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty." *Id.* at 35.

The Supreme Court in *Soper* rejected the state's contention that a federal officer can remove a criminal prosecution only "by admitting that he did the act for which he is prosecuted." *Id.* at 32. Rather, the Court enunciated the following test:

There must be causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, *and he must by direct averment exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty.* But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.

Id. at 33 (emphasis supplied).

At the same time, the Court explained that, "[i]n invoking the protection of a trial of a state offense in a federal court . . . , a federal officer abandons his right to refuse to testify because accused of crime, at least to the extent of disclosing in his application for removal all the circumstances known to him

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out of which the prosecution arose." *Id.* at 34. The *Soper* Court further explained that, "[i]n order to justify so exceptional a procedure [as removal of a criminal prosecution], the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer." *Id.* at 35.

Here, however, Clarke declined to take the stand at the removal hearing and testify as to his knowledge of the events that occurred on September 7, 2008. During the April 1, 2009, hearing, the defense attorney stated:

And I think Your Honor may understand. I'll be frank with the Court. My client is here today. I don't want to put my client on the witness stand to establish, you know, if I don't have to.

(Hr'g Tr. 89, Apr. 1, 2009.) While the Court appreciates Clarke's desire not to incriminate himself, it notes that Clarke could have testified at the removal hearing for the limited purpose of determining the removal question, without prejudice to his case at trial, as is often done in the context of suppression hearings. *See Simmons v. United States*, 390 U.S. 377, 390- 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (holding that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial). Clarke has also not

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offered any other evidence regarding the details of the events in question to enable the Court to determine whether the shooting of Sukow occurred under the guise of Clarke's federal authority. Instead, Clarke has offered a single-paragraph stipulation, roughly outlining the events that occurred on the morning of the shooting. Like the agents in *Soper*, Clarke has not been "candid, specific and positive" in his explanation of the circumstances out of which the instant prosecution arose. See *id.*

The Supreme Court again addressed the propriety of removing a state criminal prosecution to federal court in *Colorado v. Symes*. In that case, a federal prohibition agent was charged with murder in state court. The defendant sought removal on grounds that he was engaged in the discharge of his official duties at the time of the charged conduct. In his petition for removal, the defendant averred that on the date in question he was investigating an establishment suspected of violating prohibition laws. See *Symes*, 286 U.S. at 516. While he was "in the act of observing and searching said premises," he saw a man take out a bottle of wine and "look for a drinking glass." *Id.* (internal quotations omitted). The defendant attempted to arrest the man, but the man resisted arrest and assaulted the defendant. Thereafter, the defendant struck the man in the head with his gun.

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The Supreme Court found that removal was inappropriate because the averments in the defendant's removal petition did not meet the specificity test outlined in *Soper*. The *Symes* Court explained that in the case before it,

[t]he outstanding fact is that petitioner killed Smith by intentionally striking him on the head with a gun. That is the basis of the state's prosecution. The burden is on the accused to submit a 'candid specific and positive' statement of the facts so that the court will be able to determine the validity of his claim for removal. It is sufficiently shown that in performance of official duties he and another agent went into the place described to observe whether federal law was being violated and that the deceased entered and was about to take a glass of wine from a bottle that he carried in his pocket. These facts led up to the crucial occurrences the principal of which was the death blow. And as to these the statements are not such as would naturally be employed by one desiring fully to portray what happened. For example, it is said petitioner 'proceeded to take possession of said bottle' and to 'arrest * * * Smith' and that thereupon Smith 'did resist arrest' and attempt to destroy the bottle of wine and 'did proceed to assault your petitioner' and did 'attempt to escape' and that Green did attempt to assist deceased to escape and that 'in the scuffle that ensued' and while petitioner was engaged in the discharge of his duties, etc., it became necessary 'in order to subdue * * * Smith for your petitioner to strike' him 'on the head with your petitioner's gun.'

While phrases such as those quoted may appropriately be used to characterize facts that have been disclosed, they are not calculated to give specific information as to the details of the occurrence. The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential details

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of the defense he claims.

Id. at 520-21. Ultimately, the Court in *Symes* held that the facts presented by the defendant were insufficient to support removal, and thus "[t]he motion to remand should have been granted." *Id.* at 521.

Here, as in *Soper* and *Symes*,⁸ the evidence that demonstrates

⁸ The removal statute at issue in *Soper* and *Symes* was a predecessor to Section 1442(a)(1), Judicial Code of 1911, section 33, 36 Stat. 1097, as amended by 39 Stat. 532 (Aug. 23, 1916) ("Section 33"). Section 33 provided, in relevant part, that:

when any . . . criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, or on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, . . . the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the District Court next to be holden in the district where the same is pending upon the petition of such defendant to said District Court and in the following manner: Said petition shall set forth the nature of the . . . prosecution and be verified by affidavit

Congress later extended the removal statute to cover all federal officers when it enacted Section 1442(a)(1) as part of the Judicial Code of 1948. See *Willingham*, 395 U.S. at 406 (explaining the evolution of the federal officer removal statute). While the federal officer removal statute has therefore broadened in scope since Act 33, the substantive standard of removal remains the same. Significantly, one substantive constant has been that in criminal matters, a sufficient evidentiary showing must be made to support removal.

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that Clarke is being prosecuted for acts he did under color of official authority is wanting.

III. CONCLUSION

This case presents an uncommon and difficult issue. At its core, the parties ask this Court to determine where a significant local criminal matter must be tried. The determination is complicated by the competing sovereign interests that caused this matter to be removed to this Court in the first instance. On one hand, the state has an understandably compelling interest in prosecuting Clarke, a federal law enforcement agent charged with murder, in violation of local law. On the other hand, federal law provides a vehicle that seeks to avoid any animus that might exist, or may arise, between local and federal entities in such cases. That vehicle -- removal -- allows such matters to be tried in a court not appointed by the prosecuting sovereign. The merits in that approach are equally understandable.

Notwithstanding the tension between federal and local

Indeed, while Section 33 required a defendant to set forth facts supporting removal by means of an affidavit accompanying the removal petition, today Section 1446(c)(5) contemplates that such facts will be adduced at an evidentiary hearing. See 28 U.S.C. § 1446(c)(5) (providing that if the district court does not order summary remand of a criminal prosecution, "it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require").

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interests, resolution of this issue is facilitated by review of specific evidence presented by Clarke. Removal would be appropriate if Clarke were to demonstrate that he is being prosecuted for acts undertaken under color of official authority. Surmounting that threshold requirement is where Clarke has stumbled.

The stipulation offered by Clarke in this case shows that, on the morning in question, Duncan was inside her vehicle when Sukow retrieved a large steel flashlight from his vehicle and struck Duncan's vehicle with the flashlight. Duncan thereafter got into Clarke's vehicle. Sukow then approached Duncan and Clarke, and hit Clarke's vehicle with the flashlight. After Sukow hit Clarke's car, Clarke shot Sukow.

As in *Symes*, the facts presented by Clarke in support of removal merely describe the events that led up to the crucial occurrence in this case -- the shooting of Sukow. However, the evidence presented by Clarke does not give the Court a full picture of what happened on the morning in question. Indeed, the Court is unable to discern from the evidence in the record whether Clarke shot Sukow because he believed Sukow posed a threat to Clarke or Duncan, or because Clarke was angry that Sukow struck Clarke's vehicle with a flashlight. In what may be an attempt not to commit himself with respect to the details of

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the case against him, Clarke has presented insufficient evidence to enable the Court to find that the instant prosecution arises from acts done by Clarke under color of federal office. While the evidence presented by Clarke might satisfy the broad requirements for removal in civil cases, *see Willingham*, 395 U.S. at 409, it does not satisfy the more stringent requirements for removal in criminal cases, *see Symes*, 286 U.S. at 519-21; *Soper*, 270 U.S. at 33-34.⁹

For the reasons given above, the Court will grant the Government's motion to remand.¹⁰ An appropriate Order follows.

S_____
CURTIS V. GÓMEZ
Chief Judge

⁹ The Court acknowledges that in both *Soper* and *Symes*, the Supreme Court remanded the cases with instructions that the district court judge was at liberty to allow further amendments to the removal petitions, or other evidence, to enable the defendants to meet their burdens of showing that removal was proper. Here, the Court made repeated efforts to remind Clarke of his evidentiary burden at the April 1, 2009, hearing. Notwithstanding those efforts, Clarke chose not to avail himself of that opportunity.

¹⁰ Because the Court has found that Clarke has failed to satisfy the color of office prong of the test for removal under Section 1442(a)(1), the Court need not reach the issue of whether Clarke has raised a colorable federal defense.