Case No. 19-1140

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANTHONY MARTINEZ,
Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Richard P. Matsch
District Court Civ. Action No. 1:15-cv-01993-RPM

APPELLANT'S SUPPLEMENTAL BRIEF RE: DISCRETIONARY FUNCTION

Respectfully submitted,

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INTRODUCTION

This case arises out of an encounter between Plaintiff Anthony Martinez ("***Martinez***") and three police officer, Mitchell, Herrera, and Backer (collectively, the "***Officers***") resulting in Martinez being shot in the back. The Officers were employed with the Southern Ute Police Department, a division of the Bureau of Indian Affairs ("***BIA***"). Aplt. App. 144; 400-401; 986. As discussed in Judge Matsch's May 5, 2016 Order, the Officers here were acting within the scope of their employment, either as a federal law enforcement officers or as federal employees and are subject to the provisions of the FTCA.

The United States did not raise the discretionary-function exception of Federal Tort Claims Act at any time during the pendency of the case or on appeal. However, this Court, *sua sponte*, inquired about the matter during oral argument and ordered supplemental briefing. The Supreme Court has counseled against appellate review of questions outside of the issues raised by the parties. *U.S. v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Nonetheless, the jurisdictional question can be easily resolved and the inquiry highlights further error by the District Court in failing to consider the Officers' violations of policy.

ARGUMENT

A. Legal Standards.

The discretionary function exception to the FTCA provides that the Government is not liable for:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation,

> whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). A two-part test applies to determine whether the discretionary function exception applies to preclude suit against government employees for tortious conduct. *See, e.g. U.S. v. Gaubert*, 499 U.S. 315, 325 (1991).

First, the exception applies only to acts that involve an element of judgment or choice. *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988). The requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy prescribes certain conduct because the employee has no rightful option but to adhere to such directives. *Id*. Moreover, the majority of Circuit Courts have adopted the view that conduct cannot be discretionary if it violates the Constitution because officials do not possess discretion to violate Constitutional rights.[1]

Second, even if the challenged conduct involves an element of judgment or choice, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. 486 U.S. at 536. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id*.

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[1] *See Loumiet v. U.S*, 828 F.3d 935, 943 (D.C. Cir. 2016); *Thames Shipyard & Repair Co. v. U.S.*, 350 F.3d 247, 254–55 (1st Cir. 2003); *Medina v. U.S.*, 259 F.3d 220, 225–26 (4th Cir. 2001); *Nurse v. U.S.*, 226 F.3d 996, 1002 (9th Cir.2000); *U.S. Fid. & Guar. Co. v. U.S.*, 837 F.2d 116, 120 (3d Cir. 1988); *See also, K.W. Thompson Tool Co. v. U.S.*, 836 F.2d 721, 727 n. 4 (1st Cir.1988); *Sutton v. U.S.*, 819 F.2d 1289, 1293 (5th Cir. 1987); *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir.1975).

(quoting *Varig*, 467 U.S. at 814). If liability for a government official's conduct would not lead to second-guessing of policy decisions of Congress, the discretionary function exception does not normally preclude suit.

Only where both of these prongs are met – i.e. there are no statutes, regulations, policies, or constitutional restrictions that constrain the discretion of the government actor *and* liability for the tortious acts would call into question the legislative and administrative policy-making decisions of Congress – will the discretionary function exception apply to preclude suit. If, however, plaintiff can show that either prong is not met, then the exception does not apply and a claim may proceed. *Sydnes v. U.S.*, 523 F.3d 1179, 1183 (10th Cir. 2008).

Exceptions to the FTCA should be considered in view of the underlying purpose of permitting liability for governmental employee conduct for which a private person could be held liable under state tort law. *See* 28 U.S.C. §§ 1346(b); *U.S. v. Agronics Inc.*, 164 F.3d 1343, 1346 (10th Cir. 1999); *See, also Simmons v. Himmelreich*, 136 S. Ct. 1843, 1850 (2016). Exceptions to the FTCA are to be narrowly construed. *First Nat. Bank v. U.S.*, 552 F.2d 370, 376 (10th Cir.1977); *Smith v. U.S.*, 507 U.S. 197, 203 (1993).

B. The Discretionary Function Exception Does Not Apply Because the Officers' Conduct Violated Policy and the Constitution.

The Officers here were not engaging in a "discretionary function" because there were several BIA policies and constitutional rights that constrained their discretion at the time of the incident. Officer Mitchell acknowledged that the

officers' conduct contravened the most pertinent policies. Accordingly, the discretionary function exception does not apply.

BIA policy 1-21 required the Officers to wear only clothing and uniforms that are immediately recognizable as those of police officers and to exhibit their badges and credentials prior to initiating contact with others. Aplt. Appx. 382; 1305-1307. No combination of police uniform and civilian attire are authorized. *Id*. at 1305. BIA policy 2-02 required the Officers to identify themselves as law enforcement officers as soon as possible, if it was not evident. *Id*. at 380-81; 1306.

The Officers failed to follow these BIA policy directives. Instead of approaching the Martinez home in a manner that would reasonably permit them to be identified as police officers, they chose to use a stealth "blackout approach." *Id*. at 416-17; 990-92; 1050-51; 1059-62; 1324. The purpose of the blackout approach was to avoid being detected by concealing themselves from anyone who might see them. *Id*. at 154-55; 361. To accomplish this approach, the Officers "blacked out" (turned off) their vehicle headlights before they slowly drove by the Martinez home, to a dead-end, in the dark. *Id*. at 410; 422-23; 198-99; 201.

As they walked up to the Martinez home, Officers Herrera and Backer were dressed in all black clothing: black pants, black boots, black gloves, black beanies, and black jackets that covered their uniforms and badges. *Id*. at 204-05; 418; 1282-1288. The black jackets they used did not have badges or police identifications on the front so any person facing the officer would see only all-black clothing and nothing indicating the persons are officers. *Id*. at 207-08, 420; 1282-1288. Mitchell

was wearing a grey uniform shirt but purposefully walked behind the other officers as they approached Martinez' home. *Id*. at 219. The Officers stayed away from light sources; wore dark clothing and used "noise discipline" (moving quietly and keeping quiet), including turning off phones and radio. *Id*. at 151-54; 291.

As the Officers approached the Martinez house, they had numerous opportunities to identify themselves so as not to appear as trespassers, but did not. When Officers get nearer to the house, they heard voices and saw a person in the Martinez yard, but did not announce police or turn on their flashlights. *Id*. at 224; 226-27. When they got closer, Backer heard a key fob "beep-beep" and had reason to believe that someone was in the yard, but, still, Officers did not identify themselves as police. *Id*. at 434-37; 431-32. As they continued to walk closer, Officers heard rustling sounds from the bushes/trees in the Martinez yard and heard voices. *Id*. at 438; 1062-63. The Officers had the opportunity, yet again, to identify themselves, but did not do so. *Id*. at 438-39; 1062-63.

At trial, Mitchell admitted that the concealment tactics used during the home approach were inconsistent with these BIA policies. *Id*. at 381-84. Accordingly, there is no reasonable dispute about whether the BIA polices applied to the circumstances or whether Officers conduct contravened the policies.

Furthermore, the very core of the Fourth Amendment permits a man to retreat into his home and there be free from unreasonable governmental intrusion into his home or curtilage. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). A homeowner has a clear Fourth Amendment right to choose not to speak with officers who may

appear at his home without a warrant, and when such right is exercised the officers do not have the authority to anything more than an ordinary citizen does. *Kentucky v. King*, 563 U.S. 452, 469-470 (2011). When an invitation is not extended after an initial knock and/or it becomes clear that a homeowner does not want police there, police do not have consent to continue to attempt to force contact in contravention of the homeowner's wishes. *Jardines, 569 U.S. at 6*; *Manzanares v. Higdon*, 575 F.3d 1135, 1146 (10th Cir. 2009). Concordantly, BIA policy 2-02-02 precludes officers from forcing or coercing members of the public into contact or cooperation with officers. Reasonable interpretation of this policy prohibited the Officers from attempting to force contact with Martinez and Rossi in contradiction of their clear exercise of Fourth Amendment rights. Aplt. Appx. 381; 1306.

Trial testimony about the purpose of the Officers' use of the blackout tactics involved led Officers Backer and Mitchell to admit that they used the stealth tactics in the hope of circumventing Rossi and Martinez' refusal to speak with them – after Mitchell had earlier knocked on the door at 1:00 a.m. and the occupants had refused contact. *Id*. at 161; 181-82; 208-11. Backer admitted that he used a concealed approach to Martinez home in hopes that the people inside wouldn't have the choice of avoiding contact through exercise of their Fourth Amendment rights not to talk. *Id*. at 488-89; 621-23. Thus, the Officers' actions not only directly contradict BIA policy, but were a conscious effort to violate Martinez' and Rossi's rights. Accordingly, the discretionary function exception should not shield them.

C. The Officers' Conduct Was Not the Type of Judgment the Discretionary Function was Designed to Shield.

Even assuming for the sake of argument that the Officers' conduct involved an element of judgment, their judgment was not the kind the discretionary function was designed to shield. *Berkovitz*, 486 U.S. at 536. The discretionary exception, properly construed, protects only governmental actions and decisions based on considerations of public policy. *Id. at 537*; *See also Gaubert*, 499 U.S. at 322 ("It is the nature of the conduct, rather than the status of the actor that determines whether the challenged conduct falls within the discretionary function exception"); *Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 2004). Accordingly, the discretionary function exception was meant to protect governmental employees from liability from decisions in the interest or furtherance of public policy that would be hampered by judicial second-guessing. 499 U.S. at 332; *Berkovitz*, 486 U.S. at 536.

By contrast, day-to-day law enforcement is not the kind of conduct that is, as a general proposition, fairly susceptible to public-policy analysis. *Garcia v. U.S.*, 709 F. Supp. 2d 1133, 1150 (D.N.M. 2010). A police officer on the street does not generally consider "budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition," as one might when making hiring-and-firing decisions. *Garcia v. U.S.*, 709 F. Supp. 2d 1133, 1150 (D.N.M. 2010) (citing *Sydnes v. U.S.*, 523 F.3d at 1186) (quoting *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C.Cir.1997), and citing *Tonelli v. U.S.*, 60 F.3d 492, 496 (8th Cir.1995)). It is unlikely that the officer, in fighting crime on a day-to-day basis, assesses the larger,

overarching policy ramifications of his or conduct; rather an officer is concerned only with the immediate effects of his or her actions. *Id*. at 1150-51; *Compare with Gaubert*, 499 U.S. at 332.

The Officers' decision to use the "blackout approach" by concealing their identities as police officers during the approach of Plaintiff's home was not a decision based on considerations of public policy. It was, instead, a specific instance of police decision-making untethered to policy concerns, within the ambit of "ordinary discretion." *Daigle v. Shell Oil Co*., 972 F.2d 1527, 1538 (10th Cir. 1992) (Ordinary discretion is not the kind of discretion that the exception was designed to shield because that discretion can hardly be said to be grounded in regulatory policy) (citing *Gaubert*, 499 U.S. at 325, Ftn. 7) ("There are obviously discretionary acts performed by a Government agent within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish."); *See, also, Andrulonis v. U.S.*, 952 F.2d 652, 655 (2d Cir. 1991) (Negligence is not shielded just because it can be couched as being "discretionary," because the conduct must be based on policy considerations); *Accord, C.R.S. by D.B.S. v. U.S.*, 11 F.3d 791, 802 (8th Cir. 1993).

Respondent may argue that the Officers' actions were discretionary because the Officers' tactics were based on choices. However, as noted in *Garcia*, where Officers are only concerned with the immediate effect of their actions in making contact, that is more of a day-to-day decision-making that does not rely on policy

judgment. The discretionary function exception was intended to protect officials engaging in decisions, that regardless of their choice of options, were based on considerations of policy. The means of contact utilized here were chosen for the purpose of forcing persons to make contact with officers. The discretionary function except was not intended to protect officers who, without consideration of policy, engage in a cat and mouse game to make contact with individuals who had refused to speak to them earlier by sneaking up on them and hoping to catch them by surprise at 3:00 a.m. Thus, they were acting with "ordinary discretion" not protected by the exception.

Moreover, governmental actors cannot simply ignore duties under tort law by claiming their actions were discretionary. *Smith v. U.S.*, 546 F.2d 872, 877 (10th Cir. 1976); *See also Coffey v. U.S.*, 906 F. Supp. 2d 1114, 1163 (D.N.M. 2012) (the BIA cannot assert that the discretionary-function exception protects its decision to ignore basic tort duties in performing that activity); *Coulthurst v. U.S.* 214 F.3d 106, 109–10 (2d Cir. 2000) (if inspector failed to perform a diligent inspection out of laziness or was carelessly inattentive the U.S. is not shielded from liability); *Hartman v. Holder*, 100-CV-6107-ENV-JMA, 2009 WL 792185, at *9 (E.D.N.Y. Mar. 23, 2009) (correctional officer's carelessness in performing her rounds, including ignoring her training, is not suspectable to policy analysis). Practically all decisions can be argued to be superficially discretionary in a broad and ethereal sense; if the exception were to be interpreted to cover all arguably discretionary decisions, then the exception would swallow the rule. *Smith*, 546 F.2d at 877.

The Officers here engaged in negligent behavior despite the known dangers and ignored relevant policies/training by using the black-out approach. The Officers had knowledge that a stealth approach could be misinterpreted and cause the occupants to believe that they were about to be assaulted. Aplt. App. 1327-28. Mitchell had knowledge of several incidents in which officers were mistaken by homeowners as intruders because of blackout tactics. *Id*. at 157-59; 200. Mitchell described the training provided by SUPD supervisors as always including a specific warning that a homeowner could misperceive the officer as intruders; that officers approaching a home clad in all-black clothing could be viewed as someone up to no good. *Id*. at 156-57; 159-60. Herrera was also aware from her training that if a person approaches a home in the dark, another person may not know that person is a police officer. *Id*. at 1016. These facts support that the Officers' actions were more of the type of "ordinary" discretion which *Daigle* and *Gaubert* delineated as not being grounded in policy and subject to the exception. More importantly, the fact that the Officers had been trained and warned against using the black-out approach because of the risk to both officer and civilian safety makes it difficult, if not impossible, to argue that their decisions were based on considerations of public policy.

For the foregoing reasons, the discretionary-function exception does not apply. Mr. Martinez respectfully requests that this Court reverse the judgment and remand this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the page limitations set by Order of the Court on May 7, 2020 because it is 10 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: June 8, 2020.

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(1) I hereby certify that a copy of the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk.

(2) I further certify that it has been scanned for viruses with the AVG Antivirus software and, according to the program, is free of viruses.

(3) In addition, I certify all required privacy redactions have been made.

Dated: June 8, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF** was furnished through (ECF) electronic service to the following on this 8th day of June, 2020:

Counsel for Defendant

By: */s Raymond Bryant*