No.

In The
Supreme Court of The United States

ANTHONY MARTINEZ.,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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**admission pending*

QUESTION PRESENTED

Whether the discretionary function exception of the FTCA, 28 U.S.C. 2680(a) precludes liability against the United States where federal officers used "blackout" tactics that concealed their police identities and failed to identify themselves as police resulting in a homeowner-police confrontation during which Mr. Martinez was shot when there were federal agency policies that limited the discretion of its officers by (a) requiring officers to wear uniforms that are "immediately recognizable as those of police officers," and (b) requiring officers to "identify themselves as law enforcement officers as soon as possible if it is not evident."

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PARTIES TO THE PROCEEDINGS BELOW

Petitioner Anthony Martinez was the Plaintiff in the United States District Court for the District of Colorado and Appellant in the Court of Appeals for the Tenth Circuit.

Respondent the United States of America was the Defendant in the United States District Court for the District of Colorado and Appellee in the Court of Appeals for the Tenth Circuit.

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RELATED PROCEEDINGS

United States District Court (D. Colo.)

Martinez v. Patrick Backer, et al., No. 14-CV-03305-RPM, *consolidated with*

Martinez v. United States, et al., No. 15-CV-01993-RPM (March 14, 2019)

United States Court of Appeals (10th Cir.):

Martinez v. United States of America, No. 19-1140 (July 17, 2020)

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TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and reproduced at App. 1. The opinion of the U.S. District Court for the District of Colorado is unreported and reproduced at App. 21.

JURISDICTION

The judgment of the Appellate Court was entered on July 17, 2020. This Court issued Miscellaneous Order regarding COVID-19 related public health concerns on March 19, 2020, which extended the deadline for all petitions for writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This petition is timely filed. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(a) provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to–

(a) Any 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.

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STATEMENT

On December 4, 2012, Mr. Martinez was shot by a federal officer[1] from the Southern Ute Tribal Police Department ("SUPD"), after three officers (Patrick Backer, Matthew Mitchell, and Cheryl Herrera) approached Mr. Martinez's rural family home in the middle of the night for a purported "welfare check" using stealth "blackout" tactics that concealed the officers' police identities. App. 4.[2]

Earlier that evening, Mr. Martinez hosted a gathering at his house that was attended by a few friends. App. 21. Two of those friends got into a fight and Mr. Martinez told one of them to leave. *Id.* Soon thereafter, one of the men who had left returned with a group of dangerous, gang-affiliated leaders, known as the Price brothers. App. 21-22. The Price brothers and the group surrounded Mr. Rossi and a fight

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[1] The Indian Self-Determination and Education Assistance Act ("ISDEA") allows the United States to contract with Native American tribes to provide law enforcement funding. Under such contracts, "an Indian tribe . . . and its employees are deemed employees of the [United States] while acting within the scope of their employment in carrying out the contract or agreement." Department of the Interior and Related Agencies Appropriation Act, 1991, Pub. L. No. 101-512, 104 Stat. 1915, 1960 (codified in 25 U.S.C. § 5301 et seq.). Civil claims against law enforcement officers carrying out their duties under such contracts are thus "afforded the full protection and coverage of the [FTCA]." *Id.* The Department of Interior's Bureau of Indian Affairs ("BIA") funds the SUPD under a contract with the Southern Ute Tribe. Under the contract, SUPD officers are considered federal employees for the purposes of the FTCA. *See* Dist. Ct. Doc. 23 at 6.

[2] References to facts in the appellate Order and Judgment are not complete and are used only for summary purposes. For a full factual accounting, *see* Appellant's Opening Brief, Doc. 010110233086.

ensued which only ended when Mr. Martinez threatened to "get the bats" and the Price brothers drove off. App. 22. One of the Price brothers called 911 to report the fight and claimed that the fight had started because Mr. Rossi had struck Ms. Weaver. *Id.* Two officers, including Officer Mitchell, drove into the Martinez driveway in a police car with flashing lights to conduct a "knock and talk." *Id.* They went to the front door, exposed their police uniforms, and knocked and announced their presence as police officers. *Id.* There was no response so Officer Mitchell went to the side of the house, shined a flashlight through a window, and saw Mr. Rossi hiding on the floor. *Id.* Failing to make contact, the officers drove away. *Id.*

Two hours later, at approximately 3:30 a.m., officers decided to return to the house to purportedly conduct a welfare check on Ms. Weaver at the Martinez home. *Id.* The officers decided to use blackout tactics to approach the home. The blackout tactics included, *inter alia*: turning off all police vehicle lights as the vehicles were driven by the home to a dead end and wearing all black clothing that was used to conceal their police uniforms, badges, and nametags while the officers quietly approached on foot. *Id* at 4, 23, 25, 52-55, 57. Mr. Martinez observed the darkly-clad figures lurking in the darkness as they approached his home. App. 3. Because of the blackout tactics, Mr. Martinez believed the officers to be the gang-related intruders who had earlier driven to his home in a similar dark-colored SUV and started a fight earlier that night. *Id.* He believed the darkly-clad figures to be the Price brothers who were returning to cause him bodily harm, consistent with their

reputation for violence, so he armed himself with his son's T-ball bat behind the bushes in his yard. *Id.* The officers heard and saw Mr. Martinez in the yard, but failed to identify themselves as police. App. 12. Mr. Martinez then attempted to scare away the perceived intruders by running toward them and yelling while holding a bat overhead. App. 5, 24. Mr. Martinez did not reach the officers and did not harm them. App. 24. However, one of the three officers shot Mr. Martinez in the back after Mr. Martinez initially ran toward the officers and then turned away. App. 5. Mr. Martinez had no knowledge that it was a police officer who had shot him. App. 24.

Mr. Martinez survived the encounter and filed Constitutional claims against the individual officers for excessive force and malicious prosecution pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). *Id.* Mr. Martinez filed negligence claims against the United States, pursuant to the Federal Torts Claims Act ("FTCA"). App. 6. The excessive force claim was found to be substantiated by the evidence on a motion for summary judgment but was dismissed on the basis of qualified immunity for lack of clearly established law. *Id.* The parties agreed to dismiss the malicious prosecution claim. *Id.* A bench trial was held on the remaining FTCA claims and a defense verdict was entered. *Id.*

Appeal was taken of the trial verdict to the Tenth Circuit Court of Appeals on several legal and evidentiary grounds. *Id.* At oral argument, the Appellate Court inquired into whether the "discretionary function exception" of the FTCA pursuant to 28 U.S.C.

2680(a) insulated the United States from liability for the officers' acts. App. 6-7. The United States had never before raised the issue and did not assert the defense at oral argument. *Id.* Nevertheless, the Appellate Court ordered that the parties submit simultaneous supplemental briefs on the issue. App. 2. The Appellate Court determined that the discretionary function exception applied and ordered the case to be dismissed. App. 20. This appeal followed.

1. The Discretionary Function Exception of the FTCA.

A two-part test applies to determine whether the discretionary function exception applies to preclude suit against government employees for tortious conduct. *U.S. v. Gaubert*, 499 U.S. 315, 325 (1991). For the immunity to apply, both elements must be met. *Id.*

First, the exception applies only to acts that involve discretionary "judgment or choice." *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988). The requirement of discretionary 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.*

Second, even if the challenged conduct involves discretionary judgment or choice, a court must question whether the conduct 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.* (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). Properly construed, this

protects only governmental actions and decisions based on considerations of public policy. *Gaubert*, 499 U.S. at 323. When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. App. 324. However, where actions of a government agent are not the kind of conduct grounded in the policy of the regulatory regime, the immunity should not apply. App. 324-25. Where acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish, those acts, even if discretionary, are not within the discretionary function exception. App. 325, Fn. 7.

Exceptions to the FTCA should be considered in view of the underlying purpose of permitting liability for governmental conduct in circumstances for which a private person would be held liable under state tort law. *See* 28 U.S.C. §§ 1346(b); *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1850 (2016). Exceptions to the FTCA are to be narrowly construed. *Smith v. U.S.*, 507 U.S. 197, 203 (1993). Unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the FTCA statute. *Dolan v. U.S. Postal Service,* 5466 U.S. 481, 492 (2006).

2. Relevant Policies.

At the time of the incident, there were no written regulations, policies, procedures or other guidelines regarding the use of "blackout approach" or "blackout" tactics used by the officers. App. 11, 27. Officers testified that the SUPD taught officers these tactics and liberally permitted their use. App. 27-28.

However, the federal agency responsible for overseeing the tribal police departments, the Bureau of Indian Affairs ("BIA") maintained a Law Enforcement Handbook (2008), which included numerous law enforcement policies and guidelines. These policies restricted the discretion of federal tribal officers in the choices available to them in many ways. Among those, the following are applicable to the circumstances:

1-21-01. B. Requirement to Wear Official Uniform:

All commissioned police officers will wear the approved and issued police uniform when on duty.

No combination of police uniform and civilian attire may be worn.

App. 59.

1-21-01. D. Distinctiveness of Uniforms:

BIA/OJS law enforcement uniforms are distinctive and immediately recognizable as those of police officers.

App. 59.

2-02-04. FIELD INTERVIEWS:

D. Officers not in uniform will fully identify themselves as officers and exhibit their badges or credentials prior to initiating any field interview.

App. 61.

2-02-02. INITIAL ENCOUNTERS WITH THE PUBLIC:

A. Investigators will identify themselves as law enforcement officers as soon as possible if it is not evident.

App. 60.

3. The Appellate Court's Analysis of the Policies and the Discretionary Function Exception.

The Appellate Court properly cited to this Court's precedent in *Berkovitz* for the two-pronged test required for evaluating discretionary function immunity. In analyzing the first of the two prongs, the Appellate Court concluded that there were no applicable policies that were violated by the officers and that without any applicable policy violations the officers were free to exercise their judgment as they did. App. 11-13.

The Appellate Court concluded that the second prong of the *Berkovitz* test was satisfied because the officers' decision to use the blackout approach was susceptible to public policy considerations. App. 17. The Court acknowledged that there were no policies regarding the blackout approach, but pointed to issues expressed by the officers at trial, including the need for officer safety and effectiveness, which the Appellate Court concluded made the tactics susceptible to public policy consideration. App. 17-19.

As a result, the Court concluded that discretionary function immunity applied to the circumstances and ordered the case be remanded with instructions to dismiss. App. 20.

REASONS FOR GRANTING THE PETITION

1. The Appellate Court Erroneously Disregarded Federal Law Enforcement Policies that Restricted Discretion of the Officers.

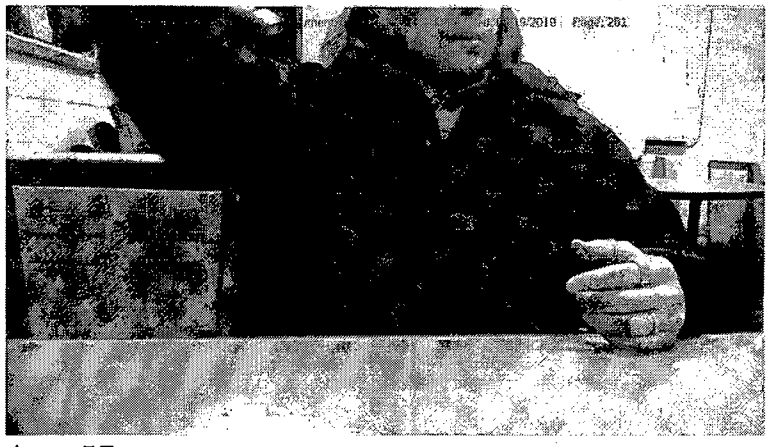
a. *The BIA Uniform Policies Precluded Officers From Wearing Their Uniforms in a Manner that Masked Their Police Identities.*

At the time of the incident, BIA law enforcement handbook policies required that "all commissioned police officers wear the approved and issued police uniform when on duty." App. 59. This policy explicitly recognized that such uniforms are "distinctive and immediately recognizable as those of police officers." *Id.* The policy reinforces the importance of the recognizability of police uniforms by precluding officers from combining "police uniform and civilian attire." *Id.* These policies, when reasonably interpreted, clearly convey that police uniforms should be worn at all times and be distinctive as police uniforms to ensure that its officers are immediately readily recognizable as police. Fairly construed, they do not provide discretion for officers to choose to wear their uniforms in a manner that provides intentional concealment of their police identities. As such, the policies should be viewed, individually and collectively, as constraining officer discretion, not only in what officers are permitted to wear but how they wear it, so that officer uniforms are not used in a manner antithetical to their stated purposes.

The trial evidence reinforces that the policies constrained officer discretion regarding tactics that

conceal their identity as officers. One of the three involved officers, Officer Mitchell, testified at trial that the use of blackout tactics was inconsistent with these policies. App. 32-35. He testified that BIA policy 1-21-01 indicates that officers should wear only uniforms that are immediately distinctive and recognizable as police attire. App. 34. Officer Mitchell admitted that the intent of the BIA policies is to ensure that police uniforms should be worn so that they clearly and immediately make officers recognizable as police. App. 35. The policies make clear to officers, like him, that the BIA desires officers to identify themselves and show their badges and credentials. App. 34. Wearing black jackets over police uniforms and badges, without police markings on the front and with only shoulder patches, is inconsistent with BIA policies that indicate uniforms should be clearly and immediately recognizable as those of police officers. App. 35. The Appellate Court was dismissive of this testimony and its implications but provided no substantive basis for disregarding this evidence and the common-sense interpretation of the policies provided other than the imposition of its own interpretation. *See* App. 12, fn. 5.

Trial evidence in the form of photographs and video of the officers' clothing demonstrates how officers would be unrecognizable as police when wearing black jackets zipped up to cover their police badges and uniforms. App. 52-58.



App. 57.

These photos also revealed that the officers had violated BIA policy 1-12-01(B) by combining their police attire with civilian attire, including wearing beanie hats with a "Body" logo that were obviously not police-issue.

App. 54.

The Appellate Court opinion did not consider that BIA policy prohibited the officers from combining police and civilian attire. App. 11.

Ultimately, the Appellate Court dismissed the uniform policies as wholly inapplicable to the discretionary function analysis based on a perfunctory conclusion that the black jackets that the officers wore zipped up to cover their uniforms, badges, and ID tags were police-issue. The Appellate Court concluded that because the jackets were provided to the officers by the police department, they comprised part of the officer's uniforms and that by wearing them the officers complied with the policy requiring the officers to wear law enforcement uniforms. However, in making this determination, the Appellate Court failed to consider the possibility that *how* the officers used their jackets – intentionally zipping them up over their uniforms, badges, and ID nametags – and in mixing them with additional civilian black clothing, including black beanie hats, may have contravened the individual and collective policy-making directives. A common-sense reading of the policies and their implications makes clear that the officers' manner of wearing their uniforms contravened these policies.

Review by this Court should be taken to ensure the policies and conduct of the officers are fairly interpreted against the requirements of the discretionary function exception. The limited discretion afforded by the policies has material effects for both the first and second prong analysis of the discretionary function test, which should preclude application of the immunity. The Appellate Court distorted the fair and reasonable interpretation of the policies as they applied to the analysis of the discretionary function exception and erred in applying the exception.

b. ***The Appellate Court Strained Interpretation of BIA Policy 2-02-02 in a Manner that Defies the Policy's Ordinary and Reasonable Meaning.***

BIA Policy 2-02-02 clearly requires officers to "identify themselves as law enforcement officers as soon as possible if it is not evident." The plain language of the policy stands in stark contrast to the officers' behavior in failing to identify themselves as they approached Mr. Martinez's family home in blackout fashion and heard and/or saw Mr. Martinez before shooting him. Even if wearing black clothing that conceals the officers' identity as police officers is within the discretionary function exception, the failure to identify oneself as a police officer, particularly after donning clothing intended to conceal one's identity, cannot be reasonably interpreted as being open to judgment or choice in light of this clear directive.

While the Appellate Court acknowledged that the officers failed to identify themselves, its opinion wholly disregarded that the officers' behavior contravenes a policy mandate by interpreting the policy language in a strained manner that defies its plain and ordinary meaning. The Appellate Court described the policy with modified language, injecting the words "when" and "initiating contact" to suggest that the policy imposed an obligation on officers only to identify themselves "when" they achieve contact with someone according to plan. App. 11. The Appellate Court then blamed Mr. Martinez for "initiating contact" with the officers and asserted that the policy requiring officers to identify themselves was not violated because if the officers had been permitted to initiate contact with Mr. Martinez in the manner they had planned, they would not have concealed their identity at that time. App. 12.

However, this interpretation suffers from several critical flaws. First, the word "when" does not appear in the policy. *See* App. 60. The only temporal modifier in the language of the policy is language indicating that officers must identify themselves "as soon as possible." *Id.* Second, the policy is written in

general terms for police officers who, by the nature of their work, face a myriad of tense, uncertain, and rapidly evolving circumstances, not simply a particular kind of circumstance where everything goes as planned for an officer. Third, the officers encroached upon Mr. Martinez's home, not vice versa. It is plainly unreasonable to conclude that the officers did not, in any way, "initiate" the contact when their approach prompted Mr. Martinez to react in defense of his home. Finally, the officers' very purpose in using the blackout approach was to conceal themselves from view as they approached Mr. Martinez's home. Their apparent conduct contradicts the disingenuous assertion that if they had been able to initiate contact as they had planned, they would not have concealed their identity.

In fact, Officers Mitchell and Backer's express purpose in approaching Mr. Martinez's home at 3:30 a.m., in blackout fashion was to force contact with Mr. Martinez to circumvent his earlier-expressed Fourth-Amendment refusal to speak with them. App. 13. At 1:30 a.m., two hours earlier, Officer Mitchell had knocked on Mr. Martinez's door after conspicuously approaching the residence with police vehicle lights on, with his uniform visible, and by announcing his police identity. App. 4. But, the occupants of the home did not want to speak with him. *Id.* Thus, the entire point of the blackout approach at 3:30 a.m. was to conceal their identities to catch Mr. Martinez unaware and prevent him from having the opportunity to refuse to talk to them. App. 14. It is disingenuous to rely on any assertion that the officers did not intend to conceal their identities in regards to the contact. The blackout approach was part and parcel of the plan for making contact with Mr. Martinez.

A reasonable interpretation of BIA Policy 2-02-02 obviously places common-sense limits on the officers' discretion to choose whether or not they should

conceal their identities, keep themselves concealed, and whether they should identify themselves as police officers when it mattered most. It was clear error for the Appellate Court to disregard the policy and to impose discretionary immunity as if the policy requiring the officers to identify themselves as soon as possible did not exist. This error must be reversed.

2. The Appellate Court Erred in Concluding the Actions of the Officers were Subject to the Public Policy Consideration of the BIA Given the Lack of Agency Policy on Blackout Tactics and the Existence of Policies Requiring Officers to Openly Present Themselves as Police Officers.

If a government agent's challenged conduct is found to be discretionary, the second prong of the *Birkovitz* test questions whether the choice permitted is "of the kind that the discretionary function exception was designed to shield." 486 U.S. at 536. The type of conduct the discretionary function was meant to shield is that which is grounded in the "social, economic, or political goals of the statute and regulations." *U.S. v. Gaubert,* 499 U.S. at 323. In other words, the challenged actions must be "based on the purposes that the regulatory regime seeks to accomplish." 325, fn. 7. That regulatory regime is "established [by] government policy, as expressed or implied by statute, regulation, or agency guidelines..." *Id.* at 324. Thus, a negligence claim cannot be precluded by the second prong of the *Birkovitz* test when a claimant challenges government actions that are "not the kind of conduct that can be said to be grounded in the regulatory regime." *Id.* at 324-325.

Both the United States and the Appellate Court failed to identify anything in the text of any BIA federal agency regulations or policies that suggests blackout tactics further the agency's policy aims or

goals. Early in the opinion, the Appellate Court correctly recognized that the BIA handbook does not address blackout approaches, nor does any official BIA or SUPD policy, procedure, or other guidelines. App. 11. In absence of any express or implied authorization for officers to use such tactics, the only agency policies in the record that appears to bear on the propriety of the blackout tactics are the policies identified by Mr. Martinez. These policies, when fairly read and interpreted, dictate conduct antithetical to the blackout approach by requiring that officers wear immediately recognizable police attire, display police credentials, and verbally identify themselves as police.

The text of the identified BIA policies, taken together, suggest a considered and purposeful agency public policy of open and conspicuous policing, not one of concealed stealth. The public policy aims reflected in these policies are not advanced by the officers' use of the blackout tactics challenged in Mr. Martinez's suit. On the contrary, policy aims are contravened by the officers' use of blackout tactics. As a result, it cannot be fairly said that the actions of the officers are permitted by public policy considerations in the agency's regulatory regime because there is no evidence that the aims of the policies provide room for this type of conduct. The officers here were required to follow agency policy. None of that policy provided discretion to contravene the clear policy objectives that its officers be clearly identifiable as officers. Thus, the officers' conduct in using blackout tactics to conceal their identities should not be shielded by the discretionary function exception. The Appellate Court erred in concluding that public policy considerations supported the discretionary function exception.

3. There is no Legitimate Public Policy Interest in a Blackout Approach for a Knock and Talk, Only Safety Risks for Officers and Homeowners Alike.

In concluding that the officers' use of the blackout approach implicated public policy concerns, the Appellate Court combed the trial record for evidence of public policy issues that could support the imposition of discretionary function immunity. App. 17. The Appellate Court concluded safety and effectiveness were raised, based on the testimony of the officers indicating that when they were originally taught the blackout tactics, they were told that the tactics could, hypothetically, be used to protect officers from potential attack, prevent perpetrators of domestic violence from silencing victims as police near, and avoid causing a public disruption late at night. However, none of those concerns are relevant to the circumstances of this case. The officers testified that their purpose in approaching the Martinez home was to conduct a knock and talk to check on the welfare of someone they had been told was the victim of a simple assault, hours earlier, who drove away in her vehicle. App. 22, 29-31, 38.

A knock and talk, by definition, is a basic law enforcement tactic that utilizes the implied license homeowners have historically afforded visitors, by which officers like any other visitors, may approach a home by the front path, knock promptly, wait to be received, and then (absent invitation to linger longer) leave. *Florida v. Jardines,* 569 U.S. 1, 8 (2013). Importantly, a knock and talk does not permit officers license to do anything more than an ordinary citizen would traditionally be expected to do. *Id.*; *Kentucky v. King,* 563 U.S. 452, 469-470 (2011). The traditions that permit it also require it to be carried out in an open and conspicuous manner to facilitate the type of consensual engagement inherent in a consensual encounter. *See* App. 39-43 (testimony by Police Policies expert Roger Willard). Stealth tactics, which conceal a person's identity and hide people in shadows as they

lurk around people's homes are obviously inconsistent with open and conspicuous consensual contact. A blackout approach to a person's home plainly does not comport with the nature or practice of a knock and talk encounter. *Id.* 45-51. Similarly, an officer concealing himself is inconsistent with the purposes and practices of a welfare check. App. 44. Surreptitious tactics used late at night only serve to create safety risks to both officers and homeowners, which were aggravated further in the circumstances of this case. App. 45-50.

Thus, the nature of the officers' purpose in initiating a "knock and talk" precludes the argument that legitimate safety or effectiveness concerns needed to be balanced under the circumstances. There were no officer safety needs or law enforcement effectiveness issues required to properly conduct a traditional, routine, knock and talk – as is evidenced by the fact that Officer Mitchell earlier in the evening executed a knock and talk by driving into Mr. Martinez's driveway with police lights on, exposed his police uniform, and identified himself as a police officer – without any threats or violence posed.

This Court should take review to make clear that there is no room for blackout tactics in these types of encounters and that using such tactics only creates public safety risks that do not promote any legitimate public policy purpose.

4. The Appellate Court's Determination is Inconsistent with this Court's Well-Settled Precedent and the Purposes of the FTCA.

Nothing is clearer in this Court's discretionary immunity jurisprudence than the bedrock principle that "if a federal statute, regulation, or policy prescribes certain conduct the employee has no rightful option but to adhere to such directives. *Birkovitz* v.

U.S., 486 U.S. at 536. If an employee violates relevant policies, the discretionary function exception provides "no shelter from liability because there is no room for choice." *Gaubert,* 499 U.S. at 324. Even where policies are silent regarding the discretionary choice afforded to a government actor by a regulatory regime, this Court's precedent requires courts to meaningfully analyze the conduct in question to determine whether it is the kind of conduct that can be said to be grounded in the agency's public policy purpose. App. 324-25, fn. 7. Where there is inconsistency, there must be liability. *Id.*

While the Appellate Court's decision cited to this Court's prevailing precedent for the correct test to apply in analyzing the discretionary function immunity, it sidestepped proper analysis dictated by the test by disregarding policies that plainly apply to the challenged conduct. The Appellate Court applied testimony regarding inapplicable and hypothetical public policy considerations instead of those policy goals reflected in the policies of the agency responsible for overseeing the officers' conduct. The Appellate Court's decision, as written, interprets the exception to the FTCA's waiver of immunity provision in a manner that invites speculation regarding the possibilities of relevant public policy concerns as far and wide as the imagination of lawyers can reach. The Appellate Court interpretation of the discretionary function exception of the FTCA swallows the rule permitting liability to attach. *See* 28 U.S.C. 1346(b); *Smith v. U.S.*, 546 F.2d 872, 877 (10th Cir. 1976) (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). Governmental actors cannot be permitted to simply ignore duties under tort law by claiming their actions were discretionary. *Id.*

If this Court permits the Appellate Court decision to stand, it will invite the same type of disregard of relevant policies and leave precedent that requires lower courts to skirt the stated purposes of the FTCA and cause other injured claimants to suffer without a remedy. Not only will Mr. Martinez be unable to continue pursuing a claim for his injuries, but other similarly situated injured claimants will be unable to pursue remedies as intended by Congress in enacting the FTCA.

5. The Appellate Court Decision Invites Thousands of Federal Officers Across the Country to Ignore Federal Policy and Engage in Reckless Conduct that Risks Further Police-Homeowner Confrontations.

In addition to frustrating this Court's precedent and the underlying purposes of the FTCA, the Appellate Court's decision sends a message that dangerous blackout approaches to persons' homes are tolerable and that police need not identify themselves when homeowners see them lurking about – despite what the BIA official policy says. The BIA serves 574 federally contracted Tribes and their respective Police Departments across the country. The guidance provided by the Law Enforcement Handbook and its interpretation by the Appellate Court influences tens of thousands of BIA and OJS police officers in the performance of their duties each and every day. Thus, the number of people affected by the Appellate Court decision are numerous.

When the officers involved in this case were deposed in 2017 they each acknowledged that they used blackout tactics regularly during night-time encounters. *See e.g.* App. 28. They acknowledged that there is no written agency or departmental guidance about how officers should or should not conduct blackout approaches. App. 27. The shooting officer, Officer Backer, claimed that the police department did not

even provide him warnings about the dangers of misidentification that could occur when using blackout encounters. App. 36-37. The decision of the Appellate Court serves as notification to these and all other similarly situated federal officers across the nation that the unguided use of blackout tactics, including the failure to identify oneself as a police officer, are not limited, not regulated, and that their use (or misuse) cannot result in civil liability. This is exceedingly dangerous.

If the Appellate Court decision is left to stand, it will encourage these tactics and likely increase the number of misunderstandings between homeowners and police using these concealment tactics as homeowners seek to defend themselves from the encroachment of unrecognizable darkly-clad officers and increase the inevitable risk of harm to homeowners and officers alike.

This Court should review the case to prevent that result.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Appellate Court should be reversed.

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

July 17, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANTHONY MARTINEZ,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 19-1140
(D.C. No. 1:15-CV-01993-RPM)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MATHESON**, and **CARSON**, Circuit Judges.

Plaintiff-Appellant Anthony Martinez sued the United States under the Federal Tort Claims Act ("FTCA") after a police officer shot him. He alleged three Southern Ute Police Department ("SUPD") officers—Cheryl Herrera, Matthew Mitchell, and Patrick Backer (the "Officers")—negligently intruded onto his property late at night without

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

identifying themselves.[1] The district court held a bench trial and found for the United States. Mr. Martinez appealed, challenging the district court's negligence analysis.

After oral argument, we ordered the parties to submit supplemental briefs to address whether the district court lacked subject matter jurisdiction under the FTCA because the United States retained sovereign immunity under the discretionary function exception. *See* 28 U.S.C. § 2680(a).[2]

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[1] The Indian Self-Determination and Education Assistance Act ("ISDEA") allows the United States to contract with Native American tribes to provide law enforcement funding. Under such contracts, "an Indian tribe . . . and its employees are deemed employees of the [United States] while acting within the scope of their employment in carrying out the contract or agreement." Department of the Interior and Related Agencies Appropriation Act, 1991, Pub. L. No. 101-512, 104 Stat. 1915, 1960 (codified in 25 U.S.C. § 5301 *et seq.*). Certain civil claims against law enforcement officers carrying out their duties under such contracts are thus "afforded the full protection and coverage of the [FTCA]." *Id.*

The Department of Interior's Bureau of Indian Affairs ("BIA") funds the SUPD under a contract with the Southern Ute Tribe. Under the contract, SUPD officers are considered federal employees for the purposes of the FTCA. *See* Dist. Ct. Doc. 23 at 6 (determining that the Officers "were acting within the scope of the [contract] and are deemed BIA employees entitled to the protection of the FTCA for those torts covered by the Act"); Dist. Ct. Doc. 13-4 (providing the relevant page of the contract).

[2] We "have an independent obligation" to determine whether we have subject matter jurisdiction under the FTCA. *Garling v. U.S. EPA*, 849 F.3d 1289, 1293 (10th Cir. 2017) (citation omitted). "Consequently, even if the government failed properly to raise and preserve the discretionary function defense . . . we nonetheless are bound to consider it." *Irving v. United States*, 162 F.3d 154, 160 (1st Cir. 1998).

The United States asserts that we need not address subject matter jurisdiction under the FTCA because, in *Cox v. United States*, 881 F.2d 893, 894 n.1 (10th Cir. 1989), we declined to decide a discretionary function exception issue that was not raised on appeal. Aplee. Suppl. Br. at 2. But in *Cox*, we held that the district court lacked subject matter jurisdiction under 28 U.S.C. § 1346(b)(1), another provision of the FTCA. 881 F.2d at 894-95. There was no reason to consider whether the discretionary function exception also deprived the court of jurisdiction.

After reviewing the supplemental briefs and the record, we conclude the discretionary function exception applies and the district court lacked subject matter jurisdiction over the negligence claim. We remand with instructions to dismiss the negligence claim.

I. BACKGROUND

In determining whether the United States retains sovereign immunity under the discretionary function exception, we "consider[] the allegations in the complaint as well as the evidence in the record." *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175 (10th Cir. 2008).

A. *Factual Background*

1. The Fight

Mr. Martinez hosted a social gathering at his father's house. Andrew Rossi and his girlfriend, Bridget Weaver, and Luana Price and her boyfriend, Fabian Pena, were guests.

A fight began when Mr. Rossi hit Ms. Weaver and Mr. Pena intervened. Mr. Martinez forced Mr. Rossi and Mr. Pena outside, where the fight ended. Ms. Weaver, Mr. Pena, and Ms. Price left the gathering. Mr. Rossi remained.

Around 1:00 a.m., Mr. Pena returned with Ms. Price and her two brothers. After they threatened Mr. Rossi, Mr. Martinez punched one of the Price brothers. A brawl ensued, and Mr. Martinez told Mr. Rossi they should "go get the bats." App. at 105. The Price brothers, Mr. Pena, and Ms. Price left.

2. First Police Response

One of the Price brothers called the police. Officer Herrera met them at an intersection near Mr. Martinez's house. Officers Mitchell and Backer arrived as backup.

Officer Mitchell and a fourth officer went to Mr. Martinez's house to investigate what had happened. They parked in front, walked to the door, and announced themselves as police. Nobody answered. Officer Mitchell looked in a side window and saw Mr. Rossi in the house. He reported to Officers Backer and Herrera and then returned to regular duty.

3. Second Police Response

Officer Herrera met with a deputy from the county sheriff's office and learned that Ms. Weaver might have returned to Mr. Martinez's house after the fight. *Id.* at 990-92. In response, Officers Herrera and Backer returned to Mr. Martinez's house around 3:30 a.m. to look for Ms. Weaver and check on her welfare. *Id.* at 415, 534, 993. As they neared the house, they "saw a vehicle that looked like [Ms.] Weaver's car . . . in the driveway." *Id.* at 993-94.

Officer Herrera, who was in charge, decided to approach the house using a stealth tactic called a "blackout," whereby police keep quiet, wear dark clothing, and park out of sight. *Id.* at 410, 416-17, 994, 1050-51, 1059-61. The method is employed to protect officers from attack from inside the house. In domestic violence cases, it also is used to prevent perpetrators from injuring victims or attempting to silence them as police near.

Officer Mitchell arrived as backup. He drove past the house in his patrol car and saw two people in the yard look at him and go inside. He assumed they recognized him as a police officer, and he expected no response because Mr. Martinez had ignored the police earlier.

Mr. Martinez thought the Officers' car was the Price brothers' SUV, which looked similar. Believing the brothers had returned to resume the fight, Mr. Martinez got a baseball bat from inside and hid behind a bush near where his driveway met the road.

4. The Shooting

The Officers walked quietly toward the house without using flashlights. Officers Herrera and Backer wore standard-issue black police jackets with the SUPD logo on the shoulders, but no police identification on the front. *Id.* at 308-09, 1284-86. Officer Mitchell, wearing his standard gray police shirt and no jacket, walked behind Officers Herrera and Backer.

The Officers heard the bush rustling and shined a flashlight. Mr. Martinez jumped out and ran toward them, raised the bat above his head, and shouted. The Officers drew their guns, and Officer Backer shot Mr. Martinez.

B. ***Procedural Background***

1. The Complaint and Pretrial Rulings

Mr. Martinez sued the Officers under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging excessive force and malicious prosecution. He sued the United States under the FTCA, alleging intentional

torts and negligence under Colorado law. The district court dismissed the intentional tort claims under 28 U.S.C. § 2680(h), which exempts certain torts from the FTCA's waiver of sovereign immunity.

The court later granted summary judgment to the Officers on the *Bivens* excessive force claim, holding they were entitled to qualified immunity. Although it found there was "conflicting evidence regarding the reasonableness of the officers' conduct," Dist. Ct. Doc. 87 at 5, the court concluded they did not violate clearly established law by shooting Mr. Martinez. The parties agreed to a dismissal of the *Bivens* malicious prosecution claim. Only the FTCA negligence claim against the United States remained for trial.

2. Bench Trial

After a six-day bench trial on the negligence claim, the district court ruled for the United States, finding that even if the Officers were negligent, they did not proximately cause Mr. Martinez's injuries because Mr. Martinez's ambush with the bat was a superseding cause. Alternatively, it found Mr. Martinez's negligence accounted for more than 50 percent of the fault, barring recovery under Colorado's comparative negligence statute. Mr. Martinez timely appealed, challenging only the district court's disposition of the FTCA negligence claim.

3. Supplemental Briefing on Jurisdiction

At oral argument, we asked the parties whether the Officers' decision to use the blackout approach was "a discretionary function" under 28 U.S.C. § 2680(a) and thus

exempt from the FTCA's waiver of sovereign immunity. Because neither the district court nor the parties had raised the issue or prepared to discuss it at oral argument, we requested supplemental briefs addressing the discretionary function exception and its effect on subject matter jurisdiction. The parties submitted supplemental briefs simultaneously.

II. DISCUSSION

The district court lacked jurisdiction over Mr. Martinez's negligence claim because the discretionary function exception to the FTCA's waiver of sovereign immunity applies. First, the Officers exercised discretion in choosing how to approach Mr. Martinez's house, and no statute, regulation, or policy prohibited their choice or required a different one. Nor has Mr. Martinez shown their actions violated the Fourth Amendment. Second, the decision to use the blackout approach was susceptible to public policy concerns regarding safety and effectiveness.

A. *Legal Background*

"The concept of sovereign immunity means that the United States cannot be sued without its consent." *Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010) (quotations omitted). The FTCA provides "a limited waiver of [the United States'] sovereign immunity . . . for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976); *see* 28 U.S.C. § 1346(b)(1). It includes exceptions to this limited waiver. *See* 28 U.S.C.

§ 2680. "When an exception applies, sovereign immunity remains, and federal courts lack jurisdiction." *Garling v. U.S. EPA*, 849 F.3d 1289, 1294 (10th Cir. 2017).

Under the FTCA's discretionary function exception, the United States does not waive its immunity for claims "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). "[T]he purpose of the exception is 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." *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quotations omitted). When determining whether government conduct falls within the discretionary function exception, courts apply the two-part test set forth in *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). *See Garling*, 849 F.3d at 1295.

First, courts determine whether the conduct was "discretionary"—that is, whether it was "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. Conduct is not discretionary if it "violate[s] a federal statute, regulation, or policy that is both specific and mandatory." *Elder v. United States*, 312 F.3d 1172, 1177 (10th Cir. 2002) (quotations omitted). Most circuits also have held conduct is not discretionary when it "exceeds constitutional bounds." *Loumiet v. United States*, 828 F.3d 935, 944 (D.C. Cir. 2016) (collecting cases); *see, e.g.*, *Medina v. United States*, 259 F.3d 220, 225 (4th Cir.

2001) (explaining that "[f]ederal officials do not possess discretion to violate constitutional rights" (quotations omitted)).[3]

Second, if the conduct was discretionary, courts determine whether it was "based on considerations of public policy." *Berkovitz*, 486 U.S. at 537. They "ask[] categorically (rather than case specifically) whether the kind of conduct at issue can be based on policy concerns." *Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). Courts "do not consider the employee's 'subjective intent in exercising the discretion . . . , but on[ly] the nature of the actions taken and . . . whether they are susceptible to policy analysis.'" *Garcia*, 533 F.3d at 1176 (quoting *Gaubert*, 499 U.S. at 325). "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324.

If both parts of the *Berkovitz* test are met, the discretionary function exception applies, "the United States retains its sovereign immunity[,] and the district court lacks subject matter jurisdiction to hear the suit." *Garcia*, 533 F.3d at 1175-76. "Because the

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[3] *See also Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009); *Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975); *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000). *But see Kiiskila v. United States*, 466 F.2d 626, 627-28 (7th Cir. 1972) (concluding the discretionary function exception applied to government conduct that was "constitutionally repugnant" and in violation of the First Amendment).

discretionary function exception is jurisdictional, the burden is on [the plaintiff] to prove that it does not apply." *Hardscrabble Ranch, L.L.C. v. United States*, 840 F.3d 1216, 1220 (10th Cir. 2016); *accord Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998) ("The discretionary function exception poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction." (quotations omitted)). If the plaintiff fails to make the necessary showing under *Berkovitz*, "[t]he [discretionary function] exception applies even if the governmental employees were negligent." *Aragon*, 146 F.3d at 822.

B. *Analysis*

We first determine whether use of the blackout approach was within the Officers' discretion. Finding that it was, we then assess whether their conduct was based on public policy concerns.

1. Discretion

Mr. Martinez argues the Officers lacked discretion to use the blackout approach because it violated (1) the BIA Office of Justice Services Law Enforcement Handbook ("BIA Handbook"),[4] and (2) the Fourth Amendment. But he has not shown that the Officers "violated a federal statute, regulation, or policy" by using the blackout approach,

[4] The BIA Handbook contains a set of policies that federally recognized tribes may adopt. The SUPD has adopted the Handbook.

Elder, 312 F.3d at 1177, or that the approach "exceed[ed] constitutional bounds," *Loumiet*, 828 F.3d at 944. Their conduct was therefore discretionary.

a. *BIA Handbook*

The BIA Handbook does not address the blackout approach. Mr. Martinez acknowledges that "[t]here are no official BIA or SUPD policies, procedures, or other guidelines regarding the blackout approach. Use of the blackout approach is left to officer discretion . . . ." Aplt. Br. at 5 (citing App. at 163-64).

Even so, Mr. Martinez argues the Officers violated the following provisions of the BIA Handbook when they used the blackout approach:

> (1) "All commissioned police officers will wear the approved and issued police uniform when on duty," App. at 1305;
>
> (2) "Officers not in uniform will fully identify themselves as officers and exhibit their badges or credentials prior to initiating any field interview," *id.* at 1307; and
>
> (3) When "initiat[ing] a contact" with the public, officers must "identify themselves as law enforcement officers as soon as possible if it is not evident," and must avoid "force or coercion," *id.* at 1306.

Mr. Martinez argues that these policies prohibited the Officers from using the blackout approach. We disagree because the Officers did not violate these provisions.

First, Officers Herrera and Backer wore standard-issue police jackets that were part of their uniforms. App. at 305-06, 382, 510, 1093. Officer Mitchell wore his standard gray police uniform without a jacket. *Id.* at 219. They did not, therefore, violate the BIA requirement that "police officers will wear the approved and issued police

uniform," App. at 1305, nor the provision pertaining to "[o]fficers not in uniform," *id.* at 1307.

Second, although the Officers did not identify themselves as police as they approached the property, they did not "initiate a contact" with Mr. Martinez. *Id.* at 1306. He did when he ran out from behind a bush waving a bat and yelling. Officer Herrera testified that, had she been able to initiate contact with Mr. Martinez, she had "[no] intention of concealing [her] identity as a police officer." *Id.* at 995. Officers Mitchell and Backer gave similar testimony. *See id.* at 323-24, 415-16. The Officers did not, therefore, violate the provision that they identify themselves as police and avoid force or coercion when "initiat[ing] a contact" with the public. *Id.* at 1306.

Third, the trial testimony supports that the BIA Handbook allowed the blackout approach. BIA Chief of Police, John Roberts Burge, testified that the Officers' approach was consistent with the Handbook. *Id.* at 1116-18. Officer Mitchell also noted that police field training teaches the blackout approach and instructs officers to use the approach "depend[ing] on the nature of the contact and prior history with the residence itself and also the people that [the officers are] attempting to contact." *Id.* at 281. The SUPD teaches officers that use of the approach is "situationally dependent." *Id.* at 785.[5]

[5] Although Officer Mitchell said during cross examination at trial that some of the BIA Handbook's provisions seem inconsistent with the blackout approach, App. at 381-84, our analysis above shows those sections do not prohibit the blackout approach.

In short, Mr. Martinez has not shown that the Officers' use of the blackout approach violated a "specifically prescribe[d] . . . course of action" in the BIA Handbook. *Garling*, 849 F.3d at 1295 (quotations omitted).

b. *Fourth Amendment*

Mr. Martinez argues the blackout approach violated his Fourth Amendment rights and therefore was not discretionary. He relies on *Florida v. Jardines*, 569 U.S. 1, 6 (2013), *Kentucky v. King*, 563 U.S. 452, 469-470 (2011), and *Manzanares v. Higdon*, 575 F.3d 1135, 1146 (10th Cir. 2009), to argue that "[a] homeowner has a clear Fourth Amendment right to choose not to speak with officers who may appear at his home without a warrant." Aplt. Suppl. Br. at 5-6.[6] He contends the Officers violated that right by approaching the house in a clandestine manner despite his failure to answer the door for Officer Mitchell earlier that night. Although, as noted above, most circuits have held that conduct is not discretionary under the FTCA when it violates the Constitution, this circuit has not addressed this issue. We need not do so here because, as explained below, Mr. Martinez's arguments for a Fourth Amendment violation are not persuasive.

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[6] In *Jardines*, the Supreme Court said that police officers may knock on a front door, but that using a drug-sniffing dog on a home's curtilage is a search under the Fourth Amendment. 569 U.S. at 11-12. In *King*, the Court stated that when police knock on a door, "the occupant has no obligation to open the door or to speak." 563 U.S. at 469-70. In *Manzanares*, we held that an officer violated a homeowner's Fourth Amendment rights because he "remained in [the] home without a warrant or valid exception to the warrant requirement" after the homeowner "unequivocally asked [him] to leave." 575 F.3d at 1143, 1146.

i. Additional legal background

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "Houses, for Fourth Amendment purposes, include a home's curtilage . . . ." *United States v. Carloss*, 818 F.3d 988, 992 (10th Cir. 2016) (quotations omitted).

Even without a warrant or reasonable suspicion, "a police officer, like any member of the public, has an implied license to enter a home's curtilage to knock on the front door, seeking to speak with the home's occupants." *Id.*; *accord United States v. Shuck*, 713 F.3d 563, 567 (10th Cir. 2013) ("[A] 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion." (quotations omitted)).

A knock and talk becomes a nonconsensual seizure when occupants reasonably believe they cannot refuse to speak with the police—that is, when the encounter becomes "coercive." *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008); *compare id.* at 1168-69 (holding that officers seized a homeowner when they pounded on his door and windows and yelled for 20 minutes between 2:30 a.m. and 3:00 a.m.) *with United States v. Hernandez-Chaparro*, 357 F. App'x 165, 167 (10th Cir. 2009) (unpublished) (holding that an officer did not violate the Fourth Amendment when he knocked on a homeowner's door before 6:00 a.m. and asked to check on the welfare of children in the

house).[7] We have held that an early-morning knock and talk by multiple officers is not "inherently coercive." *United States v. Abdenbi*, 361 F.3d 1282, 1288 (10th Cir. 2004).

When a homeowner preempts a knock and talk by attacking the approaching officers, the officers' approach "do[es] not implicate the Fourth Amendment." *United States v. Carter*, 360 F.3d 1235, 1239 (10th Cir. 2004). At that point, the officers have neither "seized anything or anyone," nor "conducted a search." *Id.*

ii. Analysis

The Officers planned to knock on Mr. Martinez's front door when they approached his house. App. at 995. Mr. Martinez prevented them from reaching the door by charging at them with a bat. The Officers neither seized him, searched his property, nor even initiated contact. *See Carter*, 360 F.3d at 1238-40 (holding that no search or seizure occurred when officers walked up a driveway at midnight to conduct a knock and talk, but the homeowner ran out of the garage "in a combative manner" before they reached the door).[8]

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[7] Although not precedential, we find the reasoning of this unpublished decision instructive. *See* 10th Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

[8] We thus do not address whether the Fourth Amendment would have allowed the Officers to enter the house to check on Ms. Weaver even if Mr. Martinez had refused. *See, e.g.*, *United States v. Sanders*, 956 F.3d 534, 539-40 (8th Cir. 2020) (holding that police officers' warrantless entry into a house to check on a potential victim of domestic violence did not violate the Fourth Amendment under the community caretaking exception).

And even if the Officers had been able to carry out their plan, their approach at 3:30 a.m. to check on Ms. Weaver was reasonable despite Mr. Martinez's failure to answer the door for Officer Mitchell at 1:30 a.m. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'"). Officer Mitchell testified that he did not know about a domestic violence incident when he approached the house at 1:30 a.m. App. at 301. Officer Herrera ordered the second visit only after confirming with corroborating witnesses that Mr. Rossi had attacked Ms. Weaver and that she might be at the house. *Id.* at 990-92. The Officers stopped at the property and approached the house only after seeing her car in the driveway, where it had not been when Officer Mitchell knocked earlier. *See* App. at 104, 535, 993-94. They approached with the intent of "knock[ing] and ask[ing] to speak with [Ms.] Weaver." *Id.* at 995; *see also Carloss*, 818 F.3d at 992 ("[A] police officer, like any member of the public, has an implied license to enter a home's curtilage to knock on the front door, seeking to speak with the home's occupants."). Mr. Martinez identifies no case holding that a welfare check on a victim of domestic violence is coercive simply because the police received no response when they approached the house hours earlier.

Finally, *Jardines*, *King*, and *Manzanares* do not apply here. The Officers did not search Mr. Martinez's property, *see Jardines*, 569 U.S. at 11-12, nor compel him to answer questions, *see King*, 563 U.S. at 469-70. Nor did they "remain[] in his home

without a warrant or valid exception to the warrant requirement" after he "unequivocally asked [them] to leave." *Manzanares*, 575 F.3d at 1143, 1146.

Based on the foregoing, Mr. Martinez cannot establish that the Officers violated his Fourth Amendment rights.

* * * *

Because Mr. Martinez has not shown the Officers' use of the blackout approach violated the BIA Handbook or the Constitution, and because the evidence showed they chose the blackout approach rather than other options, the Officers' decision was discretionary. *See Berkovitz*, 486 U.S. at 536; *see also Hardscrabble Ranch*, 840 F.3d at 1220 ("[T]he burden is on [the plaintiff] to prove that [the discretionary function exception] does not apply.").

2. Public Policy

Mr. Martinez fails to overcome the "presum[ption] that the [Officers'] acts [were] grounded in policy." *Gaubert*, 499 U.S. at 324; *see also Berkovitz*, 486 U.S. at 537. A police department's decision to teach the approach and an officer's decision to use it implicate policy concerns about safety and effectiveness. The trial evidence showed that the method (1) protects officers from potential attack when they approach homes, App. at 405, 533, 886, 1117-19, 1325, (2) prevents perpetrators of domestic violence from silencing victims as police near, *id.* at 1120, and (3) avoids causing a public disruption late at night, *id.* at 292.

On the other hand, the method risks that officers will be misperceived as trespassers, *id.* at 157, 167-68, 1328, jeopardizing officer and homeowner safety. The SUPD cautions trainees about this danger. *Id.* at 157. The blackout approach thus requires departments and officers to weigh safety and effectiveness considerations. *See Johnson v. U.S., Dep't of Interior*, 949 F.2d 332, 339 (10th Cir. 1991) (explaining that "the balancing of safety objectives against . . . practical considerations" sufficiently implicated public policy (footnote omitted)).

Mr. Martinez argues that the Officers' use of the blackout approach did not involve public policy because it was "chosen for the purpose of forcing persons to make contact with officers." Aplt. Suppl. Br. at 9. That is, the Officers sought merely to prevent Mr. Martinez from refusing to speak to them. But in assessing the public policy step of the *Berkovitz* analysis, "we do not consider the employee's 'subjective intent in exercising the discretion.'" *Garcia*, 533 F.3d at 1176 (quoting *Gaubert*, 499 U.S. at 325). We consider only "the nature of the actions taken and . . . whether they are susceptible to policy analysis." *Id.* (quotations omitted). As discussed, the blackout approach is susceptible to a public policy analysis. It does not matter whether the Officers in this particular case subjectively considered policy issues, though the evidence showed they weighed such concerns. *See* App. at 417, 526.

Mr. Martinez also relies on *Gaubert*, 499 U.S. at 325 n.7, and *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1538 (10th Cir. 1992), to argue the Officers' conduct was merely "ordinary discretion" not grounded in policy, and therefore does not meet the second step

of *Berkovitz*. Aplt. Suppl. Br. at 8. But in those cases, we explained that "ordinary discretion" encompasses acts such as driving a car in the course of official duties. *See Gaubert*, 499 U.S. at 325 n.7; *Daigle*, 972 F.2d at 1538. The discretion to use the blackout approach, by contrast, involves safety and effectiveness concerns crucial to police investigations.[9]

Finally, Mr. Martinez asserts that the blackout approach's "risk to both officer and civilian safety makes it difficult, if not impossible, to argue that [the Officers'] decisions were based on considerations of public policy." Aplt. Suppl. Br. at 10. But, as discussed, the blackout approach requires officers and police departments to balance competing

[9] *See, e.g.*, *Suter v. United States*, 441 F.3d 306, 311-12 (4th Cir. 2006) (holding that an undercover FBI agent's discretionary participation in the crimes the FBI was investigating was susceptible to a policy analysis); *Deuser v. Vecera*, 139 F.3d 1190, 1195-96 (8th Cir. 1998) (holding that National Park Service rangers' discretionary decisions about arresting and releasing the plaintiff were rooted in policy concerns about the safety of other parkgoers); *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997) (holding that "[t]he decision as to how to locate and identify the subject of an arrest warrant prior to service of the warrant is susceptible to policy analysis" involving "such factors as the potential threat the subject poses to public safety and the likelihood that the subject may destroy evidence"); *Hart v. United States*, 630 F.3d 1085, 1090 (8th Cir. 2011) ("We readily conclude a federal law enforcement officer's on-the-spot decisions concerning how to effectuate an arrest—including how best to restrain, supervise, control or trust an arrestee—fall within the discretionary function exception to the FTCA absent a specific mandatory directive to the contrary.").

safety concerns. And Mr. Martinez does not explain why such risks would preclude consideration of policy concerns.[10]

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Policy concerns inform the blackout approach. Mr. Martinez has not shown otherwise. The Officers' conduct thus satisfied the second step of *Berkovitz*. The discretionary function exception applies, and the United States retains sovereign immunity.

III. CONCLUSION

The district court lacked subject matter jurisdiction over Mr. Martinez's negligence claim. We therefore remand with instructions to dismiss the negligence claim.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[10] To the extent Mr. Martinez argues the discretionary function exception does not apply because the Officers "ignore[d] duties under tort law," Aplt. Suppl. Br. at 9, we note that "[t]he [discretionary function] exception applies even if the governmental employees were negligent," *Aragon*, 146 F.3d at 822.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01993-RPM

ANTHONY MARTINEZ,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Anthony Martinez ("Martinez") brought this action for damages claiming that he was injured as a result of the negligent conduct of three Southern Ute Tribal Police Officers for which the United States of America ("Government") is liable pursuant to the Federal Tort Claims Act, 28 U.S.C. § § 2671, *et seq.* After trial the following narrative constitutes this court's finding of facts and conclusions of law as required by Fed. R. Civ. P. 52.

The events giving rise to this case occurred on the evening of December 4 and the early morning hours of December 5, 2012. At that time, Martinez was 24 years old living at his father's house at 189 County Rd. 320B near Ignacio, Colorado, within the Southern Ute Indian Reservation and LaPlata County, Colorado.

Martinez was hosting a party at the house attended by Andrew Rossi, Bridgette Weaver, Fabian Pena and his girlfriend Luana Price. During the evening, Pena and Rossi got into a fight. Martinez told them to take it outside which they did. Martinez broke up the fight and told Pena to leave. He did with Price. Weaver also left. Soon

Attachment A

thereafter Pena returned with Darien and Draven Price, brothers of Pena's girlfriend. When the Price brothers surrounded Rossi, Martinez started fighting to protect him, which turned violent with injuries. When Martinez yelled "let's get the bats" and ran to the house, Pena and the Price brothers drove off in a dark colored SUV.

One of the Price brothers called 911 to report the fight. Dispatch from the LaPlata County Sheriff's office notified the SUPD at about 1:00 a.m. on December 5. Officers Herrera, Backer and Mitchell met the Price brothers at the intersection of County Roads 320 and320B. Herrera took statements and with Backer drove two injured men to a hospital in Durango, Colorado.

Officers Mitchell and Hibbard went to the Martinez house to conduct a "knock and talk." County Road 320B is a short road resulting in a dead end. There are no street lights on it and only one other occupied house which is at the dead end and occupied by a reclusive old man who was not a witness to any of the relevant events.

Mitchell and Hibbard drove into the Martinez driveway in a police car with flashing lights. They went to the front door, knocked and announced their presence as police officers. There was no response. Mitchell went to the side of the house, shined a flashlight through a window and saw Rossi lying on the floor. Failing to make contact the officers drove away at about 1:30 a.m.

After returning from Durango at about 3:30 a.m., Herrera decided that the officers should go to the Martinez house to conduct a welfare check for Bridgett Weaver because the Price brothers had said that Rossi struck her during the fighting and that she was a member of the Tribe. At that time Herrera was still in training as a new officer and Backer was her Field Training Officer. He had been with the SUPD for a year. Mitchell had been a patrol officer for 2 ½ years.

Although still in training with only months as an officer, Herrera was given command. She decided to approach the house in her police SUV with lights off in a stealth approach and park at the dead end. Backer was with her as they drove to the dead end and turned around. This police tactic is referred to as a "black out" approach designed to protect police officers from a possible shooting from inside the house.

Mitchell was driving down Road 230B when Herrera instructed him to turn off the lights on his SUV. Mitchell did that about half way down the road. He had seen people in the yard and knew they had seen him turn off the lights. Martinez had observed it from inside the house. The street was very dark and the only light was a small porch light in front of the house illuminating only a small part of the front yard. Bridgette Weaver had driven into the driveway with a friend named Lopez a short time earlier. Martinez asked if she had turned off her headlights and got a negative answer.

Martinez and Rossi were alarmed thinking that the Price brothers had come back to renew the fight, possibly with weapons. That would be consistent with their reputation for violence. The three officers started walking up the road toward the Martinez house. The weather was cold. Herrera and Backer wore dark coats over their uniforms with dark pants. Mitchell was in uniform but was walking behind the dark clad officers. Peeking from behind a clump of bushes in his yard, Martinez saw these dark figures walking toward him which reinforced his belief that they were the Price brothers coming to do him and Rossi harm. He had taken his son's T-Ball metal bat from the house. As the officers approached Martinez jumped out from behind the bushes and ran toward the officers waving the bat in his right hand above his head and yelling in an attempt to scare the intruders as he had done previously by his reference to go get the bats. The officers were startled and shined their flashlights on Martinez. Both Mitchell

and Backer drew their weapons which were .40 caliber Glock pistols. Herrera also drew her weapon but had difficulty getting it ready to fire because of her gloves.

What happened next is much disputed. Martinez testified that he was blinded by the lights, turned and started running toward his house. He then heard a gun shot and then felt pain in his leg, fell to the ground and felt that his legs were paralyzed. Backer testified that he fired two shots directed at the center mass of Martinez' body and that he fell backward onto the road still holding the bat in his right hand. The distance between Backer and Martinez when shots were fired was estimated differently by the testimony of the officers at trial ranging between five feet and twenty feet. There were differences as well in their prior statements in the investigations done by LaPlata County, the Colorado Bureau of Investigation, and the Bureau of Indian Affairs as well as at the two criminal trials of charges against Martinez. He was acquitted of assaults on the police officers.

This was a highly charged emotional event over six years ago in less than three minutes time. It would be unlikely that the witnesses would have a clear memory of what happened as well as their perceptions of what actually happened in this dark, isolated area. These differences are understandable and do not impeach the credibility of the officers.

As may be relevant there is different testimony as to what was said just before the shots were fired. Martinez said that he heard shouts of "drop the bat - drop the fucking bat" but no identification that these were police officers. Mitchell said he yelled "police."

What is relevant is that Martinez had no knowledge that a police officer had shot him. That is clear from his conversation with Backer who recorded it when standing over Martinez after he was shot.

Martinez' perceptions and conduct were affected by alcoholic intoxication. A blood test taken at the hospital more than an hour after the shooting showed a level 2½ times that for impaired driving.

The plaintiff's testimony that he was shot in the back while running toward his house is disproven by the trajectory of the bullet that hit him. The entry wound was on the right side of his back. The hollow point bullet shattered when it hit vertebrae and fragments went out on the left side. Some fragments remain in his body. Dr. Robert Bux gave persuasive testimony that Martinez must had been starting to turn away from the shooter when he was hit by the second shot.

Conclusions of Law

The plaintiff's claim is that the officers were negligent in using the black out approach concealing both their presence and identity causing him to attempt to defend himself from expected injury from assailants known to be dangerous. The evidence does not support a finding that such an approach is, in itself, an unreasonable method of an approach to the unknown risks involved in the investigation of domestic violence. As many witnesses testified that is the second most dangerous police call. The decision to make a welfare check two hours after Mitchell and Hibbard had been to a quiet house and saw Rossi lying on the floor by himself is questionable judgment. There was no reason to suspect that there was any ongoing violence. Herrera was concerned that Weaver may have been injured and needed assistance. That decision may have been imprudent but it is not a basis for finding a lack of reasonable care for the safety of a resident. When the officers were at the intersection talking to the Price brothers, a deputy sheriff told them that he would take over the investigation and that he was going to get an arrest warrant for Rossi. They had reason to believe that Rossi

might react violently if they went directly to the house in the same manner used by Mitchell.

The officers are charged with knowledge that a stealth approach could be misinterpreted and cause the occupants to believe that they were about to be assaulted but they had no reason to believe that Martinez would run at them on the county road threatening them with a bat with little time to react.

That lack of forseeability breaks the chain of causation. Martinez charged at them which is an intervening cause of his injury. The stealth approach was not the proximate cause of injury to Martinez.

Under Colorado law a plaintiff may not recover damages for negligent conduct if his own negligence was greater than that of a defendant. Martinez was himself negligent in going out of his house and confronting what he assumed were the Price brothers on the county road. That was a lack of reasonable care for his own safety and contributed more to his injury than the stealth approach by the officers. The claim for negligent infliction of emotional harm fails for the same reasons as the claim for negligent injury. In short, Martinez' claim is barred by his own negligence if the police officers were negligent in creating a dangerous circumstance because his negligence was greater than that of the officers.

It is ORDERED that judgment shall enter for the defendant, The United States of America, dismissing this civil action with an award of costs.

DATED: March 14, 2019

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

regardless.

Q Is your testimony that concealing your identity isn't in any way associated with trickery?

A I wouldn't say it's trickery; it's tactics.

Q Tactics to gain some sort of advantage; isn't that right?

A We're always trying to gain an advantage.

Q A tactical advantage?

A Correct.

Q By depriving them of knowing who you are?

A I wouldn't say depriving them of knowing who we are; it's more of trying to stay out of sight.

Q So they can't see you coming?

A Correct.

Q Now, there is no Bureau of Indian Affairs policies or procedures regarding blacking out, are there?

A I do not believe so.

Q And there are no SUPD policies or procedures regarding the blackout approach?

A I do not believe so.

Q Okay. So there is nothing written in place to guide you, as an officer, about how you should or you shouldn't conduct the practice?

A Correct.

Q The department leaves it completely up to officer

discretion?

A The department typically leaves a lot of fieldwork to the discretion of the officers. It also is dependent on the conditions of the call, the area that the call is in, things of that nature.

Q Thank you, that's not what I asked.

What I asked was whether they leave it up to officer discretion the ability to use the blackout approach?

A Yes.

Q So you could use it 100 percent of the time?

A If I chose to.

Q Every nighttime encounter?

A We typically try to incorporate some element into most of the things that we do at night.

Q Explain that.

A Again, like I said, a lot of tactics that are employed in what you're referring to as the blackout approach, things such as noise and light discipline, as I testified earlier, things that we do as a normal course of business every day, keeping a radio low in case the person that you're contacting has warrants, or if there is sensitive information being transmitted across the radio, you don't want other members of the public hearing that. That's why typically a lot of officers wear earpieces, rather than just a standard radio mic.

Mr. Martinez's home?

A Okay.

Q So there would be no other lights to reflect on your dark-colored SUV if you drove by Mr. Martinez's home?

A That's correct.

Q All right. Would you agree that you've seen your vehicle in darkness before?

A Yes.

Q All right. And -- well, so it would be reasonable to say that you knew that it were very, very dark, that that reflective lighting couldn't be seen?

A Yes, it would.

Q All right. Let's talk about the 3:30 call when you actually drove to Mr. Martinez's home. Officers Backer and Herrera gave you some information, didn't they?

A They called and -- again, I don't remember if it was via cell phone or if they advised me over the radio, but they relayed the information that they had gotten done interviewing some people at the hospital and they had additional information to follow up on.

They had gone by the residence and seen the porch light on and were wanting to make contact -- or attempt to make contact.

Q All right. So you're just going to approach and do a regular knock-and-talk, right?

A That was my feeling at the time.
Q Okay. So you approached Mr. Martinez's home with full lights on?
A I still had my lights on when I turned onto the county road.
Q Okay. But then you get a call from Officers Backer and Herrera, didn't you?
A I don't remember if they called me or if I turned my lights off of my own volition.
MR. BRYANT: Let's give the witness Volume 2.
Q (By Mr. Bryant) Would it refresh your recollection if you took a look at your trial testimony?
A Yes.
Q Okay.
MR. KEECH: I can hand the witness a transcript of trial testimony taken July 22, 2013.
Q (By Mr. Bryant) If you turn to page 370, please, and look at lines 13 to 20. Does that refresh your recollection?
A Yes.
Q Okay. So Officer Herrera radioed you over the tack radio; isn't that right?
A Yes.
Q And he told you to turn off your lights?
A Yes.

end of a dead-end road?

A No, it doesn't.

Q Right. So -- so follow D, you could have simply parked across the street from Mr. Martinez's home?

A Well, it also says the police vehicle directly in front of residence or other side of the disturbance.

Q Okay. So you would agree you could have parked the vehicle next to Mr. Martinez's residence?

A That's correct.

Q It doesn't have to be as far away as the dead-end road?

A It didn't have to be, but that was the most suitable tactical location to park the vehicles.

Q Okay. Well, let's ask a better question.

Was this a domestic violence call?

A As I've testified, I didn't know it was a domestic violence call at the time.

Q To your knowledge, it was just a follow-up to an assault, correct?

A That's correct.

Q And it was nonemergent, right?

A That's correct.

Q There was no reason to think there was any urgency going on here?

A Correct.

A I see that.
Q Did I read that correctly?
A Yes.
Q And that would have been in your policy book?
A That's correct.
Q Doesn't that suggest that you shouldn't use blacked-out tactics?
A It's saying that -- the way I read it is, is we shall identify ourselves as soon as possible.
Q Okay. Now, in Provision 2, I also have that highlighted. Do you see that there?
A Yes, I do.
Q An officer may not use force or coercion in initiating contact or in attempting to obtain cooperation. Officers will act in restrained and courteous manner. Persons refusing to cooperate will be permitted to go.
Did I read that right?
A Yes.
Q All right. So what that means is people who don't want to talk to you during a knock-and-talk encounter should be permitted to go?
A That's correct.
Q They should be left alone?
A Correct.
Q They shouldn't be harassed later at 3:30 in the

morning?

MR. BRENTON: Objection, Your Honor.

THE COURT: Sustained.

Q (By Mr. Bryant) Let's turn to page 1162 in the handbook. This is field interviews. Does Provision D look familiar?

A Yes.

Q And that says: Officers not in uniform will fully identify themselves as officers and exhibit their badges and credentials prior to initiating any field interview.

Isn't that right?

A Correct.

Q So doesn't that suggest that the BIA policy handbook requires officers to have badges exposed so people know who they are?

A It would suggest that.

Q But Officers Herrera and Backer wore black coats that covered their badges and uniforms; isn't that right?

A They were wearing standard issue jackets at that time, yes.

Q So isn't this policy also inconsistent with the idea that officers should be permitted to blackout and conceal themselves routinely during everyday encounters?

A It would suggest that.

Q And we'll go to page 1113. This is Uniforms and

Protective Equipment. Do you see that?

A I do.

Q All right. Now, the policy is that sworn personnel are authorized to wear prescribed police uniforms or civilian attire and carry law enforcement credentials and a badge identifying them as commissioned officers. Sound right?

A Yes.

Q So you would agree that that would suggest the BIA wants its officers to identify themselves and show their badge and credentials?

A That's correct.

Q All right. Now, indeed, Distinctiveness of Uniforms, this reads: BIA -- I'm sorry: BIA/OJS law enforcement uniforms are to be distinctive -- I'm sorry, are distinctive and immediately recognizable as those of police officers.

Do you see that?

A Yes, I do.

Q Doesn't that also sound like the BIA wants officers to wear only uniforms that are immediately distinctive and recognizable as police uniforms?

A Yes.

Q And you agree that the black jacket that Officer Herrera and Backer wore on the night of the incident would seem to be inconsistent with this policy?

A I don't believe it is.
Q Why not?
A Because it has shoulder patches on it and it's very clearly a tactical or uniform type jacket.
Q All right. So we're talking about the patches on the sides of the shoulders; is that correct?
A That's correct.
Q So somebody could only see those by looking at the officer from the side?
A Or if they were even just slightly to one side or the other, they are visible.
Q But somebody looking face on, like Mr. Martinez was with you looking down the road, wouldn't see those patches?
A Not necessarily, no.
Q Probably not, right?
A Fair enough.
Q Okay. And you would agree that that would be, at least, inconsistent with the intent of the policy here, which is that the uniform should be clearly and immediately recognizable as those of police officers?
A Yes.
Q All right.
MR. BRYANT: Your Honor, at this time we would like to enter into evidence these three pages of the BIA policy. Instead of the giant handbook there, we would just like to

Q Okay. And POST certification?
A Yes, sir.
Q All right. Did they teach you that there?
A I believe so.
Q So you learned about blackouts before you came to the SUPD?
A I know that it was covered in officer safety and then again through field training.
Q All right. So you were taught to use the technique by the Southern Utes?
A I was just taught the technique.
Q Okay. You were taught how often to use it, correct?
A Correct.
Q You were taught under what circumstances to use it?
A Correct.
Q All right. And you -- were you provided any guidelines, either in written formal policies or otherwise, about when the technique should not be used?
A No, sir.
Q Okay. So they told you you could use it, but never told you when you couldn't use?
A It was just something that we were trained.
Q Okay. Did anyone ever provide you any warnings about the dangers of using this blacked-out concealment

technique?

A No, sir.

Q All right. Nobody ever told you that you -- you could be mistaken for somebody else?

A No, sir.

Q Nobody ever told you that somebody might perceive you to have a nefarious purpose?

A No, sir.

Q An evil motive?

A No, sir. I'm a police officer, I don't have evil motives.

Q But no one ever warned you that if you used a blacked-out technique, that you could be misunderstood or misperceived?

A No, sir.

Q Officer Mitchell told us that SUPD training, standard training, always includes a warning when the blackout technique is trained on, and that warning is that you could be misperceived as somebody you're not. Do you remember any -- getting any instruction like that?

A No, sir.

Q No one has ever told you that in all of these years?

MS. ROSS: Objection; asked and answered.

THE COURT: Yes, you're belaboring it.

A She wanted to go up and do a welfare check on Bridget Weaver.

Q Thank you, but that's not my question.

My question was: Did you formulate plan before you got there?

A That was our plan.

Q Okay. So you formulated a plan on the drive over; is that correct?

A Yes, sir.

Q All right. The plan was to do a standard knock-and-talk consensual encounter, correct?

A Our plan was to do a welfare check on Bridget Weaver.

Q Okay. A welfare check in a way that -- you're not saying you had any sort of information that was immediately urgent, correct?

A I wouldn't say that's fair to say.

Q Okay. Were you going to enter Mr. Martinez's home?

A No, sir, not without consent.

Q Okay. So what was your plan then?

A To go do a welfare check on Bridget Weaver.

Q How were you going to conduct that plan?

A We would have liked to walk up to the house safely and knock on the door and ask if Bridget Weaver was there.

Q All right. So you were going to engage in a

A Certainly. The homeowners are understandably interested in who is knocking on the door and for what purpose. Police officers need to state that purpose so that they reduce the anxiety on the part of the homeowner, the fear of who that person might be at the door.

So, obviously, identifying yourself as a police officer is the safest approach, both for the officer and for the homeowner.

Q And are there other ways that police officers typically would represent to a homeowner that they're an officer?

A Well, a verbal announcement, obviously. In the case of a patrol officer, the badged uniform, the nameplate, the patches, that sort of thing, is going to notify the homeowner who he is.

Q And in the culture of policing, is a knock-and-talk encounter usually an open, conspicuous approach to a resident's home?

A Yes, it is. And the purpose is to have the consensual engagement in an open discussion about the purpose of the officer's visit.

Q Now, in the culture of policing, is there any consensus in the community about whether knock-and-talk should occur at night or during the day?

A Originally, typically knock-and-talks were done

during the day. And that's because homeowners are up and active and moving about during the day. Nighttime knock-and-talks create a problem for both the police officer and for the homeowner. There can be confusion about the identity of the person knocking on the door and the even confusion on the part of the police officer about who responds to the door.

In the nighttime, typically if you knock on the door 2 or 3 o'clock in the morning you wake a person up and they may not be thinking very clear at that point in time, but are very concerned about why a person would be knocking on their door during the nighttime.

There have been more recently a number of incidents where a knock-and-talk was conducted during the hours of darkness. The homeowner, not knowing who is at the door, showed up at the door holding a weapon for their own protection and there have been fatal shootings over that process. So it's -- it's a very dangerous time to conduct a knock-and-talk.

Q And do you think it would be even more dangerous if an officer concealed their approach during one of these nighttime knock-and-talks?

A It certainly is. The more open and identifiable police officers are, if they find that they need to do or want to do a knock-and-talk during darkness, verbal

announcements usually are the best way to alleviate the concern on the homeowner's part. But the homeowner, even then, is not going to know until he opens his door and visually contacts the officer whether or not that's a legitimate police officer.

Q Now, you say that there are safety risks between homeowner and officer when the officer knocks at the door, but it sounds like an officer typically would have to come onto the homeowner's property to get to the door; is that fair?

A Certainly.

Q So are there also additional risks if a homeowner sees an officer crossing onto their property?

A Well, of course. If the officer or his equipment is not immediately identifiable to the homeowner, then the anxiety increases and the concern increases about who that is there and why.

Q And so is this a risk that the homeowner would be likely to respond in a self-defensive manner that might look aggressive?

A Yes. And as I just said, there have been several fatal shootings where the homeowner was so concerned about who was on their property or at their door at that hour of the day and show up with a weapon in their hand to ensure their own safety.

Q Now, you've talked a little bit how, if an officer approaches in the middle of the night, they might be likely to catch a homeowner, you know, in their sleep and to arouse them; is that right?

A Typically that's happens in a late-night encounter.

Q Now, folks in their home, they typically have the right to imbibe alcohol or things of that nature at night in their home, would that be fair to say?

A Certainly.

Q So do you think there is also a greater risk of an officer encountering somebody who might have imbibed alcohol or might otherwise be not in their normal sense or state of mind?

A That could certainly happen.

Q And do you think that would be something foreseeable that an officer could think of about in determining whether or not to approach in that way at that time?

A Well, certainly. Police officers do have the responsibility to ensure the safety of both themselves and the people that they come in contact with. And in today's society, we all know that people do imbibe in the evenings and that needs to be taken into account.

Q Now, would it be standard practice to conceal yourself as a police officer when attempting a

knock-and-talk?

A It would be very unusual circumstance if that were to occur. That's not the intent of the knock-and-talk. The knock-and-talk is intended to be an open consensual encounter.

Q Okay. And so do you think that a concealed approach could take away the consent of the homeowner?

A Yep. The homeowner wouldn't know who was approaching the property or the home if the police officer concealed his identity.

And the only time I can think of where a concealed or surreptitious approach to a knock-and-talk would be as a part of an investigation where an officer wanted to observe, surveil a property or a residence, either in the daytime or the nighttime, in order to gather evidence, but the knock-and-talk is a separate process than what I just described.

Q Okay. And you just briefly mentioned that an officer might conceal themselves to conduct surveillance?

A Yes.

Q Did you mean when they moved towards a home or did you mean when they're away from the home and looking at the home?

A When they're away looking at the home, you would be obvious -- your presence would be obvious if you were on the

is it probable cause for something else?

A Well, probable cause to conduct an entry into the home on a welfare check situation that justifies their entry. I don't know that there is a difference between that and probable cause in a criminal case. The officer has to be convinced that the circumstances are such that he's justified legally in continuing his investigation of that.

Q Well, when we started this discussion of welfare checks, you described that generally it's used for medical emergencies; is that right?

A Typically it is, yeah.

Q So is that what you mean by probable cause, to believe there is some sort of urgent medical need?

A Yes.

Q Okay. So in your typical welfare check, is that something that should be conducted by concealing yourself as an officer?

A There is no legitimate purpose for concealing yourself to do a welfare check. The purpose of a welfare check, whether it's what I just described or some other person who becomes aware and concerned that there is a need for emergency services in that residence.

Q Now, if an officer does become aware of an urgent need for medical services, is there a point where that information grows stale or becomes unusable over time?

ensued?

A Yes.

Q The shooting?

A The shooting, yes.

Q And do you also have an opinion about whether the conduct of the Southern Ute officers involved was in conformance with standard police policies or training?

A That approach at the home was not comporting to standard police approaches under those circumstances.

Q Why not? How did it deviate?

A There was an opportunity for a misunderstanding, a misidentification of both the police and the homeowner, and that predictably could result in the homeowner thinking that the people who were approaching were approaching his home for an inappropriate contact.

They -- I believe the homeowner had legitimate concern that the individuals approaching the home could very well have been the individuals that were involved in the disturbance earlier in the evening.

Q Now, in rendering your opinions, are you critical of the officers' conduct in blacking out their headlights?

A Yes.

Q Can you tell us why?

A Yes. Again, that was a stated knock-and-talk event and that requires an open approach. The blackout of the

vehicles would reasonably cause the homeowner not to believe or to think that it was police officers approaching, and conceivably, very conceivably, cause him to think that it was the other part of the previous disturbance over a fight with the other members, because the homeowner had no reason to believe the police would do that.

Q And is that opinion supported by the earlier knock-and-talk that was attempted?

A Yes.

Q Can you tell us why that was in play.

A Yeah. The earlier knock-and-talk attempt was pretty much in conformance with the way knock-and-talks should be and normally are conducted. And there was clearly no activity on the part of the homeowner to be defensive and clearly decision on the part of the homeowner not to engage in the police.

Q Okay. So do you feel that the 1 a.m. encounter, where the officers conducted an open and conspicuous approach provided information to the homeowner that would have informed him about whether or not these people might be dangerous?

A I'm not sure I understand what you're --

Q Sure. Does the 1 a.m. approach by the officers when they did the regular knock-and-talk, did that play into your opinion about your perception of the reasonableness of

the belief of Mr. Martinez?

A Certainly. He knew that they were police officers. That was very clear, that they arrived in a -- in a marked police unit, identified themselves as officers. They were very open and clear. So the homeowner would not expect police officers to approach surreptitiously at a later time.

Q Now, are you also critical of the officers walking towards the home using concealment strategies, like -- like hiding behind sheds and trailers and things like that?

A There -- the property was fairly large and extended, I believe, to the end of the road where police officers parked their cars. The length of that portion of the road had shrubs and trees growing along the side of the road and that there were a number of sheds and trailers and I believe maybe some farm equipment, that type of thing. So there was a lot of cover between where the police officers parked their car and the home.

Q So if the officers used that concealment, you would be critical of the officers' behavior?

A Yeah, they were aware of it and walked down the road using that cover.

Q Okay. And are you critical in your opinion about the officers not using flashlights?

A Yes. That's kind of dangerous in a dark environment, not being able to see where you're putting your

feet, so I would be concerned about that.

Q Okay. Are you critical of the officers' attire in terms of the black coats without any sort of police indicators on the front?

A Yes. My understanding was, in the photo I had seen on scene, the coats had Southern Ute Police Department emblems on both shoulders, but there was no badge, no nameplate on the front of that coat. And that coat did cover the lighter-colored portion of the uniforms, at least of a couple of the three officers, and covered the badge and the nameplate so that it effectively concealed the identity of the individual, at least from someone approaching from the front.

Q And I've been told -- you've been told, we've all been told, that those jackets, those winter jackets, were standard issue by the department?

A Yes.

Q Do you think that excuses an officer from considering the impact it would have?

A No. The fact that the clothing was provided to the police officer doesn't resolve his responsibility to take that into account in terms of making an open approach and fully identifying themselves.

Q Okay. Now, I understand that you're critical of the officers for not identifying themselves before they

reached the front of the home; is that right?

A Yes.

Q Okay. And can you tell us a little bit more about that.

A Yes. The officers were aware of an individual outside the home in the yard concealed by brush and the trees between the road and the home. The proper approach, the safe approach, would be to, when they became aware of the presence of another individual, that they let that individual know clearly that they were police officers, and they did not do that.

Q Now, I also understand that you're critical of the officers for not identifying themselves at the point where they know Mr. Martinez is present?

A Yes. When Mr. Martinez openly approached them, there is conflicting information about their clear identification to him that they were police officers.

My reading of the available information was that two of the officers did not make any effort to identify themselves. The third may have, but it's -- there is conflict about whether or not that occurred.

Q So would it be fair to say that if the officers didn't identify themselves, you would be critical of that?

A It's my belief they didn't do it effectively.

Q Okay. So even if they tried it, it was

ineffective?

A That's my understanding.

Q Okay. And I understand that you're also critical of the officers for not reassessing their plan; is that correct --

A Yes.

Q -- at some juncture?

Can you tell us more about that.

A Yes. In my opinion, the original plan to do a surreptitious approach was faulty. And it became compounded when the third officer arrived and explained to them that he blacked out, as he was asked to. And as he drove toward the house, people in the yard became aware of him and ran inside the house. That should have triggered a reassessment of the original plan.

Q Okay. What do you think the officers should have done then?

A I think they should have driven into the yard with their lights on and announced and walked up to the door and knocked on it, like they did the first time.

Q Are you also critical of the officers for failing to consider the dangers involved with a concealed approach like this after Martinez was in two prior physical altercations?

A Yes.

Q How does that factor in?

A I think it's reasonable for the officers to consider, and the fact that I believe they absolutely should have considered their response of any occupant in that home when the officers surprised them that it would be reasonable consideration that we need to -- we need to talk about this because if he doesn't recognize us as police officers, he may think that it was the people who were previously involved, or at least would respond in a way to protect himself and his property.

Q Now, are you also critical of defendant's assertion that they were responding to some sort of emergency need for a welfare check?

A Certainly. They had knowledge two hours previously, at least two hours previously, that there may have been physical contact between a man and a woman in the house who had a relationship. No description of any damage, any blood, any injury. Only that there was physical contact, the man hit the woman.

If there was exigency, then that should have been addressed at the earliest time that they heard about that alleged contact. Two hours later there is no exigency.

If the person who was injured needed the medical help, waiting two hours to conduct a routine patrol in traffic stops negated any concern for the need for an

EXHIBIT 12

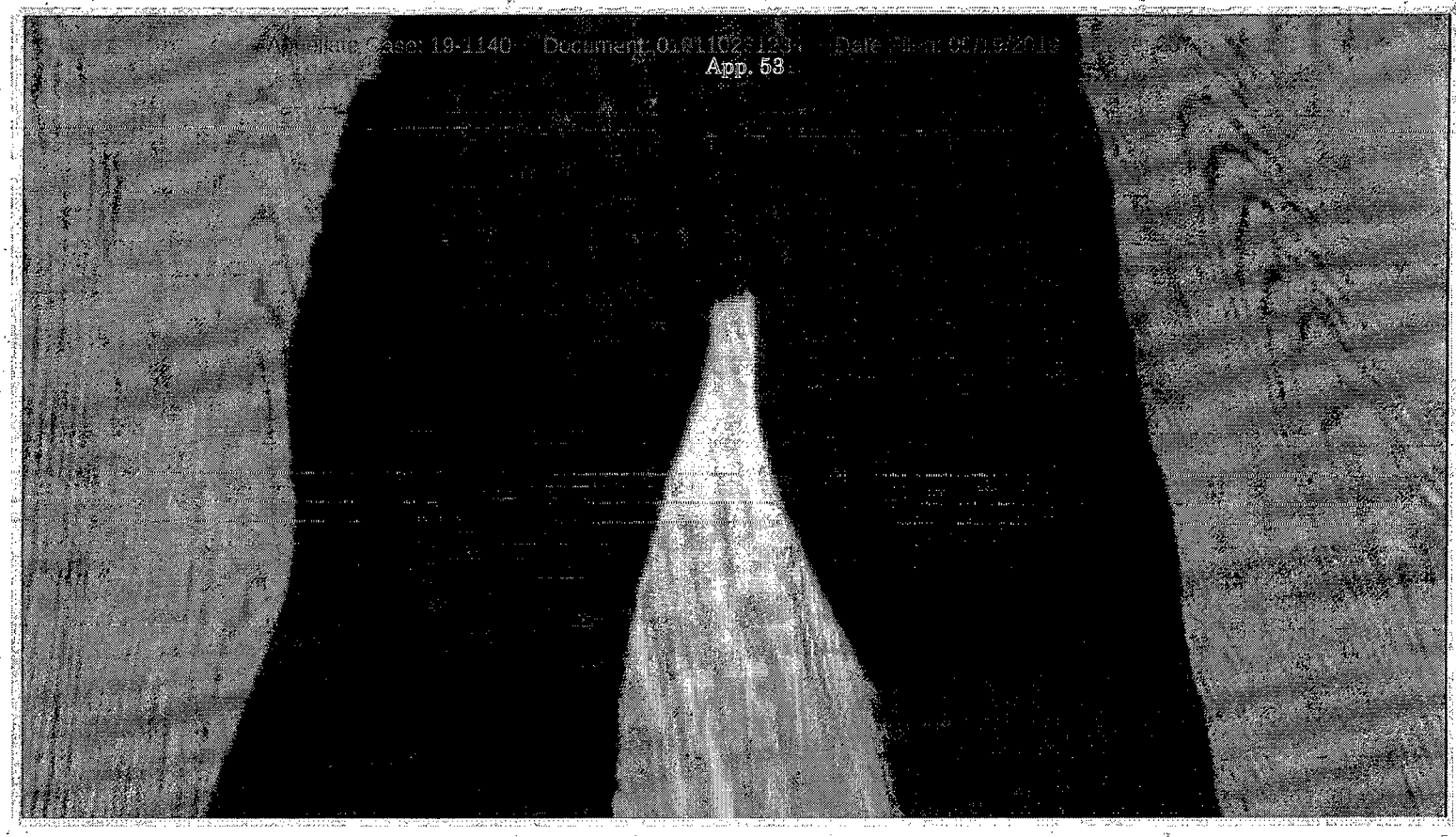
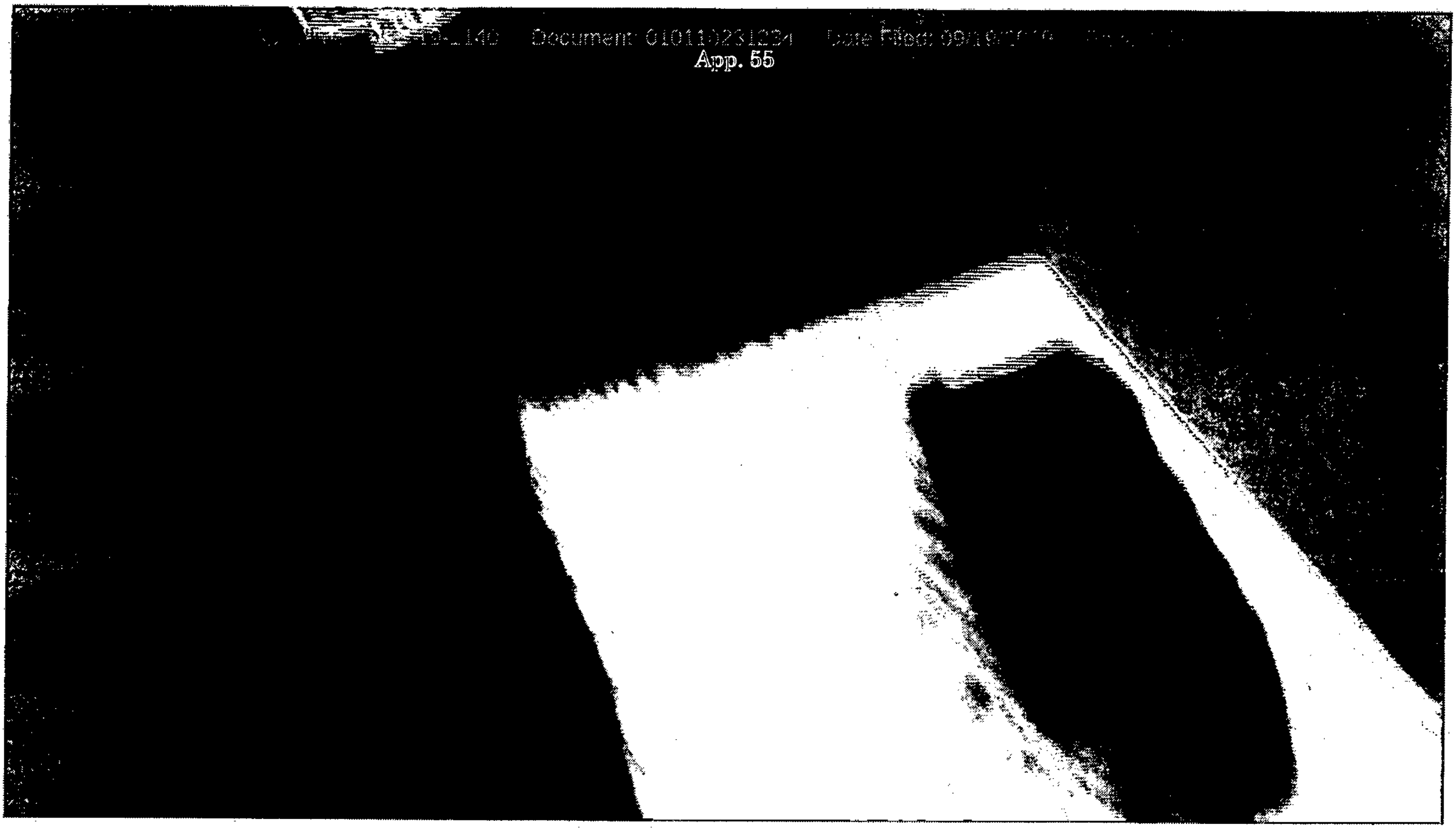


EXHIBIT
13

EXHIBIT
14



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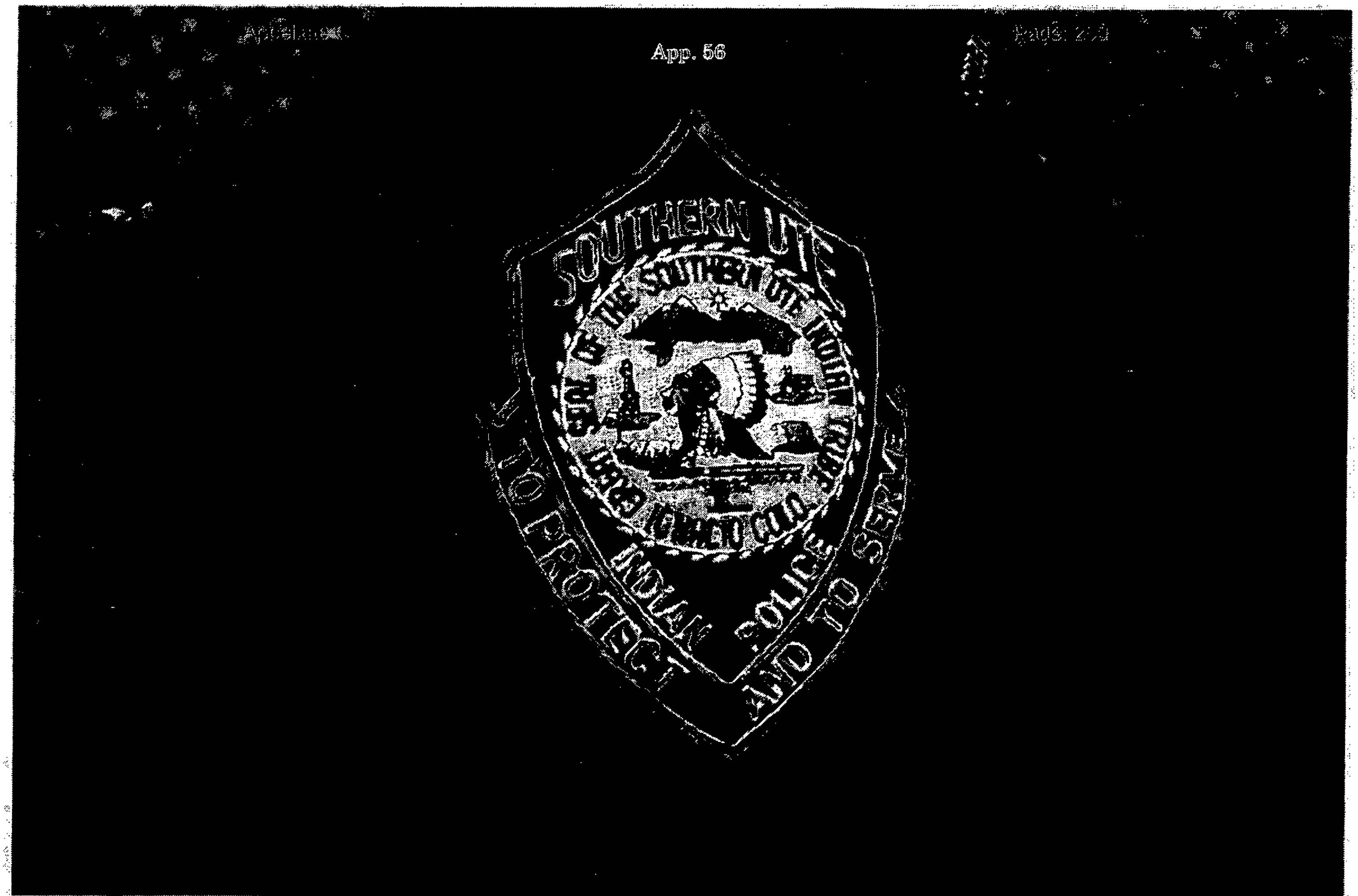
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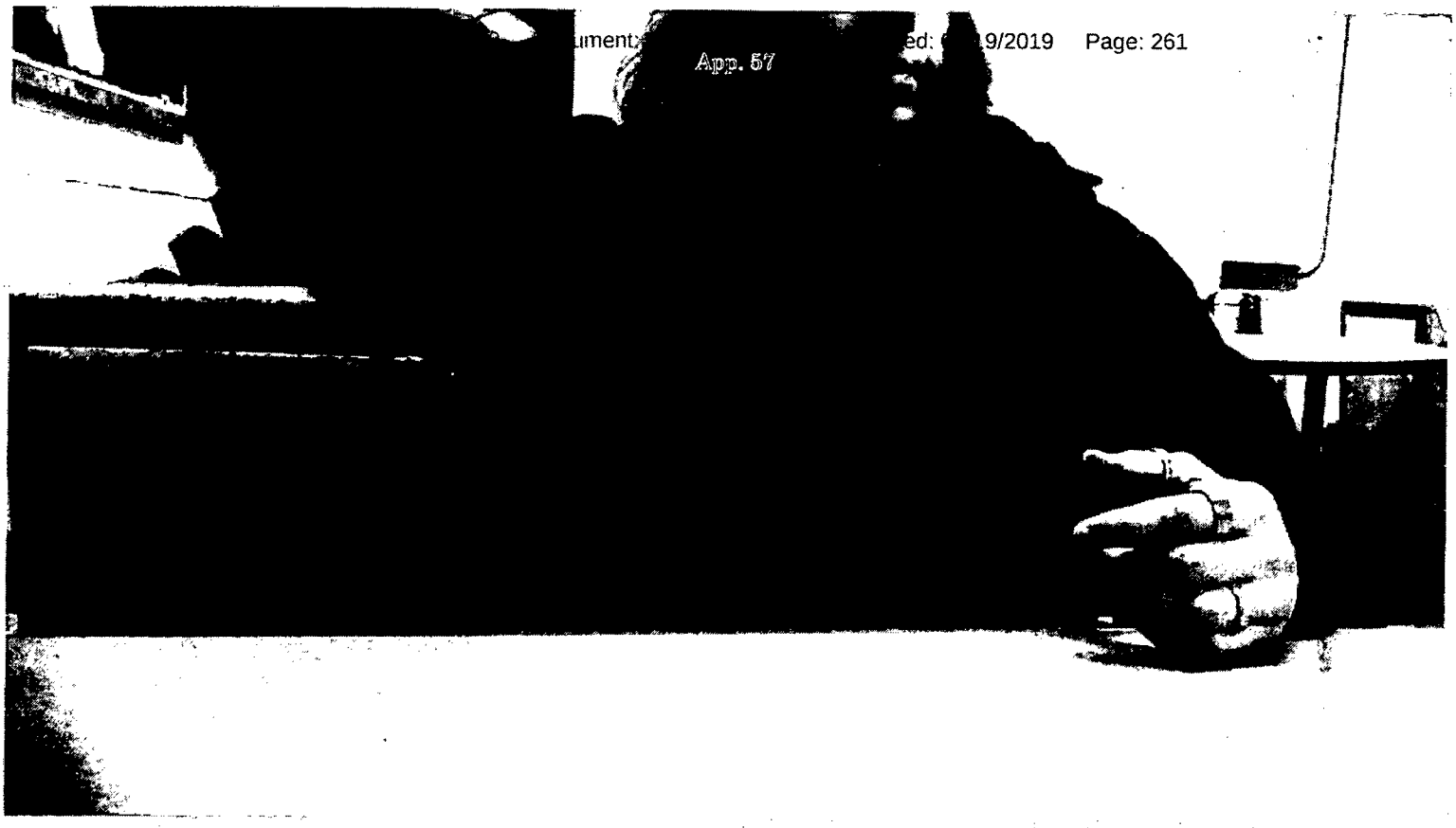

EXHIBIT 8

Ex. 14 - Video of Officer Clothing

Effective: 07/01/2008 Revised:
CALEA Standard(s)--31.2.3

1-21 UNIFORMS AND PROTECTIVE EQUIPMENT

POLICY

Sworn personnel are authorized to wear prescribed police uniforms or civilian attire and carry law enforcement credentials and a badge identifying them as commissioned BIA/OJS officers or CI special agents.

RULES AND PROCEDURES

1-21-01 GENERAL INFORMATION

A. Purpose
This directive establishes guidelines for wearing, caring, and surrendering, the Bureau of Indian Affairs (BIA), Office of Justice Services (OJS) law enforcement uniforms and related equipment. It also describes appropriate civilian attire to be worn by sworn personnel when officially representing OJS.

B. Requirement to Wear Official Uniform:
All commissioned police officers will wear the approved and issued police uniform when on duty. No combination of police uniform and civilian attire may be worn. The Chief of Police or Supervisory Special Agent may release officers from uniform requirements due to extreme weather or the nature of the assignment.

C. Wearing Uniform Restricted to On-duty Status:
Equipment and uniforms issued to officers of BIA-OJS are only for use and wear during official business. Officers making official appearances off-duty, when authorized by a supervisor, and, when traveling between their residence and their assigned duty area, may wear their uniform.

D. Distinctiveness of Uniforms:
BIA/OJS law enforcement uniforms are distinctive and immediately recognizable as those of police officers. As a result, the Chief of Police will ensure that uniformed personnel who are not police officers within his jurisdiction do not wear uniforms which are identical to those issued to law enforcement officers.

E. Property Officer
Each Chief of Police or Supervisory Special Agent will designate a property officer.

Effective: 07/01/2008 Revised:
CALEA Standard(s)--1.2.3; 1.2.4; 1.2.5; 1.2.6.

2-02 PRE-ARREST AND ARREST PROCEDURES

POLICY

Law enforcement officers will follow all laws and training guidelines when stopping, frisking, detaining, and arresting individuals suspected of committing crimes.

RULES AND PROCEDURES

2-02-01 GENERAL INFORMATION

A. Guidelines for Contact.
This section establishes guidelines for contact with civilians, victims, suspects, arrestees, and prisoners.

B. Applicability.
This section applies to all inquiries, questioning, stops, detentions, citations, and arrests by members of the Office of Justice Services (OJS), on or off duty.

C. Changes in Requirements.
OJS requires that its officers stay current in changes to applicable case law in their jurisdiction.

2-02-02 INITIAL ENCOUNTERS WITH THE PUBLIC

A. An officer may initiate a contact in any place that the officer has a right to be. Investigators will identify themselves as law enforcement officers as soon as possible if it is not evident.

1. A contact is not a stop or an arrest. Persons contacted will not be detained against their will or searched, unless the officer develops reasonable suspicion during the contact that the person has committed, is committing, or is about to commit a crime.
2. An officer may not use force or coercion in initiating a contact or in attempting to obtain cooperation once the contact is made. Officers will act in a restrained and courteous manner. Persons refusing to cooperate will be permitted to go. When appropriate, the officer may keep the person under surveillance.

B. A stop is a temporary detention of a person for investigation. A stop occurs when an officer uses law enforcement authority either to compel a person to halt, to remain in a certain place, or to perform some act (such as walking to a nearby location where the officer can use a radio or telephone). When citizens reasonably believe that they are not free to leave the officer's presence, a stop has occurred.

Effective: 07/01/2008 Revised:
CALEA Standard(s)--1.2.3; 1.2.4; 1.2.5; 1.2.6.

F. When officers feel an object that they reasonably believe is a weapon or that may contain a weapon, they may reach into the area of the persons clothing where the object is located and remove the object. Officers will proceed in one of the following ways:

1. Officers will determine if the person's possession of the weapon is lawful.
   a. If lawful, the officer may place the object in a secure location out of the person's reach for the duration of the detention.
   b. Ammunition may be removed from any firearm, and the weapon and ammunition returned in a manner that ensures the officer's safety.
   c. If the possession is unlawful, the officer may seize the weapon and arrest the person.
2. If the officers have a reasonable belief that it contains such an item, they may look inside of the object and briefly examine the contents.

G. Officers will return the object and continue the frisk or detention if no weapon or item that can be seized is found.

H. If officers feel an object that they do not reasonably believe to be a weapon but do believe it to be an item that can be seized, they may not take further steps to examine the object without either the consent of the person or a search warrant.

I. If the person frisked or detained is not arrested by the officer, any objects taken pursuant to these frisk procedures are returned upon completion of the frisk or detention.

2-02-04 FIELD INTERVIEWS

A. Officers may conduct a field interview when the behavior of an individual creates reasonable suspicion that criminal activity has occurred, is occurring, or is about to occur. A field interview is not made merely on the basis of random selection, ethnicity, unusual appearance, or personal beliefs. A greeting, an offer of or a request for assistance, or a casual conversation is not a field interview.

B. The purpose of a field interview is to assist in the investigation and prevention of a crime.

C. A field interview is conducted with the utmost courtesy. Officers will answer reasonable questions posed by a citizen.

D. Officers not in uniform will fully identify themselves as officers and exhibit their badges or credentials prior to initiating any field interview.

In the
Supreme Court of the United States

ANTHONY MARTINEZ
Petitioner,
-v-
UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I certify that on December 14, 2020, I have served the PETITION FOR WRIT OF CERTIORARI, APPENDICES, and CERTIFICATE OF COMPLIANCE WITH PAGE LIMITS on counsel of record for Respondent,

Kyle Brenton, Esq.
Assistant U.S. Attorney
1801 California Street Suite 1600
Denver, CO 80202
(303) 454-0100
Attorney for the United States

All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Raymond K. Bryant

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(720) 515-6165
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Attorney for Petitioner Anthony Martinez

No.

In The
Supreme Court of The United States

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,272 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 14, 2020.

/s/ Raymond K. Bryant