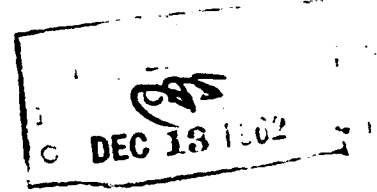


Filed
U.S. District Ct.
South Bend

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

Dec. 6, 1962

HAMMOND DIVISION



UNITED STATES OF AMERICA)

v.

HAMMOND CRIMINAL
NO. 3285

CLINTON B. SAVAGE and
WILLIAM KENNEDY

MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTIONS FOR A NEW TRIAL

The United States of America submits this memorandum in opposition to the defendants' motions for a new trial. The motion of each defendant is made upon nine grounds.

Ground 1 in each motion is the general allegation that the verdict is contrary to the law and the evidence. The reasons hereinafter set forth in discussion of the more specific grounds will suffice to dispose of this ground.

Ground 2 in each motion alleges that under the evidence, if the respective defendants are guilty of any offense it is assault and battery under Indiana law but not an offense under any law of the United States. There is no merit to this contention. As was pointed out by the

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Supreme Court in Screws v. United States, 325 U.S. 91, 108 (1945) in discussing what is now Section 242, Title 18, United States Code:

Some of the arguments . . . suggest that the question . . . is whether Congress has made it a federal offense for a state officer to violate the law of his State. But there is no warrant for treating the question in state law terms. The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under "color of any law." He who acts under "color" of law may be a federal officer or a state officer. He may act under "color" of federal law or state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when someone is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such

So, in the instant case, because the evidence may have disclosed the commission of an offense against the State of Indiana is no indication that the same evidence did not disclose a violation of Section 242, Title 18, United States Code. There was evidence that the defendants, at about midday on November 20, 1961, obtained custody of James Lee Anderson, who was then a prisoner at the Gary City Jail. The admitted purpose of this removal from jail was to attempt to obtain from Anderson confessions to various crimes which allegedly had been committed in the Gary area. Defendants admittedly were acting in their capacity as police detectives on the occasion in question.

There was evidence that James Lee Anderson was in good physical condition when he left the jail with the defendants and that he bore no signs of injury at that time.

There was evidence (and admissions by the defendants) that Anderson was not out of the custody of the defendants until he was observed by others in a bruised and bloody condition some three or three and one-half hours later. There was evidence that the defendants took Anderson to an outlying area where the defendant Clinton E. Savage beat Anderson with fists and a nightstick in an effort to force Anderson to confess to various alleged crimes. Evidence was adduced to the effect that the defendant William Kennedy not only stood by without attempting to stop the assault by Savage but that he assisted the defendant Clinton E. Savage by acting as a lookout, that he held Anderson for the defendant Savage to strike him on one occasion and that he kicked Anderson on another occasion, all in the effort to force Anderson to admit to committing the alleged crimes in question. There was evidence that as a result of the beating Anderson sustained injuries. There was evidence that these injuries were observed by third parties both while Anderson was still in the custody of the defendants and immediately after his release from their custody. Medical testimony and records verified injuries to Anderson.

Clearly there was substantial evidence from which the jury could find that the defendants did "wilfully and unlawfully assault, strike and beat James Lee Anderson . . . with the intent and purpose of inflicting summary punishment upon him, and of coercing a confession from him" as charged in the indictment. And it is apparent that the jury did so find, especially in view of the instructions by the court relative to the necessity of finding that the acts were done with the intention and for the purpose

of depriving Anderson of a federal right. The jury was instructed that the fact that the defendants, acting under their duty and right, took Anderson from the jail could not, standing alone, be taken as a deprivation of the rights charged in the indictment. They then were instructed that if they found that Anderson had been struck, pushed or touched by the defendants but that such touching, striking or pushing was not done with the intent or purpose to wilfully inflict summary punishment or to coerce a confession from him, then the jury should find the defendants not guilty. Further, the jury were instructed that each defendant stood before the Court as an individual and that before the jury could find either guilty as charged in the indictment they had to find that each defendant acting independently or in conjunction with the other did intentionally or wilfully commit the acts described in the indictment with the wilful and intentional purpose of inflicting summary punishment upon Anderson.

In addition, the Court charged that even though the evidence should show and the jury should believe that the defendants were guilty of a crime other than that charged in the indictment, they should not let that influence their decision in any way and that they had to confine their consideration to the offense charged in the indictment.

In view of the evidence presented to the jury and the instructions with which the Court charged the jury to consider such evidence, the defendants' contention that they could have been found guilty, if at all, of only a State offense of assault and battery is not well founded.

Ground 3 in each motion is that the evidence fails to establish that the defendants were attempting to assault, strike and beat James Lee Anderson with the intent and purpose of inflicting summary punishment upon him and of coercing a confession from him. It is noted that in this ground the defendants mention "attempting" in reference to the beating alleged in the indictment. Suffice it to say that the indictment does not charge that the defendants were "attempting" to assault, strike and beat Anderson but that they actually did strike, assault and beat Anderson wilfully and with the necessary intent to violate Section 242, Title 18, United States Code. Beyond that, the same reasons discussed with reference to grounds 2 are apropos here.

Ground 4 in each motion alleges that the supplemental charge, which the Court gave to the jury after they had deliberated for several hours and had indicated to the Court that they could not agree, operated as a "moral coercion" and administered a "verbal spanking or scolding" to the jury, the effect of which was to "yoke each individual juror's convictions and to force a verdict of guilty when the Court ordered them to again retire and consider the verdict." It is alleged further that the return of the guilty verdict three hours later established that the jury had substituted the will and judgment of the Court for their own. Ground 5 in the motion of the defendant Savage and ground 6 in the motion of the defendant Kennedy deal with the same instruction and also will be considered with grounds 4. The defendant Savage's ground 5 and the defendant Kennedy's ground 6 allege that the giving of the

supplemental instruction forced the individual jurors to
forfe their individual opinions and convictions in regard
to the evidence, thus depriving the defendants of
"substantial justice freely rendered by minds uncoerced
after the fatigue of long deliberation."

The instruction given by the Court in the instant
case has a long history which dates back to a similar
instruction given by Judge Hear in the Court of Common Pleas
and approved by the Supreme Judicial Court of Massachusetts
in Commonwealth v. Tney, 62 Mass. 1 (1851), later modified
by Circuit Judge Sanborn in United States v. Allis, 73 Fed.
165 (N.D. Kan. 1893), affirmed 155 U.S. 117 (1894), and
later approved in Allen v. United States, 164 U.S. 492
(1896). See United States v. Tomoya Kawakita, 96 F. Supp.
824 (S.D. Cal. 1950). Since the Allen case, this type of
supplemental instruction has been widely used and has been
approved by the Court of Appeals in each circuit. E.g.,
Boston & M.R.R. v. Stewart, 254 Fed. 14 (1st Cir. 1918);
United States v. Dunkel, 173 F. 2d 506 (2nd Cir. 1949);
Shaffman v. United States, 239 Fed. 370 (3rd Cir. 1923);
United States v. Wyckchurch, 286 F. 2d 516 (4th Cir. 1961);
Weather v. United States, 126 F. 2d 118 (5th Cir. 1942);
Israel v. United States, 3 F. 2d 743 (6th Cir. 1925);
Peschon v. United States, 70 F. 2d 491 (7th Cir. 1934);
Janko v. United States, 281 F. 2d 156 (8th Cir. 1960);
Shoe v. United States, 260 Fed. 807 (9th Cir. 1919);
Spook v. United States, 161 F. 2d 542 (10th Cir. 1947).

The Allen case is the case from which this supplemental instruction derived its popular name--the "Allen Charge." In that case the defendant was tried and convicted of murder on an Indian reservation. During their deliberations the jury were given supplemental instructions the substance of which was that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

A writ of error was sued out assigning, inter alia, the giving of this supplemental instruction as error. In holding that such did not constitute error, the Supreme Court said at 501:

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by argument among the jurors themselves. It certainly cannot be that each juror should not listen with deference to the arguments and with a dis-

trust of his own judgment, if he finds a larger majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.

As heretofore indicated, this type of supplemental instruction has been widely used and unanimously approved by the circuit courts of appeal. The instruction in the instant case is one based directly on the supplemental instruction given by Judge Mathes in United States v. Tomoya Kawakita, supra. There the defendant was tried over a period of two months for treason against the United States. The jury's deliberations consumed a total of 48 hours and 25 minutes, covering a period of nine days, which included one day of rest. After the jury returned a verdict of guilty, the defendant moved for, inter alia, a new trial, one of the grounds therefor being that the verdict was the result of coercion, compulsion and fear which resulted from the giving of the supplemental instruction (See 96 F. Supp. 824, 833-837) after the jury had announced that they were unable to arrive at a verdict after the fourth day of deliberations. In denying the motion Judge Mathes said at 835:

Far from indicating coercion, it is my opinion that the time element involved, the daily hours of deliberation, the change of foreman on Monday, the absence of any hint or intimation on the part of any member of the jury that there existed the slightest desire to be discharged at any time from Monday until the jury returned into court with their verdict on Thursday afternoon, --all indicate that the jurors were taking their time as they should, and as the court had instructed them they might do. Further-

more, the factors just mentioned, and others above discussed (the answering of 64 interrogatories even though they had been instructed that eight was sufficient and the finding of guilty as to eight overt acts even though instructed that one would suffice), point to a calm, deliberate and conscientious consideration of the evidence . . . , and a unanimous verdict voicing the considered opinion of each juror . . . , without surrender of the conscientious convictions of any of the jurors.

In Bowen v. United States, 153 F. 2d 747 (8th Cir. 1946), a supplemental instruction similar to the one in the instant case was approved even though the foreman had disclosed to the court the count of the deadlock. There the defendant was convicted of using the mails to defraud. After the jury had deliberated for 10 hours the foreman advised the court that they were deadlocked 11 to 1. This information had not been solicited by the court. The court then proceeded to give the conventional supplemental instruction to which the defendant objected as being coercive. The defendant moved for a mistrial which motion was denied and the defendant appealed. The Court of Appeals held that the supplemental instruction, in and of itself, was unobjectionable, and even though it would have been reversible error for the judge to inquire of the jury, which had failed to agree, how they were divided, the unsolicited furnishing of this information by the foreman was no cause for a mistrial and did not preclude the court from giving the supplemental instruction.

There would appear to be no more reason to believe that the instruction in question in the instant case was any more coercive than that in the Kavakita or Bowen cases. It is true that the trial in the instant case was not nearly

as time consuming nor the charges nearly as extensive as those involved in the Kawchits case. Nevertheless, much of what was said there is applicable here. The jury in this case had deliberated approximately six hours when the court was advised that the jury could not agree. After the supplemental charge was given the jury returned to the jury room and deliberated an additional three hours before the verdict was returned. Just as Judge Mathes felt in the Kawchits case, the time involved here would seem more to indicate, not coercion or a departure of jurors from their conscientious convictions, but rather a sincere, deliberate and conscientious consideration of the evidence and a close examination and consideration of opposing views. Especially indicative of this is the period of time which the jury's deliberation consumed after the alleged "coercive" instruction was given. And if an instruction of this nature was found not to be coercive under the circumstances of the Bowen case, where prior to the giving of the instruction the court knew the greatness of the disparity between the opposing views, surely such an instruction cannot be said to be coercive in this case where the court had no idea of the manner in which the jury were divided.

The defendants' notions also indicate that the length of the deliberations was such as to make fatigue of the jurors a coercive factor. In United States v. Haupt, 152 F. 2d 771 (7th Cir. 1945), the jury returned a verdict of guilty on a charge of treason after deliberating 28 hours without sleep. One of the many grounds urged by the defendant on appeal was that the verdict was induced by physical exhaustion of the jury. Said the Court of Appeals at 799:

The cases are many where the jury remained in deliberation 28 hours or more without sleep. Experience wisely leaves such matters to the discretion of the trial judge. We must reject defendants' assignment in this respect. (Citations).

Ground 6 in the motion of the defendant Savage and ground 9 in the motion of the defendant Kennedy are identical and will be considered together. These grounds allege that the Court erred in giving its instruction which read, to wit:

Four essential elements are required to be proved beyond a reasonable doubt, in order to establish the offense charged in the indictment:

First: That the defendants were acting under color of law.

Second: That the person upon whom the acts were committed was a subject or inhabitant of a state, territory or district of the United States.

Third: The act or acts were done willfully; and

Fourth: That the act or acts were done in deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The defendants contend that this instruction was erroneous and prejudicial because it failed to instruct the jury that the burden of proof was upon the Government to prove that the assault and battery was committed by the defendants with the intent of coercing a confession from the complaining witness, and that under the instruction as given the jury could have found that a wilful assault and battery only was committed, which does not satisfy the indictment nor the statute.

The defendants' argument is not well founded. This particular instruction did not purport to be the entire charge but merely told the jury that they must find (1) color of law, (2) inhabitancy, (3) wilfulness, and (4) deprivation of a federal right--the four elements of the offense charged. Immediately following this instruction the Court defined each of the legal terms--first, "color of law"; second, the "right to liberty," a deprivation of which the defendants had been charged with; third, "summary punishment," also alleged in the indictment; and fourth, "wilfulness." With respect to the latter the Court instructed the jury, to wit:

An act is done wilfully if done voluntarily and purposefully and with the specific intent to do that which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

In this case it means a purpose to deprive the prisoner of a constitutional right, i.e., the right to be tried by a court rather than by ordeal. (Emphasis added).

This instruction was based on the opinions in Screws v. United States, *supra*, and Morrisette v. United States, 342 U.S. 246 (1952).

Assuming that some of the jurors did get the impression that the meaning of the challenged instruction was as the defendants contend, any such impression should have been erased when the Court so plainly and immediately defined in detail what the requirement of "wilfulness" was in "this case."

In addition, the Court proceeded to instruct the jury, at the request of the defendants, as follows:

You are further instructed if you find it to be a fact arising from all of the evidence in this case that the said James Lee Anderson was struck or pushed or touched by the said defendants either acting independently or jointly but that said touching or striking or pushing was not done with the intent or purpose to wilfully inflict summary punishment or to coerce a confession from him and was not done intentionally and wilfully to deprive said James Lee Anderson of the rights and privileges guaranteed to him by the Constitution of the United States to be immune from summary punishment, then in that event you will find the defendants not guilty.

The Court instructs the jury that the defendant Clinton E. Savage, and the defendant William Kennedy, are both jointly charged with the commission of wilful and intentional acts to-wit: unlawfully assaulting, striking and beating one James Lee Anderson with the intent and purpose of inflicting summary punishment upon the said James Lee Anderson and of coercing a confession from him thereby depriving the said James Lee Anderson of rights, and immunities protected by the Constitution and laws of the United States to-wit: the right not to be deprived of liberty without due process of law and the right and privilege to be immune from summary punishment by persons acting under color of law.

You are instructed that each defendant stands before the Court as an individual and before you can find either of the defendants guilty as charged in the indictment you must find that each defendant acting independently or in conjunction with the other defendant did intentionally and wilfully commit the acts described in the indictment with the wilful and intentional purpose of inflicting summary punishment upon said James Lee Anderson and with the further wilful and intentional purpose of depriving said James Lee Anderson of immunities protected by the Constitution and the laws of the United States.

Further, of its own motion, the Court charged the jury:

Even though the evidence should show and you should believe that the defendants are guilty of some crime other than that specifically charged in the indictment, that should not influence your decision in any way. You must confine your consideration to the offenses charged in this indictment.

On viewing the charge as a whole it is clear that the jury was thoroughly instructed on the necessary intent with which the defendants must have been found to have committed the acts before a conviction under the statute and indictment could be had.

Ground 7 in the motion of the defendant Clinton E. Savage and the latter portion of ground 7 in the motion of the defendant William Kennedy allege that the Court erred in denying the defendants' motion for acquittal made at the conclusion of all the evidence because there was no substantial evidence upon which the defendants could be found guilty. Ground 8 in the motion of the defendant Savage and the first portion of ground 7 of the motion of the defendant Kennedy allege that the Court erred in denying their motions for acquittal made at the close of the Government's case because at that time there was no substantial evidence tending to prove the offense charged.

According to the cases, when a motion for judgment of acquittal is made, the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the Government, tends to show the defendant guilty beyond a reasonable doubt. E.g., United States v. Yeoman-Henderson, Inc., 193 F. 2d 867 (7th Cir. 1952); Hell v. United States, 185 F. 2d 302 (4th Cir. 1950). As has been reviewed in the discussion of grounds 2 and 3 of the defendants' motions, there was substantial evidence in this case from which the jury could find the defendants guilty of the offense charged. With the exception of the admissions of the defendants, all of this evidence had been introduced at the time when the defendants first made their

motions. Evidence had been presented as to each of the elements of the offense alleged. Consequently, there was no error in denying the defendants' motion either at the close of the Government's case or at the conclusion of all the evidence. In the words of the Supreme Court in Pierce v. United States, 252 U.S. 239 (1920) at 251:

There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal . . . The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

See also Crone v. United States, 59 F. 2d 339 (9th Cir. 1932).

United States v. Deardorff, 40 F. Supp. 312 (M.D. Pa. 1941) held that where sufficient evidence is produced to send the case to the jury the accused is not entitled to a new trial on the ground of alleged error in refusing his motion for a directed verdict.

Ground 9 of the defendant Savage's motion and ground 8 of the defendant Kennedy's motion allege that the verdict is contrary to the weight of the evidence.

That substantial evidence of the defendants' guilt was presented in this case has been illustrated above. A new trial should not be granted if there is substantial evidence to support the verdict and, in determining whether there was substantial evidence, the trial court must consider the evidence most favorable to the government together with all reasonable inferences which can be deduced therefrom. Glasser v. United States, 313 U.S. 60 (1942); United States v. Ludwig, 177 F. Supp. 363 (S.D. Pa. 1959); United States

v. Green, 143 F. Supp. 442 (S.D. Ill. 1956); United States v. El Rancho Adolphus Products, 140 F. Supp. 645 (N.D. Pa. 1956). It is not the duty of the trial judge to grant a new trial unless he is convinced that no reasonable man could think the evidence sufficient beyond a reasonable doubt. Bain v. United States, 262 Fed. 664 (6th Cir. 1920); United States v. Green, supra. As Judge Mathes stated in United States v. Schneideman, 106 F. Supp. 906 (S.D. Calif. 1952) at 921;

(If) the evidence be such that the verdict of guilt falls within the bounds of reason--within that realm of the debatable where reasonable persons may differ--then the decision of the jurors as judges of the facts must stand, unless it appear that the force of some extraneous circumstance or influence prevented the jurors from functioning as the law contemplates a jury should function. (Citations).

There is not even a claim in the defendants' motion that any "extraneous circumstance or influence" affected the decision of the jury. There was sufficient evidence presented to the jury to bring the finding "within the bounds of reason." Accordingly, there is no merit to the contention that the jury's verdict was against the weight of the evidence.

One other ground remains--ground 3 of the defendant Kennedy's motion. That ground is a general allegation by the defendant Kennedy that there was no evidence, or evidence of a substantial nature, by which the jury could have found him guilty under the indictment. What has been said hereinbefore relative to the evidence answers this contention.

A careful examination of the case shows that the defendants received a fair trial, that the verdict of the jury should stand and that the interests of justice do not require that the defendants' motions for a new trial be granted.

John L. Murphy
Special Attorney

Gerald W. Jones, Attorney

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

FILED

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AT
KENNETH LACKEY, CLERK
U. S. DISTRICT COURT

UNITED STATES OF AMERICA

V.

CLINTON E. SAVAGE
WILLIAM KENNEDY

Hammond Criminal 3285

Section 242, Title 18 U.S.C.

MOTION FOR A NEW TRIAL

Comes now the defendant Clinton E. Savage and moves the Court to grant him a new trial in the above styled cause for the following reasons:

1. Because the verdict of the jury is contrary to the law and the evidence.
2. Because under the evidence the defendant if guilty of any offense, is guilty of the crime of assault and battery, a crime denounced by the laws of the State of Indiana, but not by any law of the United States.
3. Because the evidence fails to establish that the parties named in the bill of indictment more particularly the defendant Clinton E. Savage were attempting to assault, strike and beat said James Lee Anderson with the intent and purpose of inflicting summary punishment upon him and of coercing a confession from him, in violation of the due process clause of the Constitution of the United States.
4. Because after the jury had retired for consideration of their verdict on Wednesday, October 31, 1962 at 10 minutes till 2

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in the afternoon they deliberated until 9:30 of the same day when they conceded to the Court the information that they were unable to agree and had not made any progress toward agreement since 5 o'clock previous. That approximately 9:30 the Court called the jury back into the Courtroom and in substance, as will be fully shown by the bill of exceptions stated to the jury that it was their duty to agree and that a majority should not be thwarted and that this trial had cost the government a lot of money and that it had cost the defendants a great deal of money and that there was no reason to believe that a new jury no more intelligent than they were, would hear different evidence than they did, and that the opinions of the majority should not be thwarted and should be considered by the minority and that they were not partisans in their deliberation but were in fact judges and that they ought to pursue their deliberations dispassionately without considering the human element involved and that the majority members of the jury had heard the same evidence that the minority had heard and it was up to the minority or vice versa to reconsider their opinions as individual jurors as to whether or not they might have misunderstood or overlooked certain of the evidence that the majority had heard and had not overlooked; the effect of which supplemental charge to the jury was to operate as a moral coercion, and to administer a verbal spanking or scolding to the jury, the effect of which was to forgo each individual juror's convictions and to force a verdict of guilty when the Court ordered them to again retire and consider the verdict. That at 12:30 in the morning of November 1, 1962, the jury returned into Court with a verdict of guilty against this defendant thus establishing that

they had by their verdict substituted the will and judgment of the Court for their own judgment and will.

5. That all in all the jury deliberated on this question after being deadlocked for approximately 10 hours and that the giving of said supplemental coercive instruction by the Court to the jury as above set forth in Item 4 above was to the effect of forcing the individual jurors to forgo their individual opinions and convictions in regard to the evidence thus depriving this defendant of substantial justice freely rendered by minds uncoerced after the fatigue of long deliberation.

6. That the Court erred in giving the Court's proposed instruction No. 6 which was the 7th instruction read by the Court to the jury which said instruction reads, to-wit: Four essential elements are required to be proved in order to establish the offense charged in the Indictment:

First: That the defendants were acting under the color of law.

Second: That the person upon whom the acts were committed was a subject or inhabitant of a state, territory or district of the United States.

Third: The act or acts were done willfully; and

Fourth: That the act or acts were done in deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

To which said instruction the defendants and each of them objected on the grounds that the instruction is an improper statement of the burden resting on the Government. That the said instruction was erroneous, misleading and prejudicial and peremptory in nature; and was highly damaging and prejudicial to the defendants.

cause. That the said instruction was erroneous and prejudicial for the reason that it failed to instruct the jury that the burden of proof was upon the Government to prove that the defendants and each of them in committing an assault and battery upon the complaining witness had the intent to coerce a confession from him.

That by the said instruction the jury was instructed that the Government need only to prove an assault and battery upon the complaining witness and that the assault and battery was done willfully.

That such activities are not an offense of the laws of the United States and do not constitute a violation of the statute and ^{alleged} indictment/to have been violated by the defendants and that proof of the said acts or activities though done willfully and intentionally do not constitute sufficient proof to obtain a conviction under the terms of the indictment in this cause.

That said peremptory instruction given by the Court is particularly damaging to the defendant, Clinton Savage, for the reason that all of the evidence discloses no intent on the part of the defendant Clinton Savage to willfully subject the witness Anderson to summary punishment or to coerce a confession from him.

7. That the Court erred in denying the defendant Clinton Savage's Motion for acquittal made at the conclusion of all the evidence for the reason that at the conclusion of all of the evidence there was no substantial evidence excluding every reasonable hypothesis but guilt with regard to the defendant Clinton Savage and the evidence taken as a whole showed that the story of the complaining witness Anderson was impossible of belief by

reasonable men especially taking into consideration the character of the said complaining witness as established by the evidence as compared with the character and reputation of the defendant as established by the evidence.

8. That the Court erred in denying the defendant Clinton Savage's motion for acquittal made at the close of the Government's case in that there was no substantial evidence worthy of belief in the record at the close of the Government's case tending to show that the defendant Clinton Savage had assaulted, struck, or beaten the said James Lee Anderson with the intent and purpose of inflicting summary punishment upon him and of coercing a confession from him. That the Government's evidence was based upon the testimony of the said Anderson which was unworthy and impossible of belief not only in view of the said witness's character and the discrepancy between the treatment allegedly received by him at the hands of the defendant Clinton Savage as compared with the Government's evidence as to injury to him but was in view of the fact that the said witness testified that the defendants were attempting to extort a confession from him with regard to a crime about which the defendants already had more than sufficient evidence to procure a conviction and to which the witness later pleaded guilty in open Court with advice of counsel and under no duress whatsoever.

9. That the verdict is contrary to the weight of the evidence because considering the evidence as a whole reasonable men could not think that the evidence was sufficient beyond a reasonable doubt with respect to the defendant Clinton Savage.

U.S. v. Robinson
71 F. Supp. 9

The Court on a motion for a new trial is entitled to weigh the evidence and to take into consideration the character of the witnesses and all other aspects of the case. Taking all factors into consideration the weight of the creditable evidence introduced in this cause tends to show that the defendant Clinton E. Savage, was at the time mentioned in the indictment a police officer engaged in the normal course of his duties in questioning a suspect, and fails to show beyond a reasonable doubt that there was any intent or desire on the part of the defendant to inflict summary punishment or coerce a confession from the complaining witness. Taking into consideration all of the evidence in this cause including the defendant's story as to the evidence on the day set out in the indictment the weight of the evidence tends to confirm the defendant's testimony for the reason that the evidence and testimony given by the defendant is uncontradicted, save by the discredited witness Anderson; for the further reason that the defendant's testimony is in full compliance and is fully compatible with all of the other evidence in the cause. That there was absolutely no evidence adduced other than the discredited testimony of the complaining witness tending to show an intent on the part of this defendant to inflict summary punishment and to coerce a confession as charged in the indictment in this cause.

WHEREFORE, the defendant Clinton E. Savage prays that the Court set aside the verdict of the jury and grant this defendant Clinton E. Savage a new trial

GEORGE COHAN & SHELDON H. COHAN

BY: Sheldon H. Cohan

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ACKNOWLEDGMENT OF SERVICE

I, do hereby acknowledge that on this 5th day of November, 1962, a copy of the forgoing motion, being a motion for a new trial filed by the defendant Clinton E. Savage in the case of the United States vs. Clinton E. Savage, was served upon the United States District Attorney by leaving a copy of the said pleading at the Office of the United States District Attorney at the Federal Courthouse at 507 State Street, Hammond, Indiana.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA

vs.

TRAY FOWLER,

Defendant

EXHIBIT NO.

(U.S.D. 250)

The Grand Jury charges:

That on or about December 5, 1960, at Gideon, Missouri, in the Eastern District of Missouri and within the jurisdiction of this Court, the defendant, Tray Fowler, Night Marshal of Gideon, Missouri, acting under color of the laws of the State of Missouri, did wilfully subject Verlan Graham, an inhabitant of the State of Missouri, to the deprivation of rights, privileges and immunities secured and protected by the Constitution and laws of the United States, to wit: the right not to be deprived of his life without due process of law, the right and privilege to be immune from summary punishment by persons acting under color of the laws of the State of Missouri, and the right and privilege not to be subjected to punishment without due process of law.

That is to say, that at the time and place aforesaid, the defendant, Tray Fowler, while acting under color of the laws of the State of Missouri and for the purpose of administering and enforcing

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Illegal summary punishment upon said Verlan Graham, did wilfully and without lawful authority shoot and kill said Verlan Graham with intent to deprive him of the aforesaid constitutional rights, privileges and immunities.

In violation of Section 242, Title 18, United States Code.

A TRUE BILL

Verlan

United States Attorney

**List of Suggested Witnesses
To Be Subpoenaed for Grand
Jury Hearing**

1. (Mrs.) Avis Mix
Rural Route #3
Portageville, Missouri
2. Otis Starnes
Gideon, Missouri
3. Carl Cummings
Marston, Missouri
4. Ben Meese
o/o John's Drink Shop
Gideon, Missouri
5. Willis Wingo (for information concerning the warrant.)
Marshal's Office
Gideon, Missouri
6. Charles Webb
o/o Willie Shaw
Tallapoosa, Missouri
7. Death certificate from Bureau of Vital Statistics, Jefferson
City, Missouri.
Record of Coroner's Jury's verdict from Clerk of Circuit
Court, Van Buren.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TROY FOWLER,

Defendant.)

No. 62CR 25 ()

The Grand Jury charges:

That on or about December 5, 1960, at Gideon, in the State of Missouri, within the Southeastern Division of the Eastern District of Missouri, the defendant,

TROY FOWLER,

Night Marshal of Gideon, Missouri, acting under color of the laws of the State of Missouri, did wilfully subject Verlan Graham, an inhabitant of the State of Missouri, to the deprivation of rights, privileges and immunities secured and protected by the Constitution and laws of the United States, to wit, the right not to be deprived of his life without due process of law, the right and privilege to be immune from summary punishment by persons acting under color of the laws of the State of Missouri, and the right and privilege not to be subjected to punishment without due process of law.

That is to say, that at the time and place aforesaid, the defendant, Troy Fowler, while acting under color of the laws of the State of Missouri and for the purpose of administering and imposing illegal summary punishment upon Verlan Graham, did wilfully and without lawful

authority shoot and kill said Verlan Graham with intent to
deprive him of the aforesaid constitutional rights, privileges
and immunities.

In violation of Section 242, Title 18, United
States Code.

A True Bill

Foreman

UNITED STATES ATTORNEY