COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, **Respondent**	**NO: 48008-5 II**
V.	**STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW UNDER RAP RULE 10.10**
JARED D. EVENS, **Appellant.**	

I, Jared D. Evans, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Grounds 1

A. Issues:

Does the United States 5th Amendment of Double Jeopardy mean anything?

B. Facts:

(1) It is a fact that the appellant's trial judge allowed Mr. Jared D. Evans to go "pro-se" under Pierce County case #15-1-00951-8. (2) It is also a fact that the same trial judge allowed the appellant to have a 30 day time frame, from the time of the interview of the state's key witness, "Mr. Kevin D. Donoghue." See: Appendix B-1, certified copy of Judge's order.

The appellant's, Jared D. Evens, argument is that this is a high level of "governmental misconduct," and violations of "Double Jeopardy" under the U.S. 5th Amendment.

In open court on May 27th, 2015, the appellant moves the trial court under the Hon. Judge Stanley L. Rumbaugh Dept: 18 (1). Motion to proceed pro-se (2). Motion to have witness "Kevin D. Donoghue" interviewed 30 days before trial can start, Judge Rumbaugh on the record granted the appellant's motion. State prosecutor, "Hon. Bryce Nelson" gave no objection. See: Appendices A-1 and B-1.

On July 22nd, 2015, the day of the interview of the state's witness, "Kevin D. Donoghue," just like that, Judge Rumbaugh changed his mind and told the pro-se defendant that trial would be starting the same day as the defendant was to interview Mr. Donoghue. This was wrong and violated the appellant's rights to a fair trial. See: DOUBLE JEOPARDY provision in the Fifth Amendment to the Constitution of the United States which provides that "No person ... shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." This provision has been fundamental to the common law and finds expression in state constitutions. See 18 Wall. 163, 168. It has now been held applicable to the states through the due process clause of the Fourteenth Amendment. See 395 U.S. 784, 786.

The clause operates only in criminal settings and prevents a second prosecution, regardless of the outcome of the first trial (acquittal, conviction, or mistrial) unless there has been an appeal from a conviction, see 163 U.S. 662, 668, or a mistrial granted upon manifest necessity. See 410 U.S. 458, 465; 400 U.S. 470, 485.

The bar against double jeopardy applies only after "jeopardy has attached," i.e., after the jury has been sworn or after a judge in a non-jury trial receives the first piece of evidence at the trial. A dismissal prior to jeopardy attaching does not preclude a second or renewed prosecution under the double jeopardy clause.

Double jeopardy bars double punishment as well as double prosecution. While a higher penalty upon a retrial following a successful appeal does not itself violate the double jeopardy guarantee, there must generally appear independent justification for the increased penalty in order to insure that the higher penalty is not vindictive. See 395 U.S. 711. See also collateral estoppel.

Therefore, when the Hon. Judge Rumbaugh denied Mr. Evans from the second interview of Mr. Donoghue on July 22nd, 2015. After Judge Rumbaugh ordered that the trial would not start until after 30 days after the second interview. This was "double jeopardy" at the highest level and violated Mr. Evans' rights to a fair trial. See: Keith Cline vs. Wal-Mart Stores, 144 F.3d 294, that a New trial will be granted if verdict (1) is against clear weight of evidence, (2) is based upon evidence which is false, or (3) will result in miscarriage of justice, even though there may be substantial evidence which would prevent direction of a verdict. Fed.Rules Civ.Proc.Rule 59(a), 28.

There is no issue bigger than this issue. Throw out the whole case. This case must be remanded for a new trial in the fairness of justice. See: Appendix A-1 and B-1.

CONCLUSION:

Based on the facts in this Statement for Additional Grounds for Review Under Rap Rule 10.10, the appellant prays upon this court for reasons indicated to vacate my conviction and grant me a new trial.

Dated this 16th day of March, 2016.

JARED D. EVANS #377719
Coyote Ridge Corr. Center
P.O. Box 769
Connell, WA 99326

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs JARED D. EVANS, Defendant	CASE NO: 15-1-00951-8 PRO SE NOTICE ON APPEARANCE

The undersigned Defendant enters an appearance in this action, and demands notice of all further proceedings. The Clerk of the Court and the opposing party will be informed of any changes in address. Any notices may be sent to:

JARED D. EVANS
B.A. #2015064036
PIERCE COUNTY JAIL
910 TACOMA AVENUE SOUTH
TACOMA, WA 98402

MAY 27TH 2015
Date

X _____
JARED D. EVANS

APPENDIX A-1

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs JARED D. EVANS, Defendant	CASE NO: 15-1-00951-8 AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED PRO-SE

COMES NOW: The defendant herein, moves this honorable court to proceed pro-se under Faretta vs. The State of California 422 U.S. 806, and "Yes," I am aware of the dangers of appearing pro-se but at this time the only way that I am going to get any justice from the courts I am going to have to get this justice myself. So at this time I am now moving this honorable court under U.S. vs. Walker, 142 F. 3d 103 (2nd Cir 1998) which states that if a defendant asks to proceed pro-se before trial commences, the defendant's Sixth Amendment Right to Self-Representation is absolute, and his request must be granted.

My reason for this request is that my attorney is ineffective in his or her assistance of counsel. I strongly feel at this time a motion for a pre-trial hearing under Brady vs. The State of Maryland, 373 U.S. 83 as well as a "Knapstad Evidence Hearing," a "Crawford Motion" may be warranted. I plan to file numerous pre-trial motions. I would ask this court to view a 2013 news report, also in the past I feel that my "Public Defender" was more or less not trying to win my case but to just get me to

plead guilty to a crime that I did not do. On this case, your Honor, I plan to fight my case to prove my innocence.

See: Appendix A-1, case law Faretta vs. California and 2013 reports.

My attorney is and has not filed any pre-trial motions on my behalf to show that I am an innocent man. He has been all negative as to the issues of fighting for my innocence. I have now, on my own, hired a real good "paralegal" and a "legal investigator" who feel 100% confident in their legal powers to help me prove my innocence. I do not need or want my "public defender" any longer.

I understand the "Public Defender" on my case is over-worked and does not have the resources to help me fight my case. Therefore, for this reason I am proceeding pro-se on my case.

DATED this 27th day of May, 2015.

X _____

JARED D. EVANS
B.A. #2015064036
PIERCE COUNTY JAIL
910 TACOMA AVENUE SOUTH
TACOMA, WA 98402

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs JARED D. EVANS, Defendant	CASE NO: 15-1-00951-8 AFFIDAVIT IN SUPPORT FOR STATE WITNESSES/VICTIM TO BE INTERVIEWED BEFORE A TRAIL CAN START

COMES NOW: The defendant herein respectfully moves this court to order that the state's victim be interviewed by the defendant's legal investigator before a trial can start under Riley vs. Taylor, 237 F.3d 300 [Brady Material].

A ISSUE:

If there is evidence that may be used to impeach, does this evidence qualify as "Brady Material"?

B. ARGUMENT:

The defendant's argument is that a pre-trial interview of the state's key witness is necessary for impeachment reasons the victim in this case must be interviewed before a trial can start.

APPENDIX B-1

The defendant in this case would ask that such interview take place at least thirty days before a trail can start under US vs. Gill, 297 F.3d 93 (2nd Cir), that Brady Material must be disclosed in time for its effective use at trial.

The defendant in this case needs time before a trial can start to allow the defendant's legal investigator to investigate what was said at the "Brady Interview." It is a prosecutor's duty to disclose evidence encompassing both exculpatory and impeachment evidence. See: U.S. vs. Elem, 269 F.3d 877 (7th CIR). Therefore, it is a must and the defendant has a constitutional right under "Brady" to such pre-trial interview of the victim in this case.

C. CONCLUSION:

The defendant/petitioner, JARED D. EVANS, prays upon this court based on reasons indicated to allow the defendant's investigator to conduct an interview of the states key witness/victim at least thirty days before a trial can start. This request comes under the rules of "Evidence" state and federal laws.

Respectfully submitted this 29th day of May, 2015

X _____

JARED D. EVANS
B.A/#2015064036
PIERCE COUNTY JAIL
910 TACOMA AVENUE SOUTH
TACOMA, WA 98402

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs JARED D. EVANS, Defendant	CASE NO: 15-1-00951-8 MOTION TO HAVE VICTIM AND ALL STATE'S WITNESSES INTERVIEWED BEFORE TRIAL STARTS UNDER U.S. SUPREME COURT RULING IN BRADY VS. THE STATE OF MARYLAND, 373 US, 83, 10 Led2d 215, 83 S.C.T. 1194 (1963)

COMES NOW: The defendant herein pro-se respectfully moves this court for an order under the U.S. Supreme Court in Brady vs. The State of Maryland, 373, U.S. 83, 10 Led2d 215, 83 S.C.T. 1194 (1963) to have victim and all State's witnesses interviewed before the start of a trial.

That I am the defendant and that I have a 5th Amendment right of due process to interview the victim/victims and all State's witness in this case.

Respectfully submitted this 29th day of May, 2015

X _____

JARED D. EVANS
B.A. #2015064036
PIERCE COUNTY JAIL
910 TACOMA AVENUE SOUTH
TACOMA, WA 98402

BRADY VIOLATIONS

US V. QUINTANILLA, 193 F3d 1139 (10th Cir. 1999)

Whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information to the defendant.

BRADY V. MARYLAND, 373 US 83, 10 LEd2d 215, 83 SCt 1194 (1963)

Suppression of favorable evidence violates due process (GRANDDADDY CASE).

IN RE SEALED CASE NO. 99-3096 (BRADY OBLIGATIONS), 185 F3d 887 (D.C. Cir. 1999)

It was irrelevant, for purposes of government's BRADY disclosure obligations, whether witness' cooperation agreements about which defendant sought information were between witness and United States Attorney's Office or between witness and police.

KYLES V. WHITLEY, 514 US 419, 131 LEd2d 490, 115 SCt 1555 (1995)

On federal habeas corpus review, accused who had been convicted of murder and sentenced to death in Louisiana trial held entitled to new trial because of prosecution's failure to disclose material evidence favorable to accused.

JOHNSON V. GIBSON, 169 F3d 1239 (10th Cir. 1999)

To establish a BRADY claim, a habeas petitioner must demonstrate that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the petitioner; and (3) the evidence was material.

US TURNER, 104 US F3d 217 (8th Cir. 1997)
US V. BLAIS, 98 F3d 647 (1st Cir. 1996)

1) BRADY error occurs when government suppresses "material" information that is favorable to defense; information is "material" if there is a reasonable probability that, had the evidence been disclosed to defense, result of proceeding would have been different.
2) BRADY rule, which prohibits government fro suppressing evidence favorable to defense, applies to impeachment evidence, as as to exculpatory evidence.

83 S.Ct. 1194
373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215
(Cite as: 373 U.S. 83, 83 S.Ct. 1194)

Briefs and Other Related Documents

Supreme Court of the United States
John L. BRADY, Petitioner,
v.
STATE OF MARYLAND.

No. 490.
Argued March 18 and 19, 1963.
Decided May 13, 1963.

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the Maryland Court of Appeals, 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

West Headnotes

[1] Federal Courts 170B ⇐503

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk503 k. Finality of Determination. Most Cited Cases
(Formerly 106k393)

Decision of Maryland Court of Appeals on petitioner's appeal in post-conviction proceeding, remanding case for retrial on question of punishment but not on question of guilt was "final judgment" within statute relating to federal Supreme Court review of final judgments by certiorari. Code Md.1957, art. 27, § 413; Code Supp. Md. art. 27, § 645A et seq.; 28 U.S.C.A. § 1257(3); U.S.C.A.Const Amend. 14.

[2]

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.7 Statements, Disclosure of
110k627.7(3) k. Statements of Witnesses or Prospective Witnesses. Most Cited Cases
(Formerly 92k268(5), 92k257)

Constitutional Law 92 ⇐4594(4)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(2) Particular Items or Information, Disclosure of
92k4594(4) k. Witnesses. Most Cited Cases
(Formerly 92k268(5), 92k257)

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 ⇐4594(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(1) k. In General. Most Cited Cases
(Formerly 92k268(5), 92k257)

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const. Amend. 14.

[4] Criminal Law 110 ⇐734

110 Criminal Law
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k734 k. In General. Most Cited Cases

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. Const.Md. art. 15, § 5.

[5] Federal Courts 170B ⇐371

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk371 k. Nature and Extent of Authority. Most Cited Cases
(Formerly 106k359(1), 106k359)

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const. Md. art 15, § 5.

[6] Constitutional Law 92 ⇐4771

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)8 Appeal or Other Proceedings for Review
92k4771 k. Determination and Disposition. Most Cited Cases
(Formerly 92k271)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(8) k. Sentence. Most Cited Cases
(Formerly 92k271)

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

****1195 *84** E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found

guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

[1] Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland *85 Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812, 83 S.Ct. 56, 9 L.Ed.2d 54.[FN1]

FN1. Neither party suggests that the decision below is not a 'final judgment' within the meaning of 28 U.S.C. s 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that 'Final judgment in a criminal case means sentence. The sentence is the judgment' (Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that 'is fundamental to the further conduct of the case' (United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This question is 'independent of, and unaffected by' (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421-422, 63 S.Ct. 667, 668-669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

**1196 The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words 'without capital punishment.' 3 Md.Ann.Code, 1957, Art. 27, s 413. In Maryland, by reason of the state constitution, the jury in a criminal case are 'the Judges of Law, as well as of fact.' Art. XV, s 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

*86 [2] We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the

main on two decisions from the Third Circuit Court of Appeals-United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763-which, we agree, state the correct constitutional rule.

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the Court ruled on what nondisclosure by a prosecutor violates due process:

'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.'

In Pyle v. Kansas, 317 U.S. 213, 215-216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

'Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.'

*87 The Third Circuit in the Baldi case construed that statement in Pyle v. Kansas to mean that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in Mooney v. Holohan when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Wilde v. Wyoming, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. Durley v. Mayo, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

[3] We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates**1197 due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'[FN2] A prosecution that withholds evidence on demand of an accused which, if made available,*88 would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

FN2. Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business

144 F.3d 294, 73 Empl. Prac. Dec. P 45,320, 135 Lab.Cas. P 33,681, 4 Wage & Hour Cas.2d (BNA) 1185, 8 A.D. Cases 154, 12 NDLR P 198

Briefs and Other Related Documents
Judges and Attorneys

United States Court of Appeals,
Fourth Circuit.
Keith W. CLINE, Plaintiff-Appellee,
v.
WAL-MART STORES, INCORPORATED, Defendant-Appellant.

No. 96-2680.
Argued Dec. 1, 1997.
Decided May 5, 1998.

Employee, who was demoted from supervisory position, and ultimately terminated, following his return from lengthy medical leave, sued employer under Family and Medical Leave Act (FMLA) and Americans With Disabilities Act (ADA), and for wrongful termination under state law. The United States District Court for the Western District of Virginia, B. Waugh Crigler, United States Magistrate Judge, dismissed state claim, and entered judgment to employee on his FMLA and ADA claims. Employer appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) request for leave form did not provide adequate notice of employer's intent to designate employee's vacation days as FMLA leave, and employer violated FMLA by failing to restore employee to his prior position when he returned to work before expiration of FMLA leave period and vacation time; (2) evidence supported finding that employee's termination was motivated by retaliation for asserting his rights under FMLA; (3) evidence supported finding that employer viewed employee as disabled following his surgery to remove brain tumor, thus supporting verdict against employer on ADA demotion claim; (4) though employer was liable for compensatory and punitive damages under ADA, record did not justify $117,500 and $182,500 amounts awarded by jury, and Court of Appeals would grant remittitur on those damages awards and grant new trial on those awards at employee's option; and (5) with respect to damages available on employee's FMLA claim, district court erred in submitting issue of front pay to the jury, as determination of front pay was to be made by district court sitting in equity.

Affirmed in part and reversed and remanded in part.

West Headnotes

[1] KeyCite Citing References for this Headnote

231H Labor and Employment
231HVI Time Off; Leave
231Hk373 k. Non-statutory rights; relationship to statutory rights. Most Cited Cases
(Formerly 231Hk377, 78k1231, 78k173.1)

Request for leave form did not provide adequate notice of employer's intent to designate employee's vacation days as Family and Medical Leave Act (FMLA) leave, thus entitling employee to full 12 weeks of FMLA leave plus his five days of paid vacation leave; though form explained that leave for "medical" reasons was designated as FMLA leave, it said nothing about vacation leave, and reasonable employee reviewing form would not be put on notice that vacation days were to be designated as part of his 12 weeks of FMLA leave. Family and Medical Leave Act of 1993, § 102(a)(1), (c), (d)(2), 29 U.S.C.A. § 2612(a)(1), (c), (d)(2); 29 C.F.R. §§ 825.208(b), 825.700(a).

[2] KeyCite Citing References for this Headnote

231H Labor and Employment
231HVI Time Off; Leave
231Hk373 k. Non-statutory rights; relationship to statutory rights. Most Cited Cases
(Formerly 231Hk377, 78k1231, 78k173.1)

Although employer has option of requiring employee to designate vacation or other leave as Family and Medical Leave Act (FMLA) leave, that option is waived if employer fails to give proper notice of its intentions in that regard. Family and Medical Leave Act of 1993, § 102(d)(2), 29 U.S.C.A. § 2612(d)(2); 29 C.F.R. §§ 825.208(b), 825.700(a).

[3] KeyCite Citing References for this Headnote

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk389 Evidence
231Hk389(4) k. Weight and sufficiency. Most Cited Cases
(Formerly 255k40(4) Master and Servant)

Evidence supported jury's conclusion that plaintiff employee's termination was motivated by retaliation for asserting his rights under Family and Medical Leave Act (FMLA), where supervisor testified that individual who fired plaintiff knew of plaintiff's threat to take legal action against employer for demoting him following his return from medical leave, and, while another worker engaged in identical behavior as plaintiff and was also terminated, other worker was reinstated and had his record expunged while plaintiff was permanently discharged. Family and Medical Leave Act of 1993, § 105(a)(2), 29 U.S.C.A. § 2615(a)(2).

[4] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk764 k. Taking case from jury. Most Cited Cases

170B Federal Courts KeyCite Citing References for this Headnote
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk765 k. Judgment notwithstanding verdict. Most Cited Cases

170B Federal Courts KeyCite Citing References for this Headnote
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk798 k. Directed verdict. Most Cited Cases

170B Federal Courts KeyCite Citing References for this Headnote
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions

170Bk801 k. Judgment n. o. v. Most Cited Cases

On appeal, reviewing court will affirm denial of judgment notwithstanding the verdict (JNOV) if, giving non-movant the benefit of every legitimate inference in his favor, there was evidence upon which jury could reasonably return verdict for him. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[5] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk765 k. Judgment notwithstanding verdict. Most Cited Cases

170B Federal Courts KeyCite Citing References for this Headnote
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk801 k. Judgment n. o. v. Most Cited Cases

In reviewing denial of judgment notwithstanding the verdict (JNOV), Court of Appeals is not permitted to retry factual findings or credibility determinations reached by jury; rather, Court is to assume that testimony in favor of non-moving party is credible, unless totally incredible on its face, and is to ignore substantive weight of any evidence supporting moving party. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

[6] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk763.1 k. In general. Most Cited Cases

On review of motion for new trial, Court of Appeals is permitted to weigh evidence and consider credibility of witnesses. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

[7] KeyCite Citing References for this Headnote

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(B) Grounds
170Ak2338 Verdict or Findings Contrary to Law or Evidence
170Ak2339 k. Weight of evidence. Most Cited Cases

New trial will be granted if verdict (1) is against clear weight of evidence, (2) is based upon evidence which is false, or (3) will result in miscarriage of justice, even though there may be substantial evidence which would prevent direction of a verdict. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

[8] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk825 New Trial or Rehearing
170Bk825.1 k. In general. Most Cited Cases

Decision to grant or deny new trial is within sound discretion of district court, and Court of Appeals will respect that determination absent abuse of discretion. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

[9] KeyCite Citing References for this Headnote

231H Labor and Employment
231HVI Time Off; Leave
231Hk381 Actions
231Hk389 Evidence
231Hk389(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 255k40(1) Master and Servant)

231H Labor and Employment KeyCite Citing References for this Headnote
231HVI Time Off; Leave
231Hk381 Actions
231Hk390 Trial
231Hk390(2) k. Questions of law or fact. Most Cited Cases
(Formerly 255k40(1) Master and Servant)

It was not necessary to apply prima facie case standard for Title VII retaliation claims in reviewing denial of employer's motion for judgment notwithstanding the verdict (JNOV) or for new trial on employee's retaliation claim under Family and Medical Leave Act (FMLA); rather, because case was before Court of Appeals following full trial on merits, Court's sole focus was "discrimination vel non," that is, whether in light of applicable standard of review the jury's finding of unlawful retaliation was supportable. Family and Medical Leave Act of 1993, § 105(a)(2), 29 U.S.C.A. § 2615(a)(2).

[10] KeyCite Citing References for this Headnote

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1552 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases
(Formerly 78k242(3))

157 Evidence KeyCite Citing References for this Headnote
157VII Admissions
157VII(E) Proof and Effect
157k265 Conclusiveness and Effect
157k265(2) k. As to particular facts in general. Most Cited Cases

For purposes of employee's ADA claim, finding that store manager perceived employee to be significantly restricted in his ability to perform as night maintenance supervisor, after surgery to remove brain tumor, was supported by district manager's admission that employee had been demoted because store manager had informed him that employee could work only one or two days a week and could not hold pressure that he had as supervisor, and that he was demoted because of his health, and by coworker's testimony that store manager had offered him employee's position in case employee no longer had mental capacity to do the job. Americans with Disabilities Act of 1990, §§ 3

(2), 102(a), 42 U.S.C.A. §§ 12102(2), 12112(a); 29 C.F.R. § 1630.2(*l*)(1, 2).

[11] KeyCite Citing References for this Headnote

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1534 Presumptions, Inferences, and Burden of Proof
78k1540 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases
(Formerly 78k240(2))

78 Civil Rights KeyCite Citing References for this Headnote
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1552 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases
(Formerly 78k242(3))

ADA plaintiff may prove his case by direct or indirect evidence, or by use of *McDonnell Douglas* burden-shifting scheme. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[12] KeyCite Citing References for this Headnote

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1552 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases
(Formerly 78k242(3))

Evidence supported finding that employer regarded employee as being substantially limited in his ability to perform class of supervisory jobs, and that employer demoted employee from night maintenance supervisor position for that reason, in violation of ADA; employee's field of employment was maintenance supervisory work, as opposed to maintenance work in general, and store manager's statement that employee could not handle stress or hours of supervisor's position, following surgery to remove brain tumor, indicated that manager perceived employee to be generally disqualified from handling supervisory tasks. Americans with Disabilities Act of 1990, §§ 3(2), 102(a), 42 U.S.C.A. §§ 12102(2), 12112(a); 29 C.F.R. § 1630.2(*l*)(1, 2).

[13] KeyCite Citing References for this Headnote

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1543 Weight and Sufficiency of Evidence
78k1552 k. Discrimination by reason of handicap, disability, or illness. Most Cited Cases
(Formerly 78k242(3))

Evidence that employee lost $1,100 in wages as result of his unlawful demotion, and employee's and his wife's testimony that he suffered some degree of emotional pain and mental anguish, supported finding of employer's liability under ADA for compensatory damages for lost wages and other harm resulting from his demotion. 42 U.S.C.A. § 1981a(b)(3); Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[14] KeyCite Citing References for this Headnote

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes
78k1569 Monetary Relief; Restitution
78k1574 k. Measure and amount. Most Cited Cases
(Formerly 78k274)

Though employer was liable for compensatory damages under ADA for lost wages and other harm resulting from employee's unlawful demotion, record did not justify $117,500 amount awarded by jury, absent evidence that trauma from demotion persisted over time, that it affected employee's ability to perform his job or to cope with his medical condition, that he required counseling or medication, or that he suffered physical symptoms of stress; thus, Court of Appeals would grant remittitur on jury's compensatory and punitive damages awards and grant new trial on those awards at employee's option. 42 U.S.C.A. § 1981a(b)(3); Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[15] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk825 New Trial or Rehearing
170Bk827 k. Inadequate or excessive damages. Most Cited Cases

Grant or denial of motion for new trial, based on excessive damages, is entrusted to sound discretion of district court and will be reversed on appeal only upon showing of abuse of discretion, under which standard reviewing court must give benefit of every doubt to judgment of the trial judge, while recognizing that there must be upper limit to allowable damages.

[16] KeyCite Citing References for this Headnote

115 Damages
115X Proceedings for Assessment
115k208 Questions for Jury
115k208(1) k. In general. Most Cited Cases

Whether upper limit of allowable damages has been surpassed is not question of fact with respect to which reasonable men may differ, but question of law.

[17] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk945 k. Determination of damages, costs or interest; remittitur. Most Cited Cases

If Court of Appeals concludes that jury's award of compensatory damages is excessive, Court has option of ordering new trial nisi remittitur.

[18] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)1 In General

170Bk554 Nature, Scope and Effect of Decision
170Bk561 k. Modifying or vacating judgment or orders; proceedings after judgment. Most Cited Cases

170B Federal Courts KeyCite Citing References for this Headnote
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk945 k. Determination of damages, costs or interest; remittitur. Most Cited Cases

Although Seventh Amendment does not preclude appellate review of trial judge's denial of motion to set aside jury verdict as excessive, Court of Appeals' options in remedying excessive verdict are not unlimited, and, for purposes of avoiding conflict with Seventh Amendment, the preferable course, upon identifying jury's award as excessive, is to grant new trial nisi remittitur, which gives plaintiff the option of accepting remittitur or of submitting to a new trial. U.S.C.A. Const.Amend. 7.

[19] KeyCite Citing References for this Headnote

170A Federal Civil Procedure
170AXVI New Trial
170AXVI(C) Proceedings
170Ak2377 k. Remittitur. Most Cited Cases

"Remittitur," used in connection with new trial motion, is process by which trial court orders new trial unless plaintiff accepts reduction in excessive jury award. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

[20] KeyCite Citing References for this Headnote

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk945 k. Determination of damages, costs or interest; remittitur. Most Cited Cases

If reviewing court concludes that verdict is excessive, it is court's duty to require remittitur or order new trial, and failure to do so constitutes abuse of discretion. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

[21] KeyCite Citing References for this Headnote

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1569 Monetary Relief; Restitution
78k1575 Exemplary or Punitive Damages
78k1575(1) k. In general. Most Cited Cases
(Formerly 78k275(1))

Evidence supported finding that employer behaved with malice or reckless indifference toward employee's rights under ADA and that punitive damages were justified to punish and deter such behavior; employee was demoted from his position without even a phone call to warn him that his job would not be waiting upon his return from medical leave, supervisor did not inquire as to employee's condition but hired replacement before he had returned from leave, supervisor's comment that employee might not have mental capacity to do his job was based on ignorance of employee's condition and callous indifference to employee's rights under ADA, and supervisor's actions were

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