

T. 6/15/62

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144-13-210

JUN 15 1962

AIR MAIL

Honorable Lawrence M. Henry
United States Attorney
Denver, Colorado

Re: Florenz Michael Cooney, et al;
Eugenia Degenhardt, et al - Victims
Civil Rights

Dear Mr. Henry:

Reference is made to your letter of May 2, 1962, concerning the above captioned case, in which you request our views on the element of "color of law" as it affects these defendants.

As you stated in your letter, Smith and Ferrero are deputy sheriffs and, as such, are capable of acting under color of law. Your request then may be considered from two angles: whether Smith and Ferrero were in fact acting under color of law in this situation and, if so, whether Cooney, Horkans and Degenhardt were also acting under color of law.

The outward circumstances of this case indicate that Smith and Ferrero were acting in their official capacities. They went to the house of Mrs. Degenhardt, in uniform and in a patrol car, after Horkans had told Ferrero they were needed in the event a disturbance developed. There should be little doubt that Cooney and Horkans wanted them there because they were law officials who, in uniform, would provide official assistance to the detectives and impress Mrs. Degenhardt with the official nature of the intrusion. Furthermore, Smith

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and Ferrero acted officially by placing Mrs. Degenhardt and Mr. Richardson under arrest and taking them to the Adams County Jail where they were booked and detained. They were not merely passive bystanders.

Even though Smith and Ferrero were not specifically detailed by superiors to help Cooney and Horkans, they were still there clothed with state powers. Note U.S. v. Classic, 313 U.S. 326, where the court stated: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Also see Screws v. U.S., 325 U.S. 91 where the court defines "color of law" as the performance of official duties in which there may be a misuse of power that was authorized to be executed. In Screws, the court states that "under color of law" means "under pretense of law" and quotes from Ex parte Virginia, 100 U.S. 339, where that court, in discussing a state officer who exceeded the limits of his authority, stated: ". . . as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The court in Screws also held that "acts of officers who undertake to perform their official duties are included under Section 242 whether they hew to the line of their authority or overstep it."

The issue as to whether Smith and Ferrero were acting under color of law since, as you put it, they were "acting pursuant to instructions from Cooney and Horkans," is tied in with the question of whether Cooney, Horkans and Mr. Degenhardt may be considered as having likewise acted under color of law.

Section 2(a) of Title 18, United States Code, abolishes the distinction between principals and accessories and makes one who aids and abets as responsible for that act as if he committed it directly. Nye and Nissen v. U.S., 336 U.S. 613. It therefore makes little difference who was giving instructions as long as some of the participants are acting under color of law. This is a proper question to be submitted to the jury.

The charge in this case must distinguish, inter alia, between official and unofficial acts of Smith and Ferrero. The Department would be happy to assist you in its preparation, if you desire.

Sincerely,

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

By: JOHN L. MURPHY, Chief
General Litigation Section