

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

BILLY M. SMITH,

:

Plaintiff,

Case No. 3:10-cv-448

-vs-

District Judge Thomas M. Rose  
Magistrate Judge Michael R. Merz

:

MONTGOMERY COUNTY  
SHERIFF'S OFFICE, et al.,

Defendants.

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**DECISION AND ORDER**

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A Scheduling Order was entered in this case on July 28, 2011, which, inter alia, set the deadline for each party to file its lay witness list not later than November 1, 2011 (Doc. No. 53, ¶ 4.) A discovery cut-off was set for May 1, 2012. *Id.* at ¶ 7.

Defendants filed lay witness lists on the date due (Doc. Nos. 64, 65). Defendant Kowalski identified nine witnesses and the other Defendants identified six witness plus all Defendants and witnesses named by others and all of Plaintiff's medical providers. On November 22, 2011, Plaintiff filed his "Lay Witness List As of October 26, 2011" which listed twenty-eight names (Doc. No. 69).

On March 15, 2012, Defendants other than Kowalski filed an Amended Witness List (Doc. No. 90), adding the names of Bill Couch "and possibly other members of the Warren County Drug Task Force" as well as Prosecutor Greg Spears. *Id.* at PageID 806. On May 1, 2012, Defendant Kowalski filed an Amended Lay Witness Disclosure which added the names of Jeff Perkins, Joseph Niehaus, Craig Bailey, Mike Kemper, Dan Schweitzer, Bill Couch, Zackarij Wright, Christopher Ludwick, Kristopher Long, and FBI Special Agent Matthew Hartmann (Doc. No. 93, Page ID 835-836.) Then on May 18, 2012, Plaintiff filed his "Lay Witness List As Of April 28, 2012" (Doc. No. 94) which lists sixty-two names. It omits two names listed in the Plaintiff's October 26<sup>th</sup> list (Schweitzer and Clifford), but adds thirty-six new names. Some of these (Bill Couch, Jim Burke, Don Williams, and Christopher Ludwick) duplicate names identified by the Defendants and Plaintiff has expressly listed all four individual Defendants as witnesses; otherwise, the added names on Plaintiff's list are new to the litigation.

The General Order on Pretrial and Trial Procedures for the Dayton location of court provides

Lists of witnesses are to be final lists of those intended to be called at trial, not preliminary lists of those who may have relevant information. The purpose of this filing of witness lists is to permit timely completion of discovery. Supplementation of the lists after filing will be only upon a showing of good cause, i.e., that the identity of the witness and/or the need for the witness's testimony could not have been previously determined upon the exercise of due diligence by counsel.

(General Order DAY 12-01, available under General Orders at [www.ohsd.uscourts.gov](http://www.ohsd.uscourts.gov).)

Although this General Order was revised as of February 2, 2012, this provision on witness lists has been part of the Dayton General Order for many years.

The Court notes at least the following problems with the amended witness lists:

1. No party sought leave of Court to amend nor included a showing of good cause in the amended list.
2. Plaintiff's and Defendant Kowalski's lists were filed at or after the discovery cut-off date, precluding other parties from taking discovery from the added witnesses.
3. Plaintiff's List includes as to many witnesses Plaintiff's summarized speculation about what the witnesses will testify to. Trial is not an occasion to call a witness to see what he will have to say. Rather, it is for presentation of evidence which has been prepared beforehand by the party presenting the witness.

Accordingly, each party's amended witness list is STRICKEN except as to Bill Couch, Jim Burke, Don Williams, and Christopher Ludwick who have been identified by Plaintiff and at least one Defendant. To the extent any party seeks to add any other name to his witness list who was not identified by the due date of November 1, 2011, that party must seek leave of court.

May 21, 2012.

s/ **Michael R. Merz**  
United States Magistrate Judge