

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

RICO DIAMOND,
Plaintiff,

v.

JACK O'CONNOR; UNNAMED OFFICERS
OF THE SOUTH BURLINGTON POLICE
DEPARTMENT; AND CITY OF SOUTH
BURLINGTON,
Defendants.

No. 2:05-cv-279

JURY CHARGE

Members of the Jury:

The Plaintiff in this case is Rico Diamond. The Plaintiff is represented by Lisa Shelkrot. The Defendants are Officer Jack O'Connor and the City of South Burlington ("City"). Defendant O'Connor is represented by Kaveh Shahi. Defendant City is represented by Joseph Farnham.

The case arises out of events occurring at the Holiday Inn Express in South Burlington on March 21, 2005. At that time, O'Connor, as an officer in the South Burlington Police Department ("SBPD") conducted a search of Diamond's hotel room and seized \$5,200 in currency. Diamond has brought this suit against O'Connor and the City under 42 U.S.C. § 1983 based on alleged violations of his Fourth and Fourteenth Amendment rights. Diamond seeks an award of nominal damages against both O'Connor and the City and an award of punitive damages against O'Connor.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of

sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you and reach a just verdict regardless of the consequences.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses—something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence for it is a

general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and

introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

LAW ENFORCEMENT WITNESSES

You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal, state or municipal government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness

and to give to that testimony whatever weight, if any, you find it deserves.

EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any

testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the plaintiff and the defendants stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on matters related to my questions.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

BURDEN OF PROOF

This is a civil case and as such the plaintiff has the

burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proven by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

PLAINTIFF'S CLAIMS

I will now give you instructions on the legal theories that apply to this case.

In this case, Diamond claims that O'Connor and the City violated his civil rights under the United States Constitution. Specifically, Diamond alleges that while O'Connor was acting under color of the authority of the State of Vermont as a member of the SBPD, O'Connor violated his constitutional rights. First, Diamond alleges that O'Connor violated his Fourth Amendment rights by unlawfully seizing his property. Second, Diamond

claims that O'Connor violated his Fourteenth Amendment rights by acting based on his race. Finally, Diamond claims that the City had a policy of deliberate indifference that caused the alleged constitutional violations.

SECTION 1983

The law to be applied in this case is the federal civil rights law, which provides a remedy for individuals who have been deprived of their constitutional or statutory rights under color of state law. Section 1983 of Title 42 of the United States Code states:

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 creates a federal remedy for persons who have been deprived by state officials of rights, privileges and immunities secured by the United States Constitution and federal statutes.

The plaintiff has the burden of proving each essential element of his section 1983 claim by a preponderance of the credible evidence. To prove an assertion by a preponderance of the evidence means proving that it is more likely true than not true. If you find that any of the essential elements of Diamond's section 1983 claim has not been proven by a preponderance of the

evidence, you must return a verdict for the defendants.

To establish a claim under section 1983, plaintiff must establish, by a preponderance of the evidence, that, the defendant intentionally or recklessly deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.

A. Plaintiff's Claim of Unlawful Seizure in Violation of the Fourth Amendment

Regarding Diamond's search and seizure claim, I instruct you that the Court has decided, as a matter of law, that O'Connor's acts in seizing Diamond's property violated Diamond's Fourth Amendment rights. The Court has also found that, in connection with the plaintiff's Fourth Amendment claim, O'Connor did not act wantonly or maliciously and punitive damages have not been awarded for the search and seizure claim. Therefore, you, the jury, need not decide this issue.

The Court's decision on Diamond's search and seizure claim has no bearing on his separate claim of racial bias. You should not conclude based on the Court's decision regarding the former that it is either more or less likely that the plaintiff has met his burden in proving the latter claim.

B. Plaintiff's Claim of Selective Treatment in Violation of the Fourteenth Amendment

Diamond's second claim, namely that O'Connor violated his Fourteenth Amendment rights by acting based on Diamond's race, is

a question of fact for you, the jury, to decide. In order to prevail on a racial bias claim, a plaintiff must show by a preponderance of the evidence that he was treated differently from other similarly-situated individuals and that the differential treatment was based on race. In other words, the plaintiff must prove that O'Connor treated the plaintiff differently than he would have treated someone in the same situation who was not African-American.

MUNICIPAL LIABILITY

As I have previously mentioned, the Court has decided as a matter of law that Diamond was deprived of his Fourth Amendment right to be free from unlawful seizures by O'Connor. Therefore, you, the jury, must consider whether the City bears any liability for the deprivation of this right. In addition, if and only if you find that Diamond was deprived of his Fourteenth Amendment rights by the actions of O'Connor, then you should consider whether the City bears any liability for that deprivation.

The fact that an employee of a municipality deprived the plaintiff of a federal right is not alone a sufficient basis for holding the municipality liable to the plaintiff. Before you can hold the municipality liable, the plaintiff must establish by a preponderance of the evidence that the action of the employee that deprived him of his federal right was directly caused by either an official policy of the municipality or a municipal

custom that was in place even though such a custom had not necessarily received formal approval through the body's official decision-making channels.

In this case, Diamond claims that the City had a custom or policy of deliberate indifference to the need to protect against unconstitutional conduct by O'Connor. In order for the City to be held liable on the claim of deliberate indifference, Diamond must prove the following three elements by a preponderance of the evidence:

- First, that O'Connor deprived Diamond of his constitutional rights;
- Second, that the City had a custom or policy of deliberate indifference; and
- Third, that there was direct causal link between this custom or policy and the deprivation of rights.

A. First Element: Deprivation of Right

I have already provided you with instructions regarding the first element, whether O'Connor deprived Diamond of his constitutional rights under the Fourth and Fourteenth Amendments.

B. Second Element: Custom or Policy of Deliberate Indifference

Regarding the second element, you must determine whether the plaintiff has proven by a preponderance of the evidence that, at the time of the incident, that the City had a custom or policy of deliberate indifference to O'Connor's unconstitutional actions.

Whether an official practice or custom exists is a question of fact for you to determine. A practice or custom is a persistent, widespread course of conduct by municipal officials (or employees) that has become a traditional way of carrying out policy, and has acquired the force of law, even though the municipality has not necessarily formally adopted or announced the custom. You may draw the inference that a custom or policy exists based on circumstantial proof.

Deliberate indifference occurs when the need for more or different action is so obvious, and the inadequacy of the current procedure is so likely to result in the violation of constitutional rights, that the policy makers can reasonably be said to have been deliberately indifferent to that need. A plaintiff cannot establish deliberate indifference merely by arguing that a city should have provided more training or supervision or that it should have taken a different approach in its training or supervision. However, a plaintiff may establish deliberate indifference by proving that a city had notice of but repeatedly failed to make any meaningful investigation into charges of unconstitutional conduct or that a policy maker was aware of a subordinate's unconstitutional actions and consciously chose to ignore them.

C. Third Element: Causation

Regarding the third element, if plaintiff is able to prove that the City acted with deliberate indifference to the constitutional rights of the plaintiff, the plaintiff must also prove, by a preponderance of the evidence, that there was a direct causal link between the City's actions and the deprivation of plaintiff's constitutional rights. A direct causal link means that the municipal policy or custom actually caused or was the moving force behind the constitutional violation. In other words, the plaintiff must prove that the deprivation would have been avoided if the City had not acted with deliberate indifference.

If, and only if, you find that the plaintiff has proven each of these three elements by a preponderance of the evidence with regard to his search and seizure claim, you must award judgment to the plaintiff on this portion of his Section 1983 claim against the City. Similarly, if, and only if, you find that the plaintiff has proven each of these three elements by a preponderance of the evidence with regard to his Fourteenth Amendment claim, then you must award judgment to the plaintiff on the race bias portion of his Section 1983 claim against the City.

NOMINAL DAMAGES

If you return a verdict for the plaintiff, then you must return an award of damages in some nominal or token amount not to exceed the sum of one dollar.

PUNITIVE DAMAGES

Whether or not you award the plaintiff actual damages, you may also, in your discretion, make an award of punitive damages. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme and outrageous conduct, and to deter or prevent a defendant and others like him from committing such conduct in the future. Punitive damages may be awarded against individual defendants under Section 1983; however, punitive damages may not be awarded against municipalities. The issue of punitive damages is only before you in connection with the plaintiff's racial bias claim against Defendant O'Connor. Therefore, you will only need to consider the issue of punitive damages if you have found that O'Connor violated Diamond's Fourteenth Amendment claims by acting based on race.

You may award the plaintiff punitive damages if you find that the acts of the defendant were done maliciously or wantonly. An act or failure to act is maliciously done if it is prompted by ill will or spite towards the injured person. An act or failure to act is wanton if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. The plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant acted maliciously or wantonly with regard to the plaintiff's rights.

If you find by a preponderance of the evidence that O'Connor

acted with malicious intent to violate the plaintiff's Fourteenth Amendment rights or if you find that O'Connor acted with a callous or reckless disregard of these rights, then you may award punitive damages. An award of punitive damages, however, is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.

In making this decision, you should consider the underlying purpose of punitive damages. Punitive damages are awarded in the jury's discretion to punish a defendant for outrageous conduct or to deter him and others like him from performing similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether defendant may be adequately punished by an award of actual damages only, or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish the wrongful conduct. You should also consider whether actual damages standing alone are likely to deter or prevent this defendant from again performing any wrongful acts he may have performed, or whether punitive damages are necessary to provide deterrence. Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts similar to those defendant may have committed.

If you decide to award punitive damages, these same purposes

should be considered by you in determining the appropriate sum of money to be awarded as punitive damages. That is, in fixing the sum to be awarded, you should consider the degree to which defendant should be punished for his wrongful conduct, and the degree to which an award of one sum or another will deter defendant or persons like him from committing wrongful acts in the future.

UNANIMOUS VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges—the judges of the facts. Your sole interest is to seek

the truth from the evidence in the case.

NOTES

You may have taken notes during the trial for use in your deliberations. These notes may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you have taken are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CLOSING INSTRUCTIONS

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject related to the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject related to the merits of the case.

Dated at Burlington, Vermont this _____ day of July, 2008.

William K. Sessions III
United States District Court