

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

SCOTT HUMINSKI :  
 : Civil No. 1:99CV160  
 v. :  
 :  
 SHERIFF R.J. ELRICK :  
 :  
 \_\_\_\_\_ :

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It already has been determined that the defendant violated the plaintiff's First Amendment rights under 42 U.S.C. § 1983. For the remainder of this charge, I will refer to this civil rights statute as "Section 1983."

It now is your duty to determine the amount of damages which the plaintiff is entitled collect from Sheriff Elrick as a result of the violation of plaintiff's rights under Section 1983.

It is your duty as jurors to follow the law as I shall state it to you, and not question it, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

The lawyers may have referred to some of the governing rules of law in their arguments. If, however, any difference

appears to you between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather it is yours.

You must perform your duties as jurors without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice or public opinion.

All parties expect that you will carefully and impartially 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 in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, and all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be disregarded.

A lawyer's statements are not evidence.

### Evidence--Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence --the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

### Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

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 witnessing an incident or a transaction may see or

hear it differently, which is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to 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 other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTIONS OF LAW

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.



### Burden of Proof and Preponderance of the Evidence

Ordinarily, the burden is on the plaintiff in a civil action to prove every essential element of his claim by a preponderance of the evidence. In this case, the plaintiff must demonstrate by a preponderance of the evidence that his injuries were proximately caused by Sheriff Elrick's conduct.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or affirmative defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called

them, and all the relevant exhibits received in evidence,  
regardless of who may have produced them.

### Proximate Cause

Injuries or damages are "proximately caused" by the act of another when it appears by a preponderance of the evidence that the act played a substantial part in bringing about or actually causing the harm. Proximate cause is shown when you can find by a preponderance of the evidence that the plaintiff's damages were either a direct result or a reasonably probable consequence of the defendant's conduct.

### Compensatory Damages

Damages which the plaintiff in this case may recover are those that will fairly and justly compensate him for injuries he sustained as a direct result of Sheriff Elrick's violation of his First Amendment right to free expression. You may award compensatory damages only for those injuries which you find the plaintiff has proven by a preponderance of the evidence.

Moreover, you may award compensatory damages only for those injuries which you find the plaintiff has proven by a preponderance of the evidence to have been the direct result of conduct by the defendant in violation of Section 1983. That is, you may not simply award damages for any injury suffered by the plaintiff -- you must award damages only for those injuries that are a direct result of actions by the defendant and that are a direct result of conduct by the defendant which violated plaintiff's federal rights.

The plaintiff is entitled to be compensated for damages proximately caused by the defendant's conduct, such as mental anxiety or suffering, emotional distress or humiliation, physical discomfort or inconvenience, or impairment of reputation. However, damages to compensate the plaintiff must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

### Mitigation of Damages

If you find the plaintiff was injured as a natural consequence of conduct by Sheriff Elrick in violation of Section 1983, you must consider whether the plaintiff could thereafter have done something to lessen the harm that he suffered. The burden is on the defendant to prove, by a preponderance of the evidence, that the plaintiff could have lessened the harm that was done to him and that he failed to do so.

If the defendant convinces you that the plaintiff could have reduced the harm done to him but failed to do so, then the plaintiff is only entitled to compensatory damages sufficient to compensate him for the injury that he would have suffered if he had taken appropriate action to reduce the harm done to him.

### Nominal Damages

If you find the plaintiff has failed to prove by a preponderance of the evidence that he suffered any compensatory damages, then you must return an award of damages in some nominal or token amount not to exceed the sum of one dollar.

Nominal damages must be awarded where, as here, the plaintiff has been deprived by a defendant of a constitutional right, but he has suffered no compensatory damages as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred is an injury to the person entitled to enjoy that right, even when no compensatory damages flow from the deprivation. Therefore, if you find that the plaintiff has suffered no injury as a result of the defendant's conduct other than the fact of a constitutional deprivation, you must award nominal damages not to exceed one dollar.

### Punitive Damages

In addition to the issues relating to compensatory and nominal damages, at this time, you are also required to consider the issue of punitive damages against Sheriff Elrick.

You may also, but are not required to, award the plaintiff punitive damages against Sheriff Elrick if you find that his acts or omissions 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 Sheriff Elrick acted maliciously or wantonly with regard to the plaintiff's rights.

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 the evidence you have heard supports the imposition of an award of punitive damages, you should consider whether Sheriff Elrick may be adequately punished by an award of compensatory or nominal damages only, or whether his conduct was so extreme and outrageous that actual damages are

inadequate to punish him.

If you now find by a preponderance of the evidence that Sheriff Elrick acted wantonly or with malicious intent to violate the plaintiff's rights under Section 1983, then you will be asked to return and consider the actual amount of any such punitive damages. Please note, however, that the decision to award punitive damages is discretionary; that is, even if you find that the legal requirements for awarding punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.



Election of a Foreperson

I will select \_\_\_\_\_ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the form of the special verdict.

[Form of special verdict is read.]

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and will date and sign the special verdict, when completed.

Verdict Form -- Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

### Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

SCOTT HUMINSKI

v.

SHERIFF R.J. ELRICK

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Civil No. 1:99CV160

Judge Murtha, we have reached a verdict.

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Foreperson

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Date

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Verdict Form

1. We, the jury, award the plaintiff the following amount of compensatory damages: \$ \_\_\_\_\_

If you have entered \$0 for question 1, please answer both questions 2 and 3. If you have entered any other amount in response to question 1, please skip question 2 and answer question 3.

2. We, the jury, award the plaintiff the following amount of nominal damages: \$ \_\_\_\_\_

[Note: Nominal damages may not exceed \$1.00.]

3. We, the jury, find Sheriff Elrick's acts in violation of the plaintiff's rights under Section 1983 were done maliciously or wantonly and therefore find punitive damages may be awarded:

\_\_\_\_\_yes                      \_\_\_\_\_no

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date