UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ARRELLO BARNES,

Plaintiff,

-against-

THOMAS RICKS, et. al.,

Defendants.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

04-CV-0391

Defendants request the Court to charge the jury in accordance with the following instructions.

DATED: Albany, New York
May 31, 2006

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UNITED STATES DISTRICT COURT
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JURY INSTRUCTIONS

04-CV-0391

General Introduction

Province of the Court and Jury

MEMBERS OF THE JURY:

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

It is your duty as jurors to follow the law as I shall state it to you, 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 must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly 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 counsel and that stated by the court in these instructions, you are of course to be governed by the Court's instructions.

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, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you 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.

Authority: Devitt & Blackmar, § 71.01

Multiple Defendants

Although there are several defendants in the action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to a fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against another. Now, keep in mind here that each of these defendants is chargeable only for his own individual actions. None of the defendants are chargeable with the acts of any other officer or person. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Authorities: Devitt and Blackmar, § 71.06; *Vetters v Berry*, 575 F.2d 90, 95 (6th Cir. 1978)

State Not a Defendant

The State of New York and the Department of Correctional Services are not defendants in this case. This is a suit against the individual defendants in their personal capacity. The individual defendants are not liable for their employer's conduct and you are only to consider the potential liability of each of the individual defendants solely on the basis of the evidence that has been presented in this case.

Authority: *Wilson v Prasse*, 325 F Supp 9 (WD Pa 1971), *affd* 463 F2d 109 (3d Cir. 1972).

Instructions Apply to Each Party

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to the plaintiff and to each defendant in the case. As I have told you, you must consider each defendant individually. If I have instructed you to consider evidence only against one particular defendant you may not consider that evidence in considering whether plaintiff has met his burden of proving his claim against another defendant.

The law requires that a defendant be personally involved in conduct that deprived another person of their constitutional rights before that defendant may be held liable for such deprivation. You, therefore, may not find one defendant liable for the actions taken by another defendant; nor may you, in consideration of damages, if you reach the question, award damages against a defendant based on actions taken by another individual, whether or not the individual is a party in this case. You may not hold a defendant liable merely because of the position he holds.

Although there are several individual defendants in this action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to fair consideration of his own defense, and is not to be prejudiced by the fact, if it becomes a fact, that you find against another. Unless otherwise stated, all instructions given you govern the case as to each.

Authority: *McKinnon v Patterson*, 568 F2d 930 (2d Cir 1977), *cert denied*, 434 US 1087 (1978); Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions, §§ 71.03 and 71.07.

Burden of Proof--Preponderance of Evidence

The plaintiff in this case has what is known as the burden of proof on the issues in this lawsuit, and must meet his burden of proof if he is to prevail in this lawsuit.

This case is a civil lawsuit. The law provides that in a civil suit, the plaintiff, here Mr. Barnes has the burden of proving the elements of his case.

In the course of my instructions to you, I will identify the essential elements of the claim asserted by the plaintiff that the law requires him to prove against each defendant in order to sustain his claim against that defendant. Only if the plaintiff meets his burden as to each essential element of his claim, is he entitled to a verdict against a defendant in this case.

In order to prevail on his claim against any of the defendants, the plaintiff must prove each essential element of his claim by what is called a fair preponderance of the credible evidence. A fair preponderance of the credible evidence means proof that something is more likely so than not so. A fair preponderance of the credible evidence means the greater weight of the believable evidence. That does not necessarily mean the greater number of witnesses or exhibits produced by either side, but rather refers to the convincing quality of the evidence and the weight and effect that it has on your own minds. A fair preponderance of the evidence does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. In other words, a preponderance of the evidence in this case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your mind a belief that what is sought to be proved is more likely true than not true.

Authorities: Adapted from Some Suggested General Instructions for Federal Civil Cases, Civ. 2.01, 28 F.R.D. 401, 415; and, from 2 Devitt & Blackmar, § 71.13, § 71.14.

Inferences Defined - Presumption of Regularity -
Ordinary Course of Business - Obedience to Law

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald 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 seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

Authority: Devitt and Blackmar, § 72.04

Evidence--Direct and 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 and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all evidence in the case, both direct and circumstantial.

Authorities: 2 Devitt & Blackmar, § 72.02; Some Suggested General Instructions for Federal Civil Cases, Civ. 2.02, 28 F.R.D. 401, 416.

Objections--Stricken Testimony--Sidebar Conferences

As you know, the parties' counsel have made a number of objections throughout the trial, as they are required to do. The Court's rulings on objections made by counsel are not to be considered by you in any respect. Counsel have not only the right, but the duty, to make whatever legal objections there may be to the admission of evidence. And while interruptions of the testimony to voice and discuss objections may have been frustrating to you at times, you must recognize that the law provides for such a procedure in order to ensure a fair trial.

When the Court has sustained an objection, you must disregard the question and may not speculate as to what the answer would have been. Similarly, if the Court has overruled an objection and permitted a question, the Court has not expressed any opinion as to the weight or effect of the evidence.

Whenever testimony was stricken, the reason is of no concern to you, and such stricken testimony must be disregarded by you.

From time to time during the trial, "sidebar" conferences may have been held out of your hearing. They related to matters of law which do not concern you, and these conferences or their purposes may not enter into your consideration.

Admissions and Pleadings and Stipulated Facts

Prior to the trial of this case, the parties filed written statements of their claims, known as the pleadings. Statements in the pleadings are not evidence, but simply set forth the facts that the parties claim to exist.

Before and during the trial of this case the parties may have entered into certain stipulations or agreements in which they agreed that certain facts could be taken as true without further proof. By this procedure it is often possible to save time.

If the parties have so agreed, you are to take such facts as true for purposes of this case.

Authorities: Adapted from 2 Devitt & Blackmar, §§ 70.03-70.04.

Credibility of Witnesses

When I explained the burden of proof a moment ago, you may recall that I said that plaintiff is required to prove certain elements by a preponderance of the credible evidence. Credible evidence means believable evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. That is, you must determine whether and to what extent you believe or do not believe each of the witnesses.

There are, however, various guidelines or factors to consider which may assist you in making these determinations of credibility. You start by using your everyday common sense. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. You should consider the candor, accuracy of recollection, appearance, background, and demeanor of each witness on the stand, to help you determine his or her frankness or lack of frankness in testifying. You may and should consider whether a witness's testimony is supported by or contradicted by other credible and believable evidence. Consider also the certainty and clarity with which each witness testifies as to given points. Consider any possible motive or lack of motive the various witnesses may have had for testifying in the way they did; any interest or lack of interest in the outcome of the trial which the witnesses may have; and any relation the witness may bear to either side of the case. Consider any inconsistencies between the testimony of the witness and any previous statements that the witness may have made. Consider the factual probability or improbability of the witness's testimony and consider the witness's opportunity for observation or for acquisition of information with respect to the matter about which the witness has testified. In weighing the effect of any discrepancy, always

consider whether the discrepancy pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

Authorities: Adapted from 2 Devitt & Blackmar, § 73.01.

Impeachment - Inconsistent Statements or Conduct

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness, or give it such weight as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Authority: Devitt and Blackmar, § 73.04

All Available Evidence Need Not be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Authority: Devitt and Blackmar, § 73.11

Elements of a Claim Under Section 1983:

Mr. Barnes claims a right to recovery under Section 1983 of Title 42 of the United States Code which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state, subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

Plaintiff claims a deprivation of his rights under the First and Eighth Amendments to the Constitution. The First Amendment to the United States Constitution guarantees, among other things, the right to be free of substantial adverse state action because of the exercise of free-speech rights. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

In order to prove either claim, the burden is upon the plaintiff to establish by a preponderance of the evidence the following three propositions:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States (here the Eighth Amendment right to be free from cruel and unusual punishment; and the First Amendment right of free speech.)

Third, that the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.

First Element - Action Under Color of State Law

The first element of plaintiff's claim is that the defendants acted under color of state law. It is not disputed in this case that the defendants acted under color of state law with regard to the events of August 14, 1999.

Second Element - Generally

The second element of plaintiff's claim is that he was deprived of a federal right by one or more of the defendants. In order for plaintiff to establish the second element of his claim, he must prove three things by a preponderance of the evidence: first, that each individual defendant committed the acts alleged by plaintiff; second, that those acts caused the plaintiff to suffer the loss of a federal right; and, third, that, in performing the acts alleged the defendant acted intentionally.

An act is done intentionally if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. In determining whether a defendant acted knowingly or recklessly, you should remember that while witnesses may see and hear and be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person’s mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

Second Element

Eighth Amendment Violation-Cruel and unusual punishment

After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To establish an Eighth Amendment violation plaintiff is required to meet two prongs: that the violation was "objectively sufficiently serious such that he was denied the minimal civilized measure of life's necessities" and that the defendant under consideration possessed a "sufficiently culpable state of mind". That is plaintiff must show by a preponderance of the evidence that he was subjected to conditions maliciously and wantonly for the very purpose of causing harm and not in a good faith effort to achieve a legitimate purpose.

In deciding the first prong, whether plaintiff was denied the minimal civilized measure of life's necessities, you should examine such facts as the extent of Plaintiff's injuries, if any, the duration of the deprivation, the relationship between the deprivation and any actual injury and any efforts made by a Defendant to temper the severity of a deprivation. The key inquiry is whether the conduct of the defendant under consideration involved unnecessary and wanton infliction of pain so as to violate contemporary standards of decency.

In considering these factors, you should give deference to prison officials in their adoption and execution of policies and practices that, in their judgment, are reasonable in a prison setting.

Plaintiff may establish the second element of his cause of action, a "sufficiently culpable state of mind", if he demonstrates upon a preponderance of the evidence that a defendant corrections official demonstrated a reckless disregard for Plaintiff's rights and deprived him of life's basic needs for the very purpose of causing pain or suffering. The defendant may also be responsible if, upon learning of another individual's malicious conduct, that defendant had an

opportunity to intercede to prevent such malicious conduct but failed to do so, resulting in injury to the plaintiff. This is called deliberate indifference. However, mere negligence is not enough. In order to establish such a claim, plaintiff must establish that the defendant under consideration must have been aware of facts from which the inference could be drawn that there was a substantial risk that the deprivation was serious and was taking place for the very purpose of causing harm, that the defendant under consideration actually drew that inference, and that defendant had the opportunity to avoid that risk, but failed to act in a way to prevent actual harm to plaintiff. If you find that the defendant you are considering acted with deliberate indifference to another's infliction of injury to Plaintiff, then you may find that this element has been satisfied.

In order to find that plaintiff has met his burden you must find both that the alleged conduct was "objectively sufficiently serious such that he was denied the minimal civilized measure of life's necessities" and that the defendant under consideration possessed a "sufficiently culpable state of mind". Likewise plaintiff bears the burden of proving a violation and that defendants knew or should have known about the violation, knew it was a violation of his rights and failed to act to correct the situation.

Derived from *Farmer v Brennan*, 511 U.S. 825, 834 [1994]; *Ingraham v Wright*, 430 U.S. 651, 670 [1977]*; Saucier v Katz*, 533 U.S. 194 [2001]; *Johnson v Glick*, 481 F. 2d 1028, cert. denied, 414 U.S. 1033 (1973).

Elements of the Plaintiff's Claims - First Amendment Retaliation

Plaintiff alleges that the defendants violated the First Amendment by retaliating against him for filing grievances against a correctional officer or officers. Specifically, plaintiff alleges that defendants placed the glass in his food in retaliation for plaintiff having filed two grievances against corrections officers for a lack of hot water for his coffee. Plaintiff must show, by a preponderance of the evidence, that the defendants intentionally committed the acts alleged. Plaintiff must also show that those acts violated his constitutional rights.

The plaintiff bears the burden of proving a retaliation claim. Plaintiff must first demonstrate that his conduct, for which he alleges retaliation, was constitutionally protected and that this conduct was a substantial or motivating factor in the prison official's actions against plaintiff. If plaintiff has made this initial showing, then the burden shifts to defendant to show that the challenged action would have been taken, even absent the protected conduct.

It has been determined that a grievance in a prison is a protected activity. Thus, if you find from a preponderance of the evidence that certain of the acts alleged by the plaintiff were, in fact, knowingly done by a defendant or defendants in retaliation for his earlier grievance, you should find for the Plaintiff.

Lt me repeat, plaintiff bears the burden of proving the retaliation claim against defendants. Plaintiff must first demonstrate that his conduct, for which he alleges retaliation, was constitutionally protected and that this conduct was a substantial or motivating factor in the prison official's actions against plaintiff. In other words, plaintiff must demonstrate a violation and that defendants knew or should have known about the violation, knew it was a violation of his rights and failed to act to correct the situation or activially took some action against plaintiff.

Authority: *Sher v. Coughlin*, 739 F.2d 77, 82 (2d Cir. 1984); *Ponchik v. Bogan*, 929 F.2d 419 (8th Cir. 1991); *El-Amin v. Tirey*, 817 F. Supp. 694, 699 (W.D. Tenn. 1993), *aff'd*. 35 F.3d 565 (6th Cir. 1994) ; *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977); *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972).

Third Element - Proximate Cause of Injury

The plaintiff must also show by a preponderance of the evidence that the defendants' acts and conduct were the proximate cause of the plaintiff's present physical injury.

A proximate cause is one that in a natural course, a continuous sequence, unbroken by any intervening cause, produces the injury, and without which the injury would not have occurred.

Stated another way, before plaintiff may recover damages for any injuries, he must first show by a preponderance of the evidence that such injury would not have come about were it not for defendants' conduct. But even if he shows that, he must then show by a preponderance of the evidence that the injury in question, although caused by defendants' conduct, was not also caused by some other intervening conduct other than defendants' conduct.

An intervening cause is one that constitutes a new and independent source of plaintiff's injury. A new factor of plaintiff's injury which is not foreseeable by defendants is an intervening cause which prevents defendants from being liable for plaintiff's injury even if defendants' conduct was one of the causes of these injuries.

If you find that any one of the three elements of plaintiff's claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendants. If you find the plaintiff has sustained his burden of proving all of these elements, you must then consider whether any or all of the defendants have established their affirmative defense of qualified immunity.

Proximate Cause

The plaintiff may recover those damages that were proximately caused by acts of a defendant. An injury or damage is proximately cased by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

Adapted from Devitt & Blackmar, § 80.18, § 80.19.

Liability

If you determine that a defendant deprived the plaintiff of his constitutional rights, your verdict will be in favor of the plaintiff, and you will go on to consider the damages to which the plaintiff is entitled. If you determine that a defendant did not deprive the plaintiff of his constitutional rights, your verdict will be in favor of that defendant. I remind you that your verdict, either for the plaintiff or for each defendant, must be unanimous.

Authority: *Whitley v. Albers*, 475 U.S. 312 (1986); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033 (1973); *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992); *Martinez v. California*, 444 U.S. 277 (1980); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Beverly v. Connor*, 330 F. Supp. 18 (S.D. Ga. 1971); *Taylor v. Allis-Chalmers Manufacturing Company*, 320 F. Supp. 1381 (E.D. Pa. 1969), *aff'd*, 436 F.2d 416 (3d Cir. 1970); *Johnson v. Geer*, 477 F.2d 101 (5th Cir. 1973); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 107 S. Ct. 3034 (1987); *Davis v. Scherer*, 468 U.S. 183 (1984).

Damages

If your verdict is in favor of the plaintiff, you must go on to consider the damages to which the plaintiff is entitled. If and only if you find that any defendants unlawfully violated the constitutional rights of plaintiff under the standards I have described to you, then you should proceed to consider the question of damages.

I will now instruct you on how to calculate damages. However, the fact that I so instruct you does not mean that I think you should award any damages, and does not mean that you must award any. That is entirely for you to decide under the standards I have described and will describe to you.

For each claim on which a defendant is liable, plaintiff is entitled to recover an amount that will reasonably compensate him for the actual loss and damage which he has proved by a preponderance of the evidence that he has suffered as a proximate result of that defendant's unlawful conduct.

A plaintiff is not automatically entitled to recover compensatory damages solely by virtue of the fact - if you should find it to be a fact - that his constitutional rights were violated. He must also demonstrate that the constitutional deprivation caused him some actual injury. A plaintiff in a civil rights action such as this is not permitted to recover damages based upon the abstract value or importance of a constitutional right; rather, such an award may only compensate a plaintiff for actual injury that he sustained, such as medical expenses (if any), lost wages (if any) and pain and suffering (if any). If you find that plaintiff's First or Eighth Amendment rights were violated, but he did not sustain any actual or compensatory damages as a result, you may then award the plaintiff nominal damages in the amount of $1.00.

Authorities: Adapted from 3 Devitt & Blackmar, § 92.16; *Memphis Community School District v Stachura*, 106 S Ct 2537, 2541-45 (1986); Carey v Piphus, 435 US 247, 253-67 (1978); *Smith v Coughlin*, 698 F2d 112 (2d Cir 1983); *Smith v Coughlin*, 748 F2d 783, 789 (2d Cir 1984) (as to nominal damages); *Smith v Wade*, 461 US 30 (1983) (as to punitive damages).

Damages - Not Punitive (Modified)

If you should find that the plaintiff is entitled to recover compensatory damages, in fixing the amount of your award you may not include in, or add to an otherwise just award, any sum for the purpose of punishing the defendants, or to serve as an example or warning for others. Nor may you include in your award any sum for court costs or attorney fees.

Authority: Devitt and Blackmar, § 85.10

Damages - Reasonable - Not Speculative

Damages must be reasonable. You are not permitted to award speculative damages.

Authority: Devitt and Blackmar, § 85.08 (modified) *Estelle v Gamble*, 429 US 97 (1976).

Damages - Punitive and Exemplary - When Caused by Intentional Tort - "Maliciously" "Wantonly" - "Oppressively" - Defined

If you unanimously award the plaintiff a verdict for actual or compensatory or nominal damages then you may consider whether to award punitive damages. Again, you must consider each defendant separately for the purpose of punitive damages.

The purpose of punitive damages is first, to punish a wrongdoer for extraordinary misconduct, and second, to warn others against doing the same.

In this case, you have discretion to award punitive damages if you find that plaintiff has proved by preponderance of the evidence that a defendant acted deliberately for the purpose of causing injury to plaintiff, or that a defendant acted in deliberate disregard of plaintiff's rights and this action proximately caused actual injury or damage to the plaintiff. If you find that plaintiff has failed to sustain his burden of proof on this issue, you should indicate this on the verdict form.

Whether or not to award punitive damages in addition to actual damages is a matter entirely within your discretion. The law allows the jury to award such damages if the plaintiff meets his burden of proving that defendants acted for the purpose of causing harm to plaintiff or in deliberate disregard of plaintiff's rights, but does not require the award of such damages.

If you decide that punitive damages are warranted against any defendants, the amount of damages will be the subject of a separate hearing and I will instruct you at that time of the factors to be considered in fixing the amount.

Authorities: Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions, §§ 104.07, 105.03 (adapted).

Requested Punitive Damage Instruction

[Defendants contend that the evidence does not warrant the submission of the punitive damages issue to the jury. Therefore, the jury should not be charged on punitive damages. In the event the Court rejects this request, defendants propose the following language for a punitive damages charge]

Plaintiff has made a claim for punitive damages in this case. Punitive damages are not favored in law and are to be allowed only with caution and within narrow limits. They are to be awarded in cases brought under § 1983 only if you determine that plaintiff proved, by a preponderance of the evidence, that the conduct of the defendants was motivated by evil motive or intent or where it involved reckless indifference to the constitutionally protected rights of others. Punitive damages may be awarded only to deter or punish violations of constitutional rights. Punitive damages are awarded at the discretion of the jury in order to punish a defendant for extreme or outrageous conduct, or to prevent or deter a defendant or others in his position from engaging in such conduct in the future.

If you find that the plaintiff has failed to sustain the burden of showing that punitive damages are appropriate, you should indicate this finding on the verdict from.

If you decide to award punitive damages against either of the defendants in this case, we will reconvene for a further hearing so that you may consider the amount of personal assets and liabilities of such individual defendant in fixing the amount of punitive damages which you may opt to assess.

Authority: *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978); *McFadden v. Sanchez*, 710 F.2d 907, 912-14 (2d Cir), *cert. denied*, 464 U.S. 961 (1983); *Smith v.*

Wade, 461 U.S. 30, 56 (1983); *Carey v. Piphus*, 435 U.S. 247, 257 n. 11 (1978); *Gagne v. Town of Enfield*, 734 F.2d 902 (2d Cir. 1984); 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 104.07, 105.03 (4th ed. 1987) (adapted).

Requested by Defendants Only in the Event that the Court Determines that the Question of Punitive Damages Should be Submitted to the Jury

Effect of Instructions as to Damages

The fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find in favor of plaintiff on the question of liability, by a preponderance of evidence and in accord with the other instructions.

Authority: Devitt and Blackmar, § 71.1

DATED: Albany, New York
May 31, 2006

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