

Members of the jury, now that you have heard all the evidence and the arguments, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

You may use notes taken during trial to assist your memory. Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. the exhibits which have been received into evidence; and
3. any facts to which the parties have agreed or stipulated.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments by Mr. Orebic and Mr. Washington are not evidence. Sworn testimony by Mr. Washington is evidence. All other statements by Mr. Washington and all statements by Mr. Orebic are not evidence. A lawyer is not a witness. What was said in opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way Mr. Orebic or Mr. Washington have argued them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony has been received only for a limited purpose; where I have given a limiting instruction, you must follow it.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Evidence may be direct or circumstantial. Direct evidence is direct proof of

a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies, "I saw Joe break the glass." Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies, "I saw Joe holding the glass before I left the room. No one else was in the room. When I returned, the broken glass was lying at Joe's feet." You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

Plaintiff is seeking money damages against Sergeant Nonoguchi and the City of Berkeley based upon his claim that defendants violated his constitutional rights. Plaintiff has the burden of proving by a preponderance of the evidence all facts necessary to establish the essential elements of his claims against each of the defendants. Preponderance of the evidence means that you are persuaded by the evidence that the plaintiff's claims are more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Plaintiff Matthew Washington claims that Sergeant Howard Nonoguchi violated his federal constitutional rights to be free from unlawful arrest and unreasonable search and seizure. Specifically, plaintiff claims that Sergeant Nonoguchi wrongfully caused (1) plaintiff to be arrested, (2) plaintiff's home to be entered and searched, (3) plaintiff's belongings to be seized, and (4) plaintiff's person to be subjected to an intrusive medical examination. The sole basis for all of plaintiff's claims against Sergeant Nonoguchi is his assertion that Sergeant Nonoguchi lacked probable cause to believe that plaintiff raped or forced oral copulation on Karen Williams, and therefore should not have so informed the other officers who conducted the arrest, searches, and seizure based on that information.

Plaintiff claims that the City of Berkeley violated his constitutional rights by causing plaintiff to undergo a urethral swab examination without a warrant. Plaintiff's claim against the City of Berkeley depends solely upon whether the urethral swab examination was an unreasonable search under the circumstances and whether it was conducted pursuant to a policy of the City of Berkeley.

Plaintiff has brought this lawsuit under a Federal statute, 42 U.S.C. section 1983, which provides a right to sue for the violation of rights protected under the United States Constitution.

Section 1983 provides:

“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.”

With respect to plaintiff's claim against Sergeant Nonoguchi, plaintiff must prove by a preponderance of the evidence that

- (1) Sergeant Nonoguchi acted intentionally and
- (2) Sergeant Nonoguchi's actions caused the deprivation of plaintiff's Fourth Amendment rights.

If you find that each of these elements has been proved against Sergeant Nonoguchi, your verdict should be for the plaintiff. On the other hand, if either of these elements has not been proved against Sergeant Nonoguchi, your verdict should be for Sergeant Nonoguchi.

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other reason.

It is not necessary to find that any defendant had a specific intent to deprive plaintiff of his constitutional rights in order to find in favor of the plaintiff. Plaintiff is entitled to relief if intentional conduct by the defendants resulted in the violation of his constitutional rights.

Plaintiff claims that Sergeant Nonoguchi's actions violated his constitutional rights under the Fourth Amendment.

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supplied by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This means that plaintiff had a constitutional right not to be arrested without a warrant unless Sergeant Nonoguchi had probable cause to believe that plaintiff had committed a crime.

Probable cause exists when, at the time of arrest, the officer has reasonably trustworthy information sufficient for a prudent person to believe that the accused had committed or was committing an offense. Conclusive evidence of guilt is not necessary to establish probable cause. Mere suspicion, common rumor, or even strong reason to suspect are not enough, however. You may look to the totality of the circumstances known to the officer and the experience and expertise of the officer in determining whether there is probable cause for an arrest.

Rape is a crime that is legally defined as, among other things, an act of sexual intercourse with a person not the spouse of the perpetrator accomplished against a person's will by means of force, violence, duress, or menace.

Forced oral copulation is a crime that is legally defined as the act of copulating the mouth of one person with the sex organ of another person when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim.

Unless circumstances indicate otherwise, a police officer is entitled to assume that a citizen who reports that she is the victim of a crime is being truthful, and in a case of reported rape or reported forced oral copulation, a woman's positive identification of her assailant shortly after completion of the alleged attack is sufficient to establish probable cause to arrest the suspect.

Once an officer has sufficient facts to establish probable cause to arrest a suspect for a crime, the officer need not investigate further before effecting the arrest, and does not lose probable cause because of negative past experiences with the suspect.

You should not judge the conduct of Sergeant Nonoguchi on the basis of hindsight. This means that whether plaintiff actually committed a crime is not relevant in your evaluation of his conduct. Rather, you should evaluate Sergeant Nonoguchi's conduct from the perspective of a reasonable officer on the basis of the facts and circumstances confronting him at the time of that conduct.

With respect to plaintiff's Section 1983 claim against the City of Berkeley, plaintiff must prove by a preponderance of the evidence that:

1. Officer Postolaki intentionally took plaintiff to the hospital for the purpose of having a urethral swab examination without first obtaining a warrant;
2. The conduct of Officer Postolaki was the result of an official policy, or custom having the force of policy, of the City of Berkeley; and
3. Application of that policy or custom caused the deprivation of plaintiff's constitutional rights to be free from an unreasonable search of his person in the form of a urethral swab examination.

If plaintiff has failed to prove any element of his claim against the City of Berkeley, your verdict should be for the City of Berkeley.

Plaintiff claims that the City of Berkeley deprived him of his Fourth Amendment constitutional right to be free from an unreasonable search of his person when, pursuant to city policy or practice, Officer Postolaki caused medical personnel to subject plaintiff to the urethral swab examination without a warrant.

The urethral swab examination constitutes a search under the Fourth Amendment. You must determine whether the urethral swab examination of plaintiff was reasonable. Generally, a bodily intrusive examination conducted without a warrant is unreasonable unless an exception to the warrant requirement exists. Exigency is an exception to the warrant requirement.

The urethral swab examination could not have been conducted without a search warrant, except under the following circumstances.

First, it must have reasonably appeared to Officer Postolaki that there were exigent circumstances. You must find there were exigent circumstances if you find that

(1) all of the circumstances known to Officer Postolaki at the time would cause a reasonable person to believe that the urethral swab examination was necessary to prevent the immediate destruction, concealment, or loss of evidence that dissipates quickly, and

(2) there reasonably appeared to be insufficient time for Officer Postolaki to get a search warrant.

Second, even if exigent circumstances are present, the urethral swab examination may still be unreasonable under the Fourth Amendment if you find that it was more intrusive than reasonably necessary to accomplish its goals. The examination was reasonable if both the necessity for the examination to prove guilt or innocence and the likelihood that the examination would help prove guilt or innocence outweighed the extent of the examination's intrusion upon plaintiff's dignitary interest in personal privacy and bodily integrity.

When a plaintiff is deprived of a constitutional right as a result of the official policy of a city, the city is liable for the deprivation.

“Official policy” means:

1. a rule or regulation promulgated, adopted, or ratified by the governmental entity’s legislative body;
2. a policy statement or decision that is officially made by the city’s lawmaking officer or policy-making official;
3. a custom that is a permanent, widespread, well-settled practice that constitutes a standard operating procedure of the city; or
4. an act or omission ratified by the city’s lawmaking officer or policy making official.

A city cannot be found liable for a deprivation of constitutional rights by a police officer simply because it is the officer’s employer.

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. Your award must be based on evidence and not upon speculation, guesswork, or conjecture.

As to the claim against Officer Nonoguchi, if you find for the plaintiff, you should consider the mental and emotional pain and suffering caused by the unlawful arrest, the warrantless entry and search of his home, the warrantless seizure of his belongings, and the entire post-arrest medical examination.

As to the claim against the City of Berkeley, if you find for the plaintiff, you should consider the mental, emotional, and physical pain and suffering caused solely by the urethral swab examination.

If you find for plaintiff on his section 1983 claims, but you find that the plaintiff has failed to prove he suffered damages, you shall return an award of nominal damages not to exceed one dollar as to that plaintiff.

In addition to compensatory damages, plaintiff is seeking punitive damages from Sergeant Nonoguchi.

If you find for plaintiff, and if you award compensatory or nominal damages against Sergeant Nonoguchi, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Sergeant Nonoguchi's conduct was malicious, or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party.

I have not intended by anything I have said or done, or by any questions that I have asked, to suggest how you should decide any questions of fact, or that I believe or disbelieve any witness.

If anything I have done or said has seemed so to indicate, you must disregard it and form your own opinion.

If it becomes necessary to communicate with me during deliberations, you may send a folded note through the marshal or clerk, signed by a juror. Do not disclose the content of your note to the marshal or clerk.

Do not communicate with the court about the case except by a signed note. I will only communicate with you regarding the case in writing or in open court.

Do not disclose any vote count in any note to the court.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the marshal in whose charge you will be that you have reached a verdict.