

PRELIMINARY INSTRUCTIONS

COURT'S JURY INSTRUCTION NO. 1.01 GENERAL: NATURE OF CASE; BURDEN OF PROOF; DUTY OF JURY; CAUTIONARY

Ladies and gentlemen of the jury: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. During the trial, I will give you more instructions. And at the end of the trial, I will give you further instructions. Unless I specifically tell you otherwise, all these instructions – both those I give you now and those I give you later – are equally binding on you and must be followed.

In this case, I am the judge of the law and the jury is the judge of the facts. As the judge of the facts, it is your duty to determine the true facts from the evidence and the reasonable inferences arising from the evidence. In making your factual determinations, you must not engage in guess work or speculation.

As I explained during *voir dire*, this is a civil case brought by Marcus Evans against ten officers at the Arkansas Department of Correction. Evans alleges that eight of the officers – McDaniels, Hardy, Cox, Bearden, Richardson, Carlock, Mullins, and Clemmons used excessive force against

him. He says that Hardy struck him in the back of his head, that Clemmons sprayed him with pepper spray, and that the other officers hit and kicked him. Evans says that Gray saw the incident and failed to protect him. And Evans says, afterwards, Jackson denied him medical care by taking him to isolation instead of the infirmary. The ADC officers say that Evans attacked one of them, that the force used was reasonable, not excessive, and that Evans got medical attention. The jury will decide, after hearing all the evidence, what happened in the encounter between Evans and each of the ADC officers and whether the United States Constitution was violated.

On the allegedly excessive-force claims: the Eighth Amendment to the Constitution prohibits cruel and unusual punishment. In particular, it prohibits the use of excessive force against someone in custody. Whether force is excessive depends on the totality of the circumstances – the need for the application of force; the relationship between the need and the amount of force used; the extent of the injury inflicted; and whether the force was used to achieve a legitimate purpose or maliciously and sadistically for the purpose of causing harm. Evans must prove by a preponderance of the evidence that McDaniels, Hardy, Cox, Bearden, Richardson, Carlock, Mullins, or

Clemmons each used force against him, that the force was excessive, and that as a result Evans was injured.

On the deliberate-indifference claim: the Eighth Amendment also prohibits a prison official from acting with a deliberate indifference to a substantial risk of harm to an inmate. Evans must prove by a preponderance of the evidence that he had a serious need for medical attention, that Jackson was aware of this need, that Jackson with deliberate indifference failed to allow Evans to go to the infirmary to obtain medical care, and that as a result Evans was injured.

On the failure-to-protect claim: Evans must prove by a preponderance of the evidence that one or more of the officers struck or kicked him, that Gray was aware of the substantial risk of an attack, that Gray, with deliberate indifference to Evans's need to be protected, failed to protect him, and that as a result Evans was injured.

On the assault claims: Evans must prove by a preponderance of the evidence that one or more of the officers acted in such a manner as to create a reasonable apprehension of immediate harmful or offensive contact, that the officer or officers intended to cause that apprehension, and that Evans was

actually put in apprehension of such contact.

On the battery claims: Evans must prove by a preponderance of the evidence that one or more of the officers acted with the intent to cause some harmful or offensive contact, or acted with the intent to create the apprehension of harmful or offensive contact, and that harmful or offensive contact with Evans resulted.

It will be your duty to decide from the evidence whether Evans is entitled to a verdict against any of the defendants. You must consider each of Evans's claims against each defendant separately. Some of Evans's claims may fail as a matter of law for one reason or another. That is for me to decide later. And I'll tell you in my final instructions if that has happened.

This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and

experiences in the affairs of life. You will then apply those facts to the law that I give you in these and in my other instructions, and in that way reach your verdict. While you are the sole judges of the facts; you must follow the law, as stated in my instructions, whether you agree with it or not. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony, and the extent to which their testimony is consistent with other evidence that you believe.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

COURT'S JURY INSTRUCTION NO. 1.02
EVIDENCE: LIMITATIONS

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses, the documents and other things received as exhibits, and any facts that have been stipulated – that is, agreed to by the parties.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions, and comments by lawyers are not evidence.

2. Objections are not evidence. Lawyers have a right and sometimes a duty to object or to move that certain evidence that has already been received be stricken. If such an objection or such a motion to strike is made, it will be my duty, as judge, to rule on the matter and determine whether you jurors may take into consideration the challenged evidence. You are not to concern yourself with the reasons for the attorneys' objections or motions to strike or with the reasons for the Court's rulings. You also should not be influenced by the objection or the motion to strike.

If I sustain an objection to a question or an exhibit, you must ignore the

question or the exhibit and must not try to guess what the information might have been. Similarly, testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and must not be considered.

3. Anything you see or hear about this case outside the courtroom is not evidence. Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the item can and cannot be used.

Finally, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case. The law makes no distinction between the weight to be given to direct and circumstantial evidence.

COURT'S JURY INSTRUCTION NO. 1.03
BURDEN OF PROOF

The burden of proving a fact is placed upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by a preponderance of the evidence. To prove something by the “preponderance of the evidence” is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

If, on any issue of fact in the case, the evidence is equally balanced, you cannot find that fact has been proved. The preponderance of the evidence is not necessarily established by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term “proof beyond a reasonable doubt.” This is a stricter standard, which applies in criminal cases. It does not apply in civil cases like this one. You should, therefore, put it out of your minds.

COURT'S JURY INSTRUCTION NO. 1.04
BENCH CONFERENCES

During the trial it will be necessary for me to speak with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the Rules of Evidence, which govern the trial, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

COURT'S JURY INSTRUCTION NO. 1.05
NO TRANSCRIPT AVAILABLE/NOTE-TAKING

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult. You must pay close attention to the testimony as it is given.

If you wish, however, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness. The Clerk has provided each of you with a pad of paper and a pencil. At each recess, leave your notes in your chair.

When you leave at night, your notes will be secured and not read by anyone.

COURT'S JURY INSTRUCTION NO. 1.06
CONDUCT OF THE JURY

Finally, to insure fairness, you as jurors must obey the following rules:

First, as jurors, I do not want you to talk among yourselves about this case, or about anyone involved with the case, until the end of the case when you go to the jury room to deliberate and decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it. If someone does try to talk to you about the case during the trial, please report it to me immediately.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case – you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person

from one side of the lawsuit sees you talking to a person from the other side –even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk or visit with you.

Fifth, do not read any news stories or articles about the case or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it.

Sixth, do not do any research or make any investigation about the case on your own about any matter involved in this case. By way of example, that means that you must not consult the Internet (e.g., Google or Google Maps), a dictionary, textbook, encyclopedia, or talk with a person you consider knowledgeable. In fairness, you must only learn about this case from the evidence you receive here at the trial and apply those facts to the law as I give it to you.

Seventh, remember, cell phones are not permitted in the courtroom or in the jury room.

Eighth, keep an open mind during the trial about what the verdict should be. Keep an open mind until after you have heard all of the evidence. Once the trial has been completed and you have retired to the jury room to decide the case, you and your fellow jurors are free to discuss the evidence among yourselves.

Ninth, remember that you are not to be influenced in any degree by any personal feelings or sympathy or prejudice for or against any of the parties or the attorneys in the case. Each party is entitled to the same fair and impartial consideration at your hands.

Tenth, no statement, remark, or ruling that I make or question that I might ask of a witness during the course of the trial is intended to indicate how I feel about the facts of the case. You, as the jurors, are the sole judges of the facts of the case. You and you alone will have to decide upon the believability and credibility of the witnesses and the weight and value of the evidence.

COURT'S JURY INSTRUCTION NO. 1.07
EXPANDED INSTRUCTION RE: JURY PROHIBITION ON
ELECTRONIC COMMUNICATIONS/RESEARCH

During the trial, while you are in the courthouse and after you leave for the day, do not provide any information to anyone by any means about this case. For example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell phone, a smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict. Do not use the Internet to look up or research anything about the case.

Ask each juror: Juror No. —, on your oath, do you promise not to post anything about your jury service on any social media website such as Facebook, Twitter, Myspace, or the like during the trial? On your oath, do you promise not to use the Internet to look up anything about the case, the matters discussed, the lawyers, Evans, any of the defendants, me, or the law?

COURT'S INSTRUCTION NO. 1.08

OUTLINE OF TRIAL

The trial will proceed in the following manner:

First, Evans's lawyer will make an opening statement. Next, the Defendants' lawyer will make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

Evans will then present evidence by calling witnesses, and Defendants' lawyers may cross-examine those witnesses. Following Evans's case, the Defendants may present evidence by calling witnesses, and Evans may cross-examine those witnesses.

Finally, Evans may offer rebuttal evidence.

After presentation of evidence is completed, the attorneys will then have a second opportunity to address you directly, and on that second occasion, they are permitted to argue to you the evidence in an attempt to persuade you to their differing views of the true facts of the case. As with opening statements, closing arguments are not evidence.

After hearing closing arguments, the Court will give you the final instructions on the law. Then you will retire to the jury room to deliberate on your verdict.