

1 THE COURT: At this point, I'm going to instruct
2 you on the law. All right. First, the duty of the
3 jury to find facts and follow the law.

4 Members of the jury, now that you have heard all
5 the evidence and the arguments of the attorneys, it's
6 my duty to instruct you on the law that applies to this
7 case.

8 It is your duty to find the facts from all of
9 the evidence in the case. To those facts you apply the
10 law, as I give it to you.

11 You must follow the law, as I give it to you,
12 whether you agree with it or not. You must not be
13 influenced by any personal likes or dislikes, opinions,
14 prejudices or sympathy.

15 That means that you must decide the case solely
16 on the evidence before you. You will recall that you
17 took an oath promising to do so at the beginning of the
18 case.

19 In following my instructions, you must follow
20 all of them and not single out some and ignore others.
21 They are all equally important.

22 Also, you must not read in to these instructions
23 or in to anything the Court may have said or done as
24 giving any suggestion as to what verdict you should
25 return. That is a matter entirely up to you.

1 You should not worry about memorizing or writing
2 down all the instructions, as I state them, because I
3 will send in to the jury room a written copy of my
4 instructions.

5 However, you must know that the law, as I will
6 give it to you from the bench, the written-- excuse me.
7 However, you must know that the law is as I will give
8 it to you from the bench. The written copy is merely a
9 guide to assist you.

10 What is evidence? The evidence from which you
11 are able to decide what the facts are consists of,
12 number one, the sworn testimony of witnesses; number
13 two, the exhibits which have been received in to
14 evidence; and, number three, any facts to which the
15 lawyers have agreed or stipulated.

16 What is not evidence? Certain things are not
17 evidence, and you may not consider them in deciding
18 what the facts are. I will list them for you. Number
19 one, arguments and statements by lawyers are not
20 evidence. The lawyers are not witnesses. What they
21 have said in their opening statements and closing
22 arguments and at other times is intended to help you
23 interpret the evidence, but it is not evidence. If the
24 facts, as you remember them, differ from the way the
25 lawyers have stated them, your memory controls.

1 Number two, questions and objections by lawyers
2 are not evidence. Attorneys have a duty to their
3 clients to object when they believe a question is
4 improper under the Rules of Evidence. You should not
5 be influenced by the objection or by the Court's ruling
6 on it.

7 Number three, testimony that has been excluded
8 or stricken or that you have been instructed to
9 disregard is not evidence and must not be considered.

10 Finally, number four, anything you may have seen
11 or heard when the Court was not in session is not
12 evidence. You are to decide the case solely on the
13 evidence received at trial.

14 Direct and circumstantial evidence. Evidence
15 may be direct or circumstantial. Direct evidence is
16 direct proof of a fact, such as the testimony of an eye
17 witness.

18 Circumstantial evidence is proof of one or more
19 facts from which you could find another fact. You
20 should consider both kinds of evidence. As a general
21 rule, the law makes no distinction between the weight
22 to be given to either direct or circumstantial
23 evidence.

24 It is for you to decide how much weight to give
25 any evidence. Direct evidence can prove a material

1 fact by itself. It does not require any other
2 evidence. It does not require you to draw any
3 inferences.

4 A witness' testimony is direct evidence when the
5 witness testifies to what she saw, heard, or felt. In
6 other words, when a witness testifies about what is
7 known from her personal-- her own personal knowledge by
8 virtue of her own senses, what she sees, touches or
9 hears, that is direct evidence. The only question is
10 whether you believe the witness' testimony.

11 A document or physical object may also be direct
12 evidence when it can prove a material fact by itself,
13 without any other evidence or inference. You may, of
14 course, have to determine the genuineness of the
15 document or object.

16 Circumstantial evidence is the opposite of
17 direct evidence. It cannot prove a material fact by
18 itself. Rather, it is evidence that tends to prove a
19 material fact when considered together with other
20 evidence and by drawing inferences.

21 For instance, assume that when you got up this
22 morning, it was a nice sunny day. But when you looked
23 around, you noticed that the streets and sidewalks were
24 very wet. You had no direct evidence that it rained
25 during the night, but, on the combination of the facts

1 that I've asked you to assume, it would be reasonable
2 and logical for you to infer that it had rained during
3 the night.

4 Not all circumstantial evidence presents such a
5 clear compelling inference. The strength of the
6 inferences arising from circumstantial evidence is for
7 you to determine. It is for you to decide how much
8 weight to give to any evidence. Inference from
9 circumstantial evidence may be drawn on the basis of
10 reason, experience, and common sense. Inferences may
11 not, however, be drawn by guesswork, speculation or
12 conjecture.

13 The law does not require a party to introduce
14 direct evidence. A party may prove a fact entirely on
15 circumstantial evidence or upon a combination of direct
16 and circumstantial evidence. Circumstantial evidence
17 is not less valuable than direct evidence. You are to
18 consider all the evidence in the case, both direct and
19 circumstantial, in determining what the facts are and
20 in arriving at your verdict.

21 Deposition testimony and prior sworn statements.
22 During the trial, you've heard reference to the terms,
23 "Examination under oath, deposition and prior sworn
24 statement." As it applies in this case, these terms
25 mean sworn testimony under oath given by a witness

1 before this trial began.

2 To the extent you have heard reference to, and
3 quotations from such deposition, examination under oath
4 or prior sworn statement, you may give it the same
5 credibility or weight as live witness testimony, if
6 any, as you think it may deserve.

7 Credibility of witnesses. In deciding the facts
8 of this case, you may have to decide which testimony to
9 believe and which testimony not to believe. You may
10 believe everything a witness says or part of it or none
11 of it at all.

12 In considering the testimony of any witness, you
13 may take in to account, number one, the opportunity and
14 ability of the witness to see or hear or know the
15 things testified to; number two, the witness' memory;
16 number three, the witness' manner while testifying;
17 number four, the witness' interest in the outcome of
18 the case and any bias or prejudice the witness may
19 have; number five, whether other evidence contradicted
20 the witness' testimony; and, number six, the
21 reasonableness of the witness' testimony, in light of
22 all of the evidence.

23 Witness impeachment, prior statements. In
24 assessing the credibility of a witness, you may also
25 consider whether, on some prior occasion, the witness

1 made statements that contradict the testimony he or she
2 gave at the time of trial.

3 If you conclude that a witness did, at some
4 prior time, make statements that were materially
5 different from what the witness said during this trial,
6 you may take this in to account in assessing the
7 credibility of such witness or determining the weight
8 that you will give to such witness' testimony.

9 Witnesses, number and weight of testimony. In
10 evaluating the testimonial evidence, remember that you
11 are not required to believe something to be a fact
12 simply because a witness has stated it to be a fact and
13 no one has contradicted what the witness said.

14 If, in light of all of the evidence, you believe
15 that the witness is mistaken or has testified falsely
16 or that he or she is proposing something that is
17 inherently impossible or unworthy of belief, you may
18 disregard that witness' testimony, even in the absence
19 of any contradictory evidence.

20 You should also bear in mind that it is not the
21 number of witnesses testifying on either side of a
22 particular issue that determines where the weight of
23 the evidence lies. Rather, it is the quality of the
24 witness' testimony that counts.

25 Thus, just because one witness testifies on one

1 side of an issue and one witness testifies on the other
2 side does not necessarily mean that you must consider
3 the evidence evenly balanced. If you feel that one of
4 the witnesses was more credible than the other, for
5 whatever reason, you may find that the weight of the
6 evidence lies on the side of that witness.

7 Similarly, just because there may be more
8 witnesses testifying on one side of an issue than on
9 the other does not mean that the weight of the evidence
10 lies in favor of the greater number of witnesses. Once
11 again, it is the credibility or quality of the
12 testimony that determines where the weight of the
13 evidence lies.

14 Expert witnesses. During this trial, you may--
15 you have heard testimony from a witness who claims to
16 have specialized knowledge in a technical field. Such
17 persons are sometimes referred to as expert witnesses.
18 Because of their specialized knowledge, they are
19 permitted to express opinions which may be helpful to
20 you in determining the facts.

21 Since they do have specialized knowledge, the
22 opinions of expert witnesses, whether expressed
23 personally or in documents which have been admitted in
24 to evidence, should not be disregarded lightly. On the
25 other hand, you are not required to accept such

1 opinions just because the witnesses have specialized
2 knowledge.

3 In determining what weight to give to the
4 testimony of a so-called expert witness, you should
5 apply the same tests of credibility that apply to the
6 testimony of any other witness; that is to say, you
7 should consider such things as the witness' opportunity
8 to have observed the facts about which he or she has
9 testified and apparent candor or lack of candor.

10 In addition, you should take in to account the
11 witness' qualifications, especially in comparison to
12 qualifications of expert witnesses who may have
13 expressed contrary opinions, and the accuracy of the
14 facts upon which the witness' opinions were based. In
15 short, you should carefully consider the opinions of
16 expert witnesses, but they are not necessarily
17 conclusive.

18 Burden of proof. The law imposes on the
19 Plaintiffs the responsibility or burden of proving
20 their claim. It is not upon-- not up to the Defendants
21 to disprove the claim.

22 Furthermore, the Plaintiffs must prove the
23 things they claim by what is called a fair
24 preponderance of the evidence, which I will now define
25 in more detail.

1 The burden of proof, fair preponderance. I have
2 just told you that the burden of proof in this case is
3 on the party making the claim in question. In a few
4 minutes, I am going to describe in detail just what the
5 Plaintiffs must prove in order to prevail on their
6 claim.

7 The Plaintiffs must prove their claim by what
8 the law refers to as a fair preponderance of the
9 evidence, which is another way of saying that the
10 parties must prove them by the greater weight of the
11 evidence. To put it another way, you must be satisfied
12 that the evidence shows that what the party making a
13 claim is claiming is more probably true than not.

14 Do not confuse the burden of proving something
15 by a fair preponderance of the evidence with the burden
16 of proving something beyond a reasonable doubt. As
17 most of you probably know or have heard, in a criminal
18 case, the prosecution must prove the Defendant is
19 guilty beyond a reasonable doubt. That is a very
20 stringent standard of proof.

21 However, this is not a criminal case.
22 Therefore, in order to prevail, the Plaintiffs need not
23 prove their claim beyond a reasonable doubt. They need
24 only prove it by a fair preponderance of the evidence.
25 Perhaps the best way to explain what is meant by a fair

1 preponderance of the evidence is to ask you to
2 visualize an old-fashioned scale with two
3 counterbalancing arms and use it to mentally weigh the
4 evidence with respect to the claim being made by the
5 Plaintiffs.

6 If, after you've heard all the evidence relevant
7 to the claim, you determine that the scale tips in
8 favor of the Plaintiffs, no matter how slightly it may
9 tip, then the Plaintiffs have sustained their burden of
10 proving that particular claim to you by a fair
11 preponderance of the evidence because they have made
12 the scale tip in their favor.

13 If, on the other hand, you determine that the
14 scale tips in favor of the Defendants or that the scale
15 is so evenly balanced that you cannot say whether it
16 tips one way or the other, then the Plaintiffs have
17 failed to prove their claim by a fair preponderance of
18 the evidence because they have not made the scale tip
19 in their favor.

20 Specific claims. I'm now going to instruct you
21 on the specific law that applies to this case. The law
22 will guide you as to the factual determinations you
23 must make. You must accept the law that I give you,
24 whether you agree with it or not.

25 Liability of each Defendant to be separately

1 considered. I want to emphasize here that, throughout
2 your deliberations, you must consider Plaintiffs'
3 claims against each Defendant separately. Plaintiffs
4 must prove each element of their claims by a
5 preponderance of the evidence against each Defendant
6 before you can find liability as to that Defendant.
7 Therefore, you must make a separate finding with regard
8 to each Defendant.

9 Introduction of Plaintiffs' claim, 42 United
10 States Code, Section 1983. The Plaintiffs' first
11 allegation is that, under Section 1983, 42 United
12 States Code, the Fourth Amendment to the United States
13 Constitution and Article I, Section 6, of the
14 Rhode Island Constitution, the Defendants subjected
15 them to unconstitutional searches and seizures when the
16 Defendants allegedly installed and maintained a
17 telephone recording system in the Providence Public
18 Safety Complex, which recorded telephone calls
19 Plaintiffs made and received to and from that public
20 building.

21 Plaintiffs have sued the City of Providence, as
22 well as Mayor David Cicilline and Colonel Dean
23 Esserman, in their official capacities. Naming Mayor
24 Cicilline and Colonel Esserman in their official
25 capacities is the equivalent of naming the City itself

1 as a party. Thus, I will be referring to the City of
2 Providence, Mayor Cicilline and Colonel Esserman as the
3 Municipal Defendants. In addition, Plaintiffs have
4 sued Manuel Vieira and Mary Lennon, in their individual
5 or personal capacity.

6 I have pointed out the distinction between the
7 Municipal Defendants and the individual Defendants
8 because, under Section 1983, the Plaintiffs will be
9 required to prove different elements against the
10 different Defendants, as I will explain in a few
11 moments.

12 Section 1983 defined. Section 1983, Title 42 of
13 the United States Code, provides, in pertinent part,
14 "Every person who, under color of any statute,
15 ordinance, regulation, custom or usage of any state,
16 subjects or causes to be subjected any citizen in the
17 United States, or other person within the jurisdiction
18 thereof, to the deprivation of any rights, privileges
19 or immunities secured by the Constitution and laws
20 shall be liable to the party injured."

21 You are instructed, as a matter of law, that
22 under the Fourth Amendment to the United States
23 Constitution and Article I, Section 6, of the
24 Rhode Island Constitution, every citizen is guaranteed
25 the right to be secure in his or her person against

1 unreasonable searches and seizures.

2 Section 1983, elements as to the individual
3 Defendants. I will now explain the elements that the
4 Plaintiffs must prove under Section 1983 against the
5 individual Defendants, Manuel Vieira and Mary Lennon.

6 The burden is on the Plaintiffs to prove each of
7 the following elements of this claim by a preponderance
8 of the evidence: First, that the Defendants' actions
9 deprived the Plaintiffs of their Federal Constitutional
10 right to be free from unreasonable searches and
11 seizures; second, that the Defendants acted under the
12 color of some law of the State of Rhode Island; and,
13 third, that the Defendants' acts were the proximate
14 cause of damages sustained by the Plaintiffs.

15 Unreasonable search and seizure defined. As I
16 told you, in order to prevail on their claim under
17 Section 1983, Title 42, of the United States Code, the
18 Plaintiffs must demonstrate that the individual
19 Defendant's actions deprived them of their
20 Constitutional rights under the Fourth Amendment and
21 Article I, Section 6, of the Rhode Island Constitution.

22 The protections provided under the Rhode Island
23 Constitution are identical to those contained in the
24 Fourth Amendment. Thus, I will simply be referring to
25 the Fourth Amendment.

1 The Fourth Amendment provides that the right of
2 the people to be secure in their persons, houses,
3 papers and effects against unreasonable searches and
4 seizures shall not be violated.

5 The Fourth Amendment's protection against
6 unreasonable searches and seizures includes not only
7 tangible items but the recording-- but, also, the
8 recording of telephone calls.

9 In order to prove a violation of the Fourth
10 Amendment, Plaintiffs must first prove by a
11 preponderance of the evidence that their phone calls
12 were recorded.

13 Second, they must prove the following two
14 elements: First, that they had an actual or subjective
15 expectation of privacy in their telephone calls; and,
16 second, that the expectation of privacy was objectively
17 reasonable; that is, a reasonable person would have an
18 expectation of privacy under similar circumstances.

19 Exceptions to the Fourth Amendment. If you find
20 that the Plaintiffs' calls were recorded and that they
21 had both an actual expectation of privacy and an
22 objective or reasonable expectation of privacy, you
23 then must determine if any of the Plaintiffs consented
24 to having their phone calls recorded.

25 It is the Defendants' burden to prove by a

1 preponderance of the evidence that Plaintiffs consented
2 and that such consent was free and voluntary. However,
3 consent need not be explicit. It can be implied from a
4 party's conduct.

5 In order to determine if any of the Plaintiffs
6 consented to the recording of their phone calls, you
7 should consider all of the circumstances, including
8 whether any of the Plaintiffs had notice, formal or
9 informal, that their calls were being recorded and used
10 the phones, despite the knowledge that they would be
11 recorded.

12 Under color of law defined. The second element
13 that the Plaintiffs must prove to sustain their claim
14 pursuant to Section 1983, Title 42, of the United
15 States Code, is that State or local officials acted
16 under color of the authority of the state. State or
17 local officials act under color of the authority of the
18 state when they act within the limits of their lawful
19 authority.

20 The parties agree that the Defendants acted
21 under the color of State law. Thus, this particular
22 element has been proven by a preponderance of the
23 evidence.

24 Proximate cause defined. The third element that
25 the Plaintiffs must prove to sustain their claim

1 pursuant to Section 1983, Title 42, of the United
2 States Code, is that the Defendants' acts or omissions
3 were the proximate cause of the injury claimed by each
4 Plaintiff.

5 I instruct you that an injury is proximately
6 caused by an act or a failure to act whenever it
7 appears from the evidence in the case that the act or
8 omission played a substantial part in bringing about or
9 causing the injury and that the injury was either a
10 direct result or a reasonably probable consequence of
11 the act or omission.

12 The Plaintiffs must prove that the injury would
13 not have occurred but for the Defendants' acts or
14 omissions, and the Defendants' acts or omissions must
15 be shown to have been a direct, rather than a remote,
16 cause of the injury. In other words, the Plaintiffs
17 must prove that, but for the Defendants' acts or
18 omissions, no injury would have occurred.

19 A person whose Federal rights were violated is
20 entitled to recognition of that violation, even if he
21 or she suffered no actual damages or injuries. This
22 violation is known as a Constitutional injury.

23 Supervisory liability, individual Defendants.
24 Plaintiffs also seek to hold Manuel Vieira and Mary
25 Lennon liable as supervisors under Section 1983. In

1 order to prevail, Plaintiffs must prove each of the
2 following elements by a preponderance of the evidence:
3 First, that the individual Defendant was acting in a
4 supervisory capacity; second, that the individual
5 Defendant, as a supervisor, had actual or constructive
6 knowledge that his subordinate was engaged in conduct
7 that posed a pervasive and unreasonable risk of
8 Constitutional injury to citizens like the Plaintiffs;
9 third, that the individual Defendant's response to that
10 knowledge as a supervisor was so inadequate as to show
11 deliberate indifference to or tacit authorization of
12 the alleged offensive practices; and, fourth, that
13 there was an affirmative causal link between the
14 individual Defendant's inaction as a supervisor and the
15 particular Constitutional injury suffered by the
16 Plaintiffs.

17 Section 1983, elements as to the Municipal
18 Defendants. Plaintiffs also seek recovery against the
19 Municipal Defendants under Section 1983. As I
20 explained earlier, a different test applies to the City
21 of Providence and Mayor Cicilline and Colonel Esserman,
22 in their official capacities.

23 The fact that an employee or employees of the
24 City deprived the Plaintiffs of their Federally
25 protected rights is not itself a sufficient basis for

1 imposing Section 1983 liability against the City.

2 In order to prevail against the Municipal
3 Defendants, Plaintiffs must prove by a preponderance of
4 the evidence that the Municipal Defendants' actions or
5 inactions deprived the Plaintiffs of their Federal
6 Constitutional right to be free from unreasonable
7 searches and seizures and that the Municipal Defendants
8 acted under the color of some law of the State of
9 Rhode Island.

10 The parties agree that the Defendants acted
11 under color of law. Thus, Plaintiffs are required to
12 prove by a preponderance of the evidence, first, that
13 the violation of the Plaintiffs' Constitutional rights
14 was pursuant to a municipal policy or a long-standing
15 custom or practice of the City; and, second, that a
16 final policy-maker for the City approved the policy,
17 custom or practice and was deliberately indifferent to
18 the risks associated with the policy, custom or
19 practice; and, third, that the City's policy, custom or
20 practice caused the violation of Plaintiffs'
21 Constitutional rights. If you find that Plaintiffs
22 have failed to establish any of these elements, you
23 cannot hold the Municipal Defendants liable.

24 Existence of municipal policy or custom. A
25 policy of the City is a written rule or a guideline

1 under the law. An unwritten rule or guideline can be a
2 policy if it is a custom or practice that is a
3 well-settled, persistent, widespread course of conduct
4 by municipal officials having the force of law.

5 Final policy-maker. In order for a custom or
6 practice or policy to become sanctioned by the City, it
7 must be shown by the Plaintiffs that this policy has
8 been officially sanctioned or ordered by a municipal
9 official who has final policy-making authority.

10 I am instructing you that, as a matter of law,
11 Manuel Vieira possessed final authority to establish
12 municipal policy with respect to the design,
13 procurement, installation and operation of all
14 communications equipment within the Providence
15 Department of Public Safety.

16 An official to whom final policy-making
17 authority has been delegated is an official whose
18 actions can be said to represent a decision of the
19 municipal entity itself.

20 The policy-making official may cause injury by
21 issuing orders, by ratifying a subordinate's decision
22 and the basis for it, or by establishing a policy for
23 municipal employees that, when followed by those
24 employees, results in injury.

25 Where a final policy-maker delegates authority

1 to another public official, then the decisions made by
2 the public official to whom the final policy-maker has
3 delegated authority do not constitute municipal policy,
4 unless the policy-maker not only approves that decision
5 but, also, approves the basis for it.

6 Deliberate indifference. The next thing that
7 Plaintiffs must show is that the final policy-maker of
8 the City, by adopting or following the policy, custom
9 or practice, was deliberately indifferent to the risks
10 associated with the policy, custom or practice.

11 Deliberate indifference does not require you to
12 find that the City's official had a wrongful motive or
13 state of mind. Rather, deliberate indifference is
14 defined by something called the objective obviousness
15 test. This means that the City is deliberately
16 indifferent if it disregarded a known or obvious risk.
17 It means that the City made a deliberate or conscious
18 choice from among-- from available alternatives to
19 follow a particular course of action, despite its
20 knowledge of or willful blindness to obvious risks
21 associated with that course of action.

22 Causation. If you find that the City was
23 deliberately indifferent, you must also determine
24 whether any policy to record telephone calls was the
25 cause, at least in part, of the violation of the

1 Plaintiffs' right. In order to establish this, the
2 Plaintiffs must show that the policy was closely
3 related to and the moving force behind the
4 Constitutional violation.

5 The Rhode Island Privacy Act, defined. The
6 Plaintiffs also claim that the Defendants violated
7 their right to privacy under Rhode Island Law. Section
8 28.1, Chapter 1, Title IX, of the Rhode Island General
9 Laws provides in pertinent part, "Every person who
10 subjects or causes to be subjected any citizen of this
11 State, or other person within the jurisdiction thereof,
12 to a deprivation and/or violation of his right to
13 privacy shall be liable to the party injured in an
14 action at law." The right to privacy, as defined by
15 this Statute, includes the right to be secure from
16 unreasonable intrusion upon one's physical solitude or
17 seclusion.

18 Rhode Island General Laws, Section 9-1-28.1, its
19 elements. In order to prove their claims under
20 Section 9-1-28.1, the burden is upon the Plaintiffs to
21 establish each of the following elements by a
22 preponderance of the evidence: First, that the
23 unreasonable intrusion was an invasion of something
24 that is entitled to be private or would be expected to
25 be private; and, second, that the invasion was or is

1 offensive or objectionable to a reasonable man.

2 Reasonable man, defined. Reasonable man, as
3 that term is used in the preceding instruction, means
4 an ordinarily prudent person. The reasonable man is
5 not an actual person. He or she is a fictitious person
6 who exercises the amount of care and prudence that an
7 average member of the community would exercise. You
8 should use your collective experience to determine what
9 qualities the reasonable man possesses, and it is that
10 standard that you should apply in your deliberations
11 with respect to the Plaintiffs' invasion of privacy
12 claim.

13 State Wiretap Statute, definition. The
14 Plaintiffs also claim that the Defendants violated
15 Section 1, Chapter 5.1, Title XII, of the Rhode Island
16 General Laws by installing and maintaining the Total
17 Recall System at the Providence Public Safety Complex,
18 which allegedly recorded their calls to and from that
19 building. This Statute provides for recovery of
20 damages for the intentional interception of a wire,
21 oral or electronic communication.

22 The elements. In order to prevail on their
23 claim under the State Wiretap Statute, the burden is
24 upon the Plaintiffs to establish by a preponderance of
25 the evidence that the Defendants, number one,

1 intentionally, two, intercepted, endeavored to
2 intercept or procured another person-- any other
3 person-- excuse me-- to intercept or endeavor to
4 intercept, number three, a wire communication.

5 Intent, defined. As the term is used in this
6 Statute, an interception is deemed intentional if it
7 was the Defendant's conscious objective. A person who
8 acts intentionally acts purposely and not accidentally
9 or involuntarily. A person acts intentionally if he or
10 she desires to cause consequences by his or her act or
11 he or she believes consequences are substantially
12 certain to result.

13 Intercept, defined. The Statute defines
14 intercept to mean the aural or other acquisition of the
15 contents of any wire, electronic or oral communication
16 through the use of any electronic, mechanical or other
17 device.

18 Wire communication, defined. A wire
19 communication means any aural transfer made, in whole
20 or in part, through the use of facilities for the
21 transmission of communications by the aid of wire,
22 cable or other like connection between the point of
23 origin and the point of reception, including the use of
24 such connection in a switching station, furnished or
25 operated by any person engaged in providing or

1 operating such facilities for the transmission of
2 communications. The term includes any electronic
3 storage of the communication. For purposes of this
4 Statute, a telephone call is a wire communication.

5 Exceptions to the Statute. There are two
6 exceptions to liability under the Statute, which you
7 may consider. First, the Statute exempts from
8 liability a recording which was done by an
9 investigative or law enforcement officer in the
10 ordinary course of his duties, as well as a recording
11 made with the actual or implied consent of a party.

12 If you find either that the recording was done
13 by an investigative or law enforcement officer in the
14 ordinary course of his duties or with Plaintiffs'
15 consent, there is no violation of the Wiretap Statute
16 and, thus, no liability.

17 It is the Defendants' burden to prove by a
18 preponderance of the evidence that either of these two
19 exceptions apply.

20 I will now provide a brief explanation of the
21 legal standard of each defense. First, as to the
22 ordinary-course exception, in determining whether any
23 recording was done by an investigative or law
24 enforcement officer in the ordinary course of his
25 duties, you should consider whether the Defendants are,

1 in fact, investigative or law enforcement officers.

2 An investigative or law enforcement officer
3 means any officer of the United States, this State or a
4 political subdivision of this State, who is empowered
5 by law to conduct investigations of or to make arrests
6 for the designated offenses, the Attorney General and
7 his or her assistants. You should also consider
8 whether the recording was routine and noninvestigative.

9 Consent. In order to determine if any of the
10 Plaintiffs consented to recording, you must first
11 consider whether any of the Plaintiffs were aware and
12 actually consented to the recording.

13 Second, you must consider whether consent may be
14 implied in the situation. Implied consent is also
15 called consent in fact, which is inferred from
16 surrounding circumstances, indicating that the party
17 knowingly agreed to the recording. Thus, implied
18 consent, or the absence of it, may deduce from the
19 circumstances prevailing in a given situation, and
20 which includes language or acts which tend to prove or
21 disprove that a party actually knows of or assents to
22 encroachments on the routine expectation that
23 conversations are private.

24 Number of days. If you ultimately conclude that
25 one or more Defendants are responsible for recording

1 Plaintiffs' telephone calls under circumstances which
2 violate Plaintiffs' rights under the State Wiretap
3 Statute, you must also determine on how many days
4 between May 23, 2002, and February 10, 2003, a total
5 period of 264 days, that violation took place.

6 In other words, you are required to determine
7 the specific number of days on which each individual
8 Plaintiff established by a preponderance of the
9 evidence that an unlawful recording of his or her
10 telephone call or calls took place.

11 State Wiretap Statute, Rhode Island General
12 Laws, Section 11-35-21. Plaintiffs also claim they are
13 entitled to damages under Section 21, Chapter 35, Title
14 XI, of the Rhode Island General Laws, which is another
15 Wiretap Statute.

16 In order to recover under that Statute, the
17 Plaintiffs must establish by a preponderance of the
18 evidence that Defendants willfully intercepted,
19 attempted to intercept or procured any other person to
20 intercept or attempt to intercept any wire, electronic
21 or oral communication.

22 Willfully, defined. To act willfully means to
23 act voluntarily and intentionally and not because of
24 mistake or accident or other innocent reason.

25 Intercept, defined. The Statute defines

1 intercept to mean the aural or other acquisition of the
2 contents of any wire, electronic or oral communication
3 through the use of any electronic, mechanical or other
4 device.

5 Wire communication, defined. A wire
6 communication means any aural transfer made, in whole
7 or in part, through the use of facilities for the
8 transmission of communications by the aid of wire,
9 cable or other like connection between the point of
10 origin and the point of reception, including the use of
11 such connection in a switching station furnished or
12 operated by any person engaged in providing or
13 operating such facilities for the transmission of
14 communications. The term includes any electronic
15 storage of the communication. Again, for purposes of
16 this Statute, a telephone call is a wire communication.

17 Exception, consent. If you determine that a
18 Plaintiff's phone calls were recorded in violation of
19 the Statute but you also find that the particular
20 Plaintiff consented to the recording, you may not
21 impose liability under the Statute.

22 Damages, introductory. I will now turn to the
23 question of damages. In discussing damages, I do not
24 in any way mean to suggest an opinion that the
25 Defendants are legally responsible or liable for the

1 damages being claimed. That is a matter for you to
2 decide.

3 Since I do not know how you're going to decide
4 this case, I am instructing you about damages only so
5 that, if you find that the Defendants are liable, you
6 will know what principles govern an award of damages.

7 You are instructed on damages in order that you
8 may reach a sound and proper determination of the
9 amount you will award as damages, if any, in the event
10 that you find the Defendants are liable.

11 You need consider the question of damages only
12 if you find that a Defendant is liable. If you do not
13 find liability, no award of damages can be made.

14 Since damages are an element of Plaintiffs'
15 claims, damages must be proven. The burden of proof as
16 to the existence and extent of damages is on the party
17 claiming to have suffered those damages and is the same
18 as to the other elements of their claim, a fair
19 preponderance of the evidence.

20 In other words, you may make an award of damages
21 only to the extent that you find damages have been
22 proven by the evidence. You may not base an award of
23 damages, or the amount of any such award, on
24 speculation or guesses.

25 You must base any award of damages on the

1 evidence presented and on what you consider to be fair
2 and adequate compensation for such damages as you find
3 have been proven.

4 As you may recall, I previously instructed you
5 that the parties stipulated that all Plaintiffs,
6 including minor children through their family, have
7 waived any and all claims for personal injury,
8 including physical and emotional, and are not seeking
9 any damages for such injuries.

10 Nominal damages. Nominal damages are
11 essentially symbolic. Their purpose is to prove a
12 point or vindicate a right that a Plaintiff can prove
13 was violated when the Plaintiff is unable to prove that
14 he or she sustained any actual loss, harm or injury.

15 In other words, nominal damages are a substitute
16 for compensatory damages. They serve as a tangible
17 indication of a Defendant's liability when proof of
18 actual damages is lacking.

19 Punitive damages. Generally, in addition to
20 nominal damages, the law permits you, under certain
21 circumstances, to award punitive damages in order to
22 punish the wrongdoer for some extraordinary misconduct
23 and to serve as an example or warning to others not to
24 engage in such conduct.

25 Whether or not to make any award of punitive

1 damages is a matter exclusively within the province of
2 the jury. But you should always bear in mind that such
3 extraordinary damages may be allowed only if you should
4 first unanimously award Plaintiffs a verdict for
5 nominal damages.

6 Not only should you bear in mind the conditions
7 under which and the purposes for which the law permits
8 an award of punitive damages to be made but, also, the
9 requirement of the law that the amount of such
10 extraordinary damages, when awarded, must be fixed with
11 calm discretion and sound reason and must never be
12 either awarded or fixed in amount because of any
13 sympathy, bias or prejudice with respect to any party
14 to the case.

15 The Section 1983 claim. If you find that
16 Defendants violated Plaintiffs' right to be free from
17 unreasonable searches and seizures with malice or
18 reckless disregard for their Constitutional rights, you
19 may, but are not required to, award punitive damages in
20 this case.

21 Plaintiffs have the burden of proving that
22 punitive damages should be awarded and the amount by a
23 preponderance of the evidence. You may award punitive
24 damages only if you find that Defendants' conduct was
25 malicious or in reckless disregard of Plaintiffs'

1 rights. Conduct is malicious if it is accompanied by
2 ill will or spite or if it is for the purpose of
3 injuring another. Conduct is in reckless disregard of
4 Plaintiffs' rights if, under the circumstances, it
5 reflects complete indifference to the safety and rights
6 of others.

7 Punitive damages may not be awarded against the
8 Municipal Defendants; that is, the City of Providence,
9 Mayor David Cicilline and Colonel Dean Esserman, in
10 their official capacities. You may impose punitive
11 damages against one or more of the individual
12 Defendants and not others and may award different
13 amounts against different Defendants.

14 The State Wiretap claim. If you find that
15 Defendants unlawfully intercepted Plaintiffs' telephone
16 calls, you may award punitive damages. You are
17 permitted to award punitive damages on the State Law
18 claim only if Defendants acted with malice, wantonness
19 or willfulness of such extreme nature as to amount to
20 criminality, which, for the good of society and as a
21 warning to individuals, ought to be punished. You
22 should award punitive damages only if Defendants'
23 conduct requires deterrence and punishment over and
24 above that otherwise provided by your verdict in favor
25 of Plaintiffs.

1 Again, punitive damages may not be awarded
2 against the Municipal Defendants; that is, the City of
3 Providence, Mayor David Cicilline and Colonel Dean
4 Esserman, in their official capacities.

5 You may impose punitive damages against one or
6 more of the individual Defendants and not others and
7 may award different amounts against different
8 Defendants.

9 The amount of punitive damages you award, if
10 any, must reasonably relate to the character and degree
11 of Defendants' wrongful conduct, the amount of harm
12 inflicted and the impact of the punitive damages on
13 third parties.

14 Selection of foreperson and duty to deliberate.
15 When you begin your deliberations, you should elect one
16 member of the jury as your foreperson. A foreperson
17 will preside over the deliberations and speak for you
18 here in Court. You will then discuss the case with
19 your fellow jurors to reach agreement, if you can do
20 so.

21 Your verdict must be unanimous. Each of you
22 must decide the case for yourself, but you should do so
23 only after you have considered all of the evidence,
24 discussed it fully with the other jurors and listened
25 to the views of your fellow jurors. Do not be afraid

1 to change your opinion during the course of the
2 deliberations if the discussions persuade you to do so.
3 Do not come to a decision simply because other jurors
4 think it is right.

5 Communications with the Court. If it becomes
6 necessary during your deliberations to communicate with
7 me, you may send a note through the Marshal, signed by
8 the foreperson. No member of the jury should ever
9 attempt to contact me, except by a signed writing, and
10 I will communicate with any member of the jury on
11 anything concerning the case only in writing or here in
12 open Court.

13 Return of verdict. Verdict forms have been
14 prepared for you by the Court. After you have reached
15 unanimous agreement on a verdict, your foreperson will
16 fill in the two forms that will be given to you, sign
17 and date them and advise the Court that you are ready
18 to return to the courtroom.

19 Verdict, unanimity required. In order to return
20 a verdict in this case, all of you must agree as to
21 what that verdict will be. You cannot return a verdict
22 for either party, unless your decision is unanimous.

23 Therefore, there are two things that you should
24 keep in mind during the course of your deliberations.
25 On the one hand, you should listen carefully as to what

1 your fellow jurors have to say and should be
2 open-minded enough to change your opinion if you become
3 convinced that it was incorrect.

4 On the other hand, you must recognize that each
5 of you has an individual responsibility to vote for the
6 verdict that you believe is the correct one, based on
7 the evidence that has been presented, and the law, as I
8 have explained it.

9 Accordingly, you should have the courage to
10 stick to your opinion, even though some or all of the
11 other jurors may disagree, as long as you have listened
12 to their views with an open mind.

13 Jury recollection controls rehearing testimony.
14 If any reference by the Court or by counsel to matters
15 of evidence does not coincide with your own
16 recollection, it is your recollection which should
17 control during deliberations. Occasionally jurors want
18 to rehear testimony. Understand that, generally, your
19 collective recollection should be sufficient for you to
20 be able to deliberate effectively.

21 However, if you feel that you need to rehear
22 testimony, I will consider your request. However, keep
23 to mind that this is a time-consuming and difficult
24 process, so if you think you need this, consider your
25 request carefully and be as specific as possible.

1 Finally, copy of instructions. I have
2 instructed you on the law that governs your
3 deliberation. As I mentioned at the beginning, I will
4 send to to the jury room a written copy of my
5 instructions. You are reminded, however, that the law
6 is as I have given it to you from the bench, and the
7 written copy is merely a guide to assist you.

8 Those are my instructions.

9 It's 1:15 at this point, and what I am going to
10 do is I am going to-- it's going to take the Clerk a
11 few moments-- a few minutes to organize the exhibits
12 and to get the other materials to you.

13 So I'm going to excuse you for the day, that you
14 not begin your deliberations until tomorrow. You can
15 report, as usual, at 9:15. I would like for you to, at
16 the beginning, deliberate on the schedule we have
17 conducted this trial, 9:15 until 1:30. If you, as a
18 group, determine that you would like to deliberate for
19 a longer period on any particular day or every day, you
20 can send that information to me by way of a note
21 through the Marshal.

22 But tomorrow, we'll start at 9:15, and I'd like
23 you to go through at least 1:30. If you want to go
24 longer, just let the Court know, and we can accomodate
25 that.

1 Ms. Noel, for the record, why don't we have the
2 Security Officer come forward and swear him to before
3 he excuses the jury for the night. All right. Come
4 forward, Frank.

5 (The Security Officer Was Sworn)

6 THE COURT: All right. Before I release you for
7 the night, I'm going to again advise you for a final
8 time not to commence your deliberations or discuss the
9 case with anyone. Tomorrow morning, you can report at
10 9:15, and you can commence your deliberations at that
11 point. The exhibits and other materials, the verdict
12 forms and my instructions will be present for you to do
13 so.

14 Again, don't try to find out anything about this
15 case, anything about the law, as I've instructed you,
16 or any other information about anyone involved to the
17 case, and I'll see-- you'll be here tomorrow morning.
18 You can escort them out. All right. Good night.

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