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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

|                                |   |                                  |
|--------------------------------|---|----------------------------------|
| ALLEN ELSETH, by his guardians | ) |                                  |
| ad litem, Roger Elseth and     | ) | 2:08-cv-02890-GEB-CMK            |
| Patricia Ann Elseth,           | ) |                                  |
|                                | ) |                                  |
| Plaintiff,                     | ) | <u>RULING AND TRANSMITTAL OF</u> |
|                                | ) | <u>TRIAL DOCUMENTS TO THE</u>    |
| v.                             | ) | <u>PARTIES</u>                   |
|                                | ) |                                  |
| Deputy Probation Officer Jeff  | ) |                                  |
| Elorduy, individually,         | ) |                                  |
|                                | ) |                                  |
| Defendant.                     | ) |                                  |
| _____                          | ) |                                  |

The attached voir dire questions, preliminary jury instructions, draft closing jury instructions, and draft verdict form concern the impending jury trial. Any proposed modifications should be submitted as soon as practicable.

The draft liability jury instruction does not include a discussion of "color of law" because it is assumed that Defendant concedes he acted under color of law. A jury instruction conference is scheduled on August 29, 2011, commencing at 1:30 p.m., at which this and other issues will be discussed.

Further, notwithstanding the following communication in the Final Pretrial Order ("FPO") concerning Defendant's qualified immunity defense, the parties have proposed an inadequate qualified immunity jury instruction:

Defendant's statements in the JPS about qualified immunity are conclusory statements of the law,

1 which are useless aids in the judicial endeavor to  
2 state the disputed facts applicable to that  
3 affirmative defense. The jury instruction on this  
4 issue, which the parties have stipulated shall be  
5 tried to the jury, shall be sufficient to inform  
6 the jury of the factual dispute it will decide.

7 (FPO, 2:14-19, ECF No. 142.) "Jury instructions must be formulated so  
8 that they fairly and adequately cover the issues presented, correctly  
9 state the law, and are not misleading. The instructions must allow the  
10 jury to determine the issues presented intelligently." Fikes v.  
11 Cleghorn, 47 F.3d 1011, 1013 (9th Cir. 1995) (citation omitted). Yet the  
12 parties propose the following qualified immunity jury instruction:

13 Defendant JEFF ELORDUY contends he is entitled  
14 to qualify immunity. The purpose of qualified  
15 immunity is to shield public officials from undue  
16 interference with their duties and from potentially  
17 disabling threats of liability.

18 It is Plaintiff's burden to prove by a  
19 preponderance of the evidence that Defendant's  
20 conduct violated a constitutional right. If  
21 Plaintiff establishes this, then Plaintiff must  
22 also prove by a preponderance of the evidence that  
23 there existed clearly established case law at the  
24 time of the incident that would have led a  
25 reasonable officer in Defendant JEFF ELORDUY's  
26 position to believe that his conduct was unlawful.

27 This proposed qualified immunity jury instruction is a  
28 woefully inadequate "guide [for] the jury's deliberation" since it does  
29 not explain instructed terms. U.S. v. Redlightning, 624 F.3d 1090, 1122  
30 (9th Cir. 2010) (internal quotation omitted). Although it informs the  
31 jury that Plaintiff has the obligation of presenting "case law  
32 [existing] at the time of the incident" which "would have led a  
33 reasonable officer in Defendant JEFF ELORDUY's position to believe that  
34 his conduct was unlawful," it does not explain what constitutes a  
35 reasonable officer, or what "clearly established case law" means. Even  
36 though these explanations are missing, the ultimate inquiry in the

1 instruction, which requires "Plaintiff [to] prove by a preponderance of  
2 the evidence that there existed clearly established case law at the time  
3 of the incident that would have led a reasonable officer in Defendant  
4 JEFF ELORDUY's position to believe that his conduct was unlawful,"  
5 presumes that the jury has been informed about clearly established case  
6 law which a constructed reasonable officer would have known, and with  
7 which he could have reasonably believed he complied.

8           Since the proposed qualified immunity jury instruction has the  
9 referenced serious flaws, despite the statement in the FPO that this  
10 instruction "shall be sufficient to inform the jury of the factual  
11 dispute it will decide," the question of law involved with this defense  
12 shall be decided by the court, rather than the jury-notwithstanding the  
13 parties' contrary stipulation that the qualified immunity question of  
14 law would be submitted to a jury. As the Ninth Circuit states in Act  
15 Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993):

16           [T]he determination of what conduct underlies the  
17 alleged violation-what the officer and claimant did  
18 or failed to do-is a determination of fact [to be  
19 decided by a jury;] however, . . . the  
20 determination whether those facts support an  
objective belief that [the officer reasonably  
believed he was not violating Plaintiff's right to  
be free from excessive force] is ordinarily a  
question for the court.

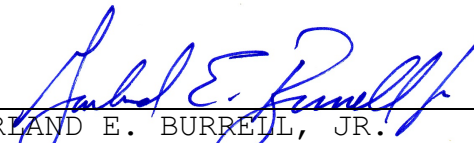
21 This decision is made in light of the closeness of the jury trial  
22 commencement date of August 30, 2011, and the parties apparent inability  
23 to propose an adequate qualified immunity jury instruction.

24           Since the jury will not decide the question of law involved  
25 with this defense, the jury need not be informed about the defense of  
26 qualified immunity during any part of the proceedings. The jury will  
27 resolve the discrete issues of fact, if any, and all assertions made by  
28 the parties regarding the defense of qualified immunity shall be

1 confined to those issues of fact.

2 In light of this ruling on how the qualified immunity defense  
3 will be decided, the FPO is supplemented as follows: A special verdict  
4 or interrogatories shall be filed no later than 8:00 a.m. on August 29,  
5 2011, for all factual disputes to be resolved by the jury concerning the  
6 qualified immunity defense. Further, no later than 8:00 a.m. on August  
7 29, 2011 each party shall file proposed prevailing party findings of  
8 fact and conclusions of law concerning the qualified immunity defense.

9 Dated: August 26, 2011

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12 \_\_\_\_\_  
GARLAND E. BURRELL, JR.  
United States District Judge