IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| ALLEN ELSETH, by his guardians ad litem, Roger Elseth and Patricia Ann Elseth,<br><br>Plaintiff,<br><br>v.<br><br>Deputy Probation Officer Jeff Elorduy, individually,<br><br>Defendant. | ) | 2:08-cv-02890-GEB-CMK<br><br>COURT'S GENERAL VOIR DIRE |



Ms. Furstenau, please administer the oath to the panel.

Good morning, and welcome to the United States District Court. Thank you for both your presence and your anticipated cooperation in the questioning process we are about to begin. You are

performing an important function in our legal system.

The court personnel who will assist me in this trial are on the platform below me. The Courtroom Deputy just administered you the oath; she is on the platform below me on my left side. Next to her is the Certified Court Reporter.

We are about to begin what is known as voir dire. The purpose of voir dire is to have each of you disclose any feelings, bias, and prejudice against or in favor of any party, so that we can ascertain which of you can fairly sit as a juror in this particular case. Voir dire consists of questions designed to tell the parties some general things about each prospective juror, and to provide the parties with information about whether a prospective juror should be a juror in this case. It allows the parties to exercise more

intelligently their peremptory challenges. A peremptory challenge is a request by a party to excuse a juror. The parties will exercise their peremptory challenges after the questioning is complete. In addition, voir dire enables the Court to determine whether any prospective juror should be excused for the concept called cause.

1. Counsel, the Jury Administrator has already randomly selected potential jurors and placed their names on the sheet that has been provided to each party in the numerical sequence in which they were randomly selected and each juror has been placed in his or her randomly-selected seat.

2. I will ask a series of questions to the jurors as a group. If you have a response, please raise your hand or the number you've been given, which reflects your seat number. Generally, you

will be given an opportunity to respond in accordance with the numerical order in which you are seated, with the juror in the lowest numbered seat first. If no juror raises his or her hand, I will simply state "no response" for the record and then ask the next question. If you know it is your turn to respond to a question, you may respond before I call your name by first stating your last name, then your seat number, and lastly your response. That should expedite the process.

3. This case is expected to take ***six days***[1] for the presentation of evidence, after which each side will give you closing arguments. After closing arguments, I will give you closing jury instructions and you will begin your deliberations. Because I handle criminal matters on Fridays and

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[1] (Note: This is Defendant's statement in Joint Pretrial Statement, Plaintiff did not provide a timeframe in the Joint Statement)

other civil matters on Mondays, we will only be in trial three days a week: Tuesday, Wednesday, and Thursday. On the days we are in trial, we will begin at 9:00 a.m. and usually end around 4:30 p.m. As soon as you commence jury deliberations, you will be expected to deliberate as necessary during these hours, including Mondays and Fridays, but not on the weekends, until you complete your deliberations.

4. Will any of you find it difficult to participate in this trial during these times?

5. Do any of you have a problem that would make it difficult for you to serve as a member of this jury?

6. Plaintiff's counsel now has the opportunity to again state his name, the name of his client, and indicate any witness that his client may choose to call, so that we can determine

whether a juror is has had contact with any person named.

7. Defendant's counsel now has the opportunity to do the same thing.

8. Do you know any of the named individuals or any of the potential witnesses; or ever had any business or other dealings with any person just named?

9. I will now state the nature of the trial on which some of you will serve as jurors so that you can evaluate whether you prefer not to be a juror in this case:

Plaintiff was minor and a resident of Juvenile Hall at the time he alleges defendant subjected him to excessive force, in violation of his constitutional right against use of such force. At the time, Defendant was a Deputy Probation

Officer with the Sacramento County Probation Department. Defendant disputes Plaintiff's claim.

i. Does any potential juror prefer not being a juror in this case?

ii. Does any potential juror have any information based on what you have done or experienced in the past that you think has a bearing on whether you could be a fair and impartial juror in this case?

10. Have you ever served as a juror in the past?

i. Please state the nature of the case and, without stating the result reached, state whether the jury reached a verdict.

11. Each of you will have to determine who is telling the truth. Please raise your hand if you are unwilling or not comfortable judging a witness' credibility and making this kind of decision.

12. Plaintiff will present his case first his case first. Only after Plaintiff has presented his case will Defendant have an opportunity to present his side of the case. Please raise your hand if you cannot agree to keep an open mind and make no decisions about the evidence until after all the evidence has been presented by both sides and I have instructed you regarding the law in this case.

13. It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law. To put it somewhat differently, whether you approve or disapprove of the court's rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. Please indicate by raising your hand if you will

not be able to follow the law as given to you by me in this case.

14. Beginning with the juror in seat #1, please provide the following information, your:

i. Name,

ii. Educational background,

iii. Present and former occupations for you and any person residing with you.

Preliminary Instruction No. 1

Ladies and gentlemen: You are now the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial, I will give you more detailed instructions. Those instructions will control your deliberations.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

Preliminary Instruction No. 2

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Preliminary Instruction No. 3

I am now going to give you jury admonitions that you must remember. When we take recesses I will reference these admonitions by telling you to remember the admonitions or something similar to that. You are required to follow these admonitions whether or not I remind you to remember them:

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial,

although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address.

Third, if you need to communicate with me, simply give a signed note to my courtroom clerk, or to the court reporter if my courtroom clerk is not present, who will give it to me.

Preliminary Instruction No. 4

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

## Preliminary Instruction No. 5

If you wish, 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. Do not let note-taking distract you so that you do not hear other answers by witnesses. When you leave, your notes shall be left on the seat on which you are seated.

Whether or not you take notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by notes.

## Preliminary Instruction No. 6

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is 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 not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence 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. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

## Preliminary Instruction No. 7

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

Plaintiff will then present evidence, and defendant's counsel may cross-examine. Then defendant may present evidence, and each plaintiff's counsel may cross-examine.

After the evidence has been presented, the attorneys will make closing arguments and I will instruct you on the law that applies to the case.

After that, you will go to the jury room to deliberate on your verdict.

# INSTRUCTION NO. 1

Members of the jury, now that you have heard all the evidence and the arguments of the lawyers, it is my duty to instruct you on the law which applies to this case. Each of you is in possession of a copy of these jury instructions, which you may take into the jury room for your use if you desire.

It is your duty to find the facts from all the evidence in the case. To those facts you must 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. And 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 and according to the law. 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. And you must not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return. Unless otherwise stated, the instructions apply to each party.

# INSTRUCTION NO. 2

When a party has the burden of proof on any claim or defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or defense is more probably true than not true.

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

## INSTRUCTION NO. 3

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

(1) the sworn testimony of any witness;

(2) the exhibits which have been received into evidence; and

(3) any facts to which the lawyers have agreed or stipulated.

INSTRUCTION NO. 4

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 and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their 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 the lawyers have stated 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 and exhibits have 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.

## INSTRUCTION NO. 5

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. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should 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.

# INSTRUCTION NO. 6

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

INSTRUCTION NO. 7

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.

## INSTRUCTION NO. 8

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

## INSTRUCTION NO. 9

Plaintiff asserts that Defendant violated his constitutional right under the Fourteenth Amendment of the United States Constitution to be free from being subjected to excessive force. Plaintiff had the constitutional right under the Fourteenth Amendment to be free from being subjected to excessive force. To prevail on his excessive force claim, Plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that Defendant intentionally used excessive force against Plaintiff when contacting and/or interacting with Plaintiff; and

Second, that Defendant's act and/or acts caused Plaintiff to sustain injury and/or damages.

In determining whether the force, if any, was excessive, consider such factors as the need for the application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; and whether the force was applied in a good faith effort to maintain and restore discipline or for the purpose of causing harm.

## INSTRUCTION NO. 10

An injury or damage is caused by an act when the evidence shows that the act played a substantial part in bringing about or actually causing the injury and/or damage, and that the injury and/or damage was either a direct result or a reasonable probable consequence of the act.

INSTRUCTION NO. 11

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

If you find for Plaintiff, you must determine Plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate Plaintiff for any injury you find was caused by Defendant. You should consider the following:

The nature and extent of the injuries and the mental, physical and emotional pain and suffering experienced.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

## INSTRUCTION NO. 12

Plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

Defendant has the burden of proving by a preponderance of the evidence:

1. That Plaintiff failed to use reasonable efforts to mitigate damages; and

2. The amount by which damages would have been mitigated.

## INSTRUCTION NO. 13

The law which applies to this case authorizes an award of nominal damages. If you find for Plaintiff but you find that Plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

## INSTRUCTION NO. 14

If you find for Plaintiff, you may, but are not required to, also award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

Plaintiff has the burden of proving by a preponderance of the evidence that punitive damages should be awarded, and, if so, the amount of any such damages.

You may award punitive damages only if you find that Defendant's conduct that harmed Plaintiff was malicious, oppressive 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 the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking

advantage of some weakness or disability or misfortune of the plaintiff.

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. In considering the amount of any punitive damages, consider the degree of reprehensibility of Defendant's conduct.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on Plaintiff.

INSTRUCTION NO. 15

Some of you have taken notes during the trial. Such notes are only for the personal use of the person who took them.

There is always a tendency to attach undue importance to matters which one has written down. Some testimony which is considered unimportant at the time presented, and thus not written down, takes on greater importance later in the trial in light of all the evidence presented. Therefore, you are instructed that your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, may not be accurate, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes time to deliberate and render a decision in this case.

## INSTRUCTION NO. 16

When you begin your deliberations, you should elect one member of the jury as your presiding juror. 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 of the evidence, discussed it fully 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.

## INSTRUCTION NO. 17

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

## INSTRUCTION NO. 18

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that will be given to you, sign and date it and advise the United States Marshal's representative outside your door that you are ready to return to the courtroom.

## INSTRUCTION NO. 19

If it becomes necessary during your deliberations to communicate with me, you may send a note through the United States Marshal's representative, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| ALLEN ELSETH, by his guardians ad litem, Roger Elseth and Patricia Ann Elseth,<br><br>Plaintiff,<br><br>v.<br><br>Deputy Probation Officer Jeff Elorduy, individually,<br><br>Defendant. | 2:08-cv-02890-GEB-CMK<br><br>VERDICT FORM |

WE THE JURY FIND THE FOLLOWING VERDICT ON THE SUBMITTED QUESTIONS.

1. Does Plaintiff prevail on his excessive force claim?

_____ YES _____ NO

(*If you answered YES, continue to Question Number 2. If you answered NO, please sign and return this verdict.*)

2. What is the amount of damages to which Plaintiff is entitled?

$_____

(*Continue to Question 3.*)

3. Do you find Plaintiff is entitled to punitive damages?

_____ YES _____ NO

(*Please sign and return this verdict.*)

Dated this _____ day of _____ 2011

_____

JURY FOREMAN