J. Tony Serra #32639
506 Broadway
San Francisco, CA 94133
415-986-5591 / FAX 421-1331

Dennis Cunningham #112910
Robert Bloom
115-A Bartlett Street
San Francisco, CA 94110
415-285-8091 / FAX 285-8092

William M. Simpich #106672
1736 Franklin Street
Oakland, CA 94612
510-444-0226 / FAX 444-1704

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.,

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

No. C-97-3989-SI

PLAINTIFFS' POST-TRIAL MOTIONS and OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT or A NEW TRIAL

DATE: Friday, July 15, 2005
Time:
Judge ILLSTON

NOTICE

Plaintiffs, by their undersigned counsel, in response to defendants' recently-filed post-trial motions,[1] and seeking post-trial relief for themselves, ask this honorable Court to deny defendants' Motion for Judgment or a New Trial, and Strike the juror affidavit by which

[1] For the timing, plaintiffs rely on the filing date for post-trial motions set in open Court when the verdict was returned. No date for hearing was set then, and none was designated by defendants in filing their instant motion; plaintiffs have selected July 15, but we will happily agree to any other date which accommodates the needs and desires of all concerned.

defendants seek to impeach the recent Verdict, and to grant such equitable relief as may be needed to consolidate, define and/or protect the Judgment recovered by plaintiffs in the recent trial, as follows:

INTRODUCTION

Unsurprisingly, even after three jury trials over a period of eight years — which doubled the period in which their constant practice has altogether belied their adamant, morally bankrupt position in defense of the purported legal authority of police to (assault? torture?) nonviolent protesters engaged in passive resistance — defendants continue to insist that, being the police, their own self-serving view must control any determination of what the law allows. Emboldened by the Jury's decision to ignore plaintiffs' damages, they dismiss the very unequivocal holding by the Court of Appeals, that no police officer could reasonably have believed the brutal, peremptory tactics used in the incidents in question were lawful, and they demand, essentially, that the Verdict against them be treated as if it were in their favor.[2]

In aid of their demand, defendants re-cycle their perennial claim in this case, that grinders are inherently dangerous and therefore should not be used, whereas pepper spray 'directly applied', etc., is harmless, and therefore its use is risk-free and inherently reasonable; *ergo*, the reasoning goes, they should have judgment. As usual, they demand that the evidence be looked at it the light most favorable to themselves, and that contrary facts — let alone the entire context in which the case arose, and has continued — be ignored; as usual, the essence of their demand

[2] Indeed, notwithstanding the clear stricture against it in the rules, defendants have not scrupled to procure and inject into the record a wholly improper and legally nugatory affidavit from a member of the most recent jury, broadly asserting that the Verdict did not mean what it said. Beside its nullity under the explicit prohibition of R.606(b) FRE — the basis of plaintiffs' below-stated motion to strike — the irony of this attempt to use an obviously lawyer-concocted story of supposed juror "compromise" on the issue of reasonableness (which, in its essence, is prolix to the verge of nonsense; see, Declaration of Donettta C. Rett, Par.4), to distract attention from the actual trade-off by which the plaintiffs' damage claims were dismissed, is meaningless to the defendants, of course; but it should not be lost upon the Court.

is, *polizei uber alles!* And so, the importunity must be rejected, and defendants' motion denied, and the offending juror affidavit must be stricken from the record and held for naught.

That leaves — especially in light of defendants' insistence that the verdict was essentially in their favor, and validated, in effect, their claim that pepper spray is not harmful; or, perhaps, is not *force* at all — the issue of whether the equitable relief originally sought by plaintiffs is now warranted. While plaintiffs themselves are content, indeed in the circumstances overjoyed, with the Verdict, the interpretation of it urged in defendants' motion — and in reported public remarks of defense counsel, to the effect that the decision only goes to application of pepper spray with Q-tips, leaving cops free to drip it out from wads of gauze — sets off loud bells of alarm. So, where the Court between the last two trials ruled that injunction and/or declaratory judgment were unavailable in the absence of "a verdict or judgment in plaintiffs' favor", that lack is now remedied, and the issue is ripe.

ARGUMENT

I. THERE IS NO BASIS FOR JUDGMENT n.o.v. OR A NEW TRIAL

The Verdict of the Jury must be sustained on a motion under R.50, F. R. Civ P. if there is substantial evidence to support it. *Landes Const. Co. v Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987), cited by defendants. "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Ibid.* The trial court may not weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. *Ibid*, (Cites omitted). Obviously, from the videotapes alone, there is substantial evidence to support a finding of excessive force.

A slightly more cogent question is present by the demand for a New Trial, in that the Court is expected to make its own assessment, to determine whether the verdict is against the clear weight of the evidence, *Landes* supra, also at p. 1371. The verdict should not be upset, however, unless "having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, ... * * * *

Doubts about the correctness of the verdict are not sufficient grounds for a new trial; the trial court must have a firm conviction that the jury has made a mistake. *See Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35m, 64 S.Ct 409, 412, 88 L.Ed. 520 (1944) ('Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.')" *Id.*, at 1371-72.

In demanding a new trial, defendants, as usual, proceed from the by now more than tiresome assertion that the facts as they see them are "uncontroverted". In fact, the uncontroverted evidence shows that, after seven or eight years of unqualified success with the panoply of means they had developed to end lockdowns, the Sheriff and his new chief deputy — who with their timber company patrons at the time were beseiged by an increasingly active and effective non-violent mass movement, protesting corporate "liquidation logging" practices in the North Coast area — gave in to some purported clamor from the dark side of the ranks of their deputies, and authorized "direct application" of pepper spray ointment, and full spray blasts at close range, to the "eye area" of forest protesters engaged in sit-ins with "black bear" steel pipe lockdown devices. Although they have continually asserted that the "inherent" danger of using high speed grinding saws to open the pipes and release the locks left them with no choice, the evidence showed they had used the grinders dozens, even hundreds of times before, without mishap, and continued to use it after the incidents in question, right up until the present time.[3] Likewise, where defendants insist that the noxious spray substance is composed exclusively of "food grade" components, and cannot cause injury, but only "transitory discomfort", the record is replete with stark, unimpeachable images and testimony, showing irredeemable injury and harm to all plaintiffs in the actual events.

---

[3] Defendants wish to minimize the number of times grinders were used — successfully, without mishap — against 'black bears', stating, without reference, that the true number was twenty to thirty times. Notes show the testimony of the Special Services deputies however was to a total of 80 to 90 times (Held: 15-20 times; Rtynolds: 40 times; Daastol, 25-30 times).

Defendants insist on three basic points: that the grinder is inherently dangerous, and therefore cannot be used against lockdowns; that there is "no evidence" that defendants as policy-makers authorized the pepper spray use for any reason other than the risk of injury from the grinder; and that pepper spray in any case is "harmless", because there is, again, "no evidence" it can cause any lasting injury — and therefore, *sub silentio*, its use is inherently reasonable, to coin a phrase, and not really properly subject to the rules governing the use of force. Consistent with unvarying past practice, they discuss only those parts of the evidence and purported evidence which (to them) supports these outlandish claims. Accordingly, they make no mention of the excruciating pain and suffering of all plaintiffs, and the incontrovertible fact thereof as shown by the evidence; they explain away the multiple circumstances clearly showing the basis for belief in the malign intentions towards the protesters which actually lay behind their policy decision, as irrelevant to whether the uses of force shown were "objectively reasonable"; and they ignore altogether the primary "objective" fact in the case: that the grinder was used again and again without mishap. In a deeper sense, and more reprehensibly, defendants ignore the distinction between a tactic which inflicts pain and suffering on the "suspects", and one which does not; but of course, that is the first rule of the police state: its subjects (enemies) must be dehumanized.

A closer look their case for setting aside the jury's verdict reveals the fundamentally corrupt nature of the defendants' plea, particularly with respect to the rule of objective reasonableness. As so clearly stated by the Court of Appeals, the rule revolves around the (objective) <u>need</u> for the use of force, and for the amount of force used. Where there is no need for force — as the Court has said separately, as in, e.g., *P.B. v. Koch,* 96 F.3d 1298,1303-04 & n.4 9th Cir. 1996) — no force is reasonable.

Quite naturally, the need for force must itself be measured objectively, in light of the facts and circumstances known to the defendants; but the measure these defendants supposedly applied here was entirely <u>subj</u>ective: the purported "nightmare" fear of the deputies that some hideous accident was simply bound to happen. Defendants insist that this supposed frame of mind on the part of workaday cops — which is actually quite implausible in light of the fact that

they went on using the grinder to break lockdowns dozens of times, indeed invariably, before and since the events in question — must trump the actual unbroken history of successful use of the grinder, as a matter of law. That is the opposite of an objective analysis.

With similar subjectivity — and again that imperious police insistence that their police pronouncements be accepted, categorically — defendants assert that the "inherent" danger of the grinder is the only cognizable reason for their authorization of the pepper spray (torture), and they demand that the multiple facts and circumstances which (circumstantially) show prejudice, intimidation and vindictiveness as the true reasons for their policy, be disregarded. (Dfts' memo, p.5:3-16.) Either way, the question is subjective, obviously, with respect to the truth about the defendants' motives in adopting the policy; but the objective truth is that sheriffs went on regularly grinding people out of lockdowns — with all the attendant risks, whatever they were, in order to carry through with their bounden duty to remove and arrest malefactors — for what is now more than fifteen years, all told. That is not consistent with any reasonable need, which by any stretch could give defendants license to cross the bright, crucial Fourth Amendment line — and so abruptly turn to violence against the innocent young people in this determined movement, with their scrupulous tactics of passive resistance — as a matter of legitimate police policy.

That is, Because the grinder and related mechanical means, together with other previously successful 'passive' approaches, give the police — and historically have always given, and continue to give them — a reasonable, proven alternative to the use of force in effectuating the arrest of lockdown protesters, *they may not use force* — meaning force intended to hurt people — under the law. It's that simple, and cut and dried. That's why *plaintiffs* are entitled to judgment as a matter of law; because, *objectively*, the existence of a reasonable alternative to using force to "subdue, remove or arrest" a person, *negates any need to use force for that purpose*, period. See, Koch, supra, and *Graham v Connor, Liston v. County of Riverside, Alexander v. City & County of San Francisco, LaLonde v County of Riverside,* etc., as cited in *Headwaters II.*

Of course, the Red State mind doesn't see things that way, and plaintiffs are well aware that this is indeed a very political question, at bottom, in a highly political time; not that the true

compromise, *of* the jury more than in it — negating, in a word, the plaintiffs' copious proofs of pain and suffering — is not a bitter pill. It surely is, and yet one has the sense of having dodged a bullet — or rather, escaped, by miracle, some ghastly hell on earth out of John-Paul Sartre, where we keep trying the issue again and again, for different select companies of poker-faced Americanos, and they are always hopelessly divided about it, forever...

This group too, was divided, and split the baby, obviously, in order to complete the job, as we asked; so be it. That's the way democracy works, and plaintiffs surely got well over half a loaf, in the circumstances;[4] plus, we're not done, see below. For the moment, however, it is surely clear that no injustice has been done by the Jury's verdict on excessive force, and there is no honest basis for a new trial.

II. THE DECLARATION OF JUROR DONETTA C. RETT MUST BE STRICKEN.

In this connection, plaintiffs absolutely oppose defendants' attempt to impeach or qualify the jury's decision on excessive force, by means of an illicit, "I say, you say" hearsay affidavit of a juror, purporting to change the result of the game, after the bell. In addition to being barred by R.606(b), and in essence not making any sense, as in Par.4, as noted, the statement put in the juror's mouth by the defense directly contradicts the verdict — thereby demonstrating the purpose and need for the Rule. The question the Jury was asked was,

> Did plaintiffs prove, by a preponderance of the evidence, that the application of pepper spray to plaintiffs, in effecting their arrest during any of the three incidents at issue in this case, constituted excessive force as defined in the instructions?

The answer was Yes, and all eight plaintiffs were awarded the token dollar, reflecting a determination that excessive force was used in all the three incidents. That means it has been legally determined that there was no need for the use of force, and the juror cannot now be heard

---

[4] Indeed, true service of Justice in the matter would yield a new trial for plaintiffs, on the issue of damages alone; see, e.g., *Spell v. McDaniel*, 604 F.Supp 641 (E.D.N.C. 1985), citing *Gasoline Products Co. v. Champlin Co.*, 51 U.S. 513, 515 (1931). As has repeatedly been said, however, including most recently by the Court herself, "This case was never about the money..."

1 to say that wasn't really what she and her colleagues meant. *James v. Southern California*
2 *Edison Co.*, 94 F.3d 651 (9th Cir. 1996); *Erikson v. Rowland*, 991 F.2d 803 (9th Cir. 1993).
3
4 **III. THE COURT MUST NOW CONSIDER PLAINTIFFS' EQUITABLE CLAIMS.**
5 Between the second and third trials, plaintiffs moved feverishly for an Injunction and
6 Declaratory Judgment — the latter to issue against P.O.S.T. as well as the defendants — and the
7 Court denied relief. It said then, that neither an Injunction or Declaratory Judgment could lie in
8 the absence of a jury verdict in plaintiffs' favor; but now we have a verdict, plainly vindicating
9 the plaintiffs claims, and removing the qualification on the opinion of the Court of Appeals. The
10 Court said, at the time, "The traditional test for injunctive relief is actual success on the merits,
11 irreparable injury, and inadequacy of legal remedies," citing *Walters v. Reno*, 145 F.3d 1032,
12 1048 (9th Cir. 1988).
13 Now we have had 'actual success' on the merits, amounting to a determination which
14 vindicates the Court of Appeals' observation that "the pepper spray was unnecessary to subdue,
15 remove or arrest the protesters", and cements the constitutional violation which arises when the
16 rule of necessity is broken. The violation of rights satisfies the requirement of 'irreparable injury
17 for which there is no adequate remedy at law." *Allee v. Medrano*, 416 U.S. 804, 815 (1974);
18 *Lewis v. Casey*, 116 S.Ct 2174 (1996), leaving only the question of a 'likelihood of recurrence'
19 of the unconstitutional use of force, pursuant to defendants' policy, such that defendants and their
20 departments must be legally restrained. *City of Los Angeles v. Lyons, 461 U.S. 95 (19830; Allee*
21 *v. Medrano*, supra; etc.
22 Here there is no ready answer to this question. While, on the one hand, as noted, we have
23 apparent public statements on behalf of the defense that the verdict is no bar to their continuation
24 of the unconstitutional practice, and statements of both defendant Sheriffs in both trials that they
25 believe the practice is reasonable and "within policy." On the other, both departments ceased
26 and desisted from the practice after the lawsuit was filed, and — save for two quick repeats just
27 after the case was thrown out by Judge Walker, in 1998 — they have laid off for eight years. In
28

addition, Sheriff Philp himself has been reported to have said after the verdict that he had no intention of resuming a practice sure to land him back in Court....

So, 'go figure', as the young people say. The fact that police have ceased their illegal conduct will not normally make the case moot, since they can always start again. See, e.g., *Friends of the Earth v. Laidlaw Environmental Services,* 120 S.Ct 693, 709 (2000) (Defendants have "the formidable burden of showing that it is absolutely clear the.... wrongful behavior could not reasonably be expected to recur.") It is a little hard to imagine — especially at the reported price already exacted, let alone what plaintiffs would appear to safely have coming in the way of attorneys fees — that this Sheriff or either of the two defendant agencies will hurry to jump back into the same kettle of fish; but the question — together with the proper terms of a an order, and who it would apply to — must be addressed.[5]

Likewise, the need for Declaratory relief — clear enough to reverberate in the halls of the P.O.S.T. Commission and other pertinent venues — is also now made out, we believe; and, where it was also previously denied by the Court "in the absence of any judgment on the merits in plaintiffs favor," plaintiffs now renew that motion also.

WHEREFORE, this honorable Court is respectfully asked to deny defendants' motion for judgment as a matter of law or a New Trial in all respects, and to strike the juror affidavit submitted therewith; to convene — in the absence of some binding assurance from the defense

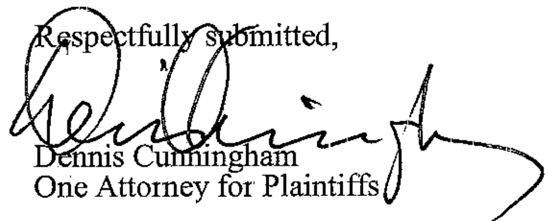
///

[5] Broadly stated, the question will obviously also involve distinguishing the circumstances here from those which caused denial of injunctive relief in *Lyons*, and extending the prohibition to cover any and all lockdown protesters in Humboldt County, per R.23, F.R.Civ P., but plaintiffs fail to see any real obstacles on either of these points.

1 that the practice is abolished — a proceeding to determine plaintiffs' right to injunctive
2 protection against any continuation of defendants' pepper spray policy; to issue a further
3 Judgment herein, declaring that policy unconstitutional; and to grant such other and further relief
4 as may be deemed just and appropriate in the premises.

5 DATED: May 28, as of
6 May 31, 2005

Respectfully submitted,

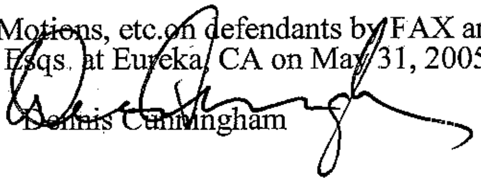


7 Dennis Cunningham
8 One Attorney for Plaintiffs

9
10
11
12

13 CERTIFICATE

14 I certify that I served the within Post-Trial Motions, etc. on defendants by FAX and mailing a copy Nancy Delaney and Wm. Mitchell, Esqs. at Eureka, CA on May 31, 2005.



15
16 Dennis Cunningham

17
18
19
20
21
22
23
24
25
26
27
28