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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,

Defendants.

Case No. C-97-3989-SI

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT BOUZA
***FEDERAL RULES OF EVIDENCE* §§702, 704**

Date: March 29, 2005
Time: 3:30p.m..
Place: Ctrm. 10, 19th Floor

Trial Date: April 11, 2005

I. INTRODUCTION

Plaintiffs' hereby respond to defendants' motion in limine to exclude the testimony of police practices expert Anthony Bouza. Defendants make a number of attacks against Mr. Bouza which are mostly inaccurate and all insufficient to disqualify Chief Bouza from serving as an

expert witness under *Federal Rules of Evidence §§ 702* and *704*. Defendants' motion is without merit.

II. DEFENDANTS MAKE INACCURATE ASSERTIONS REGARDING *FRE § 702* TO AID THEIR UNFOUNDED ATTACKS ON MR. BOUZA'S QUALIFICATIONS.

Defendants argue that Chief Bouza is not qualified to serve as a witness under *FRE § 702*. *Motion In Limine to Exclude Testimony of Plaintiffs' Expert Bouza (F.R.E. § 702)*, p.7:3-5. Defendants challenge plaintiffs' witness in several regards, arguing that his testimony should be barred because: (1) he has no experience regarding the use of force in question, *Dfts'*, p.5:21-22; (2) Mr. Bouza was not provided with adequate materials to render an opinion, *Dfts'*, p.11:3; (3) he did not remember the case of *Graham v. Connor* by name and therefore does not know the applicable standard, *Dfts'*, p.1:8-9; and (4) his opinion is unreliable because he disagrees with the jury's verdict in *Forrester v. City of San Diego*, *Dfts'*, p.2:4-6. Plaintiffs will first show that Mr. Bouza is qualified to serve and then refute each of defendants' contentions.

A. MR. BOUZA'S VAST KNOWLEDGE AND EXPERIENCE OF POLICE WORK, ADVANCED STUDY AND PROLIFIC AUTHORSHIP GIVE HIM SPECIALIZED KNOWLEGE THAT WILL ASSIST THE TRIER OF FACT.

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Federal Rules of Evidence* § *702*

Police practices experts are commonly used to assist juries with the thorny and increasingly specialized issues of police work, including the use of force.[1] Plaintiffs' expert witness, Chief

[1] See, e.g. Avery, Rudovsky & Blum, "Police Misconduct: Law and Litigation" (2001) Chapter 11, 11:28. "The use of expert testimony regarding proper police practices is now regularly entertained by the courts....In view of the increasing professionalization of police work which has taken place over the last several years, there can be little doubt that expert testimony would assist jurors in understanding evidence or determining facts at issue in most police misconduct cases. Utility of expert testimony in understanding police operations is evident from the training which police officers themselves are given to prepare police officers for their jobs...to the extent such specialized

Anthony Bouza, has 35 years of experience in law enforcement, ranging from patrolman to police chief. See *Curriculum Vitae,* attached as *Exhibit A.* Mr. Bouza is a prolific author on police practices and has served or is serving as an expert in over 40 cases. See *Curriculum Vitae* attached as *Exhibit A* and *Bouza Deposition Transcript,* p.110:9-10.

In his capacity as a law enforcement officer Chief Bouza has presided over many protests involving student, racial, anti-war, and labor issues, where various tactics were employed including civil disobedience, sit-ins, and violent strikes. *Bouza*, pp.126-128. His experience responding to nonviolent civil disobedience and his knowledge of police practice and policy at all levels, in departments throughout the United States, more than qualifies him to give opinions on all aspects of the use of force question presented here.

Police practices experts routinely form opinions and draw conclusions from their experience with and knowledge of generally accepted police procedures and the standards of other police departments and professional organizations.[2] Courts have upheld this practice as a reliable method for police practices experts. *U.S. v. Alatorre*, 222 F.3d 1098, 1104 (9th Cir. 2000) (accepting expert testimony of customs service agent on narcotics smuggling and sale based on twelve years experience, specialized training and extensive knowledge as a result of his work as a case agent and in other related capacities). This is precisely where plaintiffs' expert culls his qualifications and his conclusion as to defendants' actions.[3]

B. DEFENDANTS' IMPROPERLY INVOKE THE COURT'S "GATEKEEPING" ROLE IN THEIR EFFORT TO EXCLUDE THE TESTIMONY OF CHIEF BOUZA.

The court must act in a "gatekeeping" role to insure an expert's testimony is reliable and relevant. *Daubert v. Merrel-Dow Pharmaceuticals, Inc*. 509 U.S. at 592 (1993). In *Daubert,* the Court suggested guidelines for trial courts when determining the reliability of expert witnesses

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training is required to prepare police officers for their job, it is apparent that ordinary jurors unfamiliar with police work would be assisted by expert testimony in resolving questions of the appropriateness of police behavior.")

[2] See, e.g., Avery, Rudovsky & Blum, "Police Misconduct: Law and Litigation" (2001), Chapter 11: 11-33.

[3] Plaintiffs will also demonstrate Chief Bouza's knowledge of the law regarding reasonableness under *Graham v. Connor* and its progeny.

but stressed that in each case the judge should exercise discretion determining what criteria it uses to assess the reliability of the underlying principles and methods on which an expert relies. *Daubert*, 509 U.S. at 593-597. A court's "gatekeeping" role is not limited to "scientific" testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). "Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.' This condition goes primarily to relevance." *Daubert*, 509 U.S. at 591.

1. MR. BOUZA HAS EXPERIENCE WITH THE PARTICULAR USE OF FORCE IN QUESTION.

Defendants' have two significant flaws in their argument against Chief Bouza giving opinions about the uses of force involved in this case: First, that "none of his experience or training has anything to do with the particular use of force in question." *Dfts'* 5:21-22. This assertion rests on defendants' disregard of Mr. Bouza's experience with civil disobedience protests cited above, and is therefore unfounded.

Second, defendants employ a faulty characterization of the three events at issue, where they claim that "the method of application was fully researched and determined to be in compliance with all applicable training, field use studies, and decisional law regarding the use of pain compliance." *Dfts'*, p.9:10-12.

Defendants proffered no evidence in either trial of training, research, case law or manufacturer's instructions on any occasion, ever, where pepper spray was administered on non-violent passively resisting suspects while restrained, or where it was applied via Q-tip across the eyelid and sometimes with officers prying open the eyes; nor was there evidence presented of trainings, research, or manufacturer's instructions where application was done by direct spray, within inches of a restrained suspect's face, into the eye socket and surrounding eye-area. Defendants' one-sided, own-best-light characterization denies the reality of pepper spray use in these incidents. Despite their attempts to squeeze the application here into some pre-determined acceptable use of force "matrix," defendants' and their counsel cannot evade the fact that the application in question was "novel," and unprecedented. *Dfts'*, p.9:10. Therefore defendants' plea to exclude an expert without the "experience or training...with the particular use of force in

question" seems impossible; no such expert exists. Defendants' cite no case law suggesting expert qualifications must be so narrowly drawn to the particularities of a case.

A Police Practices expert with scientific knowledge of pepper spray is not necessary. Plaintiffs' are not arguing about the long term effects of pepper spray or that it was only a matter of improper application; the question is more broadly, whether the infliction of violence or pain on nonviolent protestors committing minor infractions by pepper spray (or for that matter by baton, taser, gun or chokehold) is a reasonable use of force. That question does not require scientific knowledge of pepper spray. Rather it comes down once again to something neither side disputes; pepper spray causes extreme pain, fear, panic and restricted breathing ability and may have serious, long-term negative psychological effects depending on how it is used. See *Defendants' Trial Exhibit AA-4, p.3*, attached as *Exhibit B.*

Mr. Bouza has previously been designated as a use of force expert where the use of pepper spray was at issue. *Bouza,* pp.66-67; p.89:12-18. Additionally, he expressed more than adequate knowledge and experience with various forms of mace/sprays, including pepper spray at his deposition.[4] "Most of the departments that I've been connected to have had – have used these weapons: mace, chemical spray, lachrymose agents. I'm not an expert on the technical names of it, but we've routinely assigned them to officers, and they were used fairly frequently." *Bouza*, p.21:1-5; p.70:2-9.

In fact, exclusion of a police practices expert such as Mr. Bouza may constitute abuse of discretion by the trial judge. See e.g., *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993) (abuse of discretion to exclude police practices experts). Mr. Bouza's experience in the field with protest situations and with the use of force against suspects generally meets the requirement of specialized knowledge based on his skill, education and experience under *FRE § 702* for the circumstances and purposes of this case.

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[4] Familiar with officers' exposure to spray, 23:8-14; the manufacturers instructions regarding application, 31:7-11; purpose of distance in spraying, 31-32; harm of OC, 52-53:24-12; knowledgeable in Training Key regarding OC, 21:18-21 and 53:3-8; personal exposure to sprays, 68:14-21; methods of first aid regarding OC, pp.45-47.

2. CHIEF BOUZA WAS PROVIDED WITH ADEQUATE MATERIALS TO RENDER AN OPINION.

The materials provided to Mr. Bouza are sufficient to form a reliable opinion.[5] In the vast majority of cases, including use of force cases, there is almost never the benefit of near-complete video recordings, that being the case here plaintiffs' expert is provided with a version less biased then any piecemeal accounting both sides could jointly create. The extensive reliance on video for exactly what took place removes much argument and interpretation of the facts themselves and therefore presents a point of view that is not one-sided. If Mr. Bouza rendered an opinion on a one-sided factual narrative the proper remedy would be to impeach him. It is not grounds to exclude an expert witness; once again, defendants' fail to cite any points or authorities supporting their contention.

In fact, Mr. Bouza's opinions as an expert were based on a variety of perspectives. He was provided with the defendants' policies[6], the Pepper Spray Training Key and the videos, to be

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[5] Plaintiff's expert witness was provided with the following materials:

a) Plaintiffs Trial Brief 8/10/04
b) U.S. Court of Appeals dec. 1/11/02
c) U.S. Court of Appeals dec. 1/31/01
d) *San Francisco Examiner* article 10/31/97
e) Videos taken by Humboldt County Sheriffs Dept.
    (1) Scotia, CA. sit-in at Pacific Lumber offices 9/25/97
    (2) Bear Creek, Ca. Demonst. 10/3/97
    (3) Sit-in at Cong. Frank Riggs' office 10/16/97
f) Notes of testimony of Former Dep. Ch. Gary Philp 9/16/04
g) Notes of testimony of Former Sheriff Dennis Lewis 9/20/04
h) Notes of testimony of Dep. Daastol 9/20/04
i) Notes of testimony of Sam Neuwirth 9/15/04
j) Notes testimony of Pltff. Maya Portugal 9/16/04
k) Notes of testimony of Pltff Noel Tendick 9/15/04
l) Training Key #462 Use of Pepper Aerosol Restraint Spray (Oleoresin Capsicum or "OC".
m) Crowd Control Mgt + Civil Disob. Guidelines POST Nov. 1998

[6] Defendants attack Mr. Bouza alleging that he had not reviewed the departmental policies of defendants' before rendering his opinion. *Defts' Motion*, p.1:9-11. However, as Mr. Bouza stated at his deposition, "The policies emerge from the testimony of the administrators, from my knowledge that they were following the POST Board Guidelines, and the fact that the policies were IACP influenced. Totally familiar to me, totally predictable, and totally anticipatable.

"If I've committed a crime in anticipating what they would say – and they said everything I thought they would say – then you would be right. But the reality is that there were no surprises in their policies. And I did not receive them subsequent to the preparation of my report, but I anticipated what they would contain and was not surprised." *Bouza*, 44:7-19. "I have to confess I was a POST-certified officer in Minnesota and a member of the

sure he knows the defendants' point of view; the videotapes alone fully depict the facts and circumstances faced by the officers in the situations presented, and the officers' testimony from the second trial gave him their whole side of the story, and then some.

Defendants' falsely criticize, "[p]erhaps most troubling is Mr. Bouza's acknowledgement that most of his information concerning the approval and use of pepper spray in this case came from the Ninth Circuit's recitation of facts in *Headwaters I* and *Headwaters II"*– and therefore not only is his opinion one-sided but that he cannot be questioned as to the basis of his opinion supposedly because this Court has previously ruled the *Headwaters* decisions may not be referred to at trial. *Dfts'*, p.1:15-18. In addition to the mystery of why this is a problem, at all plaintiffs now wonder what is most troubling about defendants' attack on Chief Bouza, their attempts to obliterate the law of the case because of the Court's in limine ruling in the last trial, or defendants' complete disregard of Mr. Bouza's further response about the basis of his opinion. In fact, Mr. Bouza stated clearly to opposing counsel at his deposition, "So to say that I relied on that *principally* [the Ninth Circuit *Headwaters* opinions] for the facts would not be accurate." *Bouza*, p.80:21-23 (emphasis added). Over the objections of plaintiffs' counsel, Mr. Bouza addressed the question again at the close of his deposition.[7]

3. MR. BOUZA IS WELL-VERSED IN THE OBJECTIVE REASONABLENESS STANDARD REGARDING THE USE OF FORCE.

Defendants attack plaintiffs' expert because he failed to recall the *Graham* case by name, even where he demonstrated knowledge of relevant and current case law regarding the use of

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IACP, and have been through all of these high-sounding phrases – particularly flowery in this case, the learning domains." *Bouza*, 110:11-14.

[7] Q. "Did you assume the factual recitation in the Ninth Circuit opinion was a statement of undisputed facts?" Mr. Cunningham: "Asked and answered. But go ahead."

A: "I actually never assumed that. It looked comprehensive. It looked cogent. It looked insightful. It looked responsible and well written. And I liked reading it and felt I gained from reading it, but I wouldn't rely on it entirely.

"I need a variety of perspectives – the videotapes and other reports – to come to a conclusion that satisfies me about the case. And if you were to surprise me with some facts that I was not aware of that go counter to my view, that would shock me and rock me.

force by the appropriate standard.[8] *Dfts'*, p.1:8-9. Plaintiffs' expert frequently considered the risk of injury to officers and others as required under *Graham v. Connor* in his testimony despite Defendants' claims. See footnote 8, in particular "*the safety of or risk of injury to law enforcement and others*." Mr. Bouza frequently serves and qualifies as an expert witness where use of force is at issue, because he knows accepted policy and practice of law enforcement nation-wide. *Bouza*, p.112:2-11. At some point, he leaves the law to the lawyers.[9] Plaintiffs' expert has been consulted as an expert on at least 32 cases and is currently working as an expert witness in approximately 10 cases. See *Curriculum Vitae*, attached as *Exhibit A* and *Bouza*, p.110:9-10.

4. THERE IS NO CASE LAW UNDER THE *FRE § 702* THAT EXPERT WITNESSES MUST CONFORM THEIR OPINIONS TO THE DECISIONS OF EACH JUDGE AND JURY.

The Chief told counsel he disagrees with the decision in *Forrester v. City of San Diego*, where the Court of Appeals upheld a jury verdict which found the use of nunchukas on non-violent passively resisting protestors was reasonable. His honest feeling is, quite simply, that they got it wrong. Defendants cite no authority for their contention that an expert in his or her honest evaluation of the circumstances gauged from their experience, knowledge, and skill must comport with all decisions upholding such verdicts.

"So I have to remain open to new learnings, but I'm satisfied about this case and did not rely on any single document for my views of it." *Bouza*, 147:2-19.

[8] *Bouza*, p.35-36:23-9 and pp.150-151. And more specifically as to:
Force must be reasonable: p.13:11-15; p.35:2-5; p.36:15-20; p.55:4-11; p.58:11-17; p.59:9-19; pp.59-64; p.70:10-16; p.74:6-12; pp.85-86; p.98:2-25; p.102:18-25; p.103:3-21; p.108:3-15; p.122:1-3;
The availability of reasonable alternatives: pp.13-16; p.37:15-22; p.61:17-20, pp.62-64; p.74:6-17; pp.85-86; p.91:16-23; p.93:12-18; p.103:3-21; pp.105-108,
The safety of or risk of injury to law enforcement and others: pp.36-38; p.55:4-24; p.59:9-19, p.61:17-20, pp.62-64; p.74:6-17; p.55:4-11; p.71:7-14; p.75:9-13; p.78:15-22; p.86:7-24;
Severity of the crime: p.11:15-16;
Risk of flight: p.13:4-5; p.18:16-21; and
The exigency of the circumstances: pp.94-95; pp.130-133.

[9] Defendants' criticize plaintiffs' expert for a perceived lack of familiarity with the defendant entity written policies, POST Guidelines and the California Penal Code but none of these are relevant to the question of reasonableness of force under *Graham* and so any lack of knowledge by plaintiffs' expert regarding them is of no consequence. The policy issue relevant here is the extent to which the unprecedented use of force in question was spawned by the defendant policymakers. This has been readily admitted to through the testimony of defendants and their subordinates.

In this connection, it should be pointed out that Defendants' have repeatedly and improperly invoked the Ninth Circuit decision in *Forrester* as meaning that *ipso jure* the use of "pain compliance" on non-violent protestors engaged in minor offenses is reasonable. The Ninth Circuit explicitly stated that it was not deciding that issue. In *Forrester*, the policy maker, Chief Burgeen, prohibited all officers from picking up the protestors, as a matter of policy, and required them to use so-called "pain compliance" in the form of nunchukas and carotid artery pressure holds to coerce the passive resisters to get up and move. *Forrester v. City of San Diego*, 25 F.3d 804, 805 (9th Cir. 1994). The jury in *Forrester* returned a verdict for the police defendants. The demonstrators appealed, and in turn the Ninth Circuit decided only that the jury's verdict was based on "substantial evidence," it did not decide that this type of pain compliance was, as a matter of policy, constitutional: "[W]e affirm the district court without deciding the constitutionally of the city's pain compliance policy." *Forrester*, 25 F.3d at 809. Furthermore, in arguing their point, defendants' ignore the law of the case and the distinction drawn by the Ninth Circuit in *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) that the inability to slowly increase and quickly alleviate pain disqualifies the pepper spray use in these incidents as legitimate "pain compliance." The court held, "it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances." *Headwaters*, 276 F.3d at 1130 citing *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000).

Defendants suggested rule that an expert's opinion must be tailored to each decision presents an additional problem. Although not the case here, what is an expert to do when faced with various circuit opinions that conflict? In every case that goes to trial, half of the experts are by necessity "wrong", this does not preclude such experts from being so designated, but it may wear at their credibility upon attempted impeachment by opposing counsel on cross examination. Furthermore, to follow defendants' argument to its logical conclusion defendants' expert would have to conclude that defendants use of pepper spray in this case was unreasonable because under the Ninth Circuit's *Headwaters* decision for the purposes of qualified immunity the actions of defendants' was clearly established as unreasonable, unnecessary and therefore excessive.

III. THERE IS NO BAR TO AN EXPERT OPINING AS TO THE ULTIMATE ISSUE UNDER *FEDERAL RULES OF EVIDENCE 704* AND SO MR. BOUZA MAY GIVE HIS OPINION THAT THE USE OF FORCE HERE WAS UNECESSARY AND UNREASONABLE.

[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *FRE §704(a)*. Defendants claim *FRE § 702* bars experts from rendering a legal conclusion on the ultimate issue of a case. Defendants cite two cases out of the Ninth Circuit to uphold their position and ignore the leading case in the circuit. *Dfts'*, p.2:15-18 and p.5:1-4 See *Davis v. Mason County*, 927 F.2d 1473 (9th Cir. 1991) (expert permitted to testify that sheriff was "reckless" in failing to train deputies and that there was a causal link between that recklessness and plaintiff's injuries.) Conveniently, they also leave out another decision to the contrary. See *Samples v. City of Atlanta*, 916 F.2d 1548 (11th Cir. 1990) (defense expert permitted to testify that shooting was "reasonable"). Not only is there no bar but it is proper for Mr. Bouza to render an opinion in particular as to the *necessity* for the use of force at the Scotia, Bear Creek and Rigg's events.

IV. CONCLUSION

Expert testimony is appropriate when the factual issue is one the trier of fact would not ordinarily be able to resolve without specialized assistance. *Hygh v. Jacobs*, 961 F.2d 359, 364 (2nd Cir. 1992). This is a question of the use of force unique to the nation and directed at its core to the humanity contemplated by the Fourth Amendment. The question of what it means for law enforcement to take this sharp turn in its use of force practice, torture like application of pain in order to get individuals to do what they want, balanced by the reasonableness of police action dictated by the necessity of the situation, is precisely the type of question presented to a jury which begs for the guidance of an expert witness; in fact, as the Court noted, it may well be just what this case needs and has been missing.

DATED: March 19, 2005

Respectfully submitted,

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OF COUNSEL:
W. GORDON KAUPP

_____

DENNIS CUNNINGHAM
Attorney for Plaintiffs

CERTIFICATE

I certify that I served the within Plaintiffs' Response to Defendants' Motion In Limine to Exclude Testimony of Plaintiffs' Expert Bouza on defendants by FAX and mailing a copy to Nancy Delaney and Wm. Mitchell, Esqs. At their offices in Eureka, CA on March 21, 2005.

Dennis Cunningham