

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHAPPELL,

Plaintiff,

v.

DICKERSON,

Defendant.

CASE NO. 1:096-cv-05576-AWI DLB-PC

FURTHER SCHEDULING ORDER

Telephonic Trial Confirmation

Hearing: March 9, 2009 at 3:00 p.m. in Courtroom 2 (AWI)

Jury Trial: May 19, 2009, at 8:30 a.m. in Courtroom 2 (AWI)

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on plaintiff’s amended complaint filed August 5, 1996, involving allegations that defendant Dickerson was deliberately indifferent to plaintiff’s safety and retaliated against plaintiff by encouraging other inmates to attack plaintiff at Corcoran State Prison. On March 14, 2007, the Court denied defendant’s motion for summary judgment and on June 14, 2007, the Court denied defendant’s motion for reconsideration. On June 18, 2007, the court issued a Second Scheduling Order scheduling a trial confirmation hearing for October 29, 2007 and a jury trial for December 4, 2007. On July 23, 2007, the Court continued the trial to January 8, 2008. On September 24, 2007, plaintiff filed a request for an extension of time in which to file his pretrial statement. On October 5, 2007, defendant filed a similar request. In light of both parties’ requests for an extension of the deadlines in this case, the Court issued an amended scheduling order for this litigation, continuing the trial to March 18, 2008, and setting the telephonic trial confirmation hearing for January 30, 2008.

1 On January 30, 2008, the Honorable Judge Ishii referred the matter back to the undersigned
2 for further proceedings, including the possibility of further limited discovery. On March 11, 2008,
3 a status conference was held before the undersigned, and limited discovery was re-opened. On
4 September 18, 2008, a further status conference was held; discovery in this matter is now resolved.
5 The Court issued a Scheduling Order setting this matter down for telephonic trial confirmation
6 hearing on January 15, 2009 and jury trial on February 18, 2009. These dates were subsequently
7 vacated to allow for settlement negotiations before the Honorable Judge Nandor Vadas on December
8 10, 2008. This matter has not settled, and accordingly, the court will, by this order, set a further
9 schedule for this litigation.

10 The parties are required to file pre-trial statements in accordance with the schedule set forth
11 herein. In addition to the matters already required to be addressed in the pre-trial statement in
12 accordance with Local Rule 16-281, plaintiff will be required to make a particularized showing in
13 order to obtain the attendance of witnesses. The procedures and requirements for making such a
14 showing are outlined in detail below. Plaintiff is advised that failure to comply with the procedures
15 set forth below may result in the preclusion of any and all witnesses named in his pre-trial statement.

16 At the trial of this case, plaintiff must be prepared to introduce evidence to prove each of the
17 alleged facts that support the claims raised in the lawsuit. In general, there are two kinds of trial
18 evidence: (1) exhibits and (2) the testimony of witnesses. It is plaintiff's responsibility to produce
19 all of the evidence to prove his case, whether that evidence is in the form of exhibits or witness
20 testimony. If plaintiff wants to call witnesses to testify, he must follow certain procedures to ensure
21 that the witnesses will be at the trial and available to testify.

22 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to Testify
23 Voluntarily - An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot
24 come to court unless this court orders the warden or other custodian to permit the witness to be
25 transported to court. This court will not issue such an order unless it is satisfied that: (a) the
26 prospective witness is willing to attend; and (b) the prospective witness has actual knowledge of
27 relevant facts.

28 A party intending to introduce the testimony of incarcerated witnesses who have agreed

1 voluntarily to attend the trial must serve and file concurrent with the pre-trial statement a written
2 motion for a court order requiring that such witnesses be brought to court at the time of trial. The
3 motion must: (1) state the name, address, and prison identification number of each such witness; and
4 (2) be accompanied by declarations showing that each witness is willing to testify and that each
5 witness has actual knowledge of relevant facts. The motion should be entitled “Motion for
6 Attendance of Incarcerated Witnesses.”

7 The willingness of the prospective witness can be shown in one of two ways: (1) the party
8 himself can swear by declaration under penalty of perjury that the prospective witness has informed
9 the party that he or she is willing to testify voluntarily without being subpoenaed, in which
10 declaration the party must state when and where the prospective witness informed the party of this
11 willingness; or (2) the party can serve and file a declaration, signed under penalty of perjury by the
12 prospective witness, in which the witness states that he or she is willing to testify without being
13 subpoenaed.

14 The prospective witness’s actual knowledge of relevant facts can be shown in one of two
15 ways: (1) if the party has actual firsthand knowledge that the prospective witness was an eyewitness
16 or an ear-witness to the relevant facts (i.e., if an incident occurred in plaintiff’s cell and, at the time,
17 plaintiff saw that a cellmate was present and observed the incident, plaintiff may swear to the
18 cellmate’s ability to testify), the party himself can swear by declaration under penalty of perjury that
19 the prospective witness has actual knowledge; or (2) the party can serve and file a declaration signed
20 under penalty of perjury by the prospective witness in which the witness describes the relevant facts
21 to which the prospective witness was an eye- or ear-witness. Whether the declaration is made by the
22 party or by the prospective witness, it must be specific about the incident, when and where it
23 occurred, who was present, and how the prospective witness happened to be in a position to see or
24 to hear what occurred at the time it occurred.

25 The court will review and rule on the motion for attendance of incarcerated witnesses,
26 specifying which prospective witnesses must be brought to court. Subsequently, the court will issue
27 the order necessary to cause the witness’s custodian to bring the witness to court.

28 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or before**

1 **February 9, 2009. Oppositions, if any, must be filed on or before February 23, 2009.**

2 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to
3 Testify Voluntarily - If a party seeks to obtain the attendance of incarcerated witnesses who refuse
4 to testify voluntarily, the party should submit with his pre-trial statement a motion for the attendance
5 of such witnesses. Such motion should be in the form described above. In addition, the party must
6 indicate in the motion that the incarcerated witnesses are not willing to testify voluntarily.

7 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to
8 Testify Voluntarily - It is the responsibility of the party who has secured an unincarcerated
9 witness's voluntary attendance to notify the witness of the time and date of trial. No action need be
10 sought or obtained from the court.

11 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
12 Testify Voluntarily - If a prospective witness is not incarcerated, and he or she refuses to testify
13 voluntarily, the witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition, the party
14 seeking the witness's presence must tender an appropriate sum of money for the witness. Id. In the
15 case of an unincarcerated witness, the appropriate sum of money is the daily witness fee of \$40.00
16 plus the witness's travel expenses. 28 U.S.C. § 1821.

17 If plaintiff wishes to obtain the attendance of one or more unincarcerated witnesses who
18 refuse to testify voluntarily, plaintiff must first notify the court in writing of the name and location
19 of each unincarcerated witness. The court will calculate the travel expense for each unincarcerated
20 witness and notify plaintiff of the amount(s). Plaintiff must then, for each witness, submit a money
21 order made payable to the witness for the full amount of the witness's travel expenses plus the daily
22 witness fee of \$40.00. The subpoena will not be served upon the unincarcerated witness by the
23 United States Marshal unless the money order is tendered to the court. Because no statute authorizes
24 the use of public funds for these expenses in civil cases, the tendering of witness fees and travel
25 expenses is required even if the party was granted leave to proceed in forma pauperis.

26 **If plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse**
27 **to testify voluntarily, plaintiff must submit the money orders to the court no later than**
28 **February 23, 2009.** In order to ensure timely submission of the money orders, plaintiff should

1 notify the court of the names and locations of his witnesses, in compliance with step one, as soon
2 as possible.

3 The parties are advised that failure to file pre-trial statements as required by this order may
4 result in the imposition of appropriate sanctions, which may include dismissal of the action or entry
5 of default.

6 Finally, the court shall direct the Clerk's Office to provide the parties with consent/decline
7 forms. Within thirty days from the date of service of this order, the parties shall inform the court
8 whether they consent to or decline Magistrate Judge jurisdiction by filling out the forms and
9 returning them to the court.

10 Accordingly, the court HEREBY ORDERS as follows:

- 11 1. This matter is set for telephonic trial confirmation hearing before the Honorable
12 Anthony W. Ishii on **March 9, 2009 at 3:00 p.m.** in Courtroom 2;
- 13 2. This matter is set for jury trial before the Honorable Anthony W. Ishii on **May 19,**
14 **2009, at 8:30 a.m.** in Courtroom 2;
- 15 3. Counsel for defendant is required to arrange for the participation of plaintiff in the
16 telephonic trial confirmation hearing and to initiate the telephonic hearing at **(559)**
17 **499-5660;**
- 18 4. Plaintiff shall serve and file a pretrial statement as described in this order on or
19 before **February 9, 2009;**
- 20 5. Defendant shall serve and file a pretrial statement as described in this order on or
21 before **February 23, 2009;**
- 22 6. In addition to electronically filing their pretrial statement, defendant shall e-mail the
23 pretrial statement to: awiorders@caed.uscourts.gov;
- 24 7. If plaintiff intends to call incarcerated witnesses at time of trial, plaintiff shall serve
25 and file a motion for attendance of incarcerated witnesses as described in this order
26 on or before **February 9, 2009;**
- 27 8. The opposition to the motion for the attendance of incarcerated witnesses, if any,
28 shall be filed on or before **February 23, 2009 and;**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

9. If plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse to testify voluntarily, plaintiff must submit the money orders, as described in subsection 4 of this order, to the court on or before **February 23, 2009**.

IT IS SO ORDERED.

Dated: January 6, 2009

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE