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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LAWRENCE JOLIVET,

Plaintiff,

v.

M. HERNANDEZ, et al.,

Defendants.

CASE NO. 1:04-cv-05095 DLB PC

PRETRIAL ORDER

Jury Trial: May 12, 2009, at 9:00 a.m. in
Courtroom 9 (DLB)

Plaintiff Lawrence Jolivet is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This case is proceeding on Plaintiff’s amended complaint, filed June 26, 2006, against Defendants M. Hernandez, A. Guzman, and T. Shinault (“Defendants”) for excessive force in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment.

The parties have submitted pretrial statements, and on April 3, 2009, the Court held a telephonic trial confirmation hearing. Having reviewed the statements and the remainder of the file and having considered the issues raised at the telephonic trial confirmation hearing, the Court now issues the instant Pretrial Order.

I. Jurisdiction and Venue

The Court has subject matter jurisdiction over this federal civil rights action. 28 U.S.C. § 1331. Venue is proper because the conduct allegedly occurred in this judicial district.

II. Jury Trial

Both parties have demanded trial by jury.

1 **III. Facts¹**

2 A. Undisputed Facts

- 3 1. Since September 2, 1998, Plaintiff has been serving a prison sentence for second
4 degree robbery and assault with a firearm and has been in the custody of the
5 California Department of Corrections and Rehabilitation (CDCR).
6 2. On August 3, 2002, Plaintiff was incarcerated in California State Prison, Corcoran
7 (COR) in Corcoran, California and was housed in facility 3B, unit 3B03. Plaintiff
8 had a level IV classification score and was housed at the maximum security level.
9 3. At all times relevant to this action, Defendants Guzman, Shinault, and Hernandez
10 were employed by the California Department of Corrections and Rehabilitation
11 (CDCR) and worked at COR as correctional officers.
12 4. At approximately 12:58 p.m., on August 3, 2008, Plaintiff was seated at the 3B03
13 day room closest to the “C” section stairwell. At that time, officers Hernandez
14 and Shinault were completing a search of Plaintiff’s cell, 3B03-244 for
15 contraband. Officer Guzman was on the floor of 3B03 to collect the 12:30 p.m.
16 close custody slips. These slips recorded the inmate count in 3B03.

17 B. Disputed Facts:

- 18 1. Whether on August 3, 2002, Defendants used excessive force on Plaintiff in
19 violation of the Eighth Amendment.
20 2. Whether Plaintiff suffered any harm because of the alleged unconstitutional use of
21 force by Defendants.
22 3. Whether Plaintiff is entitled to punitive damages from Defendants.

23 C. Disputed Evidentiary Issues

24 Defendants do not anticipate any unusual evidentiary issues in this case.

25 //

26
27 ¹ Plaintiff did not set forth disputed facts in his pre-trial statement, and did not comply with Local Rule 16-
28 281 regarding his undisputed facts. The following facts are taken from Defendants’ pre-trial statement. The Court notes for the record that Plaintiff was provided with the requirements for filing a pre-trial statement by the Court in an order filed on September 17, 2008 and a subsequent order filed on February 2, 2009. (Docs. 41 and 53.)

1 D. Special Factual Information

2 None.

3 **IV. Relief Sought**

4 This is an action for monetary damages. In his amended complaint filed on June 26,
5 2006, Plaintiff states that he is seeking \$30,000.00 in damages from each defendant, general
6 damages according to proof, and punitive and exemplary damages set by the court according to
7 proof.

8 Defendants seek judgment of dismissal and costs of suit.

9 **V. Points of Law**

10 A. Section 1983

11 The Civil Rights Act under which this action was filed provides:

12 Every person who, under color of [state law] . . . subjects, or causes
13 to be subjected, any citizen of the United States . . . to the
14 deprivation of any rights, privileges, or immunities secured by the
Constitution . . . shall be liable to the party injured in an action at
law, suit in equity, or other proper proceeding for redress.

15 42 U.S.C. § 1983. The statute plainly requires that there be an actual connection or link between
16 the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff.

17 See Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S.
18 362 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a
19 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates
20 in another's affirmative acts or omits to perform an act which he is legally required to do that
21 causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th
22 Cir. 1978).

23 “Section 1983 . . . creates a cause of action for violations of the federal Constitution and
24 laws.” Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997) (internal quotations
25 omitted.) “To the extent that the violation of a state law amounts to the deprivation of a state-
26 created interest that reaches beyond that guaranteed by the federal Constitution, Section 1983
27 offers no redress.” Id.

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1 B. Eighth Amendment

2 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
3 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue” Hudson
4 v. McMillian, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim
5 is . . . contextual and responsive to contemporary standards of decency.” Id. (internal quotation
6 marks and citations omitted). The malicious and sadistic use of force to cause harm always
7 violates contemporary standards of decency, regardless of whether or not significant injury is
8 evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth
9 Amendment excessive force standard examines de minimis uses of force, not de minimis
10 injuries)). However, not “every malevolent touch by a prison guard gives rise to a federal cause
11 of action.” Id. at 9. “The Eighth Amendment’s prohibition of cruel and unusual punishments
12 necessarily excludes from constitutional recognition de minimis uses of physical force, provided
13 that the use of force is not of a sort ‘repugnant to the conscience of mankind.’” Id. at 9-10
14 (internal quotations marks and citations omitted).

15 “[W]henever prison officials stand accused of using excessive physical force in violation
16 of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was
17 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to
18 cause harm.” Id. at 7. “In determining whether the use of force was wanton and unnecessary, it
19 may also be proper to evaluate the need for application of force, the relationship between that
20 need and the amount of force used, the threat reasonably perceived by the responsible officials,
21 and any efforts made to temper the severity of a forceful response.” Id. (internal quotation
22 marks and citations omitted). “The absence of serious injury is . . . relevant to the Eighth
23 Amendment inquiry, but does not end it.” Id.

24 C. Punitive Damages

25 The plaintiff has the burden of proving what, if any, punitive damages should be awarded
26 by a preponderance of the evidence. NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 7.5
27 (2006). The jury must find that the defendants’ conduct was “motivated by evil motive or intent,
28 or . . . involves reckless or callous indifference to the federally protected rights of others.” Smith

1 v. Wade, 461 U.S. 30, 56 (1986).

2 **VI. Abandoned Issues**

3 None.

4 **VII. Witnesses**

5 The following is a list of witnesses that the parties expect to call at trial, including
6 rebuttal and impeachment witnesses. NO WITNESS, OTHER THAN THOSE LISTED IN THIS
7 SECTION, MAY BE CALLED AT TRIAL UNLESS THE PARTIES STIPULATE OR UPON
8 A SHOWING THAT THIS ORDER SHOULD BE MODIFIED TO PREVENT “MANIFEST
9 INJUSTICE.” Fed. R. Civ. P. 16(e); Local Rule 16-281(b)(10).

10 A. Plaintiff’s Witnesses

11 1. Plaintiff Lawrence Jolivet

12 B. Defendant’s Witnesses

13 1. Plaintiff Lawrence Jolivet;

14 2. Defendant T. Shinault;

15 3. Defendant M. Hernandez;

16 4. Defendant A. Guzman;

17 5. Officer S. A. Brown;

18 6. Officer L. N. Cordova;

19 7. Officer D. Rush;

20 8. Sergeant W. Stebner;

21 9. Medical Technical Assistant F. Lemos;

22 10. Dr. Hasadsri or his designee, expert witness;

23 11. Office N. Scaife;

24 12. Lieutenant M. J. Seifert;

25 13. Lieutenant A. F. Hernandez;

26 14. Lieutenant A. Diaz;

27 15. Officer A. M. Miller;

28 16. Dr. Hirokawa or his designee - expert witness;

1 17. Custodian of Plaintiff's correctional records, correctional case records
2 administrator CDCR for CSP-COR;

3 18. Custodian of Plaintiff's medical records, medical records administrator CDCR for
4 CSP-COR.

5 Defendants request that the custodians of records be permitted to authenticate documents
6 via declaration pertaining to Plaintiff's classification records and medical records as maintained
7 by CDCR. Defendants indicate that they intend to provide Plaintiff with copies of documents to
8 be introduced in evidence thirty days before trial. Plaintiff raised no objections. Accordingly,
9 Defendants are permitted to authenticate these documents via declaration by the custodians of
10 records.

11 **VIII. Exhibits**

12 The following is a list of documents or other exhibits that the parties expect to offer at
13 trial. NO EXHIBIT, OTHER THAN THOSE LISTED IN THIS SECTION, MAY BE
14 ADMITTED UNLESS THE PARTIES STIPULATE OR UPON A SHOWING THAT THIS
15 ORDER SHOULD BE MODIFIED TO PREVENT "MANIFEST INJUSTICE." Fed. R. Civ. P.
16 16(e); Local Rule 16-281(b)(11).

17 A. Plaintiff's Exhibits

18 None.

19 B. Defendant's Exhibits

- 20 1. Abstract of Judgment, Lawrence George Jolivet, Case No. TA035177, September
21 18, 1998;
- 22 2. Inmate Appeal log number 02-1504
- 23 3. Inmate appeal log number 03-1017
- 24 4. Inmate appeal log number 03-2913
- 25 5. Rules Violation Report (CDC 115) for incident of August 3, 2002, Log No. 3B-
26 02-08-003
- 27 6. Rules Violation Report (CDC 115) for incident of August 3, 2002, Log No. 3B-
28 02-08-003R

- 1 7. Crime/Incident Report (COR-03B-08-0418) prepared by Lieutenant A. Diaz dated
2 August 3, 2002 (5 pages)
- 3 8. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by
4 A. Guzman dated August 3, 2002 (3 pages)
- 5 9. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by
6 M. Hernandez dated August 3, 2002 (3 pages)
- 7 10. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by T.
8 Shinault dated August 3, 2002 (4 pages)
- 9 11. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by S.
10 A. Brown, dated August 3, 2002 (3 pages)
- 11 12. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by L.
12 N. Cordova dated August 3, 2002 (2 pages)
- 13 13. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by
14 D. Rush dated August 3, 2002 (2 pages)
- 15 14. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by
16 W. Stebner dated August 3, 2002 (2 pages)
- 17 15. Crime/Incident Report, Supplemental Report, (COR-03B-08-0418) prepared by
18 F. Lemos dated August 3, 2002 (2 pages)
- 19 16. Medical Report of Injury and Unusual Occurrence prepared by F. Lemos, August
20 3, 2002 (2 pages)
- 21 17. Medical Report of Injury and Unusual Occurrence prepared by F. Lemos, August
22 4, 2002 (1 page)
- 23 18. Plaintiff's classification records as maintained by CDCR
- 24 19. Plaintiff's medical records as maintained by CDCR, including but not limited to:
25 A. Physician's Orders maintained by the CDCR from January 1, 2002 to
26 December 31, 2002;
27 B. Physician's Progress Notes maintained by the CDCR from January 1, 2002
28 to December 31, 2002;

- 1 20. Diagram of facility 3B at COR
2 21. Photographs of facility 3B at COR
3 22. Declaration of Custodian of records, Correctional Case Records Administrator,
4 California Department of Corrections and Rehabilitation
5 23. Declaration of Custodian of Records, Medical Records Technician, California
6 Department of Corrections and Rehabilitation
7 24. PR-24 Side Baton

8 **IX. Discovery Documents To Be Used At Trial**

9 Transcript pages from Plaintiff's deposition taken May 1, 2008.

10 **X. Further Discovery or Motions**

11 Defendants intend to move in limine to exclude all medical records or medical opinion
12 testimony introduced by Plaintiff, because he is not an expert witness.

13 **XI. Stipulations**

14 Defendants will stipulate to their own undisputed facts.

15 **XII. Amendments/Dismissals**

16 None.

17 **XIII. Settlement Negotiations**

18 No settlement negotiations have occurred.

19 **XIV. Agreed Statement**

20 None.

21 **XV. Separate Trial Of Issues**

22 The punitive damages phase, if any, will be bifurcated.

23 **XVI. Impartial Experts - Limitation Of Experts**

24 Defendants anticipate calling Dr. Hasadsri and Dr. Hirokawa, or their designees, as
25 medical expert witnesses.

26 **XVII. Attorneys' Fees**

27 Plaintiff is proceeding pro se and is not entitled to attorney's fees. If defendants prevail,
28 they will seek reasonable attorneys' fees and costs as permitted by statute.

1 **XVIII. Further Trial Preparation**

2 A. Motions In Limine

3 1. Hearing and Briefing Schedule

4 Any party may file a motion in limine. The purpose of a motion in limine is to establish
5 in advance of the trial that certain evidence should not be offered at trial. Although the Federal
6 Rules do not explicitly provide for the filing of motions in limine, the Court has the inherent
7 power to hear and decide such motions as a function of its duty to expeditiously manage trials by
8 eliminating evidence that is clearly inadmissible for any purpose. Luce v. United States, 469
9 U.S. 38, 41 n. 4 (1984); Jonasson v. Lutheran Child and Family Services, 115 F. 3d 436, 440 (7th
10 Cir. 1997). The Court will grant a motion in limine, and thereby bar use of the evidence in
11 question, only if the moving party establishes that the evidence clearly is not admissible for any
12 valid purpose. Id.; Hawthorne Partners v. AT & T Technologies, Inc., 831 F. Supp. 1398, 1400
13 (N.D. Ill. 1993).

14 Any motions in limine must be served on the other party, and filed with the Court, by
15 **April 28, 2009**. Any motion in limine must clearly identify the nature of the evidence that the
16 moving party seeks to prohibit the other side from offering at trial.

17 Any opposition to a motion in limine must be served on the other party, and filed with the
18 Court, by **May 5, 2009**.

19 If any party files a motion in limine, the Court will address the motion(s) the morning of
20 trial.

21 Whether or not a party files a motion in limine, that party may still object to the
22 introduction of evidence during the trial.

23 2. Other

24 The parties are relieved of their obligation under Local Rule 16-285 to file trial briefs.
25 The Court will prepare the verdict form, which the parties will have the opportunity to review on
26 the morning of trial. If the parties wish to submit a proposed verdict form, they must do so on or
27 before **May 5, 2009**.

28 Defendants shall file proposed jury instructions as provided in Local Rule 51-163 on or

1 before **May 5, 2009**. Defendants are only required to file proposed jury instructions relating to
2 the substantive law underlying this action. If plaintiff wishes to file proposed jury instructions,
3 he must do so on or before **May 5, 2009**.

4 In selecting proposed instructions, the parties shall use Ninth Circuit Model Civil Jury
5 Instructions to the extent possible. All jury instructions must be submitted in duplicate: One set
6 will indicate which party proposes the instruction, with each instruction numbered or lettered,
7 and containing citation of supporting authority, and the customary legend, i.e., “Given, Given as
8 Modified, or Refused,” showing the Court’s action, with regard to each instruction. One set will
9 be an exact duplicate of the first, except it will not contain any identification of the party offering
10 the instruction or supporting authority or the customary legend of the Court's disposition.

11 Defendants shall provide the Court with a copy of their proposed jury instructions via e-mail at:
12 dlrborders@caed.uscourts.gov.

13 Proposed voir dire questions, if any, shall be filed on or before **May 5, 2009**. Local Rule
14 47-162.

15 The parties may serve and file a non-argumentative, brief statement of the case which is
16 suitable for reading to the jury at the outset of jury selection on or before **May 5, 2009**. The
17 Court will consider the parties’ statements but will draft its own statement. The parties will be
18 provided with the opportunity to review the Court’s prepared statement on the morning of trial.

19 The original and two copies of all trial exhibits along with exhibit lists shall be submitted
20 to Courtroom Deputy Mamie Hernandez no later than **May 5, 2009**. All of plaintiff’s exhibits
21 shall be pre-marked with the prefix “PX” and numbered sequentially beginning with 100 (e.g.,
22 PX-100, PX-101, etc.). All of defendants’ exhibits shall be pre-marked with the prefix “DX” and
23 numbered sequentially beginning with 200 (e.g., DX-200, DX 201, etc.).

24 **XIX. Objections to Pretrial Order**

25 Any party may file and serve written objections to any of the provisions of this Order on
26 or before **April 28, 2009**. Such objections shall specify the requested modifications, corrections,
27 additions or deletions.

28 //

1 **XX. Miscellaneous Matters**

2 1. Plaintiff's Motion For Attendance of Incarcerated Witnesses

3 Plaintiff had filed a motion for attendance of incarcerated witnesses on March 2, 2009.
4 During the telephonic trial conference hearing, Plaintiff indicated that he would like three
5 incarcerated witnesses to testify on his behalf: R. Owens, J-13699, Caldwell, P-45645, and T.
6 Reed, H-42220. Plaintiff had yet to communicate with any of these individuals. Defendants
7 stated that Caldwell is a parolee. The Court ordered that Defendants help determine the location
8 of Owens and Reed and relay this information to Plaintiff. Plaintiff would then be responsible
9 for communicating with these incarcerated individuals and determining 1) whether they would be
10 willing to testify on Plaintiff's behalf and 2) if they had any knowledge of relevant facts in this
11 matter. If Plaintiff wishes these incarcerated individuals to appear as witnesses, Plaintiff must
12 submit declarations in support of his motion by **April 24, 2009**. The Court will not direct the
13 transport of any incarcerated witnesses unless the Court is satisfied that each witness is willing to
14 attend and has actual knowledge of relevant facts.

15 2. Appointment of Counsel

16 Plaintiff at the telephonic trial conference hearing made a request for appointment of
17 counsel. The United States Supreme Court has ruled that federal courts lack authority to require
18 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States District Court
19 for the Southern District of Iowa, 490 U.S. 296, 298, 109 S. Ct. 1814, 1816 (1989). In certain
20 exceptional circumstances, the Court may request the voluntary assistance of counsel pursuant to
21 28 U.S.C. § 1915(e)(1). Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997). Without a
22 reasonable method of securing and compensating counsel, this Court will seek volunteer counsel
23 only in the most serious and exceptional cases. In determining whether "exceptional
24 circumstances exist, the district court must evaluate both the likelihood of success of the merits
25 [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the
26 legal issues involved." Id. (internal quotation marks and citations omitted).

27 In the present case, the Court does not find the required exceptional circumstances. See
28 Rand, 113 F.3d at 1525. As stated in the telephonic trial confirmation hearing, Plaintiff's request

1 for counsel is denied.

2 ***

3 FAILURE TO COMPLY WITH ALL PROVISIONS OF THIS ORDER MAY BE GROUNDS
4 FOR THE IMPOSITION OF SANCTIONS, INCLUDING POSSIBLE DISMISSAL OF THIS
5 ACTION OR ENTRY OF DEFAULT, ON ANY AND ALL COUNSEL AS WELL AS ON
6 ANY PARTY WHO CAUSES NON-COMPLIANCE WITH THIS ORDER.

7
8 IT IS SO ORDERED.

9 Dated: April 13, 2009

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE