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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

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9 ANTONIO C. BUCKLEY, CASE NO. 1:04-cv-05688-LJO-GBC PC

10 Plaintiff,

**SECOND SCHEDULING ORDER**

11 v.

12 ALAMEIDA, et al.,

**ORDER DIRECTING CLERK'S OFFICE TO  
SEND LOCAL RULE 281 TO PLAINTIFF  
AND CONSENT FORM TO PARTIES**

13 Defendants.

14 Telephonic Trial Confirmation

15 Hearing: April 11, 2013 at 8:30 a.m. in  
Courtroom 4

16 Jury Trial: May 21, 2013, at 8:30 a.m. in  
17 / Courtroom 4

18  
19 **I. Procedural History**

20 Plaintiff Antonio Cortez Buckley ("Plaintiff") is a state prisoner proceeding pro se in this  
21 civil rights action pursuant to 42 U.S.C. § 1983. At the times relevant to this complaint, Plaintiff  
22 was incarcerated at California Correctional Institution (CCI), in Tehachapi, California. Doc. 126-2  
23 at 12 (Def.'s Undisputed Facts). On September 29, 2003, Plaintiff filed the original complaint. Doc.  
24

25 1. This action now proceeds under the Third Amended Complaint, filed on March 23, 2007, and the  
26 following claims and defendants are proceeding to trial: 1) Defendants Reed, Mack and Traynham  
27 for allegedly placing Plaintiff in a cell that was covered in feces; and 2) Defendants Chappel and  
28 Barker for violation of Plaintiff's First Amendment rights by allegedly confiscating Plaintiff's

1 menorah and candles. Doc. 153.

2 Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court will, by this order,  
3 set a further schedule for this litigation. The parties are required to file pre-trial statements in  
4 accordance with the schedule set forth herein. In addition to the matters already required to be  
5 addressed in the pre-trial statement in accordance with Local Rule 281, Plaintiff will be required to  
6 make a particularized showing in order to obtain the attendance of witnesses. The procedures and  
7 requirements for making such a showing are outlined in detail below. Plaintiff is advised that failure  
8 to comply with the procedures set forth below may result in the preclusion of any and all witnesses  
9 named in his pre-trial statement.

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

16 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to Testify  
17 Voluntarily - An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot  
18 come to court unless the Court orders the warden or other custodian to permit the witness to be  
19 transported to court. The Court will not issue such an order unless it is satisfied that: (a) the  
20 prospective witness is willing to attend; and (b) the prospective witness has actual knowledge of  
21 relevant facts.

22 A party intending to introduce the testimony of incarcerated witnesses who have agreed  
23 voluntarily to attend the trial must serve and file concurrent with the pre-trial statement a written  
24 motion for a court order requiring that such witnesses be brought to court at the time of trial. The  
25 motion must: (1) state the name, address, and prison identification number of each such witness; and  
26 (2) be accompanied by declarations showing that each witness is willing to testify and that each  
27 witness has actual knowledge of relevant facts. The motion should be entitled "Motion for  
28 Attendance of Incarcerated Witnesses."

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

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

19       The Court will review and rule on the motion for attendance of incarcerated witnesses,  
20 specifying which prospective witnesses must be brought to court. Subsequently, the Court will issue  
21 the order necessary to cause the witness's custodian to bring the witness to court.

22       **Motions for the attendance of incarcerated witnesses, if any, must be filed on or before**  
23 **February 11, 2013. Oppositions, if any, must be filed on or before February 25, 2013.**

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

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

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

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

20           **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse**  
21     **to testify voluntarily, Plaintiff must submit the money orders to the Court no later than March**  
22     **25, 2013.** In order to ensure timely submission of the money orders, Plaintiff should notify the Court  
23     of the names and locations of his witnesses, in compliance with step one, as soon as possible.

24           5.     Pre-Trial Statements Inclusion of Proposed Exhibits -

25           **In addition to providing a list of proposed exhibits for trial, both parties are to attach**  
26     **proposed exhibits at the end of their pre-trial statements. Failure to attach exhibits to pre-trial**  
27     **statement will result in such exhibits not being admitted unless the parties stipulate or upon**  
28     **a showing that omission of exhibits would result in "manifest injustice." Fed. R. Civ. P. 16(e);**

1       **Local Rule 281(b)(11).**

2       6.       Pre-Trial Statement and Agreed Statement -

3           Defense counsel is directed to contact Plaintiff to ascertain what, if any statements relevant  
4 to the evidence in this case can be agreed to. Any such agreed statements are to be submitted in each  
5 parties pre-trial statement.

6       7.       Failure to Submit Pre-Trial Statement -

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

10       8.       Consent/Decline Forms -

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

15           Accordingly, the Court HEREBY ORDERS as follows:

16       1.       This matter is set for telephonic trial confirmation hearing before the Honorable  
17           Gerald B. Cohn on **April 11, 2013, at 8:30 a.m.** in Courtroom 4;

18       2.       This matter is set for jury trial before the Honorable Gerald B. Cohn on **May 21,**  
19           **2013, at 8:30 a.m.** in Courtroom 4;

20       3.       Counsel for Defendants is required to arrange for the participation of Plaintiff in the  
21           telephonic pretrial conference and to initiate the telephonic hearing at **(559) 499-  
22           5680**;

23       4.       Plaintiff shall serve and file a pretrial statement with proposed exhibits as described  
24           in this order on or before **February 14, 2013**;

25       5.       Defendants shall serve and file a pretrial statement, agreed facts, and proposed  
26           exhibits as described in this order on or before **February 28, 2013**;

27       6.       In addition to electronically filing their pretrial statement, Defendants shall e-mail the  
28           pretrial statement to: [gbcorders@caed.uscourts.gov](mailto:gbcorders@caed.uscourts.gov);

1       7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve  
2       and file a motion for attendance of incarcerated witnesses as described in this order  
3       on or before **February 11, 2013**;  
4       8. The opposition to the motion for the attendance of incarcerated witnesses, if any,  
5       shall be filed on or before **February 25, 2013**;  
6       9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse  
7       to testify voluntarily, Plaintiff must submit the money orders, as described in  
8       subsection 4 of this order, to the Court on or before **March 25, 2013**; and  
9       10. The Clerk's Office shall send Plaintiff a copy of Local Rule 281.

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12 IT IS SO ORDERED.

13 Dated: December 11, 2012

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UNITED STATES MAGISTRATE JUDGE

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