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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

DONALD GLASS,

Plaintiff,

v.

A. K. SCRIBNER, et al.,

Defendants.

CASE NO. 1:04-cv-05953-AWI-DLB PC

**SECOND SCHEDULING ORDER**

**ORDER REQUIRING DEFENDANTS TO NOTIFY COURT WHETHER THEY CONSENT TO MAGISTRATE JUDGE JURISDICTION WITHIN THIRTY DAYS**

**ORDER DIRECTING CLERK’S OFFICE TO SEND LOCAL RULE 16-281 TO PLAINTIFF AND CONSENT FORM TO DEFENDANTS**

Telephonic Trial Confirmation

Hearing: December 21, 2009, at 3 p.m. in Courtroom 2 (AWI)

Jury Trial: February 23, 2010, at 8:30 a.m. in Courtroom 2 (AWI)

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Plaintiff Donald Glass (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s amended complaint against defendants Bailey, Beebe, Botello, Bryant, Case, Diaz, Kraay, Lawton, Dang, and Tracy. (Docs. 154, 155.) Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court will, by this order, set a further schedule for this litigation.

The parties are required to file pre-trial statements in accordance with the schedule set forth herein. In addition to the matters already required to be addressed in the pre-trial statement in accordance with Local Rule 16-281, Plaintiff will be required to make a particularized showing in

1 order to obtain the attendance of witnesses. The procedures and requirements for making such a  
2 showing are outlined in detail below. Plaintiff is advised that failure to comply with the procedures  
3 set forth below may result in the preclusion of any and all witnesses named in his pre-trial statement.

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

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

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

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

1 subpoenaed.

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

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

16           **Motions for the attendance of incarcerated witnesses, if any, must be filed on or before**  
17 **November 30, 2009. Oppositions, if any, must be filed on or before December 14, 2009.**

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

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

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

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

16           **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse**  
17 **to testify voluntarily, Plaintiff must submit the money orders to the Court no later than**  
18 **December 21, 2009.** In order to ensure timely submission of the money orders, Plaintiff should  
19 notify the Court of the names and locations of his witnesses, in compliance with step one, as soon  
20 as possible.

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

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

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1 Accordingly, the Court HEREBY ORDERS as follows:

- 2 1. This matter is set for telephonic trial confirmation hearing before the Honorable  
3 Anthony W. Ishii on **December 21, 2009 at 3:00 p.m.** in Courtroom 2;
- 4 2. This matter is set for jury trial before the Honorable Anthony W. Ishii on **February**  
5 **23, 2010, at 8:30 a.m.** in Courtroom 2;
- 6 3. Counsel for Defendants is required to arrange for the participation of Plaintiff in the  
7 telephonic trial confirmation hearing and to initiate the telephonic hearing at **(559)**  
8 **499-5660**;
- 9 4. Plaintiff shall serve and file a pretrial statement as described in this order on or  
10 before **November 30, 2009**;
- 11 5. Defendants shall serve and file a pretrial statement as described in this order on or  
12 before **December 14, 2009**;
- 13 6. In addition to electronically filing their pretrial statement, Defendants shall e-mail the  
14 pretrial statement to: awiorders@caed.uscourts.gov;
- 15 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve  
16 and file a motion for attendance of incarcerated witnesses as described in this order  
17 on or before **November 30, 2009**;
- 18 8. The opposition to the motion for the attendance of incarcerated witnesses, if any,  
19 shall be filed on or before **December 14, 2009**;
- 20 9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse  
21 to testify voluntarily, Plaintiff must submit the money orders, as described in  
22 subsection 4 of this order, to the Court on or before **December 21, 2009**;
- 23 10. The Clerk's Office shall send the parties consent/decline forms;
- 24 11. Within **thirty (30) days** from the date of service of this order, Defendants shall notify  
25 the Court whether they consent to or decline Magistrate Judge jurisdiction by filling  
26 out the enclosed forms and returning them to the Court; and

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