

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES JORDAN,
Plaintiff,
v.
R. CHAPNICK, et al.
Defendants.

CASE NO. 1:07-cv-0202-MJS (PC)

SECOND SCHEDULING ORDER

**ORDER DIRECTING CLERK'S OFFICE TO
SEND LOCAL RULE 281 TO PLAINTIFF**

Pretrial
Conference: December 16, 2011, at 9:30
a.m. in Courtroom 6 (MJS)

Jury Trial: January 26, 2012, at 8:30 a.m.
in Courtroom 6 (MJS)

Plaintiff James Jordan (“Plaintiff”) is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action seeking relief pursuant to 42 U.S.C. 1983.

Plaintiff initiated the action on February 7, 2007. (Compl., ECF No. 7.) It is proceeding against Defendant Chapnick on Plaintiff's Eighth Amendment claim for inadequate medical care at Pleasant Valley State Prison in 2005. (*Id.*) The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On February 15, 2011, the Magistrate Judge filed a Findings and Recommendation recommending that Defendant's Motion for Summary Judgment be granted in part and denied in part. (ECF No. 83.) The District Judge adopted the Magistrate Judge's Findings and Recommendations on March 23, 2011. (ECF No. 84.) Accordingly, pursuant to Rule 16(b) of the Federal Rules of Civil Procedure and the fact that both parties have now

1 consented to Magistrate Judge jurisdiction for all purposes, the Court here sets a further
2 schedule for this litigation.

3 The parties are required to file pretrial statements in accordance with the schedule
4 set forth herein. In addition to the matters already required to be addressed in the pretrial
5 statement in accordance with Local Rule 281, Plaintiff will be required to make a
6 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
8 that failure to comply with the procedures set forth below may result in the preclusion of
9 any and all witnesses named in his pretrial statement.

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

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

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

1 of relevant facts. The motion should be entitled "Motion for Attendance of Incarcerated
2 Witnesses."

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

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

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

26 **Motions for the attendance of incarcerated witnesses, if any, must be filed on**
27 **or before November 1, 2011. Oppositions, if any, must be filed on or before**
28 **December 1, 2011.**

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

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

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

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

28 **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses**

1 **who refuse to testify voluntarily, Plaintiff must submit the money orders to the Court**
2 **no later than December 1, 2011.** In order to ensure timely submission of the money
3 orders, Plaintiff should notify the Court of the names and locations of his witnesses, in
4 compliance with step one, as soon as possible.

5 The parties are advised that failure to file pretrial statements as required by this
6 Order may result in the imposition of appropriate sanctions, which may include dismissal
7 of the action or entry of default.

8 Accordingly, the Court HEREBY ORDERS as follows:

- 9 1. This matter is set for pretrial conference hearing before the Honorable
10 Michael J. Seng on **December 16, 2011, at 9:30 a.m.**, in Courtroom 6;
- 11 2. The parties should notify the Court by **December 1, 2011**, if they wish to
12 telephonically participate in the pretrial conference;
- 13 3. This matter is set for jury trial before the Honorable Michael J. Seng on
14 **January 26, 2012, at 8:30 a.m.** in Courtroom 6;
- 15 4. Plaintiff shall serve and file a pretrial statement as described in this Order on
16 or before **November 1, 2011**;
- 17 5. Defendant shall serve and file a pretrial statement as described in this Order
18 on or before **December 1, 2011**;
- 19 6. If Plaintiff intends to call incarcerated witnesses at the time of trial, Plaintiff
20 shall serve and file a motion for attendance of incarcerated witnesses as
21 described in this Order on or before **November 1, 2011**;
- 22 7. The opposition to the motion for the attendance of incarcerated witnesses,
23 if any, shall be filed on or before **December 1, 2011**;
- 24 8. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who
25 refuse to testify voluntarily, Plaintiff must submit the money orders, as
26 described in subsection 4 of this order, to the Court on or before **December**

1 **1, 2011; and**

2 9. The Clerk's Office shall send Plaintiff a copy of Local Rule 281.

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6 IT IS SO ORDERED.

7 Dated: August 3, 2011

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 /s/ Michael J. Seng
 UNITED STATES MAGISTRATE JUDGE