

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

BARRY LOUIS LAMON,  
Plaintiff,  
  
v.  
DERRAL ADAMS, et al.,  
Defendants.

Case No. 1:09-cv-00205-LJO-JLT PC

**SECOND SCHEDULING ORDER**

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

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

Telephonic Trial Confirmation Hearing: January 21,  
2016, at 8:30 a.m. in Bakersfield Courtroom 3 (JLT)

Jury Trial: March 8, 2016, at 8:30 a.m. in Fresno  
Courtroom 4 (LJO)

This action is proceeding to trial on Plaintiff's excessive force claim under the Eighth Amendment against Defendants Valdez, Lee, Ponce, Purvis, Baeri, and Buenos regarding an incident that took place on June 7, 2008, at California State Prison in Corcoran, California ("CSP-Cor"), as stated in Plaintiff's original Complaint.<sup>1</sup>

Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court now sets a further schedule for this litigation.

The parties are required to file pretrial statements in accordance with the schedule set

<sup>1</sup> All other Defendants and Plaintiff's claims other than this one have been dismissed. (See Doc. 111, 117, 118, 121, 268.)

1 forth herein. In addition to the matters already required to be addressed in the pretrial statement  
2 in accordance with Local Rule 281, Plaintiff will be required to make a particularized showing in  
3 order to obtain the attendance of witnesses. The procedures and requirements for making such a  
4 showing are outlined in detail below. Plaintiff is advised that failure to comply with the  
5 procedures set forth below may result in the preclusion of any and all witnesses named in his  
6 pretrial statement.<sup>2</sup>

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

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

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

25 The willingness of the prospective witness can be shown in one of two ways: (1) the party

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26  
27 <sup>2</sup> Notwithstanding the requirements set forth herein, it is within the Court's discretion to grant a motion for the  
28 attendance of incarcerated witnesses if the moving party has shown the witnesses have relevant information and the  
Court determines the witnesses' presence will substantially further the resolution of the case. *Wiggins v. County of Alameda*, 717 F.2d 466, 468 n.1 (9th Cir. 1983).

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

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

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

21 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or**  
22 **before November 2, 2015. Oppositions, if any, must be filed on or before December 8, 2015.**

23 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to  
24 Testify Voluntarily -- If a party seeks to obtain the attendance of incarcerated witnesses who  
25 refuse to testify voluntarily, the party should submit with his pretrial statement a motion for the  
26 attendance of such witnesses. Such motion should be in the form described above.

27 In addition, the party must indicate in the motion that the incarcerated witnesses are not  
28 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 incarcerated  
3 witness's voluntary attendance to notify the witness of the time and date of trial. No action need  
4 be 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  
8 party seeking the witness's presence must tender an appropriate sum of money for the witness.  
9 *Id.* In the case of an incarcerated witness, the appropriate sum of money is the daily witness  
10 fee of \$40.00 plus the witness's travel expenses. 28 U.S.C. § 1821.

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

21           **If Plaintiff wishes to have the Marshal serve any incarcerated witnesses who**  
22 **refuse to testify voluntarily, Plaintiff must submit the money orders to the Court no later**  
23 **than December 8, 2015. In order to ensure timely submission of the money orders, Plaintiff**  
24 **must notify the Court of the names and locations of his witnesses, in compliance with step**  
25 **one, on or before November 2, 2015.**

26           The parties are advised that failure to file pretrial statements as required by this order may  
27 result in the imposition of appropriate sanctions, which may include dismissal of the action or  
28 entry of default.

1 Accordingly, the Court **ORDERS**:

- 2 1. This matter is set for a telephonic trial confirmation hearing before United States  
3 Magistrate Judge Jennifer L. Thurston on **January 21, 2016, at 8:30 a.m.** in  
4 Courtroom 3 of the Bakersfield Division of this Court;
- 5 2. This matter is set for jury trial before United States District Judge Lawrence J.  
6 O'Neill on **March 8, 2016 at 8:30 a.m.** in Courtroom 4 of the Fresno Division of  
7 the Court;
- 8 3. Counsel for Defendant is required to arrange for the participation of Plaintiff in the  
9 telephonic trial confirmation hearing and to initiate the telephonic hearing at **(661)**  
10 **327-7858**;
- 11 4. Plaintiff shall serve and file a pretrial statement as described in this order on or  
12 before **November 2, 2015**;
- 13 5. Defendant shall serve and file a pretrial statement as described in this order on or  
14 before **December 8, 2015**;
- 15 6. In addition to electronically filing his pretrial statement, Defendant shall e-mail the  
16 pretrial statement to: ljoorders@caed.uscourts.gov;
- 17 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve  
18 and file a motion for attendance of incarcerated witnesses as described in this order  
19 on or before **November 2, 2015**;
- 20 8. The opposition to the motion for the attendance of incarcerated witnesses, if any,  
21 shall be filed on or before **December 8, 2015**;
- 22 9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse  
23 to testify voluntarily, Plaintiff must notify the Court of their names and locations on  
24 or before **November 2, 2015** and Plaintiff must submit the money orders, as  
25 described in subsection 4 of this order, to the Court on or before **December 8,**  
26 **2015**; and

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10. The Clerk’s Office shall send Plaintiff a copy of Local Rule 281.

IT IS SO ORDERED.

Dated: August 26, 2015

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE