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

LAMONT SHEPARD,  
Plaintiff,  
v.  
J. WISE,  
Defendant.

) Case No.: 1:09-cv-00809-BAM (PC)  
)  
) **SCHEDULING ORDER**  
)  
) **ORDER DIRECTING CLERK’S OFFICE TO**  
) **SEND LOCAL RULE 281 TO PLAINTIFF**  
)  
) Telephonic Trial Confirmation  
) Hearing: **June 13, 2017**, at 10:00 a.m.  
) in Courtroom 8 (BAM)  
)  
) Jury Trial: **August 29, 2017**, at 8:30 a.m.  
) in Courtroom 8 (BAM) (1-2 days)  
)  
)

Plaintiff Lamont Shepard appealed the district court’s summary judgment in favor of Defendant J. Wise on claim brought pursuant to 42 U.S.C. § 1983, alleging retaliation for reporting that a corrections officer used excessive force against him. On October 26, 2016, the Court of Appeals for the Ninth Circuit reversed the grant of summary judgment and remanded the matter for trial. The Ninth Circuit issued its mandate on December 19, 2016.

On February 7, 2017 at 10:00 a.m., the Court held a telephonic status conference, with Plaintiff appearing pro se, and Matthew Wilson, Office of the Attorney General appearing for Defendant Wise.

This action now proceeds to trial on Plaintiff’s claim that Defendant Wise retaliated against him in violation of the First Amendment. The parties have consented to the jurisdiction of a United States Magistrate Judge. (ECF Nos. 5, 109.)

Based on the discussion at the telephonic status conference, and pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court now sets a further schedule for this litigation. Separate orders will issue regarding a settlement conference, as discussed during the telephonic status.

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

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

13           1.       Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to Testify  
14 Voluntarily - An incarcerated witness who agrees voluntarily to attend trial to give testimony cannot  
15 come to court unless the Court orders the warden or other custodian to permit the witness to be  
16 transported to court. The Court will not issue such an order unless it is satisfied that the prospective  
17 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; and  
22 (2) be accompanied by declarations showing that each witness is willing to testify and that each  
23 witness has actual knowledge of relevant facts. The motion should be entitled "Motion for Attendance  
24 of Incarcerated Witnesses."

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

1 (2) the party can serve and file a declaration, signed under penalty of perjury by the prospective  
2 witness, in which the witness states that he or she is willing to testify without being subpoenaed.

3 The prospective witness's actual knowledge of relevant facts can be shown in one of two ways:

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

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

17 Motions for the attendance of incarcerated witnesses, if any, must be filed on or before **May**  
18 **12, 2017**. Oppositions, if any, must be filed on or before **May 26, 2017**.

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

24 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree to  
25 Testify Voluntarily - It is the responsibility of the party who has secured an unincarcerated witness's  
26 voluntary attendance to notify the witness of the time and date of trial. No action need be sought or  
27 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 refuse  
8 to testify voluntarily, Plaintiff must first notify the Court in writing of the name and location of each  
9 unincarcerated witness. The Court will calculate the travel expense for each unincarcerated witness  
10 and notify Plaintiff of the amount(s). Plaintiff must then, for each witness, submit a money order made  
11 payable to the witness for the full amount of the witness's travel expenses plus the daily witness fee of  
12 \$40.00. The subpoena will not be served upon the unincarcerated witness by the United States Marshal  
13 unless the money order is tendered to the Court. Because no statute authorizes the use of public funds  
14 for these expenses in civil cases, the tendering of witness fees and travel expenses is required even if  
15 the party was granted leave to proceed in forma pauperis.

16           If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse to testify  
17 voluntarily, Plaintiff must submit the money orders to the Court no later than **June 16, 2017**. In order  
18 to ensure timely submission of the money orders, Plaintiff must notify the Court of the names and  
19 locations of his witnesses, in compliance with step one, on or before **July 17, 2017**.

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

23           Accordingly, the Court HEREBY ORDERS as follows:

24           1.       This matter is set for telephonic trial confirmation hearing before the Honorable  
25 Barbara A. McAuliffe on **June 13, 2017**, at 10:00 a.m. in Courtroom 8.

26           2.       Parties appearing telephonically may do so by using the following dial-in number and  
27 passcode at the time set for the hearing: dial-in number 1-877-411-9748; passcode 3190866. Counsel  
28 for Defendants is required to arrange for the participation of Plaintiff in the telephonic trial

1 confirmation hearing by contacting the litigation coordinator at the institution where Plaintiff is  
2 housed;

3 3. This matter is set for jury trial before the Honorable Barbara A. McAuliffe on **August**  
4 **29, 2017**, at 8:30 a.m. in Courtroom 8;

5 4. Plaintiff shall serve and file a pretrial statement as described in this order on or before  
6 **May 12, 2017**;

7 5. Defendant shall serve and file a pretrial statement as described in this order on or  
8 before **May 26, 2017**. In addition to electronically filing their pretrial statement, Defendants shall e-  
9 mail the pretrial statement in Word format to: bamorders@caed.uscourts.gov;

10 6. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve and  
11 file a motion for attendance of incarcerated witnesses as described in this order on or before **May 12,**  
12 **2017**;

13 7. The opposition to the motion for the attendance of incarcerated witnesses, if any, shall  
14 be filed on or before **May 26, 2017**;

15 8. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse to  
16 testify voluntarily, Plaintiff must notify the Court of their names and locations on or before **June 16,**  
17 **2017**, and Plaintiff must submit the money orders, as described in subsection 4 of this order, to the  
18 Court on or before **July 17, 2017**; and

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

20  
21 IT IS SO ORDERED.

22 Dated: February 7, 2017

23 /s/ Barbara A. McAuliffe  
24 UNITED STATES MAGISTRATE JUDGE