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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 ESS'NN A. AUBERT,

11 Plaintiff,

12 vs.

13 C/O HECTOR ROBLES,

14 Defendant.  
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1:10-cv-00565-MJS-PC

**AMENDED SECOND SCHEDULING  
ORDER**  
(Doc. 43.)

Telephonic Trial Confirmation

Hearing: April 3, 2014, at 10:00 a.m. in  
Courtroom 6 (MJS)

Jury Trial: May 28, 2014, at 8:30 a.m. in  
Courtroom 6 (MJS)

19 Plaintiff Ess'nn A. Aubert, a state prisoner proceeding pro se and in forma pauperis,  
20 filed this civil rights action pursuant to 42 U.S.C. § 1983 on April 1, 2010. This action for  
21 damages is proceeding against defendant Correctional Officer Hector Robles ("Defendant"),  
22 for use of excessive force against Plaintiff, in violation of the Eighth Amendment of the United  
23 States Constitution. The parties have consented to Magistrate Judge jurisdiction and, in an  
24 order filed concurrently with this order, this case was reassigned to United States Magistrate  
25 Judge Michael J. Seng for all purposes within the meaning of 28 U.S.C. § 636(c), to conduct  
26 any and all further proceedings in the case, including trial and entry of final judgment. (Docs.  
27 16, 45.) Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the Court will, by this  
28 order, set a further schedule for this litigation.

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

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

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

19 A party intending to introduce the testimony of incarcerated witnesses who have agreed  
20 voluntarily to attend the trial must serve and file concurrent with the pretrial statement a written  
21 motion for a court order requiring that such witnesses be brought to court at the time of trial.  
22 The motion must: (1) state the name, address, and prison identification number of each such  
23 witness; and (2) be accompanied by declarations showing that each witness is willing to testify  
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25 <sup>1</sup> The Clerk of Court mailed Plaintiff a copy of Local Rule 281 on January 28, 2014. (Doc. 43-1.)

26 <sup>2</sup> Notwithstanding the requirements set forth herein, it is within the Court's discretion to grant a motion  
27 for the attendance of incarcerated witnesses if the moving party has shown the witnesses have relevant information  
28 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 and that each witness has actual knowledge of relevant facts. The motion should be entitled  
2 “Motion for Attendance of Incarcerated 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 has  
5 informed the party that he or she is willing to testify voluntarily without being subpoenaed, in  
6 which declaration the party must state when and where the prospective witness informed the  
7 party of this willingness; or (2) the party can serve and file a declaration, signed under penalty  
8 of perjury by the prospective witness, in which the witness states that he or she is willing to  
9 testify without being subpoenaed.

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

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

24 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or**  
25 **before February 25, 2014. Oppositions, if any, must be filed on or before March 25, 2014.**

26 2. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse to  
27 Testify Voluntarily - If a party seeks to obtain the attendance of incarcerated witnesses who  
28 refuse to testify voluntarily, the party should submit with his pretrial statement a motion for the

1 attendance of such witnesses. Such motion should be in the form described above. In addition,  
2 the party must indicate in the motion that the incarcerated witnesses are not willing to testify  
3 voluntarily.

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

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

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

24 **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who**  
25 **refuse to testify voluntarily, Plaintiff must submit the money orders to the Court no later**  
26 **than March 25, 2014. In order to ensure timely submission of the money orders, Plaintiff**  
27 **must notify the Court of the names and locations of his witnesses, in compliance with step**  
28 **one, on or before February 25, 2014.**

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

4 Accordingly, the Court HEREBY ORDERS as follows:

- 5 1. This matter is set for telephonic trial confirmation hearing before the Honorable  
6 Michael J. Seng on **April 3, 2014, at 10:00 a.m.** in Courtroom 6;
- 7 2. This matter is set for jury trial before the Honorable Michael J. Seng on **May 28,**  
8 **2014, at 8:30 a.m.** in Courtroom 6;
- 9 3. Counsel for Defendant is required to arrange for the participation of Plaintiff in  
10 the telephonic trial confirmation hearing and to initiate the telephonic hearing at  
11 **1-888-204-5984, code 4446176.**
- 12 4. Plaintiff shall serve and file a pretrial statement as described in this order on or  
13 before **February 25, 2014;**
- 14 5. Defendant shall serve and file a pretrial statement as described in this order on  
15 or before **March 25, 2014;**
- 16 6. In addition to electronically filing his pretrial statement, Defendant shall e-mail  
17 the pretrial statement to: **mjsorders@caed.uscourts.gov;**
- 18 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall  
19 serve and file a motion for attendance of incarcerated witnesses as described in  
20 this order on or before **February 25, 2014;**
- 21 8. The opposition to the motion for the attendance of incarcerated witnesses, if any,  
22 shall be filed on or before **March 25, 2014;**
- 23 9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who  
24 refuse to testify voluntarily, Plaintiff must notify the Court of their names and

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1 locations on or before **February 25, 2014**, and Plaintiff must submit the money  
2 orders, as described in subsection 4 of this order, to the Court on or before  
3 **March 25, 2014**.

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6 IT IS SO ORDERED.

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8 Dated: **February 10, 2014**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE

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