

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
10

11 ROBERTO M. GARCIA, JR.,

12 Plaintiff,

13 vs.

14 MATTHEW M. JUAREZ, JR.,

15 Defendant.  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1:12-cv-00750-AWI-EPG-PC

SCHEDULING ORDER FOLLOWING  
STATUS CONFERENCE HELD ON  
APRIL 26, 2016

**Settlement Conference:**

August 16, 2016

11:00 a.m.

Courtroom 10 (EPG)

**Confidential Settlement Conference**

**Statements Due:** August 9, 2016

**Telephonic Trial Confirmation Hearing:**

August 26, 2016 at 1:30 p.m.

Courtroom 2 (AWI)

**Jury Trial:**

January 17, 2017 at 8:30 a.m.

Courtroom 2 (AWI)

ORDER FOR CLERK TO SEND  
DEFENDANT A CONSENT/DECLINE  
FORM

26 **I. BACKGROUND**

27 Plaintiff, Roberto M. Garcia, Jr. ("Plaintiff") is a state prisoner proceeding *pro se* and *in*  
28 *forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. This action was filed

1 on May 8, 2012. (ECF No. 1.) This action now proceeds with the First Amended Complaint,  
2 against defendant Sergeant Matthew M. Juarez, Jr. (“Defendant”) for use of excessive force in  
3 violation of the Eighth Amendment.<sup>1</sup>

4 On December 8, 2014, Court issued a Discovery/Scheduling Order setting out deadlines  
5 in the case, including an Exhaustion Motion Filing Deadline of March 8, 2015; Deadline to  
6 Amend Pleadings of June 8, 2015; Deadline for Discovery, including filing of motions to  
7 compel, of August 8, 2015; and Dispositive Motion Deadline of October 19, 2015. (ECF No.  
8 32.) All of the deadlines in the Discovery/Scheduling Order have expired.

9 **II. STATUS CONFERENCE**

10 On April 26, 2016 at 9:45 a.m.,<sup>2</sup> a telephonic status conference was held before  
11 Magistrate Judge Erica P. Grosjean. Plaintiff appeared telephonically on his own behalf, and  
12 attorney Thomas P. Feher of LeBeau - Thelan, LLP appeared telephonically on behalf of  
13 Defendant. The parties discussed the status of this case, discovery issues, consent to Magistrate  
14 Judge jurisdiction, whether a settlement conference would be beneficial, and a trial schedule.

15 **A. Consent**

16 Plaintiff has consented to Magistrate Judge jurisdiction in this action under 28 U.S.C. §  
17 636(c). (ECF No. 35.) Defendant has not consented to or declined Magistrate Judge  
18 jurisdiction. Defendant is required to file notice of his consent or decline **no later than May 5,**  
19 **2016.**

20 **B. Settlement Conference**

21 A settlement conference was scheduled for **August 16, 2016 at 11:00 a.m.** in  
22 Courtroom 10 before Magistrate Judge Grosjean. The parties’ confidential settlement  
23 conference statements shall be due one week before the settlement conference, no later than  
24 **August 9, 2016.**

---

26 <sup>1</sup>On May 9, 2014, the Court issued an order dismissing all other claims and defendants from this  
27 action, for failure to state a claim. (ECF No. 19.)

28 <sup>2</sup> The hearing, which was scheduled for 9:30 a.m., was delayed due to issues connecting Plaintiff  
with the hearing.

1           **C.     Discovery**

2           On April 19, 2006 and April 22, 2016, the Court received Defendant's and Plaintiff's  
3 status reports of outstanding discovery issues. (ECF Nos. 66, 68.) Defendant did not raise any  
4 discovery issues. Plaintiff raised issues concerning the responses he received to interrogatories  
5 and requests for production of documents. The Court focused on the documents requested by  
6 Plaintiff pursuant to subpoenas issued to non-parties Agent M. Dunlop and CDCR.

7           Plaintiff informed the Court that CDCR had not provided any documents pursuant to  
8 the subpoena except those found in Plaintiff's C-File, and CDCR claimed that all of the other  
9 requested documents were privileged. The Court granted Plaintiff leave to file a motion to  
10 compel CDCR to produce the privileged documents, with explanation in the motion to compel  
11 why Plaintiff needs those documents and which documents Plaintiff believes are not privileged.

12           Plaintiff informed the Court that the U.S. Marshal was unable to serve the subpoena  
13 upon Agent I. Dunlop because the building where service was attempted was under  
14 construction, vacant of any businesses. The Court advised Plaintiff to send the Court a copy of  
15 the return of service he received from the U.S. Marshal, together with a motion for reissuance  
16 of the subpoena, to enable the Court to direct the Marshal to make a further attempt to serve  
17 Agent I. Dunlop.

18           **D.     Plaintiff's Motion for Counsel**

19           No ruling was made at the hearing on Plaintiff's motion for appointment of counsel,  
20 filed on April 22, 2016, and the motion remains pending. (ECF No. 67.)

21           **III.   TTCH and Jury Trial**

22           The Court set dates for a telephonic trial confirmation hearing (TTCH) and jury trial for  
23 this case before District Judge Anthony W. Ishii. The TTCH shall be held before Judge Ishii  
24 on **August 26, 2016 at 1:30 p.m.**, and jury trial before Judge Ishii shall commence on **January**  
25 **17, 2017 at 8:30 a.m.**

26           The parties are required to file pretrial statements in accordance with the schedule set  
27 forth herein. In addition to the matters already required to be addressed in the pretrial  
28 statement in accordance with Local Rule 281, Plaintiff will be required to make a particularized

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

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

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

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

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

1 of perjury by the prospective witness, in which the witness states that he or she is willing to  
2 testify without being subpoenaed.

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

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

18 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or**  
19 **before June 10, 2016. Oppositions, if any, must be filed on or before July 8, 2016.**

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

26 3. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Agree  
27 to Testify Voluntarily - It is the responsibility of the party who has secured an unincarcerated  
28

1 witness's voluntary attendance to notify the witness of the time and date of trial. No action  
2 need be sought or obtained from the Court.

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

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

19 **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who**  
20 **refuse to testify voluntarily, Plaintiff must submit the money orders to the Court no later**  
21 **than July 8, 2016. In order to ensure timely submission of the money orders, Plaintiff**  
22 **must notify the Court of the names and locations of his witnesses, in compliance with step**  
23 **one, no later than June 10, 2016.**

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

27 ///

28 ///

1 **IV. CONCLUSION**

2 Accordingly, the Court HEREBY ORDERS as follows:

- 3 1. On or before May 5, 2016, Defendant shall complete and submit the Court's  
4 form indicating whether Defendant consents to or declines Magistrate Judge  
5 jurisdiction;
- 6 2. A settlement conference is scheduled for **August 16, 2016 at 11:00 a.m.**, before  
7 Magistrate Judge Erica P. Grosjean in Courtroom 10 at the United States  
8 Courthouse, Sixth Floor, Courtroom 10, 2500 Tulare Street, Fresno, California;
- 9 3. Defense counsel shall appear at the settlement conference in person with full  
10 authority to negotiate and settle the case on any terms. Government entities may  
11 appear through litigation counsel only, but must have immediate access to the  
12 individual with settlement authority. The failure of any counsel, party or  
13 authorized person subject to this order to appear in person may result in the  
14 imposition of sanctions;
- 15 4. Plaintiff shall appear at the settlement conference in person. A Writ of habeas  
16 corpus *ad testificandum* shall be issued to transport Plaintiff to Court for the  
17 settlement conference.
- 18 5. Each party shall provide a Confidential Settlement Conference Statement to:

19  
20 Chambers of Magistrate Judge Erica P. Grosjean  
21 United States District Court  
22 2500 Tulare Street, Room 1501  
23 Fresno, California 93721

24 so they are received no later than **August 9, 2016**, and file a **Notice of**  
25 **Submission** of the Confidential Settlement Conference Statement with the Clerk  
26 of the Court (See L.R. 270(d)). Settlement statements **should not be filed** with  
27 the Clerk of the Court nor served on any other party. Settlement statements shall  
28 be clearly marked "CONFIDENTIAL" with the date and time of the settlement  
conference indicated prominently thereon. The confidential settlement statement

1 shall be **no longer than five pages** in length, typed or neatly printed, and  
2 include the following:

- 3 a. A brief statement of the facts of the case;
- 4 b. A brief statement of the claims and defenses, i.e., statutory or  
5 other grounds upon which the claims are founded; a forthright  
6 evaluation of the parties likelihood of prevailing on the claims  
7 and defenses; and a description of the major issues in dispute;
- 8 c. An estimate of the cost and time to be expended for further  
9 discovery, pretrial, and trial;
- 10 d. The relief sought;
- 11 e. The party's position on settlement, including present demands  
12 and offers and a history of past settlement discussions, offers, and  
13 demands; and
- 14 f. A brief statement of each party's expectations and goals for the  
15 settlement conference;

- 16 6. This matter is set for a telephonic trial confirmation hearing before the  
17 Honorable Anthony W. Ishii **August 26, 2016 at 1:30 p.m.** in Courtroom 2;
- 18 7. This matter is set for jury trial before the Honorable Anthony W. Ishii on  
19 **January 17, 2017 at 8:30 a.m.** in Courtroom 2;
- 20 8. Counsel for Defendant is required to arrange for the participation of Plaintiff in  
21 the telephonic trial confirmation hearing and to initiate the telephonic hearing at  
22 **(559) 499-5669**;
- 23 9. Plaintiff shall file and serve a pretrial statement as described in this order on or  
24 before **June 10, 2016**;
- 25 10. Defendant shall file and serve a pretrial statement as described in this order on  
26 or before **July 8, 2016**;
- 27 11. In addition to electronically filing the pretrial statement, Defendant shall e-mail  
28 the pretrial statement to: [awiorders@caed.uscourts.gov](mailto:awiorders@caed.uscourts.gov);



