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

MARQUES BUTLER,)	Case No.: 1:12-cv-01538-LJO-SAB (PC)
Plaintiff,)	SECOND SCHEDULING ORDER
v.)	ORDER DIRECTING CLERK’S OFFICE TO
R. WERN, et al.,)	SEND LOCAL RULE 281 TO PLAINTIFF
Defendants.)	<u>Telephonic Trial Confirmation Hearing</u> : March 24,
)	2016, at 8:30 a.m. in Courtroom 4 (LJO)
)	<u>Jury Trial</u> : May 3, 2016 at 8:30 a.m. in Courtroom 4
)	(LJO)
)	

Plaintiff Marques Butler is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

This action is proceeding against Defendants Stratton and Montano for use of excessive force in violation of the Eighth Amendment.¹ Accordingly to the allegations of the complaint,

Following the expiration of the dispositive deadline on March 19, 2015, this case is now ready to proceed to trial.

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

¹ Defendant Wern was dismissed from the action pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. (ECF No. 39.)

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

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

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

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

22 The willingness of the prospective witness can be shown in one of two ways: (1) the party
23 himself can swear by declaration under penalty of perjury that the prospective witness has informed
24 the party that he or she is willing to testify voluntarily without being subpoenaed, in which declaration
25 the party must state when and where the prospective witness informed the party of this willingness; or
26 (2) the party can serve and file a declaration, signed under penalty of perjury by the prospective
27 witness, in which the witness states that he or she is willing to testify without being subpoenaed.
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1 The prospective witness's actual knowledge of relevant facts can be shown in one of two ways:
2 (1) if the party has actual firsthand knowledge that the prospective witness was an eyewitness or an
3 ear-witness to the relevant facts (e.g., if an incident occurred in Plaintiff's cell and, at the time,
4 Plaintiff saw that a cellmate was present and observed the incident, Plaintiff may swear to the
5 cellmate's ability to testify), the party himself can swear by declaration under penalty of perjury that
6 the prospective witness has actual knowledge; or (2) the party can serve and file a declaration signed
7 under penalty of perjury by the prospective witness in which the witness describes the relevant facts to
8 which the prospective witness was an eye or ear witness. Whether the declaration is made by the party
9 or by the prospective witness, it must be specific about the incident, when and where it occurred, who
10 was present, and how the prospective witness happened to be in a position to see or to hear what
11 occurred at the time it occurred.

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

15 Motions for the attendance of incarcerated witnesses, if any, must be filed on or before
16 **January 26, 2016**. Oppositions, if any, must be filed on or before **February 9, 2016**.

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

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

26 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
27 Testify Voluntarily - If a prospective witness is not incarcerated, and he or she refuses to testify
28 voluntarily, the witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition, the party

1 seeking the witness's presence must tender an appropriate sum of money for the witness. Id. In the
2 case of an unincarcerated witness, the appropriate sum of money is the daily witness fee of \$40.00
3 plus the witness's travel expenses. 28 U.S.C. § 1821.

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

13 If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse to testify
14 voluntarily, Plaintiff must submit the money orders to the Court no later than **February 9, 2016**. In
15 order to ensure timely submission of the money orders, Plaintiff must notify the Court of the names
16 and locations of his witnesses, in compliance with step one, on or before **January 9, 2016**.

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

20 Finally, the Court shall direct the Clerk's Office to provide the parties with consent/decline
21 forms. On or before February 23, 2016, the parties shall inform the Court whether they consent to or
22 decline Magistrate Judge jurisdiction. The following is important information about scheduling and
23 trailing cases:

24 District Court Judges of the Fresno Division of the Eastern District of California now have the
25 heaviest caseload in the nation. As a result, each District Judge schedules multiple trials to begin on
26 each available trial date. Civil cases will trail and begin as soon as a courtroom is cleared. The law
27 requires that the Court give any criminal trial priority over civil trials or any other matter. A civil trial
28 set to begin while a criminal trial is proceeding will trail the completion of the criminal trial.

1 The Court cannot give advance notice of which cases will trail or for how long because the
2 Court does not know which cases actually will go to trial or precisely how long each will last. Once
3 your trial date arrives, counsel, parties and witnesses must remain on 24-hour-stand-by until a court
4 opens. Since continuance to a date certain will simply postpone, but not solve, the problem,
5 continuances of any civil trial under these circumstances will no longer be entertained, absent a
6 specific and stated finding of good cause. The Court will use its best efforts to mitigate the effect of
7 the foregoing and to resolve all cases in a timely manner.

8 One alternative is for the parties to consent to a United States Magistrate Judge conducting all
9 proceedings, including trial and entry of final judgment, pursuant to 28 U.S.C. § 28 U.S.C. 636(c),
10 Federal Rule of Civil Procedure 73, and Local Rule 305. The Eastern District Magistrate Judges, all
11 experienced former trial lawyers, use the same jury pool and same court facilities as United States
12 District Court Judges. Since Magistrate Judges do not conduct felony trials, they have greater
13 flexibility and schedule firm trial dates. Judgment entered by a United States Magistrate Judge is
14 appealable directly to the United States Court of Appeal for the Ninth Circuit. (While there are
15 scheduling benefits to consenting to Magistrate Judge jurisdiction, substantive rulings and decisions
16 will not be affected by whether a party chooses to consent or not.)

17 As another response to its large caseload, the Fresno Division of the Eastern District of
18 California is assigning cases, whenever possible, to Article III District Court Judges from around the
19 nation as Visiting Judges. Pursuant to the Local Rules, Appendix A, such reassignments will be
20 random, and the parties will receive no advance notice before their case is reassigned to an Article III
21 District Court Judge from outside of the Eastern District of California.

22 Accordingly, the Court HEREBY ORDERS as follows:

- 23 1. This matter is set for telephonic trial confirmation hearing before the Honorable
24 Lawrence J. O'Neill on March 24, 2016, at 8:30 a.m. in Courtroom 4;
- 25 2. This matter is set for jury trial before the Honorable Lawrence J. O'Neill on May 3,
26 2016, at 8:30 a.m. in Courtroom 4;
- 27 3. Counsel for Defendants is required to arrange for the participation of Plaintiff in the
28 telephonic trial confirmation hearing and to initiate the telephonic hearing at (559) 499-5680;

1 4. Plaintiff shall serve and file a pretrial statement as described in this order on or before
2 January 26, 2016;

3 5. Defendants shall serve and file a pretrial statement as described in this order on or
4 before February 9, 2016;

5 6. In addition to electronically filing their pretrial statement, Defendants shall e-mail the
6 pretrial statement to: ljoorders@caed.uscourts.gov;

7 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve and
8 file a motion for attendance of incarcerated witnesses as described in this order on or before January
9 26, 2016;

10 8. The opposition to the motion for the attendance of incarcerated witnesses, if any, shall
11 be filed on or before February 9, 2016;

12 9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse to
13 testify voluntarily, Plaintiff must notify the Court of their names and locations on or before January 9,
14 2016, and Plaintiff must submit the money orders, as described in subsection 4 of this order, to the
15 Court on or before February 9, 2016;

16 10. The Clerk's Office shall send the parties consent/decline forms;

17 11. On or before February 23, 2016, the parties shall notify the Court whether they consent
18 to or decline Magistrate Judge jurisdiction by filling out the enclosed forms and returning them to the
19 Court; and

20 12. The Clerk's Office shall send Plaintiff a copy of Local Rule 281.

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23 IT IS SO ORDERED.

24 Dated: August 21, 2015



UNITED STATES MAGISTRATE JUDGE