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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DWAYNE S. MONTGOMERY,
Plaintiff,
v.
I. SANCHEZ,
Defendant.

Case No. 1:13-cv-00247-LJO-DLB (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: October 29, 2015, at 8:30 a.m. in Courtroom 4 (LJO)

Jury Trial: December 8, 2015, at 8:30 a.m. in Courtroom 4 (LJO)

_____ /

Plaintiff Dwayne S. Montgomery, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 19, 2013. This action for damages is proceeding against Defendant I. Sanchez ("Defendant") for excessive force in violation of the Eighth Amendment. The events at issue occurred at Kern Valley State Prison in Delano, California, and arise out of Defendant Sanchez's alleged use of pepper spray on or about August 14, 2010.

1 The Court denied summary judgment as to Defendant Sanchez on June 1, 2015.¹

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

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

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

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

24 ¹ The Court granted summary judgment in favor of Defendants Smith and Duncan, and they have been dismissed from
25 this action.

26 ² Notwithstanding the requirements set forth herein, it is within the Court's discretion to grant a motion for the
27 attendance of incarcerated witnesses if the moving party has shown the witnesses have relevant information and the
28 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 A party intending to introduce the testimony of incarcerated witnesses who have agreed
2 voluntarily to attend the trial must serve and file concurrent with the pretrial statement a written
3 motion for a court order requiring that such witnesses be brought to court at the time of trial. The
4 motion must: (1) state the name, address, and prison identification number of each such witness;
5 and (2) be accompanied by declarations showing that each witness is willing to testify and that
6 each witness has actual knowledge of relevant facts. The motion should be entitled “Motion for
7 Attendance of Incarcerated Witnesses.”

8 The willingness of the prospective witness can be shown in one of two ways: (1) the party
9 himself can swear by declaration under penalty of perjury that the prospective witness has
10 informed the party that he or she is willing to testify voluntarily without being subpoenaed, in
11 which declaration the party must state when and where the prospective witness informed the party
12 of this willingness; or (2) the party can serve and file a declaration, signed under penalty of perjury
13 by the prospective witness, in which the witness states that he or she is willing to testify without
14 being subpoenaed.

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

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

1 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or**
2 **before October 1, 2015. Oppositions, if any, must be filed on or before October 15, 2015.**

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

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

13 4. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who Refuse to
14 Testify Voluntarily - If a prospective witness is not incarcerated, and he or she refuses to testify
15 voluntarily, the witness must be served with a subpoena. Fed. R. Civ. P. 45. In addition, the party
16 seeking the witness's presence must tender an appropriate sum of money for the witness. Id. In
17 the case of an unincarcerated witness, the appropriate sum of money is the daily witness fee of
18 \$40.00 plus the witness's travel expenses. 28 U.S.C. § 1821.

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

1 **If Plaintiff wishes to have the Marshal serve any unincarcerated witnesses who refuse**
2 **to testify voluntarily, Plaintiff must submit the money orders to the Court no later than**
3 **October 29, 2015. In order to ensure timely submission of the money orders, Plaintiff must**
4 **notify the Court of the names and locations of his witnesses, in compliance with step one, on**
5 **or before October 1, 2015.**

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

9 Finally, the Court shall direct the Clerk's Office to provide the parties with consent/decline
10 forms. Within thirty days from the date of service of this order, the parties shall inform the Court
11 whether they consent to or decline Magistrate Judge jurisdiction by filling out the forms and
12 returning them to the Court.

13 Accordingly, the Court HEREBY ORDERS as follows:

14 1. This matter is set for a telephonic trial confirmation hearing before United States
15 District Judge Lawrence J. O'Neill on **October 29, 2015, at 8:30 a.m.** in Courtroom 4;

16 2. This matter is set for jury trial before United States District Judge Lawrence J.
17 O'Neill on **December 8, 2015, at 8:30 a.m.** in Courtroom 4;

18 3. Counsel for Defendant is required to arrange for the participation of Plaintiff in the
19 telephonic trial confirmation hearing and to initiate the telephonic hearing at **(559) 499-5680**;

20 4. Plaintiff shall serve and file a pretrial statement as described in this order on or
21 before **October 1, 2015**;

22 5. Defendant shall serve and file a pretrial statement as described in this order on or
23 before **October 15, 2015**;

24 6. In addition to electronically filing his pretrial statement, Defendant shall e-mail the
25 pretrial statement to: ljoorders@caed.uscourts.gov;

26 7. If Plaintiff intends to call incarcerated witnesses at time of trial, Plaintiff shall serve
27 and file a motion for attendance of incarcerated witnesses as described in this order on or before
28 **October 1, 2015**;

1 8. The opposition to the motion for the attendance of incarcerated witnesses, if any,
2 shall be filed on or before **October 15, 2015**;

3 9. If Plaintiff wishes to obtain the attendance of unincarcerated witnesses who refuse
4 to testify voluntarily, Plaintiff must notify the Court of their names and locations on or before
5 **October 1, 2015**, and Plaintiff must submit the money orders, as described in subsection 4 of this
6 order, to the Court on or before **October 29, 2015**;

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

8 11. Within **thirty (30) days** from the date of service of this order, the parties shall
9 notify the Court whether they consent to or decline Magistrate Judge jurisdiction by filling out the
10 enclosed forms and returning them to the Court; and

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

12
13 IT IS SO ORDERED.

14 Dated: June 3, 2015

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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