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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TANIA BORJA,
Plaintiff,
vs.
C/O K. WILLIAMS,
Defendant.

1:13-cv-01445-DAD-GSA-PC

SECOND SCHEDULING ORDER

ORDER REQUIRING DEFENDANT WILLIAMS TO NOTIFY COURT WHETHER HE CONSENTS TO MAGISTRATE JUDGE JURISDICTION, WITHIN THIRTY DAYS

ORDER DIRECTING CLERK'S OFFICE TO SEND LOCAL RULE 281 TO PLAINTIFF AND CONSENT FORM TO DEFENDANT WILLIAMS

Telephonic Trial Confirmation Hearing:
June 12, 2017 at 2:30 p.m.
in Courtroom 5 (DAD)

Jury Trial: **August 8, 2017, at 8:30 a.m.**
in Courtroom 5 (DAD)

Plaintiff Tania Borja (“plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the first amended complaint, filed March 31, 2014, on plaintiff’s Eighth Amendment excessive force claim against defendant Correctional Officer (C/O) K. Williams (“defendant”). (ECF No. 8.)

1 Defendants' motion for summary judgment was denied in part on November 21, 2016.¹
2 (ECF No. 40.) Defendant Williams has indicated that a settlement conference at this stage of
3 the proceedings would not be beneficial. (ECF No. 42.) Therefore, pursuant to Rule 16(b) of
4 the Federal Rules of Civil Procedure, the court will by this order, set a further schedule for this
5 litigation.

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

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

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

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27 ¹ Defendant S. Johnson, and plaintiff's claims of an unconstitutional search under the Fourth
28 Amendment, were dismissed from the action on November 21, 2016 via summary judgment. (ECF No. 40.)

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 pre-trial statement a
3 written motion for a court order requiring that such witnesses be brought to court at the time of
4 trial. The motion must: (1) state the name, address, and prison identification number of each
5 such witness; and (2) be accompanied by declarations showing that each witness is willing to
6 testify and that each witness has actual knowledge of relevant facts. The motion should be
7 entitled “Motion for Attendance of Incarcerated Witnesses.”

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

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

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

4 **Motions for the attendance of incarcerated witnesses, if any, must be filed on or**
5 **before April 12, 2017. Oppositions, if any, must be filed on or before May 12, 2017.**

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

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

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

22 If plaintiff wishes to obtain the attendance of one or more unincarcerated witnesses who
23 refuse to testify voluntarily, plaintiff must first notify the court in writing of the name and
24 location of each non incarcerated witness. The court will calculate the travel expense for each
25 non incarcerated witness and notify plaintiff of the amount(s). Plaintiff must then, for each
26 witness, submit a money order made payable to the witness for the full amount of the witness's
27 travel expenses plus the daily witness fee of \$40.00. The subpoena will not be served upon the
28 unincarcerated witness by the United States Marshal unless the money order is tendered to the

1 court. Because no statute authorizes the use of public funds for these expenses in civil cases,
2 the tendering of witness fees and travel expenses is required even if the party was granted leave
3 to proceed in forma pauperis.

4 **If plaintiff wishes to have the Marshal serve any unincarcerated witnesses who**
5 **refuse to testify voluntarily, plaintiff must submit the money orders to the court no later**
6 **than May 12, 2017.** In order to ensure timely submission of the money orders, plaintiff must
7 notify the court of the names and locations of his witnesses, in compliance with step one, no
8 later than **April 12, 2017.**

9 The parties are advised that failure to file pre-trial statements as required by this order
10 may result in the imposition of appropriate sanctions, which may include dismissal of the
11 action or entry of default.

12 Finally, the court shall direct the Clerk's Office to provide Defendant Williams with a
13 consent/decline form.² Within thirty days from the date of service of this order, Defendant
14 Williams shall inform the court whether he consents to or declines Magistrate Judge
15 jurisdiction by filling out the form and returning it to the court.

16 Accordingly, the court HEREBY ORDERS as follows:

- 17 1. This matter is set for telephonic trial confirmation hearing before the Honorable
18 Dale A. Drozd on **June 12, 2017, at 2:30 p.m.** in Courtroom 5;
- 19 2. This matter is set for jury trial before the Honorable Dale A. Drozd on **August**
20 **8, 2017, at 8:30 a.m.** in Courtroom 5;
- 21 3. Counsel for defendant is required to arrange for the participation of plaintiff in
22 the telephonic trial confirmation hearing and to initiate the telephonic hearing at
23 **(559) 499-5650;**
- 24 4. Plaintiff shall serve and file a pretrial statement as described in this order on or
25 before **April 12, 2017.**

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28 ² Plaintiff consented to Magistrate Judge jurisdiction under 28 U.S.C. § 636(c) on September 30,
2013. (ECF No. 5.)

