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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDREW R. LOPEZ,

Petitioner,

No. CIV S-03-1605 GEB DAD P

vs.

S. COOK, et al.,

Respondents.

ORDER

_____ /

On December 2, 2010, the undersigned presided over a settlement conference in the above-entitled action. Plaintiff Andrew Lopez and his counsel William Bishop appeared. Deputy Attorney General Christopher Becker appeared for defendants. After the settlement conference concluded, the following matters were heard.

WITHDRAWAL OF COUNSEL AND TRIAL SCHEDULE

On November 3, 2010 and November 4, 2010, plaintiff’s counsel, Mr. Bishop, filed requests seeking to be relieved. In light of the circumstances set forth in counsel’s requests and his supporting declaration, filed on November 17, 2010, the request to withdraw as counsel will be granted. Plaintiff shall now, once again, proceed pro se in this action. No further requests for the appointment of counsel by plaintiff will be entertained.

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1 I. Procedures for Obtaining Attendance of Incarcerated

2 Witnesses Who Agree to Testify Voluntarily

3 An incarcerated witness who agrees voluntarily to attend trial to give testimony
4 cannot come to court unless this court orders the warden or other custodian to permit the witness
5 to be transported to court. This court will not issue such an order unless it is satisfied that:

6 1. The prospective witness is willing to attend;

7 and

8 2. The prospective witness has actual knowledge of relevant facts.

9 With the pretrial statement, a party intending to introduce the testimony of
10 incarcerated witnesses who have agreed voluntarily to attend the trial must serve and file a
11 written motion for a court order requiring that such witnesses be brought to court at the time of
12 trial.

13 The motion must:

14 1. State the name and address of each such witness;

15 and

16 2. Be accompanied by affidavits showing that each witness is willing to
17 testify and that each witness has actual knowledge of relevant facts.

18 The willingness of the prospective witness can be shown in one of two ways:

19 1. The party himself can swear by affidavit that the prospective witness
20 has informed the party that he or she is willing to testify voluntarily

21 without being subpoenaed. The party must state in the affidavit when and
22 where the prospective witness informed the party of this willingness; or

23 2. The party can serve and file an affidavit sworn to by the prospective
24 witness, in which the witness states that he or she is willing to testify
25 without being subpoenaed.

26 ////

1 The prospective witness' actual knowledge of relevant facts can be shown in one
2 of two ways:

3 1. The party himself can swear by affidavit that the prospective witness
4 has actual knowledge. However, this can be done only if the party has
5 actual firsthand knowledge that the prospective witness was an eyewitness
6 or an ear-witness to the relevant facts. For example, if an incident
7 occurred in the plaintiff's cell and, at the time, the plaintiff saw that a
8 cellmate was present and observed the incident, the plaintiff may swear to
9 the cellmate's ability to testify.

10 Or

11 2. The party can serve and file an affidavit sworn to by the prospective
12 witness in which the witness describes the relevant facts to which the
13 prospective witness was an eye- or ear-witness. Whether the affidavit is
14 made by the plaintiff or by the prospective witness, it must be specific
15 about what the incident was, when and where it occurred, who was
16 present, and how the prospective witness happened to be in a position to
17 see or to hear what occurred at the time it occurred.

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

21 II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse
22 to Testify Voluntarily

23 If a party seeks to obtain the attendance of incarcerated witnesses who refuse to
24 testify voluntarily, the party should submit with his pretrial statement a motion for the attendance
25 of such witnesses. Such motion should be in the form described above. In addition, the party
26 must indicate in the motion that the incarcerated witnesses are not willing to testify voluntarily.

1 III. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who
2 Agree to Testify Voluntarily

3 It is the responsibility of the party who has secured an unincarcerated witness'
4 voluntary attendance to notify the witness of the time and date of trial. No action need be sought
5 or obtained from the court.

6 IV. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who
7 Refuse to Testify Voluntarily

8 If a prospective witness is not incarcerated, and he or she refuses to testify
9 voluntarily, not earlier than four weeks and not later than two weeks before trial, the party must
10 prepare and submit to the United States Marshal a subpoena for service by the Marshal upon the
11 witness. Also, the party seeking the witness' presence must tender an appropriate sum of money
12 to the witness through the United States Marshal. In the case of an unincarcerated witness, the
13 appropriate sum of money is the daily witness fee of \$40.00 plus the witness' travel expenses.

14 A subpoena will not be served by the United States Marshal upon an
15 unincarcerated witness unless the subpoena is accompanied by a money order made payable to
16 the witness for the full amount of the witness' travel expenses plus the daily witness fee of
17 \$40.00. As noted earlier, because no statute authorizes the use of public funds for these expenses
18 in civil cases, the tendering of witness fees and travel expenses is required even if the party was
19 granted leave to proceed in forma pauperis.

20 **CONCLUSION**

21 In accordance with the above, IT IS HEREBY ORDERED that:

22 1. The November 3, 2010 and November 4, 2010 requests to withdraw filed by
23 attorney William Bishop (Docs. No. 233 and 235), are granted.

24 2. Plaintiff Andrew Lopez shall henceforth proceed pro se and no further requests
25 for the appointment of counsel by plaintiff will be entertained.

26 /////

1 3. Plaintiff's November 17, 2010 amended ex parte application to continue trial
2 and trial related dates (Doc. No. 238) is granted in part and denied in part, as follows:

3 a. The Pretrial conference set for January 31, 2011 before the Honorable
4 Garland E. Burrell, Jr., is vacated;

5 b. The requirement that the parties file a joint pretrial statement as set
6 forth in the court's September 22, 2010 order, is vacated;

7 c. Plaintiff shall file and serve his pretrial statement and any motions
8 necessary to obtain the attendance of witnesses at trial on or before December 24, 2010.²
9 Defendants shall file their pretrial statement on or before January 7, 2011. The parties are
10 advised that failure to file a pretrial statement as required by Local Rule 281(b) may result in the
11 imposition of sanctions, including dismissal of this action. Because this action has been pending
12 before the court for over seven years, no requests for an extension of time to file pretrial
13 statements will be entertained.

14 d. The Pretrial conference (as described in Local Rule 282) in this case
15 will be held on January 14, 2011, before the assigned magistrate judge. The pretrial conference
16 shall be conducted on the file only, without appearance by either party.

17 e. The trial confirmation hearing will be held before the Honorable
18 Garland E. Burrell, Jr. on February 11, 2011 at 1:30 p.m. in Courtroom 10 (13th floor).

19 f. This matter is set for jury trial before the Honorable Garland E. Burrell,
20 Jr. on March 22, 2011 at 9:00 a.m. in Courtroom 10 (13th floor).

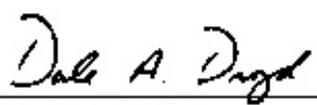
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25 ² As indicated at the hearing, in his pretrial statement plaintiff may incorporate by
26 reference any specific portion of the pretrial statement he filed in this action on April 22, 2009
(Doc. No. 190) which was filed by plaintiff himself prior to the appointment of counsel on his
behalf.

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4. As previously indicated, all motions and requests filed by plaintiff Andrew Lopez while he was represented by pro bono counsel arranged by the court are denied.

DATED: December 3, 2010.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:4
lope1605.oahsett