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

CHANCELLOR WADE,

Plaintiff,

No. CIV S-04-1711 GEB DAD P

vs.

COUNTY OF SACRAMENTO, et al.,

ORDER AND

Defendants.

FURTHER SCHEDULING ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On January 21, 2009, the court filed findings and recommendations recommending that this action be dismissed without prejudice due to plaintiff's failure to file his pretrial statement as ordered by the court on November 24, 2008. Plaintiff filed objections along with his pretrial statement on January 28, 2009. Good cause appearing, the court will, by this order, vacate the findings and recommendations and set a new schedule for this litigation.

Defendants will be required to file a pretrial statement in accordance with the schedule set forth below. In addition, the court will order plaintiff to file a motion to obtain the attendance of witnesses. On January 28, 2009, plaintiff filed a document styled, "Writ of Habeas Corpus Ad Testificandum," in which plaintiff requested the attendance of inmate witness Dale

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1 Robinson. Plaintiff's request does not comply with the court's October 10, 2008 order
2 concerning prospective witnesses. The requirements are set forth below.

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

9 I. Procedures for Obtaining Attendance of Incarcerated
10 Witnesses Who Agree to Testify Voluntarily

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

14 1. The prospective witness is willing to attend;

15 and

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

17 A party intending to introduce the testimony of incarcerated witnesses who have
18 agreed voluntarily to attend the trial must serve and file a written motion for a court order
19 requiring that such witnesses be brought to court at the time of trial.

20 The motion must:

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

22 and

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

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

- 2 1. The party can swear by affidavit that the prospective witness has
3 informed the party that he is willing to testify voluntarily without being
4 subpoenaed. The party must state in the affidavit when and where the
5 prospective witness informed the party of this willingness; or
- 6 2. The party can serve and file an affidavit sworn to by the prospective
7 witness, in which the witness states that he or she is willing to testify
8 without being subpoenaed.

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

- 11 1. The party can swear by affidavit that the prospective witness has actual
12 knowledge. However, this can be done only if the party has actual
13 firsthand knowledge that the prospective witness was an eyewitness or an
14 ear-witness to the relevant facts. For example, if an incident occurred in
15 the plaintiff's cell and, at the time, the plaintiff saw that a cellmate was
16 present and observed the incident, the plaintiff may swear to the cellmate's
17 ability to testify.

18 Or

- 19 2. The party can serve and file an affidavit sworn to by the prospective
20 witness in which the witness describes the relevant facts to which the
21 prospective witness was an eye- or ear-witness. Whether the affidavit is
22 made by the plaintiff or by the prospective witness, it must be specific
23 about what the incident was, when and where it occurred, who was
24 present, and how the prospective witness happened to be in a position to
25 see or to hear what occurred at the time it occurred.

26 ////

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

4 II. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Refuse
5 to Testify Voluntarily

6 If a party seeks to obtain the attendance of incarcerated witnesses who refuse to
7 testify voluntarily, the party should submit a motion for the attendance of such witnesses. Such
8 motion should be in the form described above. In addition, the party must indicate in the motion
9 that the incarcerated witnesses are not willing to testify voluntarily.

10 III. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who
11 Agree to Testify Voluntarily

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

15 IV. Procedures for Obtaining Attendance of Unincarcerated Witnesses Who
16 Refuse to Testify Voluntarily

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

23 A subpoena will not be served by the United States Marshal upon an
24 unincarcerated witness unless the subpoena is accompanied by a money order made payable to
25 the witness for the full amount of the witness' travel expenses plus the daily witness fee of
26 \$40.00. As noted earlier, because no statute authorizes the use of public funds for these expenses

1 in civil cases, the tendering of witness fees and travel expenses is required even if the party was
2 granted leave to proceed in forma pauperis.

3 Good cause appearing, pursuant to Fed. R. Civ. P. 16(b), THIS COURT ORDERS AS
4 FOLLOWS:

5 1. The findings and recommendations, filed on January 21, 2009 [Doc. No. 76],
6 are vacated.

7 2. Discovery is closed.

8 3. Law and motion is closed.

9 4. Plaintiff shall file and serve his motion to obtain the attendance of incarcerated
10 witnesses at trial on or before April 24, 2009. Defendants shall file their pretrial statement and
11 motion to obtain the attendance of incarcerated witnesses on or before July 17, 2009. The parties
12 are advised that failure to file comply with this order may result in the imposition of sanctions,
13 including dismissal of this action.

14 5. Pretrial conference (as described in Local Rule 16-282) is set in this case for
15 September 25, 2009, before the magistrate judge. The pretrial conference shall be conducted on
16 the file only, without appearance by either party.

17 4. This matter is set for jury trial before the Honorable Garland E. Burrell, Jr. on
18 April 20, 2010, at 9:00 a.m. in Courtroom 10.

19 DATED: April 1, 2009.

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22 _____
23 DALE A. DROZD
24 UNITED STATES MAGISTRATE JUDGE

23 DAD:4
24 wade1711.41sec