

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

ANIBAL ORTIZ,

Plaintiff,

vs.

DONNA BURNIAS, *et al.*,

Defendants.

2:09-cv-00396 JWS

ORDER AND OPINION

[Re: Motion at Docket 169]

I. MOTION PRESENTED

At docket 169, pro se plaintiff Anibal Ortiz (“plaintiff”) moves for a bench warrant and for appointment of counsel. The court interprets the filing as a response to the court’s order to show cause why plaintiff should not participate in his consolidated trial remotely and a request for issuance of a writ of habeas corpus ad testificandum. Defendants Donna Burnias, *et al.* (“defendants”) oppose the motion at docket 177. Oral argument would not assist the court.

II. BACKGROUND

Plaintiff is a prisoner of the State of Hawaii, incarcerated at the Saguaro Correctional Center in Eloy, Arizona, pursuant to an agreement between the Corrections Corporation of America and the Hawaii Department of Public Safety. Plaintiff is housed in administrative segregation.

1 Plaintiff has filed two separate lawsuits, each pursuant to 42 U.S.C. § 1983,
2 alleging a variety of civil rights violations. A consolidated trial will begin on October 22,
3 2012.

4 **III. DISCUSSION**

5 In the order at docket 157, the court ordered plaintiff to show cause why his
6 participation in the consolidated trial should not be limited to telephonic participation
7 because he is incarcerated and subject to enhanced security measures.

8 “Although due process prohibits the denial of access to the courts, a prisoner
9 does not have a constitutional right to attend the jury trial of his civil rights claims
10 involving the conditions of his confinement.”¹ Plaintiff argues that the fairness of his trial
11 will be compromised if he is not in attendance. However, he also recognizes that
12 “countervailing considerations of expense, security, logistics, and docket control . . .
13 prevent according prisoners any absolute right to be present.”²

14 The Fifth and Seventh Circuits have outlined factors for a district court to
15 consider when determining whether to exercise its discretion to issue a writ of habeas
16 corpus ad testificandum to secure a prisoner’s presence at trial.³ The Fifth Circuit has
17 stated that a

18 district court must exercise its discretion based upon consideration of such
19 factors as whether the prisoner’s presence will substantially further the
20 resolution of the case, the security risks presented by the prisoner’s
21 presence, the expense of the prisoner’s transportation and safekeeping,
22 and whether the suit can be stayed until the prisoner is released without
23 prejudice to the cause asserted.⁴

23 ¹*Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005). See also *Demoran v. Witt*, 781
24 F.2d 155, 158 (9th Cir. 1985) (“A plaintiff in a civil suit who is confined in state prison at the time
of a hearing has no absolute right to appear personally.”).

25 ²*Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 111–112 (4th Cir. 1988).

26 ³*Ballard v. Spradley*, 557 F.2d 476, 480–81 (5th Cir. 1977); *Stone v. Morris*, 546 F.2d
27 730, 735–36 (7th Cir. 1976).

28 ⁴*Ballard*, 557 F.2d at 480.

1 The Seventh Circuit has listed similar factors but, unlike the Fifth Circuit, permits a
2 district court to consider the probability of the incarcerated plaintiff's success on the
3 merits.⁵

4 Here, the controlling factors are the security risks presented by the prisoner's
5 presence and the associated costs of transportation and safekeeping. Because plaintiff
6 is an administrative segregation inmate, he must remain in full restraints at all times.
7 During trial, three officers must be present in the courtroom, and two of them must
8 remain within arm's length of the plaintiff while he is testifying. Moreover, plaintiff may
9 not be in the same holding cell as other inmates in courthouse holding cells. The
10 additional security risk that plaintiff poses, coupled with the measures that must be
11 taken to minimize that risk and the associated costs weigh determinatively against
12 issuance of a writ of habeas corpus ad testificandum. The court also notes that
13 participation by telephone or videoconference would lessen the risk that the jury would
14 be prejudiced or misled by in-court indications of plaintiff's high security status. Finally,
15 plaintiff's presence would not substantially further resolution of the case insofar as it
16 appears that he is his only witness, and his testimony can be adequately presented via
17 electronic means.

18 Because those factors are controlling, the court need not consider the merits of
19 plaintiff's claims or whether it is even appropriate to consider the merits of plaintiff's
20 claims.

21 **B. Plaintiff's Request for Counsel**

22 Plaintiff has again requested that the court appoint counsel.⁶ This is plaintiff's
23 fourth request. For the reasons set out in the orders at dockets 8, 20, and 149, plaintiff
24 is not entitled to appointment of counsel.

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27 ⁵Stone, 546 F.2d at 735–36.

28 ⁶Doc. 169 at 2.

