

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**ANIBAL ORTIZ,**

**Plaintiff,**

**vs.**

**DONNA BURNIAS, *et al.*,**

**Defendants.**

**2:09-cv-01048 JWS**

**ORDER AND OPINION**

**[Re: Motion at Docket 128]**

**I. MOTION PRESENTED**

At docket 128, *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 131. 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

1 Corrections Corporation of America and the Hawaii Department of Public Safety.  
2 Plaintiff is housed in administrative segregation.

3 Plaintiff has filed two separate lawsuits, each pursuant to 42 U.S.C. § 1983,  
4 alleging a variety of civil rights violations. A consolidated trial will begin on October 22,  
5 2012.

### 6 **III. DISCUSSION**

7 In the order at docket 120, the court ordered plaintiff to show cause why his  
8 participation in the consolidated trial should not be limited to telephonic participation  
9 because he is incarcerated and subject to enhanced security measures.

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

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

20 district court must exercise its discretion based upon consideration of such  
21 factors as whether the prisoner’s presence will substantially further the  
22 resolution of the case, the security risks presented by the prisoner’s  
23 presence, the expense of the prisoner’s transportation and safekeeping,

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24 <sup>1</sup>*Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005). See also *Demoran v. Witt*, 781  
25 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.”).

26 <sup>2</sup>*Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 111–112 (4th Cir. 1988).

27 <sup>3</sup>*Ballard v. Spradley*, 557 F.2d 476, 480–81 (5th Cir. 1977); *Stone v. Morris*, 546 F.2d  
28 730, 735–36 (7th Cir. 1976).

1 and whether the suit can be stayed until the prisoner is released without  
2 prejudice to the cause asserted.<sup>4</sup>

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

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

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

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<sup>4</sup>*Ballard*, 557 F.2d at 480.

28 <sup>5</sup>*Stone*, 546 F.2d at 735–36.

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

2 Plaintiff has again requested that the court appoint counsel.<sup>6</sup> This is plaintiff's  
3 fourth request. For the reasons set out in the orders at dockets 28, 38, and 107, plaintiff  
4 is not entitled to appointment of counsel.

5 **IV. CONCLUSION**

6 For the reasons above, plaintiff's motion for a bench warrant, construed as a  
7 request for a writ of habeas corpus ad testificandum is **DENIED**. Plaintiff's request for  
8 appointment of counsel is **DENIED**.

9 DATED this 7<sup>th</sup> day of August 2012.

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11 \_\_\_\_\_/s/  
12 JOHN W. SEDWICK  
13 UNITED STATES DISTRICT JUDGE  
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<sup>6</sup>Doc. 128 at 2.