

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONALD GLASS,)	CASE NO. 1:04-cv-05466-OWW-SMS PC
)	
Plaintiff,)	
)	ORDER GRANTING AND DENYING
v.)	PLAINTIFF'S MOTION FOR ATTENDANCE
)	OF INCARCERATED WITNESSES
)	
R.W. BEER, et al.,)	
)	(Docs. 190, 191, 192, 193, 194,
Defendants.)	and 195)
)	
)	

I. Order

A. Procedural History

This is a civil rights action filed pursuant to 42 U.S.C. § 1983 by Plaintiff Donald Glass, a state prisoner proceeding pro se. This action is proceeding on Plaintiff's complaint, filed March 22, 2004, against Defendants Beer, Keener, Sloss, Morales, and Dill for violation of the Eighth Amendment, and against Defendants Beer, Keener, Sloss, Morales, Dill, Butts, Adkison, Gonzales, Castillo, Buckley, Streeter, Marshall, and Lloren for retaliation. December 28, 2009, Plaintiff filed motions requesting a court order directing Defendants to provide the Court and Plaintiff with the prison address and location of six incarcerated witnesses, who refused to testify voluntarily, that

1 they be brought to court to attend trial. (Docs. 190, 191, 192,
2 193, 194, and 195.) Defendants filed their opposition to this
3 motion January 12, 2010. (Doc. 197.) Plaintiff filed a reply
4 February 16, 2010. (Doc. 203.)

5 Plaintiff essentially requests an order identifying the
6 location of his six incarcerated witnesses and that they be
7 brought to court to testify at the trial of this action.
8 Plaintiff'S motions are CONSTRUED as motions for attendance of
9 incarcerated witnesses.

10 B. Timeliness

11 The Second Scheduling Order delineated that Plaintiff must
12 file any motion for incarcerated witnesses to attend the trial of
13 this matter concurrent with his pretrial statement, on or before
14 December 15, 2009. (Doc. 184, pp. 2-3.) Plaintiff's motions
15 were filed December 28, 2009. (Docs. 190 - 195.) Under ordinary
16 circumstances, Plaintiff's motions would be denied as untimely -
17 which Defendants raised in their opposition. However, January 8,
18 2010, Plaintiff filed a motion explaining that he had not been
19 able to timely file his pretrial statement (and concurrent
20 motions for attendance of incarcerated witnesses) because of
21 racial tension, prisoner on prisoner violence, dense fog, power
22 outages, and other security concerns which caused the facility in
23 which he is housed to be on and off "lock down" such that, while
24 he received a ducat to go to the law library on December 15,
25 2009, Plaintiff was not actually allowed access to the law
26 library until December 21, 2009. (Doc. 196.) Plaintiff's proof
27 of service notes that both his pretrial statement and his motions
28 for attendance by unincarcerated witnesses were deposited with

1 prison staff for mailing on December 21, 2009. (Doc. 192, p. 3.)
2 Granting the leniencies accorded to a pro se inmate, Plaintiff's
3 motions for attendance of incarcerated witnesses will be
4 considered on the merits rather than summarily dismissed on
5 procedural grounds.

6 C. Legal Standard

7 As stated in the Second Scheduling Order,

8 An incarcerated witness who agrees voluntarily
9 to attend trial to give testimony cannot come to
10 court unless the Court orders the warden or other
11 custodian to permit the witness to be transported to
12 court. The Court will not issue such an order unless
13 it is satisfied that: (a) the prospective witness is
14 willing to attend; and (b) the prospective witness
15 has actual knowledge of relevant facts.

16 A party intending to introduce the testimony of
17 incarcerated witnesses who have agreed voluntarily to
18 attend the trial must serve and file concurrent with
19 the pre-trial statement a written motion for a court
20 order requiring that such witnesses be brought to
21 court at the time of trial. The motion must: (1)
22 state the name, address, and prison identification
23 number of each such witness; and (2) be accompanied
24 by declarations showing that each witness is willing
25 to testify and that each witness has actual knowledge
26 of relevant facts. The motion should be entitled
27 "Motion for Attendance of Incarcerated Witnesses."

28 The willingness of the prospective witness can
be shown in one of two ways: (1) the party himself
can swear by declaration under penalty of perjury
that the prospective witness has informed the party
that he or she is willing to testify voluntarily
without being subpoenaed, in which declaration the
party must state when and where the prospective
witness informed the party of this willingness; or
(2) the party can serve and file a declaration,
signed under penalty of perjury by the prospective
witness, in which the witness states that he or she
is willing to testify without being subpoenaed.

The prospective witness's actual knowledge of
relevant facts can be shown in one of two ways: (1)
if the party has actual firsthand knowledge that the
prospective witness was an eyewitness or an ear-
witness to the relevant facts (i.e., if an incident
occurred in Plaintiff's cell and, at the time,
Plaintiff saw that a cellmate was present and
observed the incident, Plaintiff may swear to the
cellmate's ability to testify), the party himself can

1 swear by declaration under penalty of perjury that
2 the prospective witness has actual knowledge; or (2)
3 the party can serve and file a declaration signed
4 under penalty of perjury by the prospective witness
5 in which the witness describes the relevant facts to
6 which the prospective witness was an eye- or ear-
7 witness. Whether the declaration is made by the party
8 or by the prospective witness, it must be specific
9 about the incident, when and where it occurred, who
10 was present, and how the prospective witness happened
11 to be in a position to see or to hear what occurred
12 at the time it occurred.

13 The Court will review and rule on the motion for
14 attendance of incarcerated witnesses, specifying
15 which prospective witnesses must be brought to court.
16 Subsequently, the Court will issue the order
17 necessary to cause the witness's custodian to bring
18 the witness to court.

19 (Doc. 184, 2nd Sch. Ord., pp. 2-3.)

20 Plaintiff requests the whereabouts of, and the attendance at
21 the trial in this matter by, six inmates, to wit: Wittier
22 Buchanan inmate number K02554 (Doc. 191); Jason Ortiz inmate
23 number P72425 (Doc. 195); Rodney Fleming inmate number E09596
24 (Doc. 192); Robert S Milton inmate number T06653 (Doc. 194); Eric
25 Jackson inmate number D47735 (Doc. 193); and James Thompson
26 inmate number C89908 (Doc. 190).

27 Mr. Ortiz paroled in September of 2009 and Mr. Fleming
28 paroled in July of 2009. Thus, since Mr. Ortiz and Mr. Fleming
are no longer incarcerated, an incarceration custodian cannot be
ordered to produce them to testify at trial.

Plaintiff has not shown that inmates Jackson, Thompson, and
Milton have personal knowledge of information that is relevant in
this case to necessitate their attendance at the trial of this
matter. As to these three individuals, Plaintiff only presents
information that each: has "personal knowledge" that Defendants
Beer and Morales are particularly violent prison officials who

1 have beaten defenseless prisoners at CSP-Cor (Doc. 194, Milton, ¶
2 2; Doc. 193, Jackson, ¶ 2; Doc. 190, Thompson, ¶ 2); "has himself
3 been victimized by Defendants Beer and Morales violent behavior
4 when they beat him up and seriously injured him as a perverted
5 form of prison justice" (Doc. 194, Milton, ¶ 3; Doc. 193,
6 Jackson, ¶ 3; Doc. 190, Thompson, ¶ 3); "has personal knowledge
7 that Defendants Marshall, Dill, Keener, Buckley, Castillo, and
8 Streeter were absolutely aware that Defendants Beer and Morales
9 had beat up and seriously injured so many handcuffed prisoners
10 from the numerous 602 complaints/appeals filed by all those
11 injured prisoners and the numerous CDC-837 incident reports
12 generated from these violent incidents" (Doc. 194, Milton, ¶ 4;
13 Doc. 193, Jackson, ¶ 4; Doc. 190, Thompson, ¶ 4); and "has
14 personal knowledge and information that Defendants Dill, Keener,
15 Marshall, Buckley, Castillo and Streeter used their positions as
16 high ranking prison officials and administrators at ("CSP-Cor")
17 to cover up (criminal code of silence or SCP-Cor Green Wall of
18 silence) Defendants Beer, Morales and a C/O named B. David
19 violent behavior and violence against so many inmates that they
20 attacked and beat up from 2001 through 2004" (Doc. 194, Milton, ¶
21 5; Doc. 193, Jackson, ¶ 5; Doc. 190, Thompson, ¶ 5).

22 Only relevant evidence (i.e. that which tends to prove or
23 disprove a material fact in question) is admissible at the trial
24 of an action. Fed. R. Evid. 401 & 402. Evidence of other
25 crimes, wrongs, or acts is not admissible to prove the character
26 of a person in order to show action in conformity therewith, but
27 may be admissible for other purposes, such as proof of motive,
28 opportunity, intent, preparation, plan, knowledge, identify, or

1 absence of mistake or accident. Fed. R. Evid. 404.

2 Plaintiff argues that inmates Jackson, Thompson, and Milton
3 should be allowed to testify as to the violent reputations of
4 Defendants Beer and Morales and that Defendants Marshall, Dill,
5 Castillo, Buckley, Keener, and Streeter as to their "notorious
6 reputation" of authorizing and/or condoning shootings and violent
7 assaults on inmates by Defendants Beer and Morales. (Doc. 203,
8 p. 4:3-12.) Yet, any such evidence could be offered in this case
9 for no purpose other than to show action by Defendant(s) in
10 conformity with prior alleged bad acts - which, as Defendants
11 correctly point out, is inadmissible character evidence under
12 Rule 404, of the Federal Rules of Evidence. Further, in
13 determining whether to grant Plaintiff's motion for the
14 attendance of inmates Jackson, Thompson, and Milton, factors to
15 be taken into consideration include (1) whether the inmates'
16 presence will substantially further the resolution of the case,
17 (2) the security risks presented by the inmates' presence, (3)
18 the expense of transportation and security, and (4) whether the
19 suit can be stayed until the inmate is released without prejudice
20 to the cause asserted. Wiggins v. County of Alameda, 717 F.2d
21 466, 468 n.1 (9th Cir. 1983); see also Walker v. Sumner, 14 F.3d
22 1415, 1422 (9th Cir. 1994) (district court did not abuse its
23 discretion when it concluded the inconvenience and expense of
24 transporting inmate witness outweighed any benefit he could
25 provide where the importance of the witness's testimony could not
26 be determined), *abrogated on other grounds by Sandin v. Conner*,
27 515 U.S. 472, 115 S.Ct. 2293 (1995). In this case, since
28 Plaintiff has not shown that inmates Jackson, Thompson, and

1 Milton will provide admissible evidence, their presence will not
2 substantially further the resolution of the case so as to justify
3 the risks and expenses of transporting them to testify at the
4 trial of this matter.

5 Thus, the custodian(s) of Mr. Jackson, Mr. Thompson, and Mr.
6 Milton will not be ordered to transport these inmates to testify
7 at the trial of this action.

8 Plaintiff has, however, shown that inmate Buchanan has
9 actual knowledge of relevant facts in as much as Plaintiff
10 submitted a declaration under penalty of perjury that inmate
11 Buchanan was in a cell "only several cells away" and was a
12 percipient witness to the October 23, 2010 incident (Doc. 191, ¶
13 3); witnessed Defendants Beer, Butts, and Keener supervising the
14 rolling up and inventory of Plaintiff's personal property which
15 was removed from Plaintiff's cell and left unsecured in the
16 rotunda/hallway area from October 23, 2001 through October 28,
17 2001 (*Id.* at ¶ 4); and has evidence which would contravene
18 defendants' evidence as to how Plaintiff's hearing aids were
19 disposed of and television set damaged (*Id.* at ¶ 5). The latter
20 statement is not specific enough to justify inmate Buchanan's
21 attendance at the trial in this matter, but the two former
22 statements warrant an order to cause inmate Buchanan's custodian
23 to transport him to testify during the trial of this case. While
24 Plaintiff indicates that, due to the passage of time, he is
25 unsure whether inmate Buchanan is still willing to voluntarily
26 testify, Plaintiff has sufficiently demonstrated that inmate
27 Buchanan has actual knowledge of relevant facts on which to order
28 his attendance at trial. Inmate Buchanan has been located within

1 the California State Prison system. An order will issue at the
2 appropriate time to cause his appearance to testify at the trial
3 of this case.

4 Accordingly, Plaintiff's motions for the attendance of
5 incarcerated witnesses, filed December 28, 2009, are DENIED as to
6 inmates Jason Ortiz inmate number P72425, Rodney Fleming inmate
7 number E09596, Robert S. Milton inmate number T06653, Eric
8 Jackson inmate number D47735, and James Thompson inmate number
9 C89908; and Plaintiff's motion for the attendance of incarcerated
10 witness, filed December 28, 2009, is GRANTED as to Wittier
11 Buchanan inmate number K02554.

12
13
14
15
16
17 IT IS SO ORDERED.

18 Dated: March 1, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE