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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JAMES COLE,

Plaintiff,

v.

LIEUTENANT MUNOZ, et al.,

Defendants.

CASE NO. 1:09-cv-00476-AWI-SAB (PC)

ORDER GRANTING IN PARTY PLAINTIFF’S  
MOTION FOR THE ATTENDANCE OF  
INCARCERATED WITNESSES

Motions In Limine

Hearing: April 2, 2013, 8:00 a.m  
Courtroom 2

Trial: April 2, 2013, 8:30 a.m  
Courtroom 2

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This civil rights action proceeds on Plaintiff James Cole’s complaint filed on March 13, 2009. Plaintiff, an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR), brings this action pursuant to 42 U.S.C. § 1983 against correctional officials for the violation of his federal constitutional rights. Specifically, the issues for trial are whether Defendants Munoz, Dicks, Rocha, and/or Blasdell violated Plaintiff’s Eighth Amendment rights by using excessive force and/or whether Defendants violated Plaintiff’s First Amendment rights by retaliating against him for petitioning the government.

Pursuant to the Court’s Second Scheduling Order, on September 13, 2012, Plaintiff filed a motion for the attendance of incarcerated witnesses Scott Hamby, #K-57847 and Patrick Brady, # J-89194. On November 26, 2012, Defendants filed an opposition, and on December 12, 2012, Plaintiff filed a reply.

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1 The Second Scheduling Order stated:

2 1. Procedures for Obtaining Attendance of Incarcerated Witnesses Who Agree to  
3 Testify Voluntarily - An incarcerated witness who agrees voluntarily to attend trial  
4 to give testimony cannot come to court unless the Court orders the warden or other  
5 custodian to permit the witness to be transported to court. The Court will not issue  
6 such an order unless it is satisfied that: (a) the prospective witness is willing to  
7 attend; and (b) the prospective witness has actual knowledge of relevant facts.

8 A party intending to introduce the testimony of incarcerated witnesses who  
9 have agreed voluntarily to attend the trial must serve and file concurrent with the  
10 pre-trial statement a written motion for a court order requiring that such witnesses be  
11 brought to court at the time of trial. The motion must: (1) state the name, address, and  
12 prison identification number of each such witness; and (2) be accompanied by  
13 declarations showing that each witness is willing to testify and that each witness has  
14 actual knowledge of relevant facts. The motion should be entitled "Motion for  
15 Attendance of Incarcerated Witnesses."

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

24 The prospective witness's actual knowledge of relevant facts can be shown  
25 in one of two ways: (1) if the party has actual firsthand knowledge that the  
26 prospective witness was an eyewitness or an ear-witness to the relevant facts (i.e., if  
27 an incident occurred in Plaintiff's cell and, at the time, Plaintiff saw that a cellmate  
28 was present and observed the incident, Plaintiff may swear to the cellmate's ability  
to testify), the party himself can swear by declaration under penalty of perjury that  
the prospective witness has actual knowledge; or (2) the party can serve and file a  
declaration signed under penalty of perjury by the prospective witness in which the  
witness describes the relevant facts to which the prospective witness was an eye- or  
ear-witness. Whether the declaration is made by the party or by the prospective  
witness, it must be specific about the incident, when and where it occurred, who was  
present, and how the prospective witness happened to be in a position to see or  
to hear what occurred at the time it occurred.

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

22 CM/ECF #43 (Second Scheduling Order).

23 As to both of Plaintiff's proposed incarcerated witnesses, Scott Hamby, #K-57847, and  
24 Patrick Brady, #J-89194, Plaintiff has met the above standard. Both Scott Hamby, #K-57847, and  
25 Patrick Brady, #J-89194, have signed declarations stating that they observed some of the alleged  
26 force at issue in this action, making their proposed testimony relevant. Both also have indicated a  
27 willingness to come to court to testify.  
28

1 Defendants object to Plaintiff's motion as to Patrick Brady, # J-89194, because he was not  
2 disclosed to defense as a potential witness until June of 2012. Defendants contend Patrick Brady,  
3 #J-89194's testimony should be excluded pursuant to Rule 37(c) of the Federal Rules of Civil  
4 Procedure.

5 Rule 37(c)(a) provides:

6 (1) Failure to Disclose or Supplement. If a party fails to provide information  
7 or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use  
8 that information or witness to supply evidence on a motion, at a hearing, or at a trial,  
unless the failure was substantially justified or is harmless. In addition to or instead  
of this sanction, the court, on motion and after giving an opportunity to be heard:

9 (A) may order payment of the reasonable expenses, including attorney's fees,  
caused by the failure;

10 (B) may inform the jury of the party's failure; and

11 (C) may impose other appropriate sanctions, including any of the orders listed  
in Rule 37(b)(2)(A)(i)–(vi).

12 In his reply brief, Plaintiff states that the reason Patrick Brady, #J-89194, was not disclosed earlier  
13 was because he did not know Patrick Brady, #J-89194, had any information about this matter until  
14 recently.

15 The court finds that whether Patrick Brady, #J-89194, should be excluded as a witness  
16 pursuant to Rule 37 for an alleged violation of Rule 26 is best addressed by motion in limine and not  
17 in reviewing a motion to bring an incarcerated witness to trial. At this time, the court will order  
18 Patrick Brady, #J-89194, along with Scott Hamby, #K-57847, brought to court for trial. Defendants  
19 may still file a motion in limine concerning any Federal Rules of Civil Procedure violations. The  
20 court's determination that Patrick Brady, #J-89194, should be brought to court as an incarcerated  
21 witness, does not mean Patrick Brady, #J-89194, will automatically be allowed to testify. All parties  
22 should be prepared to conduct their case regardless of how the court rules on any motion in limine  
23 concerning Patrick Brady, #J-89194.

24 Accordingly, the court ORDERS that:

- 25 1. Plaintiff's motion for the attendance of the incarcerated inmates is GRANTED;
- 26 2. The court will issue writs of habeas corpus ad testificandum once the trial date has  
27 been confirmed; and

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3. The Clerk of the Court is DIRECTED to serve a copy of this order on:

Patrick Brady, #J-89194  
CSP Corcoran  
P.O. Box 3481,  
Corcoran, CA 93212

Scott Hamby, #K-57847.  
Kern Valley State Prison  
P.O. Box 5101  
Delano, CA 93216

IT IS SO ORDERED.

Dated: January 22, 2013



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SENIOR DISTRICT JUDGE