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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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10 ELAINE K. VILLAREAL,
11 Plaintiff,
12 v.
13 COUNTY OF FRESNO,
14 Defendant.

Case No. 1:15-cv-01410-ADA-EPG (PC)
ORDER GRANTING PLAINTIFF'S
MOTION FOR ATTENDANCE OF
INCARCERATED WITNESS
(ECF No. 256)

15 **I. BACKGROUND**

16 This action is proceeding against defendant County of Fresno (“Defendant”) on
17 Plaintiff’s Eighth Amendment claim challenging the conditions of confinement based on
18 alleged lack of access to sufficient exercise. (ECF Nos. 146 & 217). According to Plaintiff,
19 there was an unconstitutional informal settled custom, pursuant to which inmates got
20 significantly less than three hours of exercise per week. (See ECF No. 212, p. 7). The trial is
21 currently scheduled for November 8, 2022. (ECF No. 238).

22 On October 3, 2022, the Court issued an order stating that it will not issue a writ of
23 habeas corpus ad testificandum to secure Plaintiff’s attendance at trial or any other inmate
24 witnesses’ attendance at trial. (ECF No. 252). In so ordering, the Court noted that “Plaintiff’s
25 counsel does not identify any other inmate witnesses for which a writ is necessary. Moreover,
26 the deadline to file motions for attendance of incarcerated witnesses has long since passed.”
27 (Id. at 2). On that same day, Plaintiff filed a motion for reconsideration of the portion of the
28 Court’s order stating that it will not issue a writ for other inmate witnesses’ attendance at trial.

1 (ECF No. 253). Plaintiff’s motion for reconsideration was denied, as was Plaintiff’s motion for
2 the attendance of incarcerated witnesses (to the extent it was included in the motion for
3 reconsideration). (ECF No. 255). However, the Court gave permission Plaintiff permission to
4 renew her motion for attendance of incarcerated witnesses. (Id. at 3). In the renewed motion,
5 the Court directed Plaintiff to “provide an explanation as to why the Court should consider the
6 untimely motion” and to address the relevant factors for obtaining attendance of incarcerated
7 witnesses. (Id.).

8 On October 7, 2022, Plaintiff renewed her motion for attendance of incarcerated
9 witness. (ECF No. 256). On October 12, 2022, Defendant filed its opposition to the motion.
10 (ECF No. 257).

11 Plaintiff’s renewed motion is now before the Court. Plaintiff asks to have one inmate
12 witness, Sarah Booth, No. 2030570, be brought to Court to testify at the trial. Defendant
13 objects to the attendance of this witness. For the reasons described below, the Court finds that
14 Ms. Booth should be brought to testify at the upcoming trial.

15 **II. PLAINTIFF’S MOTION**

16 In her motion, Plaintiff asks the Court to have Sarah Booth brought to court to testify at
17 the upcoming trial. (ECF No. 256, p. 1). Plaintiff’s counsel states that he interviewed Ms.
18 Booth on October 5, 2022. (Id.). “Ms. Booth demonstrated a clear recollection of events,
19 personal knowledge of the events that are the subject matter of this action, and a willingness to
20 testify and to be transported to the courthouse to testify as a witness for the Plaintiff.” (Id.).

21 Plaintiff argues that the security risks are nonexistent. (Id. at 2). According to
22 Plaintiff’s counsel, “[o]n the day [he] met with Ms. Booth [he] was given access to a locked
23 corridor inside South Annex Jail and shown to a series of interview rooms and permitted to
24 select one, which [he] did; Ms. Booth, who was unhandcuffed and without waistchains or
25 shackles, was permitted to walk into the interview room unescorted after which [he]
26 interviewed her; thus [he] believe[s] that Ms. Booth is a low security risk.” (Id. at 3).

27 Plaintiff also argues that the expense of the transport and security will be minimal
28 because Ms. Booth is housed 0.3 miles from the court. (Id. at 2). Moreover, a stay pending

1 Ms. Booth’s release from custody is not reasonable because Ms. Booth “has not proceeded to
2 the Preliminary Hearing in her criminal case and there is a pre-preliminary hearing date of
3 January 11, 2023.” (Id. at 4). Plaintiff further argues that Ms. Booth’s testimony is not
4 duplicative. (Id.). “[T]hough the Plaintiff and two other witnesses are to be called to testify
5 Plaintiff has the burden of proof and this is a *Monell* case; thus, it is important that Plaintiff
6 show that the customs, practices and policies of the Defendant County were longstanding,
7 widespread or well-settled and the testimony of one additional witness would thus not be
8 duplicative but would be important evidence.” (Id.). Finally, Plaintiff argues that there is no
9 prejudice to Defendant. (Id. at 2).

10 Plaintiff’s counsel further states that he did not ask the Court to extend the deadline to
11 file motions for attendance of incarcerated witnesses because he had “not yet determined which
12 witnesses would be called to testify.” Moreover, he believed that he had located several
13 witnesses, including Ms. Booth, at non-custodial addresses, but mistakenly did not recheck the
14 address of Sarah Booth upon receiving the July 21, 2021, order. (Id. at 1-2).

15 **III. DEFENDANT’S OPPOSITION**

16 In her opposition, Defendant argues that Plaintiff failed to sufficiently explain why she
17 did not timely file the motion. (ECF No. 257, pgs. 1-2). Defendant states that Ms. Booth has
18 been incarcerated in Fresno County Jail since December of 2020, which was approximately a
19 year and a half before the Court issued its order setting the deadline for filing motions for
20 attendance of incarcerated witnesses. (Id. at 2).

21 As to the relevant factors, while “Plaintiff’s counsel indicates that he believes Ms.
22 Booth ‘is a low security risk,’” “he ignores the fact that she was arrested on charges of
23 kidnaping, assault with a semiautomatic firearm, assault by means likely to produce great
24 bodily harm, amongst other various charges.” (Id.). Her bond was set at “more than one half a
25 million dollars,” and “she has been classified in medium security housing, not minimal or low.”
26 (Id.). Moreover, “while housed in the jail, Ms. Booth incurred new and additional charges of
27 possession of drugs and/or alcohol in a jail.” (Id.).

28 Additionally, Plaintiff failed to show how Ms. Booth’s testimony will substantially

1 further the resolution of this case because she failed to adequately describe the testimony that
2 Ms. Booth will provide, and only alleged, in a conclusory manner, that her testimony is not
3 duplicative. (Id. at 2-3).

4 “[T]his court should conclude that the importance of Ms. [Booth’s] presence at the trial
5 cannot be ascertained. As such, the inconvenience and expense, as well as potential safety
6 issues, of transporting [her] from the jail to the Federal Courthouse outweighs any benefit she
7 may provide.” (Id. at 3).

8 **IV. DISCUSSION**

9 “The determination whether to issue a writ of habeas corpus ad testificandum rests
10 within the sound discretion of the district court.” Cummings v. Adams, 2006 U.S. Dist. LEXIS
11 9381, *6, 2006 WL 449095 (E.D. Cal. Feb. 17, 2006). Accord Walker v. Sumner, 14 F.3d
12 1415, 1422 (9th Cir. 1994).

13 In determining whether to grant Plaintiff’s motions for the attendance of incarcerated
14 witnesses, the Court considers the following factors: (1) whether the inmate’s presence will
15 substantially further the resolution of the case, (2) the security risks presented by the inmate’s
16 presence, (3) the expense of transportation and security, and (4) whether the suit can be stayed
17 until the inmate is released without prejudice to the cause asserted. Wiggins v. County of
18 Alameda, 717 F.2d 466, 468 n.1 (9th Cir. 1983). See also Lopez v. Cate, 2016 WL 3940341, at
19 *2 (E.D. Cal. July 20, 2016).

20 After conducting a “cost-benefit analysis regarding whether the inmate[s] should come
21 to court,” Cummings, 2006 U.S. Dist. LEXIS 9381 at *7, the Court has determined that Ms.
22 Booth should be brought to court to testify.

23 While the assertions are somewhat conclusory, Plaintiff’s counsel explains that he
24 interviewed Ms. Booth, and “that she remembers the conditions inside Fresno County South
25 Annex Jail and that she has personal knowledge of events that are relevant and material to the
26 issues to be presented for adjudication in this case.” (ECF No. 256, p. 3). Additionally,
27 Plaintiff’s counsel asserts that he will call Ms. Booth to testify regarding the custom at issue in
28 this case. (Id. at 4). Finally, for purposes of this motion, the Court finds persuasive Plaintiff’s

1 argument that the testimony is important and not simply duplicative because Plaintiff has the
2 burden to show a custom that was longstanding, widespread, or well-settled, and the testimony
3 of an additional witness will help show this. Thus, Plaintiff has sufficiently shown that Ms.
4 Booth's presence will substantially further the resolution of the case.

5 The remaining factors also support Plaintiff. While the Court does not agree that the
6 risk in transport in "nonexistent," Defendant does not point to any particular risk in having Ms.
7 Booth transported to court. Moreover, Defendant does not contest that Ms. Booth is
8 incarcerated 0.3 miles away from the court, so the expense of transportation and security should
9 not be great. Finally, no one argues that this case should be stayed until Ms. Booth is released.
10 Moreover, given the age of this case, staying the case would be prejudicial.

11 As to the fact that the motion was not timely filed, based on the explanation provided by
12 Plaintiff, as well as the fact that there appears to be no prejudice to Defendant because Ms.
13 Booth is already included on the witness list in the final pretrial order (ECF No. 248, p. 14), the
14 Court will excuse the late filing.

15 Accordingly, the Court finds that Ms. Booth should be brought to court to testify at the
16 upcoming trial.

17 **V. ORDER**

18 Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's motion for
19 attendance of incarcerated witness is GRANTED.¹

20 The Court will, in due course, issue a writ of habeas corpus ad testificandum to have
21 Sarah Booth, No. 2030570, brought to court to testify at the trial.
22 IT IS SO ORDERED.

23 Dated: October 13, 2022

24 /s/ Eric P. Gray
25 UNITED STATES MAGISTRATE JUDGE

26 _____
27 ¹ In ruling on this motion, the Court is not making any evidentiary rulings. The Court is only conducting
28 a cost-benefit analysis to determine whether Ms. Booth should be brought to court. Thus, nothing in this order
prevents Defendant from raising objections to Ms. Booth's testimony at trial or in an appropriate pretrial motion.