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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 JESSE WASHINGTON,

10 Plaintiff,

11 v.

12 H. GAMBOA, and R. ROQUE

13 Defendants.
14

Case No. 1:17-cv-00302-LJO-EPG (PC)

ORDER GRANTING PLAINTIFF'S
MOTION FOR ATTENDANCE OF
WITNESSES

(ECF No. 52)

15 Plaintiff, Jesse Washington, is a state prisoner proceeding *pro se* and *in forma pauperis*
16 with this civil rights action filed pursuant to 42 U.S.C. § 1983. This action proceeds on
17 Plaintiff's claims against defendants H. Gamboa and R. Roque for retaliation in violation of the
18 First Amendment. (ECF Nos. 1, 9, 11, 13, 36, 38, 49, 58.) The trial in this case is set for
19 November 19, 2019, at 1:00 p.m. (ECF No. 43.)

20 Plaintiff has filed a motion for attendance of incarcerated witnesses and supporting
21 declarations. (ECF No. 52.) Defendants have filed an opposition to the motion (ECF No. 61),
22 and Plaintiff has filed a reply to Defendants' opposition (ECF No. 66).

23 Plaintiff seeks to bring two inmate witnesses to trial: (1) Reginal Bunn; and (2) Tony
24 Scully.¹ (ECF No. 52.) Defendants object to the attendance of both witnesses. (ECF No. 61.)

25 For the reasons described below, the Court finds that Mr. Bunn and Mr. Scully should
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27 ¹ Plaintiff also requests that he be allowed to utilize the statement of another inmate, inmate Thompson,
28 "only as rebuttal and impeachment purposes against Defendant Roque in a previous filed lawsuit in 2016." (ECF
No. 52 at 5.) Plaintiff does not, however, request that this witness testify at trial. Further, Plaintiff has not provided
sufficient information to demonstrate that this witness's testimony is relevant and that his attendance at trial is
warranted.

1 be brought to testify at the upcoming trial.

2 **I. DISCUSSION**

3 **A. Untimely Motion**

4 Defendants object that Plaintiff’s motion for attendance of incarcerated witnesses is
5 untimely. (ECF No. 61 at 2.) Plaintiff concedes that his motion is untimely but seeks leave of
6 the Court for the late filing and claims that the lateness was due to excusable neglect, citing a
7 modified program at Plaintiff’s current place of confinement, and difficulties with access to the
8 law library and obtaining photo copies. (ECF Nos. 52, 66.)

9 The deadline for Plaintiff to file his motion for attendance of incarcerated witnesses was
10 July 12, 2019. (ECF No. 43.) Plaintiff did not file his motion until August 30, 2019. Plaintiff
11 provides a limited explanation for the lateness of his filing. (ECF Nos. 52, 66.) He also
12 previously explained in greater detail the circumstances that resulted in the delayed filing of
13 Plaintiff’s pretrial statement. (*See* ECF No. 54.) The Court granted Plaintiff’s request to accept
14 a late-filed pretrial statement, given the time remaining before trial, but questioned whether the
15 conditions cited by Plaintiff actually caused Plaintiff’s delay. (ECF No. 59.) Although the
16 Court again questions whether the conditions at Plaintiff’s institution of confinement have
17 actually caused Plaintiff’s delay in filing the motion for attendance of incarcerated witnesses,
18 the Court will grant Plaintiff’s request to accept the late filing in light of the time remaining
19 before trial.²

20 **B. Cost -Benefit Analyses of Attendance of Witnesses**

21 The court has discretion on whether to issue a writ of habeas corpus ad testificandum.
22 *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994); *Cummings v. Adams*, 2006 WL
23 449095, at *3 (E.D. Cal. Feb. 17, 2006) (“The determination whether to issue a writ of habeas
24 corpus ad testificandum rests within the sound discretion of the district court.”).

25 The Court has conducted cost-benefit analyses regarding whether the inmates should

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27 ² The Court also notes that, in the initial scheduling order, the deadline for filing motions for the
28 attendance of incarcerated witnesses was set for September 3, 2019. (ECF No. 31 at 8.) This deadline was,
however, subsequently advanced to July 12, 2019, when the Court accelerated the trial date in this case (*See* ECF
No. 43).

1 come to court, and has determined that Mr. Bunn and Mr. Scully should come to court to
2 testify. *See Cummings*, 2006 WL 449095, at *3; *Wiggins v. County of Alameda*, 717 F.2d 466,
3 468 n.1 (9th Cir. 1983) (setting out factors to consider in determining whether to issue a writ to
4 bring a state prisoner witness into federal court: (1) whether the inmate’s presence will
5 substantially further the resolution of the case; (2) the security risks presented by the inmate’s
6 presence; (3) the expense of the prisoner’s transportation and safekeeping, and (4) whether the
7 suit can be stayed until the prisoner is released without prejudice to the cause asserted).

8 *1. Witness Bunn*

9 Defendants contend that Mr. Bunn should not be brought to trial to testify because his
10 testimony will not substantially further resolution of this case. Defendants argue that Mr.
11 Bunn’s declaration does not establish “that Plaintiff did not, in fact, possess more CDs than
12 those he had seen or of which he is aware,” and that Plaintiff’s testimony would be the best
13 evidence of the number of CDs that he possessed. (ECF No. 61 at 4-5.) Defendants therefore
14 assert that the inconvenience and expense of transporting Mr. Bunn to court for trial outweighs
15 any benefit he could provide.

16 The Court disagrees. Mr. Bunn states in his declaration that he will willingly testify at
17 the trial as to the following: he was a cellmate of Plaintiff’s at the time of the alleged incidents
18 and he saw and heard Defendants’ search of the cell, including the demeanor of Defendants
19 before the search and Defendants’ throwing of property items around the cell during the search;
20 he saw Defendants exiting the cell and the items that Defendants took with them; and he saw
21 the condition of the cell following the search. (ECF No. 52 at 8.) Mr. Bunn states he also
22 witnessed Plaintiff’s return to the cell; he witnessed Plaintiff’s request to unit floor officers to
23 be released to the program office to talk with Defendants about the cell search and confiscation
24 of Plaintiff’s property; and that he witnessed that Plaintiff was released to do so. (*Id.* at 8-9.)
25 Finally, Mr. Bunn states that he was familiar with and personally listened to all of Plaintiff’s
26 musical CDs, and that during the time Plaintiff was confined at CSP-COR, Mr. Bunn never saw
27 Plaintiff with, and Plaintiff was not known to possess, more than fifteen musical CDs. (*Id.* at 9.)

28 As to whether Plaintiff would be the best witness to testify regarding the number of

1 CDs he possessed, the number of CDs Plaintiff possessed is a disputed fact in this case, and
2 thus, Mr. Bunn’s testimony on this, as well as the other issues on which he indicates he will
3 testify, is relevant and will substantially further the resolution of this case.

4 The Court notes, however, that it is only determining that Mr. Bunn should be brought
5 to Court to testify because his testimony is sufficiently relevant to warrant the cost. The Court
6 is not precluding objections to his testimony, which is a question to be addressed either in
7 motions *in limine* or at trial.

8 2. *Witness Scully*

9 Defendants contend that Mr. Scully’s testimony will not substantially further resolution
10 of this case. Specifically, Defendants contend that Plaintiff has not established that Mr. Scully
11 has actual knowledge on the issue for which Plaintiff seeks to have Mr. Scully testify—the
12 statements made by Defendant Gamboa to Plaintiff following the search of Plaintiff’s cell and
13 the confiscation of Plaintiff’s property.

14 Plaintiff represents that Mr. Scully has confirmed to Plaintiff that he is willing to testify
15 at trial and will testify to the following: during the relevant time, Mr. Scully was housed on the
16 bottom tier in a cell that was below and one cell over from Plaintiff’s and Mr. Bunn’s cell;
17 Mr. Scully witnessed Defendant Gamboa’s negative attitude toward Plaintiff when Plaintiff
18 approached Gamboa following the search of Plaintiff’s cell and the confiscation of Plaintiff’s
19 property; and Mr. Scully specifically heard Gamboa tell Plaintiff that Plaintiff should not have
20 sent the appeal to the Director’s Level Review, and that Plaintiff had nothing coming and got
21 what he deserved. (ECF No. 52 at 4-5.) The Court finds the declaration of Plaintiff to be
22 sufficient to represent Mr. Scully’s proposed testimony. The Court also finds that this
23 testimony is relevant and will substantially further the resolution of this case.

24 Defendants also object to Mr. Scully as a witness, arguing that Plaintiff is seeking to
25 have Mr. Scully testify at trial regarding a subject on which Mr. Scully was not disclosed in the
26 initial disclosures. Defendant concedes that Plaintiff identified Mr. Scully in supplemental
27 disclosures, which were filed with the Court at ECF No. 25, and disclosed the following:
28 “Inmate Scully (#) was assigned to 3Aod-141 on March 14, 2016, and witnessed the actions of

1 Defendants when conducting the retaliatory cell search of Plaintiff's cell #3Aod-242." (ECF
2 No. 25.) Defendants contend, however, that because this disclosure did not identify Scully as a
3 witness who heard Gamboa's alleged statement to Plaintiff following the search and
4 confiscation of property, Plaintiff should be foreclosed from using Mr. Scully as a witness.
5 (ECF No. 61.) Plaintiff responds that Mr. Scully is listed in Plaintiff's pretrial statement and
6 declaration in support of pretrial statement as having personal knowledge of Defendant
7 Gamboa's statement. (ECF No. 66.)

8 The Court notes that it is only determining here that Mr. Scully should be brought to
9 Court to testify because his testimony is sufficiently relevant to warrant the cost. The Court is
10 not precluding objections to his testimony, which is a question to be addressed either in
11 motions *in limine* or at trial.

12 **II. CONCLUSION AND ORDER**

13 After conducting the cost-benefit analyses, the Court finds that Mr. Bunn and
14 Mr. Scully should be brought to testify at the upcoming trial. Accordingly, IT IS ORDERED
15 that Plaintiff's motion for the attendance of witnesses is GRANTED.

16 Approximately one month before the trial the Court will issue writs of habeas corpus ad
17 testificandum to have Mr. Bunn and Mr. Scully brought to the court to testify at the trial.

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19 IT IS SO ORDERED.

20 Dated: October 7, 2019

21 /s/ Eric P. Gray
22 UNITED STATES MAGISTRATE JUDGE
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