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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY JAMES COHEA,
Plaintiff,
v.
CHERYL K. PLILER, et al.,
Defendants.

No. 2:00-cv-2799-GEB-EFB P

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed a motion to obtain the attendance at trial of 16 incarcerated witnesses and seven unincarcerated witnesses. ECF No. 259. Defendants have filed an opposition. ECF No. 260. For the reasons that follow, the motion will be granted in part and denied in part.

I. Incarcerated Witnesses

Under this court’s practice (and prior orders in this action), to obtain the presence at trial of an incarcerated witness, plaintiff must file an affidavit indicating whether the witness will testify voluntarily and what relevant facts the witness has to offer. *See, e.g.*, ECF No. 225 at 14-15. The court then exercises its discretion to determine whether to issue a writ of habeas corpus ad testificandum directing the production of an inmate witness for trial, based on a consideration of such factors as: (1) whether the prisoner’s presence will substantially further the resolution of the case; (2) security risks presented by the prisoner’s presence; (3) the expense of the prisoner’s transportation and safekeeping; and (4) whether the suit can be stayed until the prisoner is

1 released without prejudice to the cause asserted.” *Wiggins v. County of Alameda*, 717 F.2d 466,
2 468 n.1 (9th Cir. 1983) (quoting *Ballard v. Spradley*, 557 F.2d 476, 480 (5th Cir. 1977)); *Walker*
3 *v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994). As there is no information before the court
4 regarding the second, third, and fourth *Ballard* factors, the court’s determinations here are guided
5 primarily by the first factor and the court’s prior practice.

6 Plaintiff has filed affidavits concerning 16 incarcerated witnesses along with his motion
7 asking the court to secure their attendance at trial. The court will grant plaintiff’s motion as to
8 three of these 16 individuals and deny the motion as to the remaining individuals for the reasons
9 that follow.

10 As stated in the supplement to the pretrial order (ECF No. 270) issued by the district
11 judge, these claims are preserved for trial:

- 12 (1) Whether defendants Colvin, McCargar, and/or Adams retaliated against plaintiff in
13 violation of the First Amendment by issuing allegedly false disciplinary documents;
- 14 (2) Whether defendants Baughman, Micheels, Yamamoto, Akin, Scarsella, and/or Gold
15 retaliated against plaintiff in violation of the First Amendment by endorsing the
16 allegedly false disciplinary documents; and
- 17 (3) Whether defendants Gold, Micheels, and/or Akin violated plaintiff’s procedural due
18 process rights under the Fourteenth Amendment through their conduct as hearing
19 officers at the hearings on the allegedly false disciplinary documents.

20 The court will now discuss whether plaintiff has made the necessary showing that each proposed
21 incarcerated witness can present facts relevant to these claims and whether the facts are such that
22 the witness’ presence will substantially further the resolution of the case.

23 **A. Rex Chappell, CDCR # B42679**

24 Plaintiff attests that Mr. Chappell (spelled “Cahppell” in plaintiff’s motion and in some
25 prior court documents) lived in the California State Prison, Sacramento (“CSP-Sac”) B-Facility at
26 the time relevant to the complaint. ECF No. 259 at 3. Mr. Chappell, a “jailhouse lawyer,” was a
27 frequent user of the B-Facility law library, and “personally witnessed defendant Colvin’s
28 retaliatory (falsely reported on Rule Violation Reports (‘RVR’)) treatment toward (against)

1 plaintiff.” *Id.* According to plaintiff, Mr. Chappell “was personally aware (and witnessed) the
2 retaliatory treatment by defendant McCargar, law library supervisor.” *Id.* Plaintiff does not
3 expand on these facts to inform the court what allegedly retaliatory conduct Mr. Chappell
4 witnessed, or what facts he would offer that would show that the conduct was retaliatory.
5 Accordingly, the court cannot find that Mr. Chappell’s presence would substantially further the
6 resolution of this case, and will decline to issue a writ of habeas ad testificandum to secure his
7 presence at trial.

8 **B. Morris Rogers, CDCR #C71298**

9 Plaintiff avers:

10 Morris Rogers’s name appears in the February 24, 1998 RVR hearing
11 proceedings, testifying not only about that filed incident, but additionally testified
12 that plaintiff always seems to have a problem getting into the library because [of]
13 defendant Colvin’s retaliatory treatment (to which Morris Rogers testified at the
RVR hearing that Colvin’s retaliatory treatment towards plaintiff was “worst
treatment” than plaintiff was illustrating at the RVR hearing [sic].

14 ECF No. 259 at 4. Defendants argue that, because the court has determined that plaintiff’s claim
15 with respect to the February 24, 1998 hearing is barred by *Heck v. Humphrey*, plaintiff has
16 provided minimal facts about Mr. Rogers’s testimony at the RVR hearing, and plaintiff has
17 provided insufficient (according to defendants) information about the foundation of Mr. Rogers’s
18 testimony, the court should not issue a writ to secure his appearance. The court finds, however,
19 that plaintiff has provided sufficient facts showing that Mr. Rogers has relevant information to
20 whether defendant Colvin bore some ill feeling toward plaintiff and thus, whether Colvin issued
21 one (or more) RVRs to plaintiff to retaliate against him. Accordingly, the court will grant
22 plaintiff’s motion and issue a writ to secure Mr. Rogers’s appearance at trial.

23 **C. James Wiley, CDCR #D18469**

24 Plaintiff avers that plaintiff worked for many years with Mr. Wiley, attempting to get his
25 criminal conviction overturned. ECF No. 259 at 5. According to plaintiff, Mr. Wiley personally
26 witnessed

27 much of both defendants Colvin and McCargar’s retaliatory treatment for
28 plaintiff’s pursued litigation (and helping other prisoners with their litigation) and
pursued administrative grievances about the conditions of confinement at [CSP-

1 Sac]. . . [and] the retaliatory treatment that plaintiff received from defendant
2 Adams and defendant Gold for plaintiff pursued administrative grievances.

3 *Id.* Plaintiff further declares that Mr. Wiley “personally witnessed plaintiff’s retaliatory transfer
4 to C-facility.”

5 Plaintiff’s claims regarding his transfer to C-facility are no longer part of this action. *See*
6 ECF Nos. 174, 177. Plaintiff provides no facts regarding what allegedly retaliatory conduct Mr.
7 Wiley witnessed or what facts he could offer to show that the conduct was retaliatory.
8 Accordingly, the court concludes that Mr. Wiley’s presence at trial would not substantially further
9 the resolution of this case and declines to issue a writ to secure his attendance.

10 **D. Keith Evans, CDCR #J65474**

11 Plaintiff’s declaration regarding Mr. Evans is very similar to the declaration regarding Mr.
12 Wiley. Importantly, the declaration only vaguely states that Mr. Evans personally witnessed
13 some defendants’ retaliatory treatment, but does not indicate what conduct Mr. Evans witnessed
14 or what testimony he would offer that would indicate that the conduct was retaliatory. In
15 addition, any testimony Mr. Wiley may offer about plaintiff’s transfer to C-facility is no longer
16 relevant to this action for the reasons stated above. The court finds that Mr. Evans’s presence at
17 trial would not substantially further the resolution of this case and declines to issue a writ to
18 secure his attendance.

19 **E. Alonzo James Joseph, CDCR #K62045**

20 Plaintiff avers that Mr. Joseph was “personally aware” of some defendants’ retaliatory
21 conduct towards plaintiff, but he does not provide any facts showing how Mr. Joseph gained that
22 awareness or what testimony he could offer that would help plaintiff show that defendants’
23 conduct was retaliatory. However, plaintiff also avers that Mr. Joseph witnessed plaintiff’s
24 confinement to quarters and deprivation of law library access as a result of some defendants’
25 allegedly false discipline. These facts are relevant to whether plaintiff suffered harm as a result of
26 defendants’ alleged misconduct. The court therefore finds that Mr. Joseph’s presence at trial
27 would substantially further the resolution of the case and will issue a writ to secure his
28 attendance.

1 **F. Douglas James, CDCR #H94727**

2 Plaintiff avers that Mr. James used to be his cellmate and that he personally witnessed the
3 “retaliatory treatment” of plaintiff by some defendants. Plaintiff again fails to provide any facts
4 showing what conduct Mr. James witnessed or what facts Mr. James could testify to that would
5 show that the conduct was retaliatory. Plaintiff also avers, however, that Mr. James witnessed
6 plaintiff’s confinement to quarters as the result of the alleged retaliation by defendants Adams
7 and Gold. These facts are relevant to whether plaintiff suffered harm as a result of defendants’
8 alleged misconduct, but are cumulative of the relevant testimony plaintiff anticipates from Mr.
9 Joseph. Plaintiff also avers that Mr. James witnessed his transfer to C-facility, but plaintiff’s
10 claims regarding that transfer are no longer part of this case. Because Mr. James has limited
11 relevant testimony and that testimony is cumulative of another witness’s testimony, the court
12 concludes that Mr. James’s presence at trial would not so further the resolution of the case as to
13 outweigh the cost to the state to produce him. Accordingly, the court declines to issue a writ to
14 secure his attendance.

15 **G. Steve Martin, CDCR #D48283**

16 Plaintiff avers that Mr. Martin was a law clerk in the CSP-Sac library who

17 personally witnessed every one of the incidents plaintiff asserts occurred
18 concerning defendants Colvin and McCargar’s retaliatory falsified RVR
19 accusations (centering around or occurring in [CSP-Sac]’s B-facility law library).
20 In fact, Steve Martin worked in B-facility law library on each one of the days
21 defendant McCargar’s and defendant Colvin’s retaliatory falsified RVRs were
22 alleged to have occurred, as Steve Martin also personally witnessed these
23 incidents occurrences [sic] which took place outside of the law library concerning
24 plaintiff’s failed attempts to gain access to the B-facility law library through
25 defendant Colvin.

26 ECF No. 259 at 9. Defendants argue that plaintiff has failed to provide sufficient facts showing
27 that Mr. Martin has knowledge of defendant Colvin or defendant McCargar issuing allegedly
28 false RVRs. The court finds that plaintiff’s facts – that Mr. Martin was present and witnessed the
29 incidents that led the defendants to issue the RVRs at issue in this case – are sufficient to show
30 that Mr. Martin possesses relevant information that would substantially further the resolution of
31 this case. Accordingly, the court will grant plaintiff’s motion with respect to Mr. Martin and
32 issue a writ of habeas corpus ad testificandum to secure his attendance at trial.

1 **H. Hunt, CDCR #C24128**

2 The CDCR inmate locator database (<http://inmatelocator.cdcr.ca.gov>) reveals no inmate
3 by the number C24128 currently incarcerated by the State of California. Accordingly, the court
4 cannot issue a writ to secure this inmate’s attendance at trial.

5 **I. McGruder, CDCR #C64024**

6 The CDCR inmate locator database reveals no inmate by the number C64024 currently
7 incarcerated by the State of California. Accordingly, the court cannot issue a writ to secure this
8 inmate’s attendance at trial.

9 **J. Nathaniel Wallace, CDCR #E63680**

10 Plaintiff’s declaration concerning Mr. Wallace states that plaintiff assisted him with his
11 state habeas corpus writ and that he was “a personal witness to the retaliatory treatment” plaintiff
12 received at the hands of defendants Colvin, McCargar, Adams, and Gold. ECF No. 259 at 12.
13 Plaintiff avers that Mr. Wallace is also a “personal witness to the fact that” the “sole reason” for
14 these defendants’ actions was plaintiff’s grievances. *Id.* Plaintiff provides no facts showing the
15 circumstances under which Mr. Wallace witnessed the alleged retaliation or what facts he could
16 testify to that would tend to show defendants’ conduct was retaliatory. Additionally, any
17 testimony Mr. Wallace could offer about plaintiff’s transfer to C-facility are not relevant to this
18 action for the reasons stated with respect to other proposed witnesses, above. Although plaintiff
19 avers that Mr. Wallace witnessed plaintiff’s confinement to quarters, this testimony would be
20 cumulative of the testimony plaintiff proposes for Alonzo James Joseph. The court finds that the
21 burden of producing Mr. Wallace for trial outweighs the limited, and cumulative, relevant
22 testimony he may offer. Accordingly, the court declines to issue a writ to secure Mr. Wallace’s
23 attendance at trial.

24 **K. Applegate, CDCR #P12421**

25 The CDCR inmate locator database reveals no inmate by the number P12421 currently
26 incarcerated by the State of California. Accordingly, the court cannot issue a writ to secure this
27 inmate’s attendance at trial.

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1 **L. Lopez, CDCR #H11564**

2 The CDCR inmate locator database reveals no inmate by the number H11564 currently
3 incarcerated by the State of California. Accordingly, the court cannot issue a writ to secure this
4 inmate's attendance at trial.

5 **M. Christopher Love, CDCR #D40953**

6 Plaintiff's declaration regarding Mr. Love states generally that he personally witnessed the
7 "retaliatory treatment" of some defendants. Plaintiff again fails to provide any facts showing how
8 Mr. Love witnessed such treatment or what information Mr. Love would provide at trial that
9 would tend to show that any defendant retaliated against plaintiff. The court therefore finds that
10 plaintiff has not provided sufficient information from which the court can conclude that Mr. Love
11 has relevant information that would substantially further the resolution of this case. Accordingly,
12 the court declines to issue a writ to secure Mr. Love's attendance at trial.

13 **N. Anthony Evans, CDCR #C30180**

14 The CDCR inmate locator database reveals no inmate by the number C30180 currently
15 incarcerated by the State of California. Accordingly, the court cannot issue a writ to secure this
16 inmate's attendance at trial.

17 **O. Juan Hilario Bautista, CDCR #K18082**

18 Plaintiff avers that Mr. Bautista personally witnessed the incident underlying the January
19 15, 1999 RVR issued to plaintiff by defendant Colvin. According to plaintiff, defendants Colvin
20 and McCargar "used" Mr. Bautista "to boost their retaliatory falsifying of the RVR accusations
21 against plaintiff, using [him] as the false source." ECF No. 259 at 17. Defendants argue that
22 "there is no January 15, 1999 RVR that is a subject of this action," citing generally to the pretrial
23 order (ECF No. 255). It is unclear why defendants believe that the January 15, 1999 RVR is no
24 longer part of this action based on the pretrial order. The pretrial order noted that the facts
25 included therein were taken solely from defendants' recitation of facts. ECF No. 255 at 2 n.1. It
26 did not limit plaintiff's claims by the facts included therein. The complaint alleges a claim
27 concerning the January 15, 1999 RVR that has not been dismissed or summarily adjudicated in
28 favor of defendants and therefore remains to be adjudicated at trial. ECF No. 122 at 11.

1 Plaintiff's facts are sufficient to show that Mr. Bautista witnessed the incident underlying the
2 January 15, 1999 RVR and thus will substantially further the resolution of the case by providing
3 information about that incident. Accordingly, plaintiff's motion to secure Mr. Bautista's
4 attendance at trial will be granted.

5 **P. Coleman, CDCR #E86262**

6 The CDCR inmate locator database reveals no inmate by the number E86262 currently
7 incarcerated by the State of California. Accordingly, the court cannot issue a writ to secure this
8 inmate's attendance at trial.

9 **II. Unincarcerated Witnesses**

10 Plaintiff asks the court to order the U.S. Marshal to serve subpoenas on seven
11 unincarcerated witnesses without payment of witness fees and travel expenses. As the court has
12 previously informed plaintiff (ECF No. 255 at 16), "even a plaintiff proceeding in forma pauperis
13 must tender the fees" because "[n]o statute authorizes the use of public funds" to cover these
14 costs. *Id.* The Ninth Circuit has held that the in forma pauperis statute, 28 U.S.C. § 1915, does
15 not authorize the expenditure of public funds to pay for witness fees and expenses. *Tedder v.*
16 *Odel*, 890 F.2d 210, 211-12 (9th Cir. 1989); *see also Dixon v. Ylst*, 990 F.2d 478, 480 (9th Cir.
17 1993). Accordingly, plaintiff's motion is denied. If plaintiff wishes to obtain the presence at trial
18 of an unincarcerated witness, he must follow the instructions provided in the pretrial order,
19 including tendering through the U.S. Marshal a money order payable to the witness in the amount
20 of the daily witness fee (\$40.00) plus the witness' travel expenses.

21 **III. Order**

22 For the foregoing reasons, it is hereby ORDERED that:

- 23 1. Plaintiff's motion to secure the attendance at trial of various incarcerated witnesses
24 (ECF No. 259) is granted in part (as to witnesses Morris Rogers, Alonzo James
25 Joseph, Steve Martin, and Juan Hilario Bautista) and is otherwise denied.

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2. Plaintiff's motion for an order requiring the U.S. Marshal to serve seven subpoenas on unincarcerated witnesses without payment of the witness fees and travel expenses (ECF No. 259) is denied.

DATED: June 5, 2015.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE