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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MALIK JONES,

Plaintiff,

No. 2:08-cv-2607 MCE CKD

vs.

J. MCGUIRE, et al.,

Defendants.

ORDER

_____ /

Plaintiff, a state prisoner, proceeds pro se with a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff has filed a motion for order to subpoena eight inmate witnesses for trial. (Dkt. No. 85.) Defendant opposes the motion, stating that plaintiff should not be allowed to call these inmate witnesses because he failed to disclose their identity in response to interrogatories propounded on plaintiff by defendant. (Dkt. No. 86.)

A motion for subpoena is not the proper method for plaintiff to attempt to secure the attendance of inmate witnesses at trial. Rather, the proper procedure for a pro se incarcerated plaintiff is to seek a writ of habeas corpus ad testificandum concurrently with the filing of the plaintiff's pre-trial statement. As plaintiff was notified in the January 11, 2011 scheduling order with regard to securing the attendance of incarcerated witnesses at trial:

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1 It is the plaintiff's responsibility to produce all of the evidence to
2 prove his case, whether that evidence is in the form of exhibits or
3 witness testimony. If the plaintiff wants to call witnesses to testify,
4 he must follow certain procedures to ensure that the witnesses will
5 be at the trial and available to testify.

6 I. Procedures for Obtaining Attendance of Incarcerated
7 Witnesses Who Agree to Testify Voluntarily

8 An incarcerated witness who agrees to voluntarily attend trial to
9 give testimony cannot come to court unless this court orders the
10 warden or other custodian to permit the witness to be transported to
11 court. This court will not issue such an order unless it is satisfied
12 that:

- 13 1. The prospective witness is willing to attend; and
- 14 2. The prospective witness has actual knowledge of
15 relevant facts.

16 With the pretrial statement, a party intending to introduce the
17 testimony of incarcerated witnesses who have agreed voluntarily to
18 attend the trial must serve and file a written motion for a court
19 order requiring that such witnesses be brought to court at the time
20 of the trial. The motion must:

- 21 1. State the name, CDC Identification number, and
22 address of each such witness; and
- 23 2. Be accompanied by affidavits showing that each
24 witness is willing to testify and that each witness
25 has actual knowledge of relevant facts.

26 The willingness of the prospective witness can be shown in one of
two ways:

1. The party intending to introduce the testimony can
swear by affidavit that the prospective witness has
informed the party that he or she is willing to testify
voluntarily without being subpoenaed. The party
must state in the affidavit when and where the
prospective witness informed the party of this
willingness; or
2. The party can serve and file an affidavit sworn to by
the prospective witness, in which the witness states
that he or she is willing to testify without being
subpoenaed.

The prospective witness' actual knowledge of relevant facts can be
shown in one of two ways:

1. The party intending to introduce the testimony can
swear by affidavit that the prospective witness has

1 actual knowledge. However, this can be done only
2 if the party has actual firsthand knowledge that the
3 prospective witness was an eyewitness or an
4 ear-witness to the relevant facts. For example, if an
incident occurred in the plaintiff's cell and, at the
time, the plaintiff saw that a cellmate was present
and observed the incident, the plaintiff may swear to
the cellmate's ability to testify.

5 Or

6 2. The party can serve and file an affidavit sworn to by
7 the prospective witness in which the witness
8 describes the relevant facts to which the prospective
9 witness was an eye- or ear-witness. Whether the
10 affidavit is made by the plaintiff or by the
11 prospective witness, it must be specific about what
12 the incident was, when and where it occurred, who
13 was present, and how the prospective witness
14 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' custodian to bring
the witness to court.

15 II. Procedures for Obtaining Attendance of Incarcerated
Witnesses Who Refuse to Testify Voluntarily

16 If a party seeks to obtain the attendance of incarcerated witnesses
17 who refuse to testify voluntarily, the party should submit with his
18 pretrial statement a motion for the attendance of such witnesses.
19 Such motion should be in the form described above. In addition,
the party must indicate in the motion that the incarcerated
witnesses are not willing to testify voluntarily.

20 (Dkt. No. 53 at 2-4.)

21 In determining whether to issue a writ of habeas corpus ad testificandum to bring
22 a state prisoner witness into federal court, a district court must exercise its discretion based upon
23 consideration of such factors as whether the prisoner's presence will substantially further the
24 resolution of the case, the security risks presented by the prisoner's presence, the expense of the
25 prisoner's transportation and safekeeping, and whether the suit can be stayed until the prisoner is
26 released without prejudice to the cause asserted. See Wiggins v. Alameda County, 717 F.2d 466,

