

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ROY A. MONTES (a.k.a. RAYMOND MONTEZELLO),)	Case No.: C 09-0976 RMW
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	PETITION FOR WRIT OF HABEAS
v.)	CORPUS AD TESTIFICANDUM
)	
CORRECTIONAL OFFICER P. RAFALOWSKI, et al.,)	
)	[Re Docket No. 72]
Defendants.)	

Roy A. Montes ("plaintiff") petitions the court for a Writ of Habeas Corpus Ad Testificandum, pursuant to 28 U.S.C. §§ 1651(a) & 2241(c)(5). For the reasons set forth below, the court conditionally denies plaintiff's petition, provided that defendants enable plaintiff to testify remotely by videoconference.

I. BACKGROUND

Plaintiff Roy A. Montes is currently an inmate at Kern Valley State Prison. On May 26, 2008, while incarcerated at Pelican Bay State Prison, plaintiff attempted to kick defendant officer Rafalowski, while Rafalowski was escorting him from the shower back to his cell. Plaintiff alleges that defendant responded to this attempted kick with excessive force, repeatedly punching plaintiff in the face and slamming plaintiff's head against the concrete floor. Plaintiff filed the instant action on March 6, 2009, asserting violation of his civil rights under 42 U.S.C. § 1983. Plaintiff filed an

1 amended complaint on August 22, 2011, asserting three additional California tort claims: assault,
2 battery, and intentional infliction of emotional distress.

3 Plaintiff is serving a life sentence for murder. In the six-and-a-half years since beginning his
4 prison term in November 2005, plaintiff has incurred seven rules violations for violent interactions
5 with other inmates and correctional officers. Plaintiff has also received various CDCR mental health
6 services since beginning his prison term and was, at the time of the relevant incident involving
7 defendant Rafalowski, housed in the Psychiatric Services Unit, which offered the highest level of
8 security housing available in the CDCR system. Plaintiff is no longer in the Psychiatric Services
9 Unit, and is currently housed with the general prison population, in a level IV security facility.

10 II. ANALYSIS

11 While “imprisonment suspends the plaintiff’s usual right to be personally present at judicial
12 proceedings brought by himself or on his behalf,” *Hernandez v. Whiting*, 881 F.2d 768, 770 (9th Cir.
13 1989), a district court has discretion to issue a writ of habeas corpus ad testificandum to secure the
14 prisoner’s presence in court so that he may testify at trial. *Wiggins v. County of Alameda*, 717 F.2d
15 466, 468 f.n. 1 (9th Cir. 1983); *Greene v. Prunty*, 938 F. Supp. 637, 638 (S.D. Cal. 1996). Although
16 plaintiff is currently incarcerated in Kern County, which is within the Eastern District of California,
17 the court may, in its discretion, issue a writ “to produce a person incarcerated outside of the district
18 to testify.” *Greene*, 938 F. Supp. at 638. When determining whether to issue a writ of habeas corpus
19 ad testificandum, the Ninth Circuit has directed courts to weigh the following four *Ballard* Factors:
20 (1) whether the prisoner’s presence will substantially further the resolution of the case; (2) the
21 security risks presented by the prisoner’s presence; (3) the expense of the prisoner’s transportation
22 and safekeeping; and (4) whether the suit can be stayed until the prisoner is released without
23 prejudice to the cause asserted. *Wiggins*, 717 F.2d at 468 f.n. 1 (citing *Ballard v. Spradley*, 557 F.2d
24 476, 480 (5th Cir. 1977)); *see also Muhammad v. Warden*, 849 F.2d 107, 113 (4th Cir. 1988)
25 (enumerating a list of factors analogous to those in *Ballard*); *Greene*, 938 F. Supp. at 639
26 (explaining that a writ of habeas corpus ad testificandum is appropriate when “the probative value of
27

1 the testimony justifies the expense and security risk associated with transporting an inmate-witness
2 to court from a correctional facility”).

3 In applying these four factors, the court notes at the outset that a stay is not appropriate in
4 this case, given that plaintiff is currently serving a life sentence. Thus, the court turns its attention
5 exclusively to factors one through three. When security concerns and expense become substantial
6 enough considerations, such that they counsel against issuing a writ of habeas corpus ad
7 testificandum, other district and circuit courts are increasingly looking to videoconferencing as a
8 viable alternative to live testimony. *See Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005)
9 (finding that “the district court did not abuse its discretion in conducting the trial by
10 videoconference” when hearing the plaintiff inmate’s §1983 action against corrections officials);
11 *Twitty v. Ashcroft*, 712 F. Supp. 2d 30, 33 (D. Conn. 2009) (“the court finds that expense and
12 security concerns outweigh the plaintiff’s interest in physically appearing at trial, particularly in light
13 of the availability of a reasonable alternative, that of having the plaintiff appear by
14 videoconference”).

15 In the instant action, resolution of the issue will significantly depend on individual testimony
16 and credibility. Courts have noted the limitations of videoconferencing in similar situations. *See*
17 *Edwards v. Logan*, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999) (“video conferencing . . . is not the
18 same as actual presence, and it is to be expected that the ability to observe demeanor, central to the
19 fact-finding process, may be lessened in a particular case by video conferencing”). Despite these
20 shortcomings, however, videoconferencing nonetheless facilitates plaintiff’s meaningful
21 participation at trial: plaintiff is able to testify, present evidence, and look each juror in the eye.
22 *United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995); *see also Edwards*, 38 F. Supp. 2d at 467-68
23 (“with video conferencing, [plaintiff] will be virtually present at his trial and will have the ability to
24 confront witnesses, address the jury, and participate fully”). The court also notes that it is not
25 uncommon for testimony to be presented by videotaped depositions. Thus, even when resolution of
26 the case hinges on the jury’s ability to judge the veracity of plaintiff’s testimony, considerable
27 expense and security concerns may recommend videoconferencing over physical presence.

1 In the instant case, the security risk posed by plaintiff and the expense associated with
2 transporting plaintiff to the courthouse weigh heavily against issuing a writ of habeas corpus ad
3 testificandum. Plaintiff is currently in a level IV security facility and has a history of violent
4 interactions with both correctional officers and other inmates. Additionally, the Kern Valley
5 litigation coordinator estimates that it would cost approximately \$20,000 to safely transport and
6 house plaintiff for the duration of the trial. Allowing plaintiff's participation through video
7 conference would alleviate substantial security risks and much of the cost, without unfairly
8 prejudicing plaintiff by denying the jury adequate opportunity to judge plaintiff's credibility.

9 To minimize any potential unfair advantage in favor of defendants, plaintiff and defendants
10 must confer to discuss whether other witnesses, particularly percipient witnesses, should also appear
11 by videoconference in lieu of making a physical appearance in court. In the event that plaintiff and
12 defendants cannot reach an agreement, either party may file a motion with the court to request that
13 certain other witnesses appear by videoconference.

14 **III. ORDER**

15 For the foregoing reasons, the court denies plaintiff's petition for writ of habeas corpus ad
16 testificandum, without prejudice, provided that defendants enable plaintiff to testify remotely by
17 videoconference. Defendants' counsel is to make videoconferencing arrangements and notify
18 plaintiff's counsel and the court with all relevant details. Defendants' counsel may contact the
19 courtroom deputy, Jackie Garcia, 408-535-5375, or Jackson Xu, the court's IT specialist, 408-535-
20 5384, to learn what, if any, equipment is located at the court that could assist in setting up
21 videoconferencing. Defendants' counsel must notify the court by no later than July 11, 2012
22 regarding the arrangements they have made.

23 **IT IS SO ORDERED.**

24
25 Dated: June 25, 2012



RONALD M. WHYTE
United States District Judge