

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

Plaintiff John Martinez, an inmate in the custody of the California Department of Corrections, brings this civil rights action against two prison guards for retaliating against him and being deliberately indifferent to his safety. This action is set for trial on October 28, 2008.

On March 31, 2008, Plaintiff filed a motion for the attendance of incarcerated witnesses. While Defendants did not file a formal opposition to this motion, Defendants objected to the testimony of these witnesses in their April 30, 2008 pretrial statement.

A. Witnesses

1. Plaintiff John Martinez

Plaintiff asks the court to issue an order requiring prison officials bring him to court for the trial in this action. Plaintiff is advised that this court will issue a writ of habeas corpus ad testificandum directed to the warden of his current place of incarceration to bring him to trial to testify. This order will be issued after the trial date is confirmed.

2. *Inmate Morales*

2 Inmate Morales is willing to testify that he was told by Inmate Andy Rodriguez that there
3 was a rumor Plaintiff was a homosexual. When Inmate Morales became Plaintiff's cellmate he
4 asked Plaintiff about homosexual activity. Plaintiff denied any activity and informed Inmate
5 Morales he was not a homosexual and the rumor was started by Defendant Lunes. Inmate
6 Morales has been Plaintiff's cell mate for two and a half years and has come to the conclusion
7 that Plaintiff is not a homosexual. Defendants object to this proposed testimony on the ground
8 that it is hearsay. Defendants also claim that the fact Plaintiff and Inmate Morales never
9 engaged in any homosexual behavior does not mean Plaintiff did not engage in the behavior with
10 Inmate Radillo.

11 Based on the facts, the issue of whether Plaintiff engaged in homosexual behavior with
12 Inmate Radillo is very relevant to this action. If the homosexual behavior did not occur, then
13 Defendants had no reason to document such behavior. While it is entirely possible that Inmate
14 Morales could have lived with Plaintiff for over two years and not realize Plaintiff engaged in
15 homosexual behavior with others, Inmate Morales does have relevant knowledge of much of
16 Plaintiff's conduct over a two year span. Thus, Inmate Morales's testimony is relevant, and he
17 will be brought to trial. In addition, while Inmate Morales's proposed testimony about a rumor
18 may be hearsay, this argument is better addressed in a motion in limine and is not a reason to
19 decline to bring Inmate Morales to testify.

3. *Inmate Dunn*

21 Inmate Dunn will testify that Defendant Lunes and Correctional Officer Perez made
22 threatening comments concerning harming Plaintiff. Specifically, Inmate Dunn heard
23 Defendant Lunes and Officer Perez discussing “kicking some one’s ass.” When Inmate Dunn
24 inquired about who they were talking about, Officer Perez stated “Martinez in #17” and “some
25 one should put a hurting to that boy.” Defendants contend that these statements are hearsay.
26 Defendants also claim this evidence is not material.

The court finds that this evidence is relevant to the issues in this action. Defendant Lunes' intentions toward Plaintiff when he had Defendant Chamalbide document what occurred in Plaintiff's cell is at issue in this action: Was Defendant Lunes acting out of a legitimate penological interest or was Defendant Lunes merely attempting to chill Plaintiff's First Amendment rights? In addition, the court is not confident that Inmate Dunn's testimony is hearsay and not subject to any hearsay exception, such as a statement against interest. Thus, the court will order him brought to trial.

4. *Inmate Rodriguez*

_____ Inmate Rodriguez will testify that Defendant Chamalbide told Inmate Rodriguez to warn Plaintiff to be careful because “IGJ” was talking about him. Defendant Chamalbide also told Inmate Rodriguez that she had caught inmates in a sexual act and asked whether it was a bad thing. Later, Defendant Chamalbide told Inmate Rodriguez that she was being pressured to write up a report about Plaintiff’s behavior. Inmate Rodriguez will also testify about what could occur if a gang member engages in homosexual behavior and that when he confronted Plaintiff, Inmate Rodriguez came to the conclusion Plaintiff was being set up. Finally, Inmate Rodriguez will testify that he told several inmates what Defendant Chamalbide told him.

Defendant does not object to Inmate Rodriguez being brought to trial to testify. Inmate Rodriguez's testimony is relevant to several issues in this action, and the court will bring Inmate Rodriguez to testify.

5. *Inmate Viscarra*

The court declines to order the attendance of Inmate Viscarra at this time. While Plaintiff has provided a letter indicating Inmate Viscarra is willing to testify, it remains unclear what relevant information he may have. Defendants also dispute whether Inmate Viscarra is willing to testify. Plaintiff may file another motion requesting the transportation of Inmate Viscarra. In such a motion, Plaintiff should provide evidence that Inmate Viscarra is willing to testify and an give an offer of proof on his proposed testimony.

1 **6. Inmate Radillo**

2 Inmate Radillo was Plaintiff's cellmate at the time underlying this action, and he is the
3 one Plaintiff allegedly was engaging in the homosexual act with. Inmate Radillo will confirm
4 whether the act ever occurred and Defendant Chamalbide's statements to Plaintiff and Inmate
5 Radillo about being pressured to write Plaintiff up. Inmate Radillo's testimony is highly
6 relevant to this action and Defendants do not oppose the court bringing him to trial. Thus, the
7 court will order Inmate Radillo's testimony at trial.

8 **B. Defendants' Future Objections to Inmate Testimony.**

9 All interested parties are informed that it is necessary to grant Plaintiff's motion to allow
10 the transportation of these incarcerated witnesses at this time. The CDC needs considerable time
11 to arrange for transportation. Plaintiff is advised that some or all of the testimony of his inmate
12 witnesses may be excluded pursuant to possible motions in limine filed by Defendants. The
13 court will rule on any motions in limine the week before trial. Thus, while the court will order
14 the incarcerated witnesses transported for trial, nothing in this order is a guarantee that the
15 witnesses' testimony will not be limited.

16 **C. Incarcerated Witness's Objection to Transportation**

17 The court notes that it is not this court's policy to transport an inmate witness unless the
18 inmate witness is currently willing to come to court to testify. For that reason, the court is
19 serving courtesy copies of this order on Plaintiff's inmate witnesses. **If any inmate witness is**
20 **not willing to testify in this action, the inmate witness should contact the court indicating**
21 **the case name and case number of this action, state that the inmate witness does not wish to**
22 **be transported to trial, and ask that any transportation order be vacated.** Any request to
23 stop transportation should be filed as soon as possible to avoid any unnecessary transportation.

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ORDER

Accordingly, the court orders that:

1. Plaintiff's motion for the attendance of incarcerated witnesses Inmate Armando Morales (P-80673), Inmate Rodney Dunn (K-2-0611), Inmate Andrew Rodriguez (D-89239), and Inmate Juan Radillo (P-94519) is GRANTED;
2. Plaintiff's motion for the transportation of Inmate Anthony Viscarra is DENIED without prejudice; and
3. The Clerk of the Court is DIRECTED to send courtesy copies of this order to:

John R Martinez
J-52893
Corcoran State Prison
PO Box 3481
Corcoran, CA 93212

Armando Morales
P-80673
Corcoran State Prison
PO Box 3481
Corcoran, CA 93212

Rodney Dunn
K-2-0611
Corcoran State Prison
PO Box 3481
Corcoran, CA 93212

Andrew Rodriguez
D-89239
Corcoran State Prison
PO Box 3481
Corcoran, CA 93212

Juan Radillo
P-94519
Corcoran State Prison
PO Box 3481
Corcoran, CA 93212

IT IS SO ORDERED.

Dated: August 12, 2008

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE