

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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NATHANIEL ALLEN LINDELL,

Plaintiff,

v.

CINDY O'DONNELL, SANDRA  
HAUTAMAKI, JOHN RAY,  
PETER HUIBREGTSE, GERALD BERGE,  
SGT. S. GRONDIN, C.O. D. ESSER,  
KELLY TRUMM, C.O. JOHNSON,

Defendants.

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ORDER

05-C-04-C

This case is scheduled for jury trial on February 27, 2006, on plaintiff's claims that his First Amendment rights have been violated by the decision of defendants Haines, Berge, Trumm, Huibregtse, Hautamaki and O'Donnell to enforce prison policies prohibiting prisoners from possessing magazines with torn covers and that his Eighth Amendment rights were violated when defendant Esser used excessive force against him. Now before the court is plaintiff's petition for a writ of habeas corpus ad testificandum for proposed witnesses Rodosvaldo Pozo and Willie Williams, both inmates at the Wisconsin Secure Program Facility in Boscobel, Wisconsin.

In an order dated November 10, 2005, I denied an earlier request made by plaintiff for a writ of habeas corpus ad testificandum with respect to inmate Pozo, stating: “Plaintiff asserts that inmate Pozo would testify that defendant Esser assaulted Pozo in the past. However, this proposed ‘propensity’ evidence is not admissible under Fed. Rule of Evidence 404(b).” Order dated Nov. 10, 2005, dkt. #81, at 5. In his current petition, plaintiff asserts that, if permitted to testify, Pozo would provide information about Esser’s past acts of wrongdoing, and nothing more. Because plaintiff has not demonstrated that Pozo has relevant, admissible evidence, plaintiff’s request will again be denied.

According to plaintiff, at the time of defendant Esser’s alleged assault, plaintiff and inmate Willie Williams were being held in adjacent prison cells. Plaintiff alleges that Williams “heard relevant sounds” relating to the assault. In addition, plaintiff asserts that Williams could testify to defendant Esser’s “habit” of throwing food items at inmates. Although I am not convinced that inadmissible evidence of prior bad acts can be re-characterized as admissible “habit” evidence under Fed. R. Evid. 406, Williams’s personal knowledge of the events that occurred between plaintiff and defendant Esser on November 27, 2001 may be relevant to plaintiff’s claim. Therefore, I will grant plaintiff’s petition for a writ of habeas corpus ad testificandum with respect to Willie Williams. (Plaintiff has indicated that Williams is willing to appear voluntarily to testify on plaintiff’s behalf. If this is not the case, plaintiff will have to subpoena him as a witness.)

ORDER

IT IS ORDERED that plaintiff's petition for a writs of habeas corpus ad testificandum is GRANTED with respect to Willie Williams and DENIED with respect to Rodosvaldo Pozo. The clerk of court shall issue a writ of habeas corpus ad testificandum for prison inmate Willie Williams to appear at the trial beginning February 27, 2006.

Entered this 30th day of January, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge