IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STEVEN D. STEWART,

Plaintiff, ORDER

v. 05-C-293-C

C.O. BARR,

Defendant.

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This is a civil action for monetary, declaratory and injunctive relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Steven D. Stewart, a prisoner at the Wisconsin Secure Program Facility, maintains that defendant Barr acted with deliberate indifference to his serious medical needs when he confiscated plaintiff's prescription medication. Trial is scheduled for July 17, 2006. This order will describe how the court generally conducts a trial and explain to the parties what written materials they are to submit before trial.

A. Jury Selection - Voir Dire Questions

The trial will begin with jury selection. The judge will ask all the potential jurors standard "voir dire" questions, which they must answer under oath. ("Voir dire" means

roughly "to speak the truth.") This is the parties' chance to observe the potential jurors while they are being questioned so that they can decide which prospective jurors to strike from the panel when the time comes to exercise their strikes.

The standard questions appear in the attachment to the magistrate judge's preliminary pretrial conference order entered on September 20, 2005. The parties may add to the standard questions by submitting their proposed questions to the court and the opposing party no later than seven days before trial.

A total of thirteen possible jurors will be called forward. When the court has finished questioning the thirteen, each side will be allowed to strike the names of three potential jurors. The plaintiff will strike one name, the defendants one name, the plaintiff one name, the defendants one name, etc., leaving seven persons who will make up the jury panel.

B. Opening Statements

After the parties select the jury, plaintiff will give an opening statement describing his claim. An opening statement should give the jury an idea of what the case is about and what the jurors will see and hear from the witnesses and from the exhibits that plaintiff will offer into evidence. The opening statement is not a time for plaintiff to give testimony. What is said during opening statements is not evidence. Therefore, if plaintiff begins to make comments in the nature of testimony, and if defense counsel objects, the court will interrupt

plaintiff and instruct the jury not to consider the testimony-like statements.

Following plaintiff's opening statement, defense counsel is allowed to make a statement about defendants' case. If counsel wishes, he or she may choose to delay the statement until the beginning of defendants' case.

C. Avoiding Dismissal of the Case

After opening statements, the evidentiary stage of the trial begins. Plaintiff must put in his evidence first, because he has the burden of proving his claims by a preponderance of the evidence. He must prove each element of each of his claims. (These elements are set forth below in section D, below.) If plaintiff does not put in enough evidence to prove his claims, defendants may move the court for judgment as a matter of law against plaintiff, and the judge may dismiss the case before defendants are called upon to produce any opposing evidence.

D. Elements of Plaintiff's Claims

In order to defeat a motion for judgment as a matter of law, plaintiff must present enough evidence to allow a reasonable jury to find that each legal element of each of his claims has been proven by a preponderance of the evidence. With respect to plaintiff's claim that defendant Barr acted with deliberate indifference to his serious medical needs in

violation of the Eighth Amendment, plaintiff must show that:

1) On January 13, 2005, he had a valid prescription for pain medication;

2) Defendant Barr knew during his January 13, 2005 search of plaintiff's cell that plaintiff's prescription was valid and that without the medication plaintiff would suffer pain; and

3) Defendant Barr confiscated the medication any way.

E. Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award as compensatory damages an amount that reasonably compensates plaintiff for the injuries or damages he suffered as a result of defendant's acts. In order to recover compensatory damages, plaintiff must introduce evidence of physical harm suffered as a result of defendant's actions. If plaintiff presents evidence of physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendant's action. If the court permits it, the jury may award punitive damages as a deterrence to defendant.

F. Evidence

All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence. For example, if a party wishes to introduce evidence about the content of a

document, he should get a copy of the document, submit it as an exhibit at the time of trial and produce a witness who can testify from his or her own knowledge that the document is what it appears to be. For example, plaintiff may wish to introduce as evidence medical records showing that he had a valid prescription for pain medication on January 13, 2005. If so, he should obtain an authenticated copy of the records from the prison health service unit staff responsible for maintaining custody of the records and ask the custodian to certify that the records were made at or near the time the events recorded in them, and were recorded and kept in the course of regularly conducted business. Fed. R. Evid. 806(6). Before introducing the evidence at trial, plaintiff should ask the court and opposing counsel to allow the records to be accepted into evidence.

Plaintiff should be aware that a party may not rely on affidavits at trial because they are hearsay. The only exception to this rule is that a party may use a witness's affidavit to show that the witness made an earlier statement that is inconsistent with the witness's trial testimony.

The Federal Rules of Evidence limit the testimony of witnesses. Witnesses may give testimony on any relevant matter about which they have personal knowledge. However, witnesses generally cannot give hearsay testimony, that is, a witness cannot testify about what someone else said out of court, since the accuracy of a hearsay statement cannot be tested by the opposing party.

G. Preparing for Trial

In the magistrate judge's preliminary pretrial conference order, the parties were given a deadline to disclose to each other the names and addresses of their trial witnesses. A copy of this court's written Procedures for Calling Witnesses to Trial was attached to the order. Those procedures require that any party who wishes to call an incarcerated witness to testify must serve and file a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial, to make sure the incarcerated witness attends trial.

Plaintiff has not filed a witness list or made a motion seeking his own attendance at trial. Nevertheless, I presume that plaintiff will testify on his own behalf. Therefore, I will direct the Clerk of Court to issue a writ of habeas corpus ad testificandum for his attendance at trial. Plaintiff should note that he cannot expect defendant to be present at trial. If he wishes to call defendant as a witness at trial, he will have to subpoena him unless defendant's counsel agrees to make him available to be called by plaintiff as a witness.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff, inmate Steven Stewart (Wisconsin Secure Program Facility) at trial beginning on Monday, July 17, 2006.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN July 10, 2006, the parties are to file and serve (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; and (c) proposed jury instructions. The parties should not submit the standard voir dire questions and jury instructions attached to the magistrate judge's preliminary pretrial conference order. The court will consider any objections to the voir dire questions by either party in a conference to be held before jury selection begins.

2. The court retains the discretion to refuse to entertain special verdict forms or jury instructions not submitted on time, unless the subject of the request is one arising in the course of trial that could not reasonably have been anticipated prior to trial.

3. If either party wants to submit a trial brief in advance of trial, it must serve a copy of the brief on the opposing party. The party may file the brief with the court at any time before jury selection.

Entered this 5th day of June, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge