IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SHAROME ANDRE POWELL,

Plaintiff, ORDER

v. 06-C-58-C

SERGEANT FINK, LIEUTENANT DURDIN
and CORRECTIONAL OFFICER KOPEHAMER,

Defendants.

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This is a civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Plaintiff Sharome Powell, a prisoner at the Waupun Correctional Institution, contends that defendants Fink, Durdin and Kopehamer used excessive force against him in violation of the Eighth Amendment when they slammed his head into a shower door on July 8, 2005. Trial is scheduled for October 2, 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 April 6, 2006, dkt. #23. 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 his claim. (These elements are set forth below in section D, below.) If plaintiff does not put in enough evidence to prove his claim, 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 survive 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 his claim has been proven by a preponderance of the evidence. Plaintiff's claim is that defendants Fink,

Durdin and Kopehamer used excessive force against him in violation of the Eighth Amendment. It will be plaintiff's burden to prove that:

1) On July 8, 2005, defendants Fink, Durdin and Kopehamer used physical force on him; and

2) The force defendants used was unreasonable under the circumstances.

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 defendants' acts. In order to recover compensatory damages, plaintiff must introduce evidence of physical harm suffered as a result of defendants' actions. If plaintiff presents evidence of physical injury, he may then present evidence of mental or emotional injuries suffered as a result of defendants' action. If the court permits it, the jury may award punitive damages as a deterrence to defendants.

F. Evidence

All factual evidence offered at trial must meet the requirements of the Federal Rules of Evidence. 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.

If a party wishes to introduce documentary evidence, he has several options. First, he may ask opposing counsel to agree that the proposed exhibit may be admitted into evidence. (At the final pretrial conference, the parties will have the opportunity to discuss stipulating to the admissibility of each party's proposed exhibits.) If the parties cannot agree on the admissibility of a proposed document or other piece of evidence, at trial the party wishing to introduce the evidence must produce a copy of the document, mark it with an exhibit number 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 was examined by a nurse on September 1, 2005. If so, he should obtain an authenticated copy of the relevant medical 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). He may then testify that he obtained the records from the health services office and that they reflect the treatment he recalls receiving on September 1, 2005.

Before introducing any evidence at trial, plaintiff should have a witness (who may be

himself) identify the evidence he wishes to introduce and explain how the witness has knowledge of the document and its contents. Then, plaintiff should show the exhibit to opposing counsel and ask the court to allow the evidence to be accepted into the record.

Plaintiff should be aware that a party may not introduce affidavits into evidence or read from them at trial because they are hearsay statements, made outside the court. However, a person who has completed an affidavit may appear in person to testify as a witness if he or she can offer testimony that is relevant to the lawsuit. Also, if at trial a witness testifies to facts that are inconsistent with statements the witness made in an earlier affidavit, a party may use statements in the witness's affidavit to show that the witness's testimony is inconsistent with the witness's earlier sworn statements.

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. Because those procedures have been updated recently, with this order I am enclosing a copy of the revised procedures. Plaintiff should take particular note that the procedures require that any party who wishes to call an incarcerated witness to testify to serve and file a motion for the issuance of writs of habeas corpus ad testificandum at least four weeks before trial,

together with supporting affidavits revealing the witness's willingness to appear voluntarily.

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 defendants to be present at trial. If he wishes to call defendants as witnesses at trial, he should promptly ask defendants' counsel whether defendants will agree to be called as witnesses by plaintiff, without requiring plaintiff to subpoena them. If defendants do not agree, plaintiff will have to follow the attached procedures for issuing subpoenas to each defendant whose testimony he wishes to obtain.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff, inmate Sharome Powell (Waupun Correctional Institution) at trial beginning on Monday, October 2, 2006.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN September 25, 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 24th day of August, 2006.

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