IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LARRY BRACEY,

ORDER

Plaintiff,

10-cv-287-bbc

v.

JAMES GRONDIN, C.O. HUNT,
THOMAS TAYLOR and C.O. MURRAY,

Defendants.

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Plaintiff Larry Bracey is proceeding pro se on claims that defendants James Grondin, C.O. Hunt, Thomas Taylor and C.O. Murray violated his rights under the Eighth Amendment by using excessive force against him when they transferred him to a holding cell on July 25, 2005, and later when they returned him to his own cell. A trial is scheduled for October 31, 2011. 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.

**READ THIS ORDER NOW.** Both sides must review the order very carefully; it contains important instructions and may answer many questions about the trial.

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### A. Proving Plaintiff's Claim

At the trial, it will be the plaintiff's job to prove his claims against defendants. Because plaintiff has the burden of proof, he puts in his evidence first. In order to avoid having his case dismissed before defendants puts in their defense, plaintiff must present enough evidence to allow a reasonable jury to find that each legal element of his claims has been proven by a preponderance of the evidence. **This means that plaintiff must prove that:**

**1) defendants used physical force on him; and**

**2) the force each defendant used was unreasonable under the circumstances, considering factors such as the need for application of force, the relationship between the need and amount of force that was used, the extent of the injury inflicted, the extent of threat to safety of staff and inmates and any efforts made to temper the severity of a forceful response.**

As this case has progressed, plaintiff should have been collecting the information necessary to prove his claim by following the Federal Rules of Civil Procedure. Those rules explain the proper way to obtain documents and information that cannot be obtained through an informal request. In determining what evidence to provide, plaintiff should remember:

- **The jurors will know nothing about the case**

They will not have reviewed the complaint or any of this court's orders or opinions related to the case, and neither the complaint nor this court's orders or opinions related to the case may

be used as evidence at trial to prove the truth of plaintiff's claim. It is plaintiff's job to provide the jury with all the evidence it needs to render a verdict in his favor. If a particular piece of evidence is not introduced during trial, the jury may not consider it, even if the evidence was filed with a party's summary judgment materials or other court filings.

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

Although it is impossible to predict which rules may be important in a given trial, the most commonly cited rules are those relating to hearsay (Rules 801-807), relevance (Rules 401 and 402), unfair prejudice (Rule 403), character evidence (Rules 404 and 608) and prior statements of witnesses (Rule 613). If one party asks questions or offers an exhibit that does not comply with these rules or any other Federal Rule of Evidence, the other party may raise an objection with the court.

- **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 outside the courtroom, because the accuracy of such a statement cannot be tested by the opposing party. There are a number of exceptions to this general rule that are set out in Rules 803 and 804.

- **Documentary evidence will not be admissible unless the document is "authenticated."**

Under Federal Rule of Evidence 901, a party who wishes to rely on a piece of evidence at trial must show that the evidence is what that party claims it to be. For example, if a party wishes to introduce a particular document, he may satisfy Rule 901 by calling a witness who has personal knowledge that the document is an accurate copy. (This is the most common method of satisfying Rule 901, but other methods are listed in the rule.) Alternatively, the parties may stipulate to the authenticity of a piece of evidence. The court strongly encourages the parties to stipulate to the authenticity of documents before trial.

- **A party may not introduce affidavits into evidence or read from them at trial.**

Affidavits are hearsay statements made outside the courtroom, as are statements that plaintiff made in a complaint or grievance. Because statements made in an affidavit, complaint or grievance are hearsay, these documents cannot be introduced at trial to prove the truth of statements contained within them. 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 previous statements the witness made in an affidavit or other document, a party may use the witness's earlier statements to challenge the credibility of the witness on cross examination.

- ♦ **Orders or opinions from this court, the court of appeals or the Supreme Court are not evidence.**

Plaintiff may refer to this court's orders and other case law in deciding how to prove his case, but he may not submit them as exhibits or discuss them in front of the jury.

## B. Witnesses

In the preliminary pretrial conference order entered on October 22, 2010, the parties were given a deadline of October 3, 2011, for disclosing the names and addresses of their trial witnesses. A copy of the procedures for calling witnesses to trial was sent to the parties with the preliminary pretrial conference order. Another copy is enclosed with this order.

**Calling incarcerated witnesses to testify at trial**

The parties are reminded that if they wish to call an incarcerated witness to testify, they must serve and file a petition for the issuance of writs of habeas corpus ad testificandum. **The deadline for filing a petition is October 3, 2011** (four weeks before trial). With the motion, they must file supporting affidavits with the following information:

- a showing that the witness is willing to appear voluntarily;
- a description of the testimony the witness will give; and
- an explanation how the witness has personal knowledge of information relevant

to a claim or defense.

The parties should make all efforts to submit any petition as soon as possible so that the court will be able to issue any writs in time to insure the witness's presence at trial.

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.

- **Calling defendants to testify at trial**

Plaintiff should note that he cannot expect defendants to be present at trial. If plaintiff wishes to call any defendants as witnesses at trial, he should ask defendants' counsel whether that defendant will agree to be called as a witness by plaintiff without a subpoena. If that defendant does not agree, plaintiff will have to follow the attached procedures for calling unincarcerated witnesses if he wishes to obtain testimony from him or her.

## C. Trial Materials and Motions

The parties are to adhere to the current deadlines for the submission of pretrial materials as set forth in the preliminary pretrial conference order. Aside from the deadline for disclosing the names and addresses for trial witnesses (which was mentioned above), the order provided the following deadlines:

- **Motions In Limine** — October 7, 2011
- **Response to Motions In Limine** — October 14, 2011

A party might file a motion in limine to exclude improper evidence that the party believes the other side may try to submit. Motions in limine are not intended to resolve disputes regarding all pieces of evidence; most evidentiary objections about individual documents can be made during trial. However, in some cases in which there are disputes regarding evidence having a potentially significant impact on the course of trial, it may be appropriate to seek a ruling in advance.

- **Voir dire, proposed jury instructions and verdict forms** — October 24, 2011
- **Exhibit list and complete set of all of exhibits to be used at trial** — October 24, 2011

Although plaintiff has received a copy of this court's "Procedures for Trial Exhibits in the Western District of Wisconsin," another copy of the procedures is attached to this order.

In addition to following the exhibit procedures, the parties should exchange copies of their trial exhibits in advance of trial for two reasons. First, it will insure that each party considers carefully what documentary evidence they will need to prove the elements of the claims for which they carry the burden of proof at trial and to obtain authentication of the documents before coming to trial, if necessary. Second, it will promote the efficient conduct of the trial by allowing each party to examine the opposing party's exhibits in advance of trial so that objections to the admissibility of the documents may be taken up at the final pretrial conference outside the presence of the jury. The parties should be prepared to explain at the final pretrial conference their grounds for objecting to a particular exhibit.

**Note well**: The parties should keep the original copies of their exhibits in their possession so that they have them at the time of trial.

## D. Trial Overview

1. 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 "to speak the truth.") This is the parties' chance to observe the potential jurors while they are being questioned so that the parties 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. 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. Plaintiff will strike one name, defendant will strike one name, the plaintiff one name, defendant one name, etc., leaving seven persons who will make up the jury panel.

2. 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 to give testimony. What is said during opening statements is not evidence. Therefore, if one party begins to make comments in the nature of testimony, and the other party objects, the court will interrupt the party speaking 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.

3. Presentation of evidence

After the parties have given their opening statements, plaintiff will present his case by submitting evidence. This is called plaintiff's "case in chief." Plaintiff may provide his own testimony, call other witnesses and submit properly authenticated documents.

After plaintiff has presented his case, defendants may move to dismiss plaintiff's case on the ground that plaintiff has failed to present enough evidence to allow a jury to find that each element of his claims has been proven by a preponderance of the evidence. Fed. R. Civ. P. 50. If defendants' motion is denied, defendants will present their case.

After defendant is finished, plaintiff may present additional evidence to rebut defendants' case. Any testimony or other evidence presented during this phase of the trial is limited to

responding to evidence introduced by defendants. Plaintiff may not introduce new evidence simply because he failed to address a matter in his case in chief.

4. Closing arguments

After defendants have presented their case, plaintiff will give a closing argument explaining why the evidence presented at trial supports a verdict in his favor. As with the opening statement, the closing argument is not a time to offer new testimony. Plaintiff should focus on the evidence presented during the trial and attempt to explain to the jury why this evidence is sufficient to prove his claim against defendant. In a closing argument, a party may explain why he believes his witnesses are more credible, why his evidence should be given more weight and what inferences may be drawn from the evidence presented.

## E. Damages

If the jury finds that plaintiff is entitled to a verdict in his favor, it may award compensatory damages in an amount that reasonably compensates plaintiff for the injuries or damages he suffered as a result of defendant's acts. It will be plaintiff's burden at trial to prove any losses he sustained. Memphis v. Community School District v. Stachura, 477 U.S. 299 (1986). If plaintiff proves his claim but he cannot prove compensable harm, he will be entitled to nominal damages of $1. A prisoner may recover damages for emotional harm only if he proves that he suffered a physical injury because of defendants' conduct. 42 U.S.C. § 1997e(e).

To recover punitive damages, plaintiff will have to prove that defendants acted with "evil motive or intent" or with "reckless or callous indifference" to his constitutional rights. Smith v. Wade, 461 U.S. 30 (1983). If plaintiff satisfies the legal standard for punitive damages, the jury may, but is not required to, award these damages as a deterrence to defendants.

ORDER

IT IS ORDERED that the Clerk of Court issue a writ of habeas corpus ad testificandum for the attendance of plaintiff Larry Bracey at trial beginning on October 31, 2011. Plaintiff should arrive at the courthouse no later than 8:00 a.m.

FURTHER, IT IS ORDERED that

1. NOT LATER THAN October 3, 2011, the parties are to file and serve any motions for the issuance of subpoenas or writs of habeas corpus ad testificandum, together with supporting affidavits revealing the witness's willingness to appear voluntarily.

2. NOT LATER THAN October 7, 2011, the parties are to file and serve any motions in limine they wish to bring. Responses to those motions are due October 14, 2011.

3. NOT LATER THAN October 24, 2011, the parties are to file and serve (a) proposed questions for voir dire examination; (b) a proposed form of special verdict; (c) proposed jury instructions; and (d) a copy of all exhibits and an exhibit list. The parties should not submit copies of 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.

4. 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 the party could not reasonably have anticipated before trial.

Entered this 13th day of September, 2011.

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

## PROCEDURES FOR CALLING WITNESSES TO TRIAL

At trial, plaintiff will have to be ready to prove facts supporting his claims against the defendants. One way to offer proof is through the testimony of witnesses who have personal knowledge about the matter being tried. If a party wants witnesses to be present and available to testify on the day of trial, the party must follow the procedures explained below. ("Party" means either a plaintiff or a defendant.) These procedures must be followed whether the witness is:

1) A defendant to be called to testify by a plaintiff; or

2) A plaintiff to be called to testify by a defendant; or

3) A person not a party to the lawsuit to be called to testify by either a plaintiff or a defendant.

## I. PROCEDURES FOR OBTAINING ATTENDANCE OF INCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

An incarcerated witness who tells a party that he is willing to attend trial to give testimony cannot come to court unless the court orders his custodian to let him come. The court must issue an order known as a writ of habeas corpus ad testificandum. This court will not issue such a writ unless the party can establish to the court's satisfaction that

1) The witness has agreed to attend voluntarily; and

2) The witness has actual knowledge of facts directly related to the issue to be tried.

A witness's willingness to come to court as a witness can be shown in one of two ways.

a. The party can serve and file an affidavit declaring under penalty of perjury that the witness told the party that he or she is willing to testify voluntarily, that is, without

being subpoenaed. The party must say in the affidavit when and where the witness informed the party of this willingness;

**OR**

b. The party can serve and file an affidavit in which *the witness* declares under penalty of perjury that he or she is willing to testify without being subpoenaed.

The witness's actual knowledge of relevant facts may be shown in one of two ways.

a. The party can declare under penalty of perjury that the witness has relevant information about the party's claim. However, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. For example, if the trial is about an incident that happened in or around a plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and witnessed the incident, the plaintiff may tell the court in an affidavit what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred;

**OR**

b. The party can serve and file an affidavit in which *the witness* tells the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred.

Not later than four weeks before trial, a party planning to use the testimony of an incarcerated witness who has agreed to come to trial must serve and file a written motion for a court order requiring the witness to be brought to court at the time of trial. The motion must

1) State the name and address of the witness; and

2) Come with an affidavit described above to show that the witness is willing to testify and that the witness has first-hand knowledge of facts directly related to the issue to be

tried.

When the court rules on the motion, it will say who must be brought to court and will direct the clerk of court to prepare the necessary writ of habeas corpus ad testificandum.

## II. PROCEDURE FOR OBTAINING THE ATTENDANCE OF INCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If an incarcerated witness refuses to attend trial, TWO separate procedures are required. The court will have to issue a writ of habeas corpus ad testificandum telling the warden to bring the witness to trial and the party must serve the witness with a subpoena.

Not later than four weeks before trial, the party seeking the testimony of an incarcerated witness who refuses to testify voluntarily must file a motion asking the court to issue a writ of habeas corpus ad testificandum and asking the court to provide the party with a subpoena form. (All requests from subpoenas from pro se litigants will be sent to the judge for review before the clerk will issue them.)

The motion for a writ of habeas corpus ad testificandum will not be granted unless the party submits an affidavit

1) Giving the name and address of the witness; and

2) Declaring under penalty of perjury that the witness has relevant information about the party's claim. As noted above, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. In the affidavit, the party must tell the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or to hear what occurred.

The request for a subpoena form will not be granted unless the party satisfies the court in his affidavit that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court.

If the court grants the party's request for a subpoena for an incarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the Marshal. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

## III. UNINCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

It is the responsibility of the party who has asked an unincarcerated witness to come to court to tell the witness of the time and date of trial. No action need be sought or obtained from the court.

## IV. UNINCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, no later than four weeks before trial, the party must serve and file a request for a subpoena form. All parties who want to subpoena an unincarcerated witness, even parties proceeding in forma pauperis, must be prepared to tender an appropriate sum of money to the witness at the time the subpoena is served. The appropriate sum of money is a daily witness fee and the witness's mileage costs. In addition, if the witness's attendance is required for more than one trial day, an allowance for a room and meals must be paid. The current rates for daily witness fees, mileage costs and room and meals may be obtained either by writing the clerk of court at P.O. Box 432, Madison, Wisconsin, 53703, or calling the office of the clerk at (608) 264-5156.

Before the court will grant a request for a subpoena form for an unincarcerated witness, the party must satisfy the court by affidavit declared to be true under penalty of perjury that

1) The witness refuses to testify voluntarily;

2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or

3) The party is proceeding in forma pauperis, has been unable to arrange for service of

the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court; and

4) The party is prepared to tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the witness's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay.

If the court grants the party's request for a subpoena for an unincarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the marshal, together with the necessary check or money order. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

## V. SUMMARY

The chart below may assist in referring you to the section of this paper which sets forth the appropriate procedure for securing the testimony of witnesses in your case.

| WITNESSES | | | |
|---|---|---|---|
| INCARCERATED | | UNINCARCERATED | |
| VOLUNTARY | INVOLUNTARY | VOLUNTARY | INVOLUNTARY |
| A court order that the witness be brought to court is required. Papers are due 4 weeks before trial. | A court order that the witness be brought to court and a subpoena are required. A motion must be served & filed 4 weeks before trial. Subpoena forms must be completed 2 weeks before trial. | Nothing need be sought or obtained from the court. | Pro se parties must obtain an order granting issuance of a subpoena. Papers are due 4 weeks before trial. Completed forms and fees are due 2 weeks before trial. |

Revised May 2006

CURRENT SUBPOENA RATES
(as of January 2011)

Daily Witness Fee - $40
Milage - $0.51
Room and Meals (Per Diem) - $144

PROCEDURES FOR TRIAL EXHIBITS
IN THE WESTERN DISTRICT OF WISCONSIN

Before trial, the parties are to label all exhibits that may be offered at trial. Before the start of trial, the parties are to provide the deputy clerk with a list of all exhibits.

1. Each party is to label all exhibits with labels provided by the clerk's office.

2. If more than one defendant will be offering exhibits, that defendant should add an initial identifying the particular defendant to the label.

3. Each party is to list the exhibits on the yellow exhibit sheet provided by the clerk's office. The party should state to whom the exhibits belong, the number of each exhibit and a brief description.

4. Each party is to provide the court with the original exhibit list and a copy of each exhibit that may be offered for the judge's use.

5. As a general rules, the plaintiff should use exhibit numbers 1-500 and the defendant should use exhibit numbers 501 and up.

6. Each party is to maintain custody of his or her own exhibits throughout the trial.

7. At the end of trial, each party is to retain all exhibits that become a part of the record. It is each party's responsibility to maintain his or her exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.

8. Each party should be aware that once reference is made to an exhibit at trial, the exhibit becomes part of the record, even though the exhibit might not be formally offered or might not be received.

Any questions concerning these instructions may be directed to the clerk's office at (608) 264-5156.

Entered this 19th day of May, 2006.

BY THE COURT:

/s/ Barbara B. Crabb

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BARBARA B. CRABB
District Judge