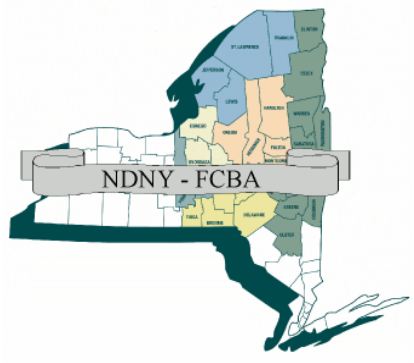


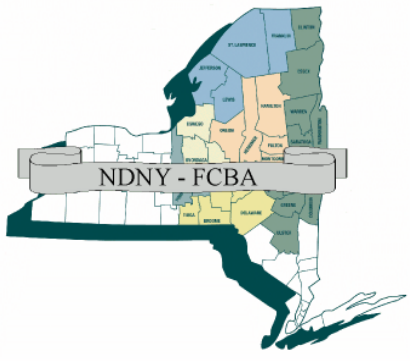
Northern District of New York
Federal Court Bar Association

Trying a Civil Rights Case

Albany, New York
October 2, 2019

&

Syracuse, New York
October 4, 2019



Northern District of New York Federal Court Bar Association

TRYING A CIVIL RIGHTS CASE

CLE PROGRAM TIMED AGENDA

Albany, New York

October 2, 2019

Date:	October 2, 2019
Location:	Federal Courthouse Albany, New York
Registration:	8:30 a.m. – 9:00 a.m. (Light Breakfast Provided)
Time:	9:00 a.m. – 3:00 p.m.
Skills:	9:00 a.m. – 11:30 a.m. and 12:00 p.m. – 3:00 p.m.
Ethics:	11:30 a.m. – 12:00 p.m. (Working Lunch Provided)
Panel:	Michael J. Sciotti, Esq., Barclay Damon LLP (Moderator) Honorable Mae A. D'Agostino, U.S. District Judge Honorable Daniel Stewart, U.S. Magistrate Judge Michael Cassidy, Prisoners' Legal Services Assistant Attorney General Greg Rodriguez, NYS Department of Law Charles J. Quackenbush, Esq., Deputy Counsel, New York State Department of Corrections and Community Supervision Robert C. Whitaker, Esq., Hancock Estabrook, LLP Robert A. Barrer, Esq., Barclay Damon LLP, Chief Ethics and Risk Management Partner

1. **Introduction & Welcome - (9:00 a.m. – 9:05 a.m.)**
   Court & FCBA Welcome
   Michael J. Sciotti, Esq.

2. **Legal Claims of Inmates Under 42 U.S.C. § 1983 (9:05 a.m. –10:30 a.m.)**

3. **Exhaustion of Administrative Remedies and Other Defenses (10:30 a.m. – 11:30 a.m.)**

4. **Ethical Issues (11:30 a.m. – 12:00 p.m.)**

   A. Competence
   B. Scope of Representation
   C. Division of Responsibility
   D. Client has a Weapon or Threatens to Escape
   E. Noncooperation
   F. Stand-By Counsel Issues
   G. Grievances

5. **Substantive Areas - (12:00 p.m. – 3:00 p.m.)**

   A. Final Pre-Trial Conference
   B. Jury Charges
   C. Jury Verdict Sheet
   D. Trial Brief
   E. Motions in Limine
   F. Exhibit List
   G. Witness List
   H. Evidentiary issues
   I. Trial Presentation

      i. Jury Selection
      ii. Opening Statements
      iii. Plaintiff's Case-In-Chief
      iv. FRCP 50(a) Motion
      v. Defense Case-In-Chief
      vi. Closing Argument
      vii. Charge Conference

viii. FRCP 50(b) Motion & Post-Verdict Motions

6. **Practical Areas**

A. Selection of Pro Bono Counsel By Court

B. Logistics of the inmate and dealing with the New York State Department of Corrections and Community Supervision

C. Contacting the prisoner/Safety Issues

D. Motion to Withdraw as Counsel

E. Retainer Agreement

F. Scope of Appointment & Law Firm Responsibility

G. What can you expect?

H. Interaction with visiting judges

I. Production of prisoner for trial

J. Costs and the Pro Bono Fund

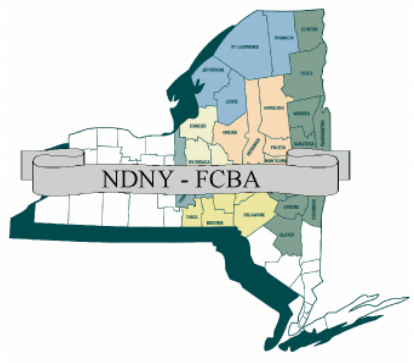
K. Use of video at trial & Use of Electronic Courtroom

L. Witness & Document Subpoenas

i. Dealing with the Attorney General's Office
ii. What do you do if the file is not complete?
iii. Subpoena for other inmates

M. Consent to trial before Magistrate Judge

N. CLE Credit for Representation



Northern District of New York Federal Court Bar Association

TRYING A CIVIL RIGHTS CASE

CLE PROGRAM TIMED AGENDA

Syracuse, New York

October 4, 2019

Date:	October 4, 2019
Location:	Federal Building Syracuse, New York
Registration:	8:30 a.m. – 9:00 a.m. (Light Breakfast Provided)
Time:	9:00 a.m. – 3:00 p.m.
Skills:	9:00 a.m. – 11:30 a.m. and 12:00 p.m. – 3:00 p.m.
Ethics:	11:30 a.m. – 12:00 p.m. (Working Lunch Provided)
Panel:	Michael J. Sciotti, Esq., Barclay Damon LLP (Moderator) Honorable Brenda K. Sannes, U.S. District Judge Honorable Thérèse Wiley Dancks, U.S. Magistrate Judge Michael Cassidy, Prisoners' Legal Services Assistant Attorney General Greg Rodriguez, NYS Department of Law Charles J. Quackenbush, Esq., Deputy Counsel, New York State Department of Corrections and Community Supervision David G. Burch, Esq., Barclay Damon LLP Robert C. Whitaker, Esq., Hancock Estabrook, LLP Robert A. Barrer, Esq., Barclay Damon LLP, Barclay Damon LLP, Chief Ethics and Risk Management Partner

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iii. Subpoena for other inmates

M. Consent to trial before Magistrate Judge

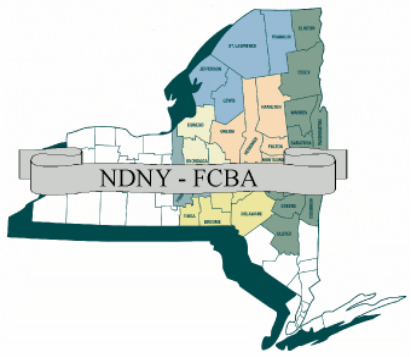
N. CLE Credit for Representation

O. Empire State Counsel Recognition

P. Obtaining Assignments

Q. Prisoner Mediation Program

7. **Closing Remarks**



NORTHERN DISTRICT OF NEW YORK
FEDERAL COURT BAR ASSOCIATION

INDEX

WARNING

These documents are listed as examples only, and were obtained using the PACER system. These documents are not binding in any way, and should be the beginning, not the end, of your research. You are encouraged to check the website frequently for updates. In addition, you are required to conduct independent research in order to fulfill your ethical obligations. These forms are a starting point for your research and not the end.

N.D.N.Y. Pro Bono Committee Model Letter of Engagement

[Attorney Letterhead]

[Date]

[Client Name]
[Client Address]

Re: John Smith v. John Jones
N.D.N.Y. Civil Action No. [_____]

Dear Mr. Smith:

By Order of Hon. [_____] dated [_____, 200_], I was assigned to represent you in connection with the above-referenced matter. In order that our relationship of attorney and client will be one of mutual understanding and agreement, I am providing this letter of engagement to you for your review and signature. This letter sets forth the terms upon which I will represent you. Please sign and return one copy of this letter to me in the enclosed, self-addressed, stamped envelope. One copy of the letter should be signed and kept by you with your records.

As your assigned lawyer, I will represent your interests to the best of my abilities. In that regard, I will do the following:

1. Appear in court for any required proceedings.

2. Conduct such pretrial proceedings, including discovery, as I believe in my best judgment are necessary and appropriate for your case.

3. Make such motions as I believe in my best judgment are necessary and appropriate for your case.

4. Defend against such motions that I believe in my best judgment there is a basis upon which to oppose.

5. Prepare all necessary and appropriate pleadings and pretrial papers.

6. Conduct the trial and any post-trial motions

7. Consult with you about your case and explain to you about decisions that I make and the reasons why I did or did not follow any requests made by you.

8. I will abide by all professional and ethical rules that govern the conduct of lawyers. In that regard, you should be aware that

lawyers cannot take positions or advance arguments that are without a legal or factual basis nor may they engage in conduct for improper purposes.

Because I was assigned by the Court, **I will not represent you in any other matter besides this one**. In addition, if there is an appeal to be taken following any adverse verdict or judgment, **I will not represent you on the appeal**. Instead, I will advise you as to the deadline for the filing of a notice of appeal and it will be up to you to file the notice of appeal and prosecute the appeal if you choose to follow that course.

As a client, you have certain rights and responsibilities that are more fully described as follows:

1. You will not have to pay for my legal fees or costs. If the Court determines that you are the prevailing party in the litigation and are entitled to an award of legal fees, I will make an application to have the other side pay for those legal fees and costs and you agree to support that request if asked. Regardless of whether you are the prevailing party in the litigation, the Court maintains a fund from which reimbursement for certain expenses can be sought. If such a request for reimbursement is made, you agree to support that request if asked.

2. You have the right to be informed about the progress of your case and to receive copies of pertinent documents including all decisions and orders of the Court.

3. You have the right to have questions about your case answered and your inquiries responded to as soon as possible. However, you must recognize that you are not my only client and that I have other cases and clients that also require my attention.

4. You must cooperate with me and assist me in the handling of your case. This cooperation includes being truthful about the facts of your case. If you do not cooperate in the handling of your case, I will ask the Court to relieve me from continuing to represent you.

5. If you provide me with any original documents or materials, I will return them to you at the conclusion of the case unless they have been submitted to the Court and accepted as evidence in which case I will provide you with copies if possible.

6. You will appear at all Court proceedings when requested to do so and cooperate with any authorities who may be required to participate in securing your appearance.

7. You must keep me advised of your current address and the most appropriate way to contact you at all times. If you change your address, you agree to let me know as soon as possible.

8. If you have a complaint about the way that I am handling your case, you will tell me about it as soon as possible and I will make every effort to address your concerns. If I am unable to satisfy your complaint, I will tell you how to address your complaint to the Court.

I look forward to working with you toward the successful conclusion of your case. Please sign a copy of this letter in the space indicated below. Thank you.

Very truly yours,

[Name]

I have read this letter of engagement and agree to its terms.

Date: _____, 200_

_____
[Client Name]

[LETTERHEAD]

[DATE]

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

VIA CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

[NAME AND ADDRESS]

Re: [CASE NAME]
[DOCKET NO.]

Dear [NAME]:

Enclosed please find the following documents:

1. Memorandum of Decision and Order dated _____; and

2. Judgment dated _____.

The Judgment was entered on _____. Please be advised that you have thirty (30) days from the date of the Judgment was entered to file an appeal of the Court's decision. A copy of the Federal Rules of Appellate Procedure are attached for your reference. Rules 3 and 4 govern how and when an appeal must be filed. However, please note that I was appointed by the Court to represent you solely for the trial of your case. Now that the trial is over and Judgment has been entered, I no longer represent you in this or any other matter, including any appeal you may wish to file. In other words, I am no longer your lawyer. Should you decide to appeal the Court's decision, you are strongly encouraged to obtain competent counsel experienced in the area of federal appellate practice and should otherwise familiarize yourself with the rules enclosed with this letter.

It was a pleasure representing you at trial. I wish you the best of luck in the future.

Very truly yours,

[ATTORNEY NAME]

Office of the Clerk
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LAWRENCE K. BAERMAN
CLERK

Linda M. Payne, Deputy Clerk
(315) 234-8549

100 S. CLINTON STREET
P.O. BOX 7367
SYRACUSE, NEW YORK 13261-7367
(315) 234-8500

* * * SAMPLE * * *

MEMORANDUM

TO: Perry Mason, Esq.
FROM: Linda M. Payne, Deputy Clerk
RE: Smith v. Goord, et al., 9:00-CV-555(NAM/DEP)
DATE: December 4, 2007

Pursuant to our telephone conversation, an Order has been signed by Magistrate Judge Peebles, a copy of which has been sent to you, appointing you as Pro Bono Trial Counsel for the plaintiff in the above matter. Enclosed is a blank Pro Bono Fund Voucher and Request for Reimbursement form with attached expense worksheet as to any expenses incurred by you. Please provide complete information as to expenses incurred. For example, as to mileage, I have provided the current authorized mileage rate of $0.485 per mile. You should list the total miles traveled in the first column, multiply by the given rate and list the dollar amount claimed in the next column. Also, please specify as to toll calls who was called, as to copying the rate charged per page and number of pages copied, etc. You must attach receipts for any individual charges over $50.00. After the trial has been held, this voucher should be forwarded to my attention to obtain the appropriate judge approvals. Please do **NOT** submit this voucher electronically.

Also, enclosed is a copy of the docket sheet for your review. The entire file is available for electronic viewing through PACER. Any costs that you incur in obtaining copies of documents from PACER can be recovered by you as stated above. Please remember to also serve the plaintiff pro se with copies of any papers filed by you since you have only been appointed as trial counsel, and any appeal, etc., must be filed by the plaintiff pro se.

Additionally, as set forth in such Order, a telephone conference has been scheduled for **(Time)** on **(Date)** with Magistrate Judge Peebles and opposing counsel. Chambers will initiate the call.

If plaintiff intends to call as a witness any person who is presently incarcerated, you are required to make a separate application for the issuance of a writ to produce such inmate to testify at trial. The New York State Department of Corrections website for inmate information searches is: **http://nysdocslookup.docs.state.ny.us/**.

If, after meeting with the plaintiff (or any witness), you determine that an interpreter's services are required for you to effectively communicate with the plaintiff outside of Court, please be advised that you must employ the services of an interpreter who already has a contract with this District and understands that payment must be made according to the pay schedule as set by the Administrative Office of the U.S. Courts. You should contact the Clerk's Office for a list of interpreters with contracts on file for the required language. Attached is a form Interpreter Voucher which you may use to assist you in tracking the amount incurred for interpreter services and which should be attached to your voucher for reimbursement purposes. **Once a trial date has been set, you should contact the Courtroom Deputy for the presiding judge to coordinate the hiring of an interpreter by the Court for the trial.**

If you have any questions, please contact me at (315) 234-8549.

lmp
Encs.

cc: (Defendants' Attorney's Name), Esq.

EXPENSE WORKSHEET

Case Title: _____ **Civil Action No.**_____

DATE	Brief Description of Services	Number of Miles	@ $0.485 per mile	Parking	Copying	Postage	Toll Calls	Other
	TOTAL AMOUNT PER ITEM							

TOTAL EXPENSES: $_____

I. INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I am now instructing you and apply that law to the facts as you find them. In doing so, you are not allowed to select some instructions and reject others, rather you are required to consider all the instructions together as stating the law. In that regard, you should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it.

In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards either party. The plaintiff and the defendant, as well as the general public, expect you carefully and impartially to consider all the evidence in this case, follow the law as the Court states it, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case or what that opinion may be. It is not my function to determine the facts, that is your function.

II. ROLE OF ATTORNEYS

Our courts operate under an adversary system in which we hope that the truth will emerge through the competing presentations of adverse parties. The function of the

attorneys is to call your attention to those facts that are most helpful to their side of the case. It is their role to press as hard as they can for their respective positions.

In that regard, one can easily become involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this is not a contest between attorneys. You are to decide this case solely on the basis of the evidence. Remember, the attorneys' statements and characterizations of the evidence are not evidence. Insofar as you find their opening and/or closing arguments helpful, take advantage of them; but it is your memory and your evaluation of the evidence in the case that count.

III. OBJECTIONS

In fulfilling their role, attorneys have the obligation to make objections to the introduction of evidence they feel is improper. The application of the rules of evidence is not always clear, and attorneys often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and are not to be considered as points scored for one side or the other.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against either the plaintiff or the defendant. In any event, any opinion I might have is irrelevant. You are the judges of the facts.

IV. EVIDENCE

As I stated earlier, your duty is to determine the facts based on the evidence I have

admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits that I have received during trial. In addition, on occasion, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions, and you may not consider any responses which I ordered stricken from the record.

A. Direct and Circumstantial Evidence

Although you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common sense and experience. The law recognizes two types of evidence – direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts.

The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

B. All Available Evidence Need Not Be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in this case.

V. EVALUATION OF THE EVIDENCE

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his testimony. You are the sole judges of the credibility of each witness and of the importance of his testimony.

In evaluating a witness' testimony, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party, as well as the interest the witness may have in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he testified, the accuracy of the witness' memory, his candor or lack of candor, the reasonableness and probability of the witness' testimony, the testimony's consistency or lack of consistency, and its corroboration or lack of corroboration with other credible testimony.

You have heard the testimony of Corrections Officers. The fact that a witness is employed as a Corrections Officer does not mean that his testimony is deserving of any more or less consideration, or should be given any greater or lesser weight, than that of any other witness from whom you heard testimony.

You may consider the testimony of a Corrections Officer just as you would the testimony of any other witness.

VI. BURDEN OF PROOF

When a party has the burden of proof on a particular issue that means that,

considering all the evidence in the case, that party's contention on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of it. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, its weight, and the effect that it has on your minds. The law requires that, in order for a party to prevail on an issue on which he has the burden of proof, the evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than the evidence opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

IX. CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. The foreperson's vote, however, carries the same weight as the vote of any other juror.

As jurors, you are required to discuss the issues and the evidence with each other. Although you must deliberate with a view to reaching an agreement, you must not violate your individual judgment and conscience in doing so. The proper administration of justice requires you to give full and conscientious consideration to the issues and evidence before you in determining the facts of the case – and then apply the law that the Court gives you to those facts.

To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

During your deliberations, do not hesitate to re-examine your views and change your mind. Do not, however, surrender your honest convictions because of the opinion of a fellow juror or for the purpose of returning a verdict. Remember you are not partisans. You are the judges -- judges of the facts. Your duty is to seek the truth from the evidence presented to you, while holding the parties to their burdens of proof.

If, in the course of your deliberations, your recollection of any part of the

testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony read to you or my instructions further explained. I caution you, however, that the read-back of testimony may take some time and effort. You should, therefore, make a conscientious effort to resolve any questions as to testimony through your collective recollections.

Should you desire to communicate with the Court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshal who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the marshal that you have reached a verdict. I have prepared a verdict form for you, and I will now review it with you.

Punitive Damages

[Plaintiff] also seeks punitive damages. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, or to deter or prevent a defendant and others like him from committing similar acts in the future.

I must emphasize, however, that at this stage of the proceedings, you are only to consider whether or not [Plaintiff] is entitled to an award of punitive damages. If you determine that [Plaintiff] is entitled to such an award, you will be asked to determine what amount such an award should be at a separate hearing concerning this issue. Therefore, you are not to consider the amount of punitive damages, if any, you believe [Plaintiff] is entitled to receive.

You may conclude that [Plaintiff] is entitled to punitive damages if you find that [Defendant's] acts were done maliciously or wantonly. An act is maliciously done if it is prompted by ill will or spite towards the injured person. An act is wanton if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. In order to justify an award of punitive damages, [Plaintiff] has the burden of proving, by a preponderance of the evidence, that [Defendant] acted maliciously or wantonly with regard to her rights.

Please remember that, at this stage of the proceedings, you are only to consider whether or not [Plaintiff] is entitled to an award of punitive damages. If you determine that [Plaintiff] is so entitled, a separate hearing will be held at which you will hear evidence relevant to the proper amount of such damages. Although many of the same

considerations apply to a determination of the amount of a punitive damages award, the Court will have specific instructions for you regarding this determination, should it become necessary.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ARRELLO BARNES, Plaintiff, v. THOMAS RICKS, *et al.*, Defendants.	Civil Action No: 04-CV-0391 (LES/DEP)

PLAINTIFF'S PROPOSED WITNESS LIST

The plaintiff, Arrello Barnes, through assigned trial counsel, hereby submits the following list of individuals who will or may be called as witnesses in the above-captioned case.

1. **Arrello Barnes**, will testify that on September 18, 2002 he was cut by a piece of glass in his tuna fish. Mr. Barnes will testify that he complained of food tampering, to no avail, and that on the day he was injured defendants said "we told you we would get you".

2. **Steven Schule** is a defendant in this action. He was formerly a correction officer at Upstate Correctional Facility and will testify concerning his job responsibilities and activities on the date in question. In the interest of efficiency, plaintiff will examine this witness when he is called during the defendants' case in chief

3. **William Brown** is a defendant in this action. He is a correction officer at Upstate Correctional Facility and will testify concerning his job responsibilities and activities on the date in question. In the interest of efficiency, plaintiff will examine this witness when he is called during the defendants' case in chief.

4. **Jeremy McGaw** is a defendant in this action. He is a correction officer at Upstate Correctional Facility and will testify concerning his job responsibilities and activities on the date in question. In the interest of efficiency, plaintiff will examine this witness when he is

called during the defendants' case in chief.

5. **Michael Riley** is a defendant in this action. He is a correction officer at Upstate Correctional Facility and will testify concerning his job responsibilities and activities on the date in question. In the interest of efficiency, plaintiff will examine this witness when he is called during the defendants' case in chief.

6. **Lieutenant Zerniack** is not a defendant in this action. He was a Corrections Sergeant at Upstate Correctional Facility and will testify concerning his job responsibilities and the procedures he used to investigate the allegations presented by plaintiff that glass was placed in his food. In the interest of efficiency, plaintiff will examine this witness when he is called during the defendants' case in chief.

7. **Sgt. Phillip Perry** is not a defendant in this action. He is a Corrections Sergeant at Upstate Correctional Facility and will testify concerning his job responsibilities and the procedures he used to investigate the allegations presented by plaintiff that glass was placed in his food. In the interest of efficiency, plaintiff will examine this witness when he is called during the defendants' case in chief.

DATED: August 19, 2009
Syracuse, New York

Respectfully submitted,

HANCOCK & ESTABROOK, LLP

By:_____
Thomas C. Cambier, Esq.
Bar Roll No: 513780
Trial Counsel for Pro Se Plaintiff
Office and P.O.Address
1500 Tower I – P.O. Box 4976
Syracuse, New York 13221-4976
Telephone: (315) 471-3151
Telecopier: (315) 471-3167

(H0620061.1)

ARRELLO BARNES, *Pro Se Plaintiff*
00-A-05597
Southport Correctional Facility
P.O. Box 2000
Pine City, New York 14901-2000

TO: ELIOT SPITZER,
Attorney General of the State of New York
Attorney for Defendants
Office and P.O. Address
The Capitol
Albany, New York 12224-0341
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
Federal Building and Courthouse
100 South Clinton Street
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Syracuse, New York 13261-7367

CERTIFICATE OF SERVICE

I, THOMAS C. CAMBIER, trial attorney for the plaintiff in this action, do hereby certify that on this date I caused the foregoing Plaintiff's Proposed Witness List to be electronically served upon the following:

Roger W. Kinsey, Esq.
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, New York 12224-0341

Lawrence K. Baerman, Clerk
United States District Court
Federal Building and Courthouse
100 South Clinton Street
Syracuse, New York 13261

THOMAS C. CAMBIER
Bar Roll No. 513780

DATED: August 19, 2009
Syracuse, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,

Plaintiff,

-against-

TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH,

Defendants.

DEFENDANTS' PROPOSED WITNESS LIST

04-CV-0989

(LEK)(RFT)

Defendants, Lt. Troy Mitchell, Sgt. Edward Rizzo, Officer Michael Woodard, and Officer Bradley Smith, by their attorney, Eliot Spitzer, Attorney General of the State of New York, Christopher W. Hall, Assistant Attorney General, of counsel, submit the following list of witnesses:

1. Troy Mitchell, Lieutenant, Auburn Correctional Facility, Auburn, NY. Lt. Mitchell will testify about the incident which gave rise to plaintiff's claim that he was subjected to excessive force on 3/14/04 at Auburn C.F. Among other things, he will testify about the struggle to subdue plaintiff in the Special Housing Unit ("SHU") where plaintiff was housed and the ensuing escort of plaintiff to the Mental Health Unit ("MHU").

2. Edward Rizzo, Sergeant, Auburn Correctional Facility, Auburn, NY. Sgt. Rizzo will testify about the incident which gave rise to plaintiff's claim that he was subjected to excessive force on 3/14/04 at Auburn C.F. Among other things, he will testify about the struggle to subdue plaintiff in SHU where plaintiff was housed and the ensuing escort of plaintiff to the MHU.

3. Jeffrey Porten, Correctional Officer, Auburn Correctional Facility, Auburn, NY. Officer Porten will testify about the incident which gave rise to plaintiff's claim that he was subjected to excessive force on 3/14/04 at Auburn C.F. Among other things, he will testify about the struggle to subdue plaintiff in SHU where plaintiff was housed and the ensuing escort of plaintiff to the MHU.

4. Bradley Smith, Correctional Officer, Auburn Correctional Facility, Auburn, NY. Officer Smith will testify about the incident which gave rise to plaintiff's claim that he was subjected to excessive force on 3/14/04 at Auburn C.F. Among other things, he will testify about the struggle to subdue plaintiff in SHU where plaintiff was housed and the ensuing escort of plaintiff to the MHU.

5. Michael Woodward, Correctional Officer, Auburn Correctional Facility, Auburn, NY. Officer Woodard will testify about the incident which gave rise to plaintiff's claim that he was subjected to excessive force on 3/14/04 at Auburn C.F. Among other things, he will testify about the struggle to subdue plaintiff in SHU where plaintiff was housed and the ensuing escort of plaintiff to the MHU.

6. John MacClellan, Registered Nurse, Hutchings Psychiatric Center, Syracuse, NY. Nurse MacClellan will testify about his physical examinations of plaintiff and the correctional officers on 3/14/04 at Auburn Correctional Facility shortly after plaintiff was escorted from SHU to the MHU.

7. John Rourke, Captain, Auburn Correctional Facility, Auburn, NY. Capt. Rourke will testify about his investigation of plaintiff's grievance concerning the events of 3/14/04 and conversations with plaintiff.

Dated: Albany, NY
November 6, 2006

ELIOT SPITZER
Attorney General of the State of New York
Attorney for Defendants C.O. Provost, C.O. Ramsey, C.O. Christian and Sergeant Champagne
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Christopher G. Todd, Esq., via CM/EMF

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF NEW YORK

KEITH SILVERA, 02-CV-882

Plaintiff, (GLS) (GJD)

-against-

JOHN J. BURGE, Superintendent,
Auburn Correctional Facility, et al.

Defendants.

PLAINTIFF'S AMENDED EXHIBIT LIST

Exhibit No.	Marked for Identification	Admitted into Evidence	Remarks	Witness	Exhibit Description
P-1					Plaintiff's Disciplinary History
P-2					Auburn Correctional Facility Law Library call out slip
P-3					Contraband Receipt dated 4/11/02
P-4					Misbehavior Report dated 4/11/02 authored by Defendant Spicer
P-5					Superintendent Hearing Disposition, dated 4/24/02 by Captain Gummerson
P-6					Plaintiff Keith Silvera, 90T3701, Grievance No. AUB36986-02, dated 4/30/02
P-7					Superintendent's Decision, dated 6/18/02; and plaintiff's Appeal Statement, dated 6/26/02; AUB. No. 36986
P-8					Central Office Review Committee (CORC) decision to Grievance No. AUB-36986-02, dated 8/14/02

P-9					CORC decision to Grievance No. AUB 36336-01 dated 2/27/02; Superintendent's Decision dated 1/17/02; and plaintiff's Appeal Statement, dated 1/23/02
P-10					Plaintiff's letter of Complaint to the Commissioner of DOCS NYS dated 5/29/02
P-11					Plaintiff's letter to IGRC Supervisor dated 5/21/02 as a follow-up to AUB Grievance No. 36986-02
P-12					Plaintiff's follow-up letter to the Commissioner of DOCS NYS, dated 5/28/02, to AUB Grievance No. 36986-02
P-13					Plaintiff's follow-up letter to the Commissioner of DOCS NYS, dated July 22, 2002, in reference to AUB Grievance No. 36986-02
P-14					Plaintiff's Grievance No. 37526-02, indicating that he should reimburse $12.00 for the Rastafarian Religious Event
P-15					Plaintiff's letters to Franz Hall, Jamaican Deputy Consul General, dated 4/14/02; and 4/16/02, respectively, detailing harassment and retaliatory conduct by defendants for the exercise of his Religious rights
P-16					Franz Hall, Deputy Consul General of Jamaica, letter to plaintiff dated March 4, 2002, with a copy of defendant Supt. Burge letter dated February 21, 2002
P-17					Plaintiff's letter to Defendant Supt. Burge, dated 1/22/02. Re: Continuous Threats and Harassment
P-18					Plaintiff's letter dated 1/29/02 to Defendant Supt. Burge, indicating that Defendant Calscibetta placed plaintiff's life in danger by referring to him as "I.G. to other messhall workers
P-19					Plaintiff's letter to Defendant Supt. Burge, dated March 8, 2002, SUBJ: Harassment Retaliation
P-20					Plaintiff's letter to Defendant Supt. Burge, dated January 17, 2002, RE: Threats, harassment and Retaliation
P-21					Tier 2, Misbehavior Report dated 11/01/02, authored by Defendant Pidlypchak charging plaintiff with violating Direct Order 106.10; and Verbal Harassment 107.11; indicating

					plaintiff was restricted from the Kitchen as a Cook for A Rastafarian event
P-22					Plaintiff's letter to Defendant Burge, dated November 2, 2002, Complaining about his being arbitrarily restricted from the messhall by Defendant Pidlypchak, ect.
P-23					Disciplinary Hearing Disposition dated 11/5/02, by Lieutenant Head, dismissing Defendant Pidlypchak's ticket dated 11/01/02
P-24					Misbehavior Report dated 1/22/02, authored by Defendant Calscibetta, charging Plaintiff with violating Rules 109.10 Out Of Place, 107.20 lying; and 106.10 Direct Order
P-25					Disciplinary Hearing Disposition, dated 1/26/02 dismissing Defendant Calescibetta's Misbehavior Report as "unjustified"
P-26					Misbehavior Report dated 8/17/011, authored by Defendant Calscibetta, charging Plaintiff with violating Rules (106.10) Direct Order; (107.10) Interference with an Employee
P-27					Disciplinary Hearing Disposition, dated 8/21/01, dismissing Defendant Calescibetta's Misbehavior Report
P-28					Misbehavior Report dated 12/15/01, authored by Defendant Calscibetta, charging Plaintiff with violating Rule (113.22) Inmate shall not possess authorized articles in unauthorized area, i.e., (legal documents) were confiscated and not returned
P-29					Violation Hearing Disposition dated 12/21/01, Found Plaintiff Guilty and imposed a "work detail" in the prison yard for 13 days
P-30					Misbehavior Report dated 4/11/02, authored by Defendant D. Spicer, charging Plaintiff with violating Rule (104.12) Inmates shall not Organize, or other action which may be detrimental to the Order of the Facility; (113.23) Contraband is an article not authorized by the Superintendent. Also see contraband Receipt, annexed hereto, dated 4/11/02
P-31					Superintendent Hearing Disposition, dated 4/24/02, dismissing Defendant Spicer's Misbehavior Report

P-32					Unauthorized Sign posted by Defendant Pidlypchak in messhall restricting workers cooking privileges
P-33					Contain four letters from Abuna A. Foxe, Rastafarian Chaplain dated January 26, 2000 to plaintiff, designating him a facilitator of the Rastafarian Church at Auburn C.F.; June 18, 2001, letter from Raymond Tenia, State Chaplain, Concerning Change in Religion Forms; September 30, 2002, letter from Abuna A. Foxe, Rastafarian Chaplain concerning Rastafarian participation in Family Events, ect.; and September 12, 2002, communication from Abuna A. Foxe, concerning the filing of beard exemptions for Rastafarians, ect.
P-34					Fax from Abuna A. Foxe, Chaplain TO : DSP Ronald Nelson, dated 9/30/02
P-35					Inter-Departmental Communication, dated October 30, 2000 to Plaintiff from Ronald F. Nelson, DSP, pertaining to Rastafarian participation in the Feast of the Transfiguration for Thursday 11/2/00
P-36					Plaintiff's letter dated January 20, 2002 to DOCS NYS Inspector General's Office entitled RE : Threats, Harassment and Retaliation
P-37					Inter-Departmental Communication TO : Keith Silvera From : mark L. Bradt, DSS, responding to Plaintiff's Complaint of 3/8/02; DSS Bradt's February 1, 2002 Communication to Plaintiff's Complaint; and DSS Bradt's February 5, 2002, Communication to Plaintiff's Complaints dated 1/22/02 and 1/29/02
P-38					Inter-Departmental Communication TO : Lt. R. Head, Watch Commander 3pm-11pm From : K.L. Signor, 2pm-10pm Mess Hall sergent, Subject : Complaint of Inamate Silvera, K. 90T3701 D-1-42, Dated : 01-28-02
P-39					Plaintiff's two letters to Abuna A. Foxe, Champlain, requesting his intervention non behalf of Plaintiff and that he contact Supt. Burge, to put an end to the violations committed

					by staff against plaintiff, See, letters dated 4-14-02 and 4-16-02, respectively, annexed hereto
P-40					Inter-Departmental Communication dated October 25, 1997, concerning the policy of "net Bag" in the Mess Hall area
P-41					Inmate Grievance Program Report dated 12/26/01 and appealed by Silvera on 1/23/02, along with Silvera letter dated 12/23/01 stating harassment by C.O. Calescibetta
P-42					Formal complaint by Silvera against C.O. Calescibetta and C.O. Pidlypchak
P-43					Letter to Captain Rourke from Lt. R. Head dated 1/30/02 regarding Silvera Complaint
P-44					Letter from Silvera to Burge dated 1/23/02 regarding threats and harassment received from Calescibetta and Pidlypchak
P-45					Notice to DSS Bradt from Burge dated 1/24/02 re: 2 complaints against Calescibetta and Pidlypchak
P-46					Notice to DSS Bradt from Burge dated 1/30/02 with addendum to earlier complaint
P-47					Letter from Abunna Ascento Foxe to Burge re: harassment of Silvera
P-48					Notice to DSS Bradt from Burge dated 2/8/02 with letter from Ministerial Services stating inmate says he's being harassed
P-49					Memo from Burge to Abunna Ascento Foxe dated 2/12/02 stated that Silvera's allegations have been unfounded
P-50					Letter from Franz Hall to Burge dated 2/8/02 re: Silvera's investigation
P-51					Notice to DSS Bradt from Burge dated 2/11/02 with letter from Consulate General of Jamaica regarding Silvera's complaints
P-52					Letter to Franz Hall from Burge dated 2/21/02 stating that Silvera's harassment allegations have been unfounded
P-53					Notice to DSS Bradt from Burge re: Silvera being harassed and retaliated against

P-54					Memorandum from Thomas Eagan, Director of Inmate Grievance Program with receipt of appeal
P-55					Directive re: Special Events Program dated 2/25/02
P-56					Standards of Inmate Behavior All Institutions

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TOMMY WALKER, III,

Plaintiff,

-vs-

Civil Action No.
89-CV-1432 (GJD)

JERRY BRIGGS; FRANK SIMONELLI; and PAUL KACZOR,

Defendants.

POST-TRIAL MEMORANDUM OF LAW

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Of Counsel

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TOMMY WALKER, III,

Plaintiff,

-vs-

Civil Action No.
89-CV-1432 (GJD)

JERRY BRIGGS; FRANK SIMONELLI; and PAUL KACZOR,

Defendants.

POST-TRIAL MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted to the Court following the Trial held on November 3 and 5, 2003. At Trial, Plaintiff proved, by a preponderance of the evidence, each element of his claims under 42 U.S.C. § 1983: (1) complained of conduct was committed by Defendants acting under color of state law;[1] (2) Defendants' conduct deprived Plaintiff of his Fourth Amendment right to be free from unreasonable searches and his Fifth Amendment right not to have a compelled statement used against him in a criminal proceeding;[2] and (3) Defendants' conduct was the proximate cause of Plaintiff's damages. Therefore, Plaintiff respectfully submits that he should be awarded: (1) Judgment in his favor on the causes of

[1] Defendants stipulated to the fact that they were acting under color of state law during the course of events that underlie this action. *See* Docket No. 106.
[2] Defendants stipulated to the fact that Plaintiff's oral admission of ownership of the items seized from the Apartment was presented to the Grand Jury. *See* Docket No. 106.

action asserted; (2) damages based on his period of unjustified incarceration and the value of the items seized and never returned; (3) reasonable attorney's fees; and (4) whatever other relief the Court deems just and proper.

STATEMENT OF FACTS[3]

The Arrest

At approximately 4:00 p.m. on November 18, 1988,[4] members of the Utica Police Department, including Defendants, arrested Plaintiff on Main Street in Utica, New York. [Tr. 11/9-14, 21-22; 12/1.] After Plaintiff was searched, he was transported to the Utica Police station, where he was placed in a holding tank and not permitted to contact his attorney. [Tr. 13/3-10, 15-22.]

Prior to his arrest, Plaintiff had been at his girlfriend's apartment on the third floor of 1635 Kemble Street (the "Apartment") and had left to run errands. [Tr. 10/15-23; 12/16-19.] Plaintiff intended to return to the Apartment upon completion of his errands because he offered to take his girlfriend, Lorraine Howard ("Ms. Howard"), to her eye appointment later that day. [Tr. 43/18-24; 44/1-4.] Since she did not want have to walk down three flights of stairs to open the front door (which was always locked) when he returned, Ms. Howard gave Plaintiff her set of keys before he left. [Tr. 11/5-8; 12/7-9, 13-15; 43/2-5, 18-24.]

[3] Citations to the Trial transcript are in the following format: [Tr. (page)/(line).].
[4] At the time of his arrest, Plaintiff was free on bond on a pending charge. [Tr. 26/5-7.]

The Illegal Entry into the Apartment

After Plaintiff left the Apartment, Ms. Howard talked to Gary Miller ("Mr. Miller"), a friend of Plaintiff's who was staying at the Apartment, and prepared for her eye appointment – she took a shower, got her clothes together, and got dressed. [Tr. 44/5-8.] Once she was ready, Ms. Howard called her niece from the only telephone in the Apartment, which was in her bedroom. [Tr. 44/11-15; 45/1-2; 46/23-25; 47/1.] While she was talking to her niece, Ms. Howard heard keys jiggling outside the Apartment door. [Tr. 45/7-12; 46/13-15.] Mr. Miller, thinking that Plaintiff had returned from his errands, said "here comes Tommy" and stood behind the Apartment door to scare him when he came in. [Tr. 45/7-12.]

Much to the surprise and shock of Ms. Howard and Mr. Miller, the door opened and police officers, including Defendants, entered the Apartment brandishing guns, including pistols, a shotgun, and a machine gun. [Tr. 45-13-17; 47/2-10; 112/9-14.] Defendants neither announced themselves as "police," nor asked permission to enter the Apartment, they just entered the Apartment. [Tr. 46/18-22.]

Defendant Jerry Briggs ("Inv. Briggs") ordered Ms. Howard to hang up the telephone, come out of her bedroom, and sit down in the den. [Tr. 47/11-17, 20-22.] Mr. Miller was brought into the living room. [Tr. 47/11-17.] After they entered, neither Inv. Briggs, nor any of the other police officers, told Ms. Howard that they had a warrant for the search of the Apartment or provided her with a copy of any such warrant. [Tr. 47/23-25; 48/1-3.]

Ms. Howard asked to contact her attorney,[5] but she was told that she "wasn't under arrest, so [she] didn't need a lawyer." [Tr. 53/3-17; 67/1-11.]

The police officers conducted a cursory search of the Apartment for other occupants. [Tr. 48/4-9.] Then, Defendants went into Ms. Howard's bedroom and closed the door. [Tr. 48/4-19, 23-24.]

The Unreasonable Search

While Defendants were in the bedroom, Ms. Howard could hear "a lot of racket" – things being thrown around, dresser drawers being opened, the telephone being picked up and dialed, etc. [Tr. 49/2-6.] Ms. Howard could also hear Defendants talking about how they were trying to get a hold of a judge, but were unable to do so. [Tr. 49/7-11.]

At one point, Ms. Howard heard the telephone ring, so she got up and opened her bedroom door. [Tr. 49/12-16.] Ms. Howard was immediately ordered to "get out" and "go sit down." [Tr. 49/12-16.] However, while the door was briefly open, Ms. Howard was able to see that her bedroom was "completely wrecked" and there was an open briefcase[6] sitting on the bed. [Tr. 49/12-16; 71/18-25; 72/1-3.] Ms. Howard did what she was told and returned to the den and sat down. [Tr. 49/12-16.]

The Involuntary Search Waiver

At some time later, Inv. Briggs came out of Ms. Howard's bedroom, stated that they were not able to get a hold of a judge, and asked her if she would be willing to sign a search waiver.

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[5] At that time, Ms. Howard had an attorney, Oscar McKenzie, Jr., who is Ms. Howard's brother. [Tr. 53/22-25; 54/1-2.]

[6] The briefcase belonged to Plaintiff. [Tr. 49/19-20.] While Ms. Howard was getting dressed earlier that day, she saw the briefcase under her bed when she went to get her shoes (which were also under her bed). [Tr. 50/1-2; 70/15-23.] When she saw it, she attempted to open the briefcase, but it was locked. [Tr. 50/3-4; 71/1-10.]

[Tr. 50/17-25; 51/3-8.] Inv. Briggs explained that if Ms. Howard refused to sign a waiver, she would go to jail for eight years "for whatever they might have found"; however, no one advised Ms. Howard that she had the right to refuse to sign a waiver. [Tr. 50/17-25; 51/17-20.] Ms. Howard asked again to contact her attorney, but she was told that she did not need one.[7] [Tr. 53/3-13, 18-21; 67/1-11.] Feeling that she had no choice but to consent to sign the waiver,[8] Ms. Howard agreed to do so. [Tr. 50/17-25; 51/21-24.]

Ms. Howard was brought into her kitchen so Inv. Briggs could prepare the waiver. [Tr. 51/5-8.] Once Ms. Howard signed the waiver, it was announced to the others in the Apartment and items were immediately brought out of Ms. Howard's bedroom, including clothing, a duffle bag, a box, and a (taped[9]) briefcase. [Tr. 52/3-14.] The police officers searched the rest of the Apartment and then they brought Ms. Howard and Mr. Miller to the Utica Police station. [Tr. 53/1-13.]

The Inaccurate Statement

Once she arrived at the station, Ms. Howard was read her *Miranda* rights and was seated at a desk with a typewriter. [Tr. 54/6-14.] Inv. Briggs was also at the desk and he typed a statement for Ms. Howard to sign. [Tr. 54/6-14.] While he typed, Inv. Briggs asked Ms. Howard a few questions, but none of the questions asked pertained to the material content of the statement. [Tr. 54/15-22; 65/18-20.] Inv. Briggs prepared the entire statement – Ms. Howard did not prepare any portion of the statement herself. [Tr. 54/23-25.]

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[7] At Trial, Ms. Howard testified, "when they asked me to sign the search waiver, I asked again would I be able to call my attorney because I've never, I hadn't never ever been in trouble before and I didn't know what to do or how to, you know, react, so I needed help, so I felt. And, you know, they told me that I didn't need one." [Tr. 53/8-13.]
[8] At Trial, Ms. Howard testified, "I felt closed in, boxed in. I felt as though I had to sign it because of what they had said prior to. It was like I was afraid. It was hard." [Tr. 51/22-24.]
[9] The briefcase was not taped prior to the arrival of the police officers. [Tr. 52/23-25; 70/9-14.]

Once Inv. Briggs completed preparing the statement, he asked Ms. Howard to read it. [Tr. 55/1-9.] She did so and noticed that it contained a few things that she had not said. [Tr. 55/1-9.] Inv. Briggs told her that he would make sure that it was noted that she had not said those things, but he did not make any changes to the statement itself. [Tr. 55/1-9; 67/24-25; 68/1.] During this time, neither Inv. Briggs, nor any of the other police officers at the Utica Police station, advised Ms. Howard that she had the right to refuse to sign the statement. [Tr. 56/7-9.] Therefore, thinking that Inv. Briggs would do what he said and feeling that she had no choice but to consent to sign the statement, Ms. Howard signed the statement and was allowed to leave. [Tr. 55/1-9; 56/1-16.]

The Compelled Oral Admission

Later, Plaintiff was removed from the holding tank and brought upstairs to an office. [Tr. 13/23-25; 14/1-2.] Defendants and Mr. Miller were in the office when Plaintiff arrived, and Plaintiff's briefcase (with the other items seized from the Apartment) was sitting on Inv. Briggs's desk. [Tr. 14/8-24.]

Upon Plaintiff's arrival, Inv. Briggs and Senior Investigator Angelo Partipelo[10] talked for approximately 15-20 minutes regarding the seized items on the desk, saying such things as "there [is] a conflict in the story concerning the ownership of the contraband" and "they need to know the truth." [Tr. 15/11-23.] Eventually, Mr. Miller spoke up and "asked the officers to ask the question." [Tr. 16/3-6.]

Inv. Briggs responded and stated to Plaintiff that "we would like to work out a deal with you" whereby Mr. Miller would be released, Ms. Howard would not be arrested, and Plaintiff

[10] Now deceased, Sr. Inv. Partipelo is a former Defendant in this action. *See* Docket No. 105.

would plea to an assault charge on another matter for which he would serve a one-year sentence in county jail. [Tr. 16/7-15; 32/4-9.] In exchange, Plaintiff would have to admit ownership of the items seized from the Apartment and provide information that would lead to the arrest of someone else on drug charges. [Tr. 16/7-15; 19/15-18; 31/2-5.]

Agreeing to the deal, Plaintiff orally admitted ownership and Mr. Miller was released. [Tr. 16/25; 17/1-4; 34/20-22.] However, Plaintiff never received the benefit of the deal proposed by Inv. Briggs. [Tr. 35/5-8.]

The Phone Call

While Plaintiff remained in the office, his beeper (which had been seized) went off on several occasions. [Tr. 18/21-23.] On most occasions, Defendant Investigator Paul Kaczor ("Inv. Kaczor") would return the call and advise the caller "that Mr. Walker was out of business." [Tr. 18/24-25; 19/1-2.] On one occasion, Plaintiff was asked to return the call as part of the deal proposed by Inv. Briggs. [Tr. 19/9-18.]

Plaintiff called James Grimes, a drug supplier, and asked him (during a recorded conversation) "whether or not he had any narcotics for sale and how much." [Tr. 19/25; 20/1-11.] Following the conversation, Plaintiff left the station (with police officers) to identify where Mr. Grimes lived. [Tr. 20/12-19.] When he returned, Plaintiff was placed in the holding tank. [Tr. 20/22-23.]

Approximately two hours later, Mr. Grimes joined Plaintiff, having been arrested for possession of a controlled substance based upon evidence obtained during the recorded telephone conversation with Plaintiff. [Tr. 20/20-23; 21/6-8, 12-17; 34/23-25.] The following morning,

Plaintiff and Mr. Grimes were each arraigned and transferred to the Oneida County Jail. [Tr. 23/9-16.]

The Period of Unjustified Incarceration

Plaintiff remained at the Oneida County Jail until January 12, 1989, at which time he was released[11] due to the prosecution's failure to indict. [Tr. 23/17-25; 24/1-2.] Six days later, on January 18, 1989, Plaintiff was re-arrested and indicted on possession of the items seized from the Apartment. [Tr. 24/3-11.] Thereafter, Plaintiff moved for a suppression hearing and his motion was granted. [Tr. 24/12-15.] At a suppression hearing held before the Honorable John Murad on July 26, 1989, the evidence seized from the Apartment was suppressed based upon the court's conclusion that Ms. Howard's consent for the search was involuntary, and in any event, it was given after the search had already taken place. [Tr. 24/23-25; 25/1-11.] Approximately a week after the evidence was suppressed, Plaintiff filed a motion to dismiss the indictment, which was denied. [Tr. 25/17-22.]

During this same time period, Plaintiff was tried on the charges that had been pending at the time of his arrest in this matter. [Tr. 26/8-17.] Plaintiff was convicted of one of the charges, and bail continued pending sentencing. [Tr. 26/10-12; 36/25; 37/1-3.] On September 6, 1989, Plaintiff was sentenced on his conviction, and the indictment on possession of the items seized from the Apartment was finally dismissed. [Tr. 26/18-20; 37/4-7.]

[11] Once released, Plaintiff remained free on bond on a (pre-existing) pending charge. [Tr. 36/5-7.]

ARGUMENT

POINT I

PLAINTIFF'S FOURTH AMENDMENT RIGHT WAS VIOLATED BY DEFENDANTS' UNREASONABLE AND UNCONSITUTIONAL SEARCH

A. As an Overnight Guest, Plaintiff Had a Reasonable Expectation of Privacy in the Apartment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828 (2002) (*quoting* U.S. CONST. amend. IV).

In order to recover for a claimed violation of his Fourth Amendment right, a plaintiff "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). "[T]he Fourth Amendment protects people, not places," and provides sanctuary for citizens wherever they have a legitimate expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351 (1967).

Thus, when a plaintiff is an overnight guest in a home, he may claim the protection of the Fourth Amendment. *See Carter*, 525 U.S. at 90 ("an overnight guest in a home may claim the protection of the Fourth Amendment"); *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990) (a party's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable").

As an overnight guest at the Apartment (a fact that is uncontested), Plaintiff had a reasonable expectation of privacy that was violated by Defendants' illegal search. [Tr. 10/3; 43/18.] Because the evidence demonstrates that Plaintiff had an expectation of privacy in the

place searched, and that his expectation was reasonable, he may recover for the violation of his Fourth Amendment right.

B. Defendants' Search of the Apartment without a Warrant Was *Per Se* Unreasonable, and Presumptively Unconstitutional.

The Supreme Court has held that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972). "[T]he Fourth Amendment embodies [the] centuries-old principle of respect for the privacy of the home" and the "'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (*quoting Payton v. New York*, 445 U.S. 573, 601 (1980)).

Courts have long observed that in Fourth Amendment jurisprudence, the home has something of a "special status" and have "emphasized the sanctity of the private home, and the particular gravity the Fourth Amendment accords to government intrusions on that privacy." *Lauro v. Charles*, 219 F.3d 202, 211 (2d Cir. 2000). It is "the warrant procedure [that] minimizes the danger of needless intrusions of that sort." *Payton*, 445 U.S. at 586 (*quoting United States Dist. Court*, 407 U.S. at 313 (1972)).

Without a warrant, a search of the home is *per se* unreasonable, and presumptively unconstitutional. *See United States v. Gagnon*, 230 F. Supp. 2d 260, 267 (N.D.N.Y. 2002) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

1. *Warrantless Search of the Apartment.*

The search of the Apartment was not conducted pursuant to a search warrant. This fact is most clearly supported by Inv. Briggs's testimony to that effect. [Tr. 111/5-8.]

This is also supported by documentary evidence created near the time of the search, such as the Department of Public Safety Investigation Report (the "Report") prepared by Inv. Briggs and submitted to Utica Chief of Police Benny Rotundo on November 18, 1988. *See* Exhibit J-8.[12] At Trial, Inv. Briggs testified that **the Report contains all of the important and material facts underlying this matter.** [Tr. 106/4-25; 107/1-15.]

As the portion that describes Defendants' entry and search of the Apartment, the Report states:

> This Writer along with Sr. Inv. Partipelo, Invs. Horgan, Simonelli, Nolan went to the subjects apartment that he shared with his live in girlfriend Lorraine Howard. Ms. Howard gave the above investigators oral permission to search the apartment and to remove any contraband found. Ms. Howard further gave a written Waiver stating same.

See Exhibit J-8. Although Inv. Briggs testified that the Report contained "all of the important and material facts," the Report does not state that the search of the Apartment was conducted pursuant to a search warrant, or that a search warrant was ever executed. [Tr. 110/7-10.] In fact, there is no mention whatsoever of a warrant for the search of the Apartment.[13] *Id.*

The fact that the search of the Apartment was not conducted pursuant to a search warrant is corroborated by the testimony of Ms. Howard. She testified that none of the police officers that entered the Apartment told her that they had a search warrant or provided her with a copy of any such warrant – they just entered her Apartment and began their search soon thereafter. [Tr. 47/23-25; 48/1-3.]

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[12] Admitted into evidence at Tr. 107/19.

[13] The Report does state that a search warrant was issued for the persons of Plaintiff and Mr. Miller, any motel room occupied by Mr. Miller, and Plaintiff's van, but conspicuously absent is any mention of a search warrant issued for, or executed at, the Apartment. *See* Exhibit J-8.

As further corroboration, Ms. Howard's statement (prepared inaccurately by Inv. Briggs) does not mention the existence or execution of a warrant for the search of the Apartment either. *See* Exhibit J-9.[14] The statement sets forth that Ms. Howard "gave the Utica Police department permission to search my apartment," but no search warrant is discussed. *Id.*

Ms. Howard's testimony, corroborated by that of Inv. Briggs and the documentary evidence admitted at Trial, establishes the fact that the search of the Apartment was not conducted pursuant to a search warrant, rendering the search *per se* unreasonable, and presumptively unconstitutional, as a matter of law.

2. *Validity of Search Warrant Issued for 1637 Kemble Street.*

Although Defendants admit that the search of the Apartment **was not conducted pursuant to a warrant,** Defendants argue that the search was legally conducted pursuant to a warrant issued (but not executed) for 1637 Kemble Street (the "Warrant"). [Tr. 111/5-8.] However, that search warrant cannot form the basis for a legal search of the Apartment.

The "manifest purpose" of the Fourth Amendment particularity requirement is "to prevent general searches." *United States v. Leon*, 468 U.S. 897, 963 (1984) (Stevens, J., concurring). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search is carefully tailored to its justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit." *Id.* at 963-64.

In order for a search warrant to satisfy the particularity requirement, the description of the property to be searched must be "such that the officer with a search warrant can, with reasonable

[14] Admitted into evidence at Tr. 67/22.

effort[,] ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925); *see also Velardi v. Walsh*, 40 F.3d 569, 576 (2d Cir. 1994). Indeed, the description must be such that the officer executing the warrant could "ascertain and identify the target of the search with no reasonable probability of searching another premises in error." *Velardi*, 40 F.3d at 576 (*quoting United States v. Valentine*, 984 F.2d 906, 909 (8th Cir. 1993).

Here, since the Warrant cannot be located and was not produced, Plaintiff can only assume that the Warrant set forth a description of the property to be searched that was identical to that which was sets forth in the Search Warrant Application executed by Inv. Briggs (the "Application"). *See* Exhibit J-5.[15] The Application described the property sought to be searched as:

> The third floor apartment located at 1637 Kemble St, Utica, N.Y. which is occupied by a Lorraine Howard and Tommie Walker and any occupants found therein. Said location being l[o]cated in a multiple dwelling apartment House in the city of Utica, N.Y.

Id.

The description did not allow Defendants to "ascertain and identify the target of [their] search with no reasonable probability of searching another premises in error," primarily because it set forth the incorrect address of the property to be searched. Although a technical error on the face of the warrant, such as an incorrect street address, may not affect its validity, the possibility of actual error **must** be "eliminated by other information, whether it be a detailed physical description in the warrant itself, supplemental information from an appended affidavit,[16] or knowledge of the executing agent derived from personal surveillance of the location to be

[15] Not admitted into evidence, but reference to the Application is necessary for a particularity analysis in the absence of the Warrant itself.
[16] No supplemental affidavit was produced by Defendants; therefore, Plaintiff will assume that one does not exist.

searched." *Velardi*, 40 F.3d at 576. Defendants did not eliminate the possibility of error by any of these types of additional information.

The Warrant (assumedly) did not set forth an adequate detailed **physical** description of the property to be searched. Rather, it merely described the property as a "third floor apartment . . . located in a multiple dwelling apartment House in the city of Utica, N.Y." The greatest support for the argument that the Warrant set forth an insufficient physical description is the fact that Defendants supposedly entered the third-floor apartment at 1637 Kemble Street[17] and advised the occupants that they had a search for their apartment, rather than the Apartment located at 1635 Kemble Street. [Tr. 85/7-21.] From the description set forth on the face of the Warrant, Defendants did not realize that they had erroneously entered the wrong apartment. When a situation such as this occurs, it is reasonable to conclude that a warrant does not set forth an adequate physical description of the property and it cannot be relied upon to overcome an error on the face of the warrant.

Likewise, Defendants did not possess knowledge derived from personal surveillance of the location to be searched necessary to overcome the error on the Warrant. The issuance of the Warrant was based upon information provided by an informant, Laverne Robinson, who

[17] Inv. Briggs testified that the buildings 1635 and 1637 Kemble Street were both three-story, three-apartment, flat roofed, light-colored buildings. [Tr. 86/19-25; 87/1-4.] Inv. Kaczor also testified that someone "would have a hard time distinguishing [between the two buildings] unless you could see the actual numbers on the house." [Tr. 136/2-13.] While an argument could have been made that Defendants justifiably entered the wrong building based upon such a physical description, the Warrant at issue here only described the property as a "third floor apartment . . . located in a multiple dwelling apartment House in the city of Utica, N.Y." There was no description of a specific number of apartments, type of roof, or color, so the similar characteristics of the building are irrelevant for an analysis of whether what the Warrant actually said provided an adequate detailed physical description of the property to be searched.

identified the address as "1637 Kemble Street." [Tr. 81/18-25; 82/1-18; 134/13-20.] Defendants did not have any personal knowledge of where Ms. Howard lived.

On the day of Plaintiff's arrest, Defendants commenced a moving surveillance at the 1600 block of Kemble Street. [Tr. 83/8-16.] Inv. Briggs testified that Defendants saw Plaintiff exit a building in that block, but were unable to see clearly which building it was (*i.e.*, 1635 or 1637) because they were stationed quite a distance away. [Tr. 83/8-16.] Without personal knowledge of the location to be searched, Defendants cannot overcome the error on the face of the Warrant.

Not being able to rely upon the foregoing types of information to overcome the deficiencies of the Warrant, Defendants apparently seek to rely upon information allegedly provided by a resident of 1637 Kemble Street. Both Invs. Briggs and Kaczor testified that they entered 1637 Kemble Street intending to search its third-floor apartment. [Tr. 85/7-16; 134/24-25; 135/1-11.] Once they reached the third floor, Defendants testified that they spoke to a woman who advised them that Plaintiff did not live there, and that he lived next door.[18] [Tr. 85/23-24; 135/3-11.] Based on the information that they received, Defendants testified that they would proceed to 1635 Kemble Street. [Tr. 86/2-10; 135/14-25; 136/1.]

Curiously, the existence of this unnamed resident was first raised at Trial, almost fourteen years (and multiple motions for summary judgment) after this action was commenced. Her existence was neither mentioned in Inv. Briggs's Report, which (according to Inv. Briggs)

[18] At Trial, there was conflicting testimony as to where this conversation took place. Inv. Briggs testified that the woman "went to the third floor apartment and went in," Defendants "walked in basically right behind [her]," and then she was told that they had a search warrant. [Tr. 85/7-21.] Inv. Kaczor (after listening to Inv. Briggs's testimony) testified that the conversation with the woman took place on "the third floor landing." [Tr. 135/3-11.]

contains "all of the important and material facts" underlying this matter, nor during the suppression hearing before Judge Murad, which led to the dismissal of the criminal indictment against Plaintiff. [Tr. 109/3-9; 24/23-25; 25/1-11.] On this basis, Plaintiff respectfully submits that no such conversation took place. Defendants proceeded to the Apartment, but they did so without other information sufficient to overcome the deficiency on the face of the Warrant and eliminate the possibility of actual error. Therefore, the Warrant was invalid and could not serve as the basis (even if it had been executed) for the search of the Apartment.

C. Defendants Have Not Satisfied Their Burden of Demonstrating that the Search of the Apartment Was the Product of Ms. Howard's Voluntary Consent.

Since Defendants' search of the Apartment was not conducted pursuant to a warrant, they must satisfy their burden of demonstrating that an exception exists to the warrant requirement.

The exceptions to the warrant requirement are "few in number and carefully delineated." *United States Dist. Court*, 407 U.S. at 318; *United States v. Kiyuyung*, 171 F.3d 78, 83 (2d Cir. 1999). One such exception occurs where a defendant obtains the voluntary consent of a person authorized to grant such consent and permission to enter the home. *See United States v. Eliot*, 50 F.3d 180, 185 (2d Cir. 1995). If a defendant relies on the consent exception, he must demonstrate by a preponderance of the evidence that the consent was voluntary. *See Schneckcloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). To ascertain the validity of the consent, a court must examine the "totality of the circumstances" to assess whether the purported consent was "a product of that individual's free and unconstrained choice, rather than a mere acquiescence in a show of authority." *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993).

Admittedly, Ms. Howard signed a search waiver and a statement stating that she gave Defendants permission to search of the Apartment. However, upon review of the circumstances surrounding the execution of each of these documents, it is clear that Ms. Howard's purported consent was not a product of her free and unconstrained choice, but rather a mere acquiescence to a show of authority. Importantly, no one ever advised Ms. Howard that she had the right not to sign either the waiver or the statement. [Tr. 51/17-20; 56/7-9.]

At Trial, Ms. Howard testified as to how she felt throughout the time she spent with Defendants, as well as the reasons for why she agreed to do what she did. It is important to remember the specifics of the ordeal that she was put through - Defendants entered her apartment without her permission; they were heavily armed, they threatened her with prison time, they ordered her around her own apartment, and they refused to allow her to call her attorney on two occasions, including when Inv. Briggs proposed the execution of a search waiver.

Prior to that day, Ms. Howard had never been arrested, never had a police officer point a gun at her, and certainly had never had police officers come into her home. [Tr. 45/23-25; 46/1-5.] Justifiably, she was emotionally overwhelmed when Defendants first arrived – Ms. Howard testified that:

> I was scared. I didn't know what was going on. I didn't know what I was going to do, what I was going to do with my kids. I just didn't know how I was going to get out of whatever I had done. I didn't want my family to know about anything. I mean, I'm religious, it was just hard, it was hard.

[Tr. 46/7-12.]

Later on, when Inv. Briggs asked Ms. Howard if she would be willing to sign a search waiver, Ms. Howard testified that she "felt closed in, boxed in" and that she felt that she had to

sign the waiver because Inv. Briggs had told her that she would go to jail for eight years for what was found in her Apartment if she refused to do so. [Tr. 50/17-25; 51/21-24.]

In regards to whether her consent was freely and voluntarily given, Ms. Howard testified that:

> No, I didn't freely give it to them, but I did, I signed the waiver. I was afraid, scared, didn't know which way to go. Couldn't call my lawyer because they said I didn't need one. I didn't know what to do, so I signed it.

[Tr. 66/20-25.]

At the station, when presented with the statement prepared by Inv. Briggs, Ms. Howard once again felt that she had no choice but to sign the statement -- Ms. Howard testified that:

> I felt as though I had to sign [the statement] because for me [to] get out of there, for me to be able to go back home with my kids and not have a big ruckus and things going on to ruin my reputation or whatever that I may have out there.

[Tr. 56/3-6.]

Throughout the events that underlie this action, Ms. Howard was afraid – afraid of the police officers and afraid to go to jail. She did what she thought she had to do in order to avoid losing her children, as well as in the hope that Defendants would leave her alone if she did what they asked. That said, Ms. Howard's consent was not a product of her free and unconstrained choice, and cannot serve as a legitimate basis for an exception to the search warrant requirement.

D. The Search of the Apartment Took Place Prior to Ms. Howard Signing the Search Waiver.

Regardless of whether the waiver was the product of Ms. Howard's voluntary consent, the search of her bedroom took place **before** she signed the waiver. Ms. Howard testified that

Defendants entered the Apartment without her permission and proceeded to conduct a cursory search. [Tr. 45/7-15; 48/5-9.] Then, Defendants went into Ms. Howard's bedroom and shut the door. [Tr. 48/4-19, 23-24.] While they were in there, Ms. Howard was able to hear sounds consistent with a search of the room. [Tr. 29/2-6.] When the phone rang and Ms. Howard opened the door, she was able to confirm her suspicions and saw that the room was "completely wrecked" and that Plaintiff's briefcase was open and sitting on the bed. [Tr. 49/7-11.] Only thereafter did Inv. Briggs come out of the bedroom and ask her if she would be willing to sign a search warrant. [Tr. 50/17-25; 51/3-8.] However, by then any consent that Ms. Howard could provide was worthless – Defendants had already illegally searched her bedroom and seized the evidence upon which Plaintiff was later indicted.

Not surprisingly, Inv. Briggs testified to a different series of events, but his version defies logic. For example, initially, Inv. Briggs testified that when he entered the Apartment, Mr. Miller was standing in the living room, and Inv. Briggs could not recall if Mr. Miller was standing behind a door. [Tr. 88/20-22.] However, after Inv. Briggs was presented with his testimony from the suppression hearing held before Judge Murad, he acknowledged that Mr. Miller was standing behind the front door like he was hiding when Defendants arrived. [Tr. 116/11-21.]

Inv. Briggs also initially testified that when he reached the third floor, Ms. Howard was standing in the open doorway to her apartment and said that she would be right back because she had to get back to the telephone. [Tr. 88/8-17; 113/16-25; 114/1-2.] Inv. Briggs was not sure how Ms. Howard came to be at the open door because "[he] didn't knock and [he] wasn't the first one in the door or at the door." [Tr. 88/8-17.]

When presented with his testimony from the suppression hearing, Inv. Briggs admitted that he could not remember what occurred. At the hearing, when he was asked if he was the first officer to enter the Apartment, Inv. Briggs testified that "[he] believed that there was someone directly in front of me, I believe [I was] the second one to go in. There were two of us kind of side by side in the doorway." [Tr. 115/5-11.] Once presented with his prior testimony, Inv. Briggs stated:

> I can remember that Lorraine came to the door, whether she opened it up in my presence or whether it was already open in my presence, perhaps she heard us coming up the stairs and she opened the door, I don't recall, but she was right there at the door, the door was not forced.

[Tr. 115/16-20.]

Given the fact that it is uncontroverted that Mr. Miller was standing behind the Apartment door and Ms. Howard was in the midst of a telephone conversation when Defendants arrived, Inv. Briggs's version of the facts seems unlikely. Why would Ms. Howard interrupt her conversation with her niece, leave her bedroom, and open the door, when Ms. Miller was standing right there? It does not make sense.

It is much more likely that Defendants used Ms. Howard's keys (which were heard before they entered, needed to open the first-floor door, and had been seized during Plaintiff's arrest) and opened the door themselves. This is especially likely considering Inv. Briggs's testimony that he was concerned about the possibility of destruction of evidence and, more importantly, he was concerned that whoever was in the Apartment posed a threat to the officers' safety. [Tr. 112/2-8, 15-18.] Opening the door with the key would not provide the occupants of

the Apartment with any notice of the officers' presence, and would serve to limit the destruction of evidence and protect the officers from harm.

E. Defendants Have Not Sustained Their Burden of Proving Their Entitlement to Qualified Immunity.

Qualified immunity is "an affirmative defense that shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003) (*quoting McCardle v. Haddad*, 131 F.3d 43, 50 (2d Cir. 1997)). As such, defendants bear the burden of proving their entitlement to qualified immunity. *See McCardle*, 131 F.3d at 50.

1. *Violation of a Fourth Amendment Right.*

In order to determine if defendants have satisfied their burden and are entitled to qualified immunity, the Court must conduct a two-part inquiry. The threshold question is "whether, 'taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right.'" *Loria v. Gorman*, 306 F.3d 1271, 1281 (2d Cir. 2002) (*quoting Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

Taken in the light most favorable to Plaintiff, the facts show that Defendants' conduct violated his Fourth Amendment to be free from unreasonable searches. As discussed above, Defendants entered the Apartment without a search warrant or Ms. Howard's permission, conducted a search prior to requesting consent to do, and obtained a search waiver that was not the product of Ms. Howard's voluntary consent. That said, Defendants' violated Plaintiff's Fourth Amendment right.

2. *Objective Reasonableness of Defendants' Belief in the Lawfulness of Their Actions.*

The second part of the inquiry requires a determination of "'whether the right was clearly established' at the time it was allegedly infringed." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* That is, if the officer's conduct violated a right, the Court must analyze the objective reasonableness of the officer's belief in the lawfulness of his actions. *See id.* (*citing Poe v. Leonard*, 282 F.3d 123, 133 (2d Cir. 2002)). If the officer's belief was not objectively reasonable, "qualified immunity offers him no solace." *Id.* (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

It is not objectively reasonable to conclude that Defendants' conduct was lawful in the situation they confronted. Looking at the situation objectively, it is difficult to conclude that a reasonable police officer would believe that it is lawful to (1) enter a home using the occupant's key without a warrant, (2) search the home prior to receiving consent, and (3) subsequently obtain consent to legitimize a search that had already taken place. Since Defendants' conduct was not objectively reasonable, they are not entitled to qualified immunity.

POINT II

PLAINTIFF'S FIFTH AMENDMENT RIGHT WAS VIOLATED BY THE USE OF A COMPELLED STATEMENT IN A CRIMINAL PROCEEDING

A. Defendants Violated Plaintiff's Fifth Amendment Right Not to Have a Compelled Statement Used Against Him in a Criminal Proceeding.

A Section 1983 remedy for a violation of plaintiff's Fifth Amendment right will exist where police officials, acting under color of state law, subjected him to the deprivation of that

constitutional right. *See Weaver v. Brenner*, 40 F.3d 527, 534 (2d Cir. 1994). The key issue is whether a self-incriminating statement was obtained, not by failure to read the *Miranda* warnings, but by coercion. *See Deshawn E. v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998).

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides in relevant part that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. It guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

Although the Fifth Amendment simply refers to the use of a statement "in any criminal case," the use or derivative use of a compelled statement in any criminal proceeding against the declarant violates that person's Fifth Amendment rights – use of the statement at trial is not required. *See Weaver*, 40 F.3d at 535. Specifically included, of course, is the use of a compelled statement before a Grand Jury because it makes the declarant a witness against himself in a criminal case which will lead to the infliction of criminal penalties against him. *Id.*

The Fifth Amendment privilege against compulsory self-incrimination clearly applies to the several States, but the determination of whether interrogation techniques are coercive are made under the Due Process Clause of the Fourteenth Amendment. *See Colorado v. Connelly*, 479 U.S. 157, 163 (1986). The Due Process Clause prohibits self-incrimination based on fear, torture, or any other type of coercion. *See Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936). The applicable test is whether a declarant's statements were made voluntarily, which depends upon examining all of the circumstances surrounding the interrogation to see if police overreaching overcame the declarant's will and led to an involuntary confession, one which was

not freely given. *See Safir*, 156 F.3d at 348; *Weaver*, 40 F.3d at 536. Where an admission is the product of deception, and not the product of a free and deliberate choice, there is no voluntary relinquishment of the Fifth Amendment right. *See United States v. Male Juvenile*, 121 F.3d 34, 41 (2d Cir. 1997) (*quoting Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

Based on the testimony of Plaintiff regarding the circumstances surrounding his verbal admission of ownership of the seized items, he has established that his statement was not freely given, but was rather the product of Defendants' overreaching. Plaintiff testified that he was not provided with his *Miranda* rights at the time of his arrest and his request to contact his attorney was denied. [Tr. 12/25; 13/1-2, 6-10.] Once he was brought to the Utica Police station and placed in a holding tank, Plaintiff was left there for several hours while Defendants went to the Apartment. [Tr. 13/15-22.]

Inv. Briggs testified that, after he returned from the Apartment, he sent for Plaintiff so that he could be "confronted with everything we had." [Tr. 99/19-23.] Once Plaintiff was brought upstairs to the office, Inv. Briggs "told him that we had went to his apartment and we had Lorraine and Gary Miller and we had the cocaine that was in a briefcase and the drug paraphernalia." [Tr. 99/23-25; 100/1.] Then, according to Inv. Briggs, Plaintiff spontaneously stated that "Lorraine Howard did not have anything to do with it, the stuff is mine." [Tr. 100/1-3.]

It seems unlikely that the situation would have played out exactly as Inv. Briggs described. What is more likely is the scenario to which Plaintiff testified, namely that he was brought to the office, confronted with the evidence, and presented with a deal by which his girlfriend would not be charged and he would plea to a specific charge.

What further corroborates Plaintiff's version of the story is the fact that Inv. Briggs testified that Plaintiff provided information regarding Mr. Grimes, a phone call was made, and a search warrant was issued based on the information obtained during the phone call. [Tr. 100/14-21.] If Defendants received an oral admission immediately upon Plaintiff's arrival at the office, why would they propose a deal? They already had what they needed to obtain an indictment and a probable conviction.

Instead, what makes more sense is that Inv. Briggs proposed a deal to Plaintiff, and he accepted, admitted ownership of the seized items, and provided Defendants with information that led to the arrest of Mr. Grimes. Unfortunately, after Plaintiff fulfilled his part of the bargain, Defendants went back on theirs and Plaintiff was indicted.

Since Defendants made dishonest promises of consideration, Plaintiff was deprived of his ability to make a rational decision. Such a tactic, combined with the evidence as to the fact that Plaintiff was not allowed to contact his attorney, was held in a holding tank for several hours, threats were made to incarcerate his girlfriend, and the environment in which the verbal statement was made, rendered the statement coerced. Since Defendants elicited a coerced statement from Plaintiff and that statement was presented to the Grand Jury that indicted him, Plaintiff's Fifth Amendment right was violated.

B. Defendants Have Not Sustained Their Burden of Proving Their Entitlement to Qualified Immunity.

Once a plaintiff proves that he had a clearly established Fifth Amendment right at the time of his interrogation, the burden shifts to the defendant to demonstrate that it was objectively reasonable for them to believe that their coercive actions were lawful and that they are entitled to

qualified immunity. *See Weaver*, 40 F.3d at 537; *Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir. 1991).

It is not objectively reasonable to conclude that Defendants' conduct was lawful in the situation they confronted. Looking at the situation from the perspective of an objective police officer, it is difficult to conclude such an officer would believe that it is lawful to present a false plea deal and threaten a person's girlfriend with incarceration in order to obtain an admission. Since Defendants' conduct was not objectively reasonable, they are not entitled to qualified immunity.

POINT III

BASED ON THE VIOLATION OF HIS CONSTITUTIONAL RIGHTS, PLAINTIFF IS ENTITLED TO DAMAGES

From the time of his arrest until the time of his sentencing on the pending charge, Plaintiff was incarcerated based on charges stemming from the illegal search at the Apartment.[19] To be clear, if not for those charges, Plaintiff would have otherwise been free. At the time of his arrest, he was free on bond on a pending charge. That bond was not discontinued until the time of his sentencing. The following table depicts the applicable series of events, as well as the number of days between each event:

November 18, 1988					Arrested (at time, free on bond on pending charge)
January 12, 1989					Released because of failure to indict (still on bond)
January 18, 1989					Re-arrested/indicted on possession of items seized from the Apartment
July 21, 1989					Suppression hearing on the Apartment evidence
July 26, 1989				42	Decision issued suppressing the Apartment evidence
September 6, 1989					Indictment dismissed/sentenced on pre-existing charge (bond discontinued)

As depicted by the foregoing, Plaintiff was incarcerated for a total of 286 days – time that he would have been otherwise free. As damages for the violations of his constitutional rights, Plaintiff is entitled to recover the fair value of his loss of freedom caused by the illegal and unconstitutional conduct of Defendants.

[19] With the exception of the six-day period between the date when Plaintiff was released and then re-arrested.

CONCLUSION

Based on the evidence submitted at Trial and for the foregoing reasons, Plaintiff respectfully requests that the Court award (1) Judgment in Plaintiff's favor on the causes of action asserted, (2) damages based on his period of unjustified incarceration and the value of the items seized and never returned, (3) reasonable attorney's fees, and (4) whatever other relief the Court deems just and proper.

DATED: December 15, 2003

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October 10, 2007

VIA CM/ECF

Honorable David E. Peebles
United States Magistrate Judge
U.S. District Court for the Northern District of New York
United States Courthouse
100 South Clinton Street
P.O. Box 7345
Syracuse, NY 13261-7396

Re: Silvera v. Burge, et al.
Civil Action No. 02-CV-882

Dear Judge Peebles:

We represent Plaintiff Keith Silvera in connection with the above-referenced matter, and I am serving as lead counsel. The Court has scheduled the trial to commence on October 29, 2007.

This letter is respectfully submitted to request that the Court issue Writs of Habeas Corpus Ad Testificandum for the following inmates to allow their appearance at the trial as witnesses on behalf of Plaintiff Silvera. The following is a brief description as to why each inmate has relevant information to support Plaintiff Silvera's claims.

1. Vernon Ricks: DIN: 92A7363. Mr. Ricks will testify regarding events he witnessed while he was housed at Auburn Correctional Facility during the period of time in which Plaintiff Silvera was retaliated against by the defendants in this case. For example, Mr. Ricks will testify that he witnessed verbal assaults by Defendant Pidlypchak on Plaintiff Silvera that he would lock him in a cell (*e.g.* "keep lock") if he attempted to enter the mess hall. In addition, Mr. Ricks will testify that he witnessed additional verbal assaults on Plaintiff Silvera by the defendants (*e.g.* Defendants Pidlypchak and Calsciabetta) after Plaintiff Silvera filed a grievance complaint concerning the defendants denying his access to approved Rastafarian events at the mess hall. For example, Mr. Ricks will testify that Defendants Pidlypchak and Calsciabetta conducted searches of the personal property of both Plaintiff Silvera and Mr. Ricks at the recreational hall and at the

B-Block of Auburn Correctional Facility for no cause. Thereafter, the defendants ordered Plaintiff Silvera into the "keep lock" unit for no cause.

2. Darryll Spearman: DIN: 94A0760. Mr. Spearman will testify regarding events he witnessed while he worked as the administrative clerk at the mess hall at Auburn Correctional Facility during the period of time in which Plaintiff Silvera was retaliated against by the defendants in this case. For example, Mr. Spearman will testify that he was ordered by Defendant Pidlypchak to remove Plaintiff Silvera's name from the approved entry list at the mess hall regarding an approved Rastafarian event even though Plaintiff Silvera had previously obtained the appropriate permission to attend the Rastafarian event at the mess hall.

3. John Gordon: DIN: 75B0127. Mr. Gordon will testify as to first-hand witnessed accounts at the mess hall at Auburn Correctional Facility at the time Mr. Silvera's was retaliated against by the defendants in this case. For example, Mr. Gordon will testify that he witnessed defendants ordering Plaintiff Silvera to leave the mess hall on the date of the approved Rastafarian event even though he had the proper approvals to attend and facilitate the Rastafarian event as the "Facilitator". Mr. Gordon now serves as the Rastafarian Facilitator at Auburn Correctional Facility.

4. Courtney Allen: DIN: 89A7774. Mr. Allen will testify regarding events he witnessed while he worked at the mess hall at Auburn Correctional Facility during the period of time in which Plaintiff Silvera was retaliated against by the defendants in this case. For example, Mr. Allen will testify that he witnessed Plaintiff Silvera bring legal documents to the mess hall. However, several of the defendants (e.g. Pidlypchak and Calsciabetta) verbally harassed Plaintiff Silvera regarding bringing any legal materials to the mess hall. Mr. Allen will also testify as to his witnessing daily verbal assaults on Plaintiff Silvera for no cause. In addition, Mr. Allen will testify that on the date of the approved Rastafarian event at the mess hall, Mr. Silvera was denied access to the mess hall by Defendant Pidlypchak for no cause.

5. Osmond Brown: DIN: 95B1958. Mr. Brown will testify regarding events he witnessed while he worked at the mess hall at Auburn Correctional Facility during the period of time in which Plaintiff Silvera was retaliated against by the defendants in this case. For example, Mr. Brown will testify that he witnessed the defendants verbally assault and harass Plaintiff Silvera after he filed a grievance complaint against Defendant Calsciabetta.

As I discussed with Clerk Sherry Lazzarro, Inmate Spearman (DIN 94A0760) is due for a parole hearing shortly after the trial date. Accordingly, we respectfully request to conduct a video deposition of Inmate Spearman's testimony prior to commencement of the trial. I will contact the Mid-Orange Correctional Facility to determine whether it can accommodate such a request if granted by Your Honor.

Thank you for your consideration of this matter. Please contact me should you have any questions or concerns.

Respectfully submitted,

s/Emanuela D'Ambrogio

Emanuela D'Ambrogio

ED:ed

cc: Keith Silvera (with Enclosure)
Via Regular Mail

Senta Suida, Esq.
Via CM/ECF

bcc: Mark R. McNamara

EMANUELA D'AMBROGIO
ASSOCIATE

ONE PARK PLACE
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October 12, 2007

Rose Snow, Inmate Records Coordinator
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, New York 10990-0900

Re: Keith A. Silvera - DIN #90T3701

Dear Ms. Snow:

I am the attorney representing Keith Silvera, DIN #90T3701, in a retaliation lawsuit he commenced against several corrections officers employed at Auburn Correctional Facility. Pursuant to your telephone conversation on today's date with my paralegal Pam Corpora, enclosed please find our client's exhibits 1 through 44 in relation to the above referenced matter. As you discussed with Ms. Corpora, please authenticate the exhibits/documents as "true copies" of the documents that you have in your file pursuant to Federal Rule 902(4).

In addition to the enclosed documents, I would like to also request certified copies of any documents/correspondence regarding inmate Silvera's disciplinary records while housed at the Mid-Orange Correctional Facility.

I have enclosed a pre-paid, self-addressed envelope for your convenience. Thank you for your assistance in this matter.

Very truly yours,

Emanuela D'Ambrogio

ED:pvc
Enclosures

cc: Keith Silvera (with enclosures)
Mark R. McNamara, Esq. (w/out enclosures)

{H0854089.1}

EMANUELA D'AMBROGIO
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October 25, 2007

VIA FACSIMILE @ 315-768-4399

Kenneth Perlman, Superintendent
Mid-State Correctional Facility
P.O. Box 216
Marcy, New York 13403-0216

Re: Keith A. Silvera - DIN #90T3701
Inmate transferred from Mid-Orange Correctional Facility

Dear Mr. Perlman:

Please be advised that I am the attorney representing Keith A. Silvera in a lawsuit against several correction officers employed at Auburn Correction Facility. Mr. Silvera is currently being transferred to Mid-State Correctional Facility from Mid-Orange Correctional Facility to be housed for the trial scheduled to commence on Monday, October 29, 2007.

I am writing this letter to request a telephone conference with Mr. Silvera on Friday, October 26, 2007 at 10:30 a.m. Please contact me as soon as possible to confirm whether or not this date and time is acceptable to you.

Thank you for your consideration in this matter.

Very truly yours,

Emanuela D'Ambrogio

ED:pvc

{H0854091.1}

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KEITH A. SILVERA,

Plaintiff,

-vs-

JOHN BURGE, Superintendent, Auburn Correctional Facility; **SERGEANT WITHERS**, Auburn CF; **SERGEANT CHUTTY**, Auburn CF; **F. CALESCIBETTA**, Auburn CF; **D. SPICER**, Auburn CF; and **C. PIDLYPCHAK**, Auburn CF,

Defendants.

Pretrial Stipulation

Civil Action No.
9:02-CV-882-NAM-GJD

The parties and their counsel agree as follows for their pre-trial stipulation:

1. Basis of federal jurisdiction: 43 U.S.C. §1983

2. Exhibits: At this time, the parties stipulate to the following exhibits into evidence:

Plaintiff's Exhibits: P-3, P-4, P-5, P-26, P-27, P-28, P-29, P-37, P-38, P-40.

Defendants' Exhibits: D-3, D-10, D-13, D-14, D-15, D-16, D-17, D-18, D-21, D-23, D-24, D-25, D-26, D-27, D-28, D-29, D-30, D-31, D-33, D-34, D-36, D-37, D-38, D-39, D-40, D-41, D-42, D-43, D-44.

At this time the parties also stipulate to the authenticity of the following documents:

Plaintiff's Exhibits: P-8, P-9, P-37, P-38, P-41, P-45, P-46, P-47, P-48, P-49, P-51, P-52, P-53, P-54, P-55, P-56.

Defendants' Exhibits: D-2, D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, D-13, D-14, D-15, D-16, D-17, D-18, D-21, D-23, D-24, D-25, D-26, D-27, D-28, D-29, D-30, D-31, D-33, D-34, D-36, D-37, D-38, D-39, D-40, D-41, D-42, D-43, D-44.

3. Relevant Facts Not in Dispute: The parties hereby stipulate to the following facts:

- On 8-17-01 Officer Calescibetta wrote a misbehavior report regarding Plaintiff Keith Silvera.

- The 8-17-01 misbehavior report written by Officer Calescibetta was dismissed on 8-21-01 and Plaintiff Silvera was found not guilty of the following charges: 1) interference with employee, and 2) refusing a direct order.

- On 12-15-01 Officer Calescibetta wrote a misbehavior report regarding Plaintiff Silvera.

- In connection with the 12-15-01 misbehavior report, Plaintiff Silvera was found guilty on 12-21-01 of the following charge: property in unauthorized area.

- On 1-22-02 Officer Calescibetta wrote a misbehavior report regarding Plaintiff Silvera.

- In connection with the 1-22-02 misbehavior report, plaintiff was found not guilty on 1-26-02 of violating the following charges: 1) false statement or information; 2) refusing a direct order; and 3) out of place.

- On 4-11-02 Officer Spicer wrote a misbehavior report regarding Plaintiff Silvera.

- The 4-11-02 misbehavior report against Plaintiff Silvera was dismissed 4-24-02 involving charges of 1) demonstrations and 2) contraband.

- Plaintiff filed grievance AUB-36336-01 against Officer Calescibetta and Sergeant Murray on 12-26-01.

- On 1-17-02 the Superintendent determined that no evidence of harassment was found relative to Plaintiff's grievance AUB-36336-01 against Officer Calescibetta and Sergeant Murray.

- Plaintiff's grievance AUB-36336-01 against Officer Calescibetta and Sergeant Murray was denied by the Central Office Review Committee on 2-27-02.

- On 5-3-02 Plaintiff filed grievance AUB-36986-02 (dated 4-30-02) against Sergeant Chuttey, Officer Calescibetta, Officer Pidlypchak, Officer Spicer, and Sergeant Withers.

- On 6-18-02 the Superintendent found no evidence to support Plaintiff's grievance AUB-36986-02 against Sergeant Chuttey, Officer Calescibetta, Officer Pidlypchak, Officer Spicer, and Sergeant Withers.

- Plaintiff's grievance AUB-36986-02 against Sergeant Chuttey, Officer Calescibetta, Officer Pidlypchak, Officer Spicer, and Sergeant Withers was denied by the Central Office Review Committee on 8-14-02.

DATED: October 26, 2007.

s/Emanuela D'Ambrogio
Emanuela D'Ambrogio, Esq.
Attorney for Plaintiff
Hiscock & Barclay, LLP
One Park Place
300 S. State Street
Syracuse, New York 13202-2078

s/Senta B. Siuda
Senta B. Siuda, Esq.
Assistant Attorney General
Office of Attorney General
State of New York
615 Erie Blvd. West, Suite 102
Syracuse, New York 13204-2455

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KEITH A. SILVERA,

Plaintiff,

-vs-

JOHN BURGE, Superintendent, Auburn Correctional Facility; **SERGEANT WITHERS,** Auburn CF; **SERGEANT CHUTTY,** Auburn CF; **F. CALESCIBETTA,** Auburn CF; **D. SPICER,** Auburn CF; and **C. PIDLYPCHAK,** Auburn CF,

Defendants.

Motion *in limine*
Civil Action No.
9:02-CV-882-GLS-GJD

PLEASE TAKE NOTICE, that plaintiff Keith A. Silvera, by his attorneys, Hiscock & Barclay, LLP, will move the Court, *in limine*, at the Trial thereof, for an Order precluding defendants from offering evidence of or concerning: (1) any criminal convictions of plaintiff (murder in the second degree and criminal possession of a weapon); (2) any lawsuits or litigation commenced by or against plaintiff; and (3) any criminal convictions of the Plaintiff's witnesses that he intends to call to testify including Vernon Ricks DIN: 92A7363 (murder in the second degree and attempted robbery in the first and second degrees), Darryll Spearman DIN: 94A0760 (attempted murder in the first degree), John Gordon DIN: 75B0127 (murder – no degree, attempted murder – no degree, and criminal possession of weapon in the third degree), Courtney Allen DIN: 89A7774 (murder in the second degree, attempted murder in the second degree, assault in the first degree and attempted robbery in the first degree), and Osmond Brown DIN: 95B1958 (murder in the second degree and robbery in the first degree). In the alternative, if the Court denies Plaintiff's motion on the papers, Plaintiff requests that the Court conduct a Hearing prior to the Trial to determine the admissibility of any such evidence.

In support of the motion, the Federal Rules of Evidence permit the impeachment of a witness by prior convictions punishable in excess of one year. *See* Fed. R. Evid. 609(a). If more than ten years has lapsed since the conviction or the release from confinement for the conviction, the evidence is not admissible unless the probative value substantially outweighs prejudicial effect. Fed. R. Evid. 609(b). In *Zinman v. Black & Decker, Inc.*, 983 F.2d 431, 434 (2d Cir. 1993), the Second Circuit stated that a conviction outside of the ten year window should be admitted "very rarely and only in exceptional circumstances." Plaintiff's criminal convictions of murder in the second degree and criminal possession of a weapon, and the convictions of the aforementioned witnesses stated above are more than ten years old and have no relevance to this matter. Accordingly, Defendants should not be permitted to offer evidence concerning the conviction of Plaintiff or those of the aforementioned witnesses.

Additionally, Defendants should likewise be precluded from offering any evidence regarding any separate and unrelated disciplinary matters against Plaintiff. Under Rule 404(b) of the Federal Rules of Evidence, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Thus, evidence concerning any prior and unrelated disciplinary actions involving Plaintiff cannot be used by the Defendants to support their allegations against Plaintiff in this case. Accordingly, Plaintiff requests that the Court issue an Order precluding Defendants from mentioning or offering evidence concerning any unrelated disciplinary matters against Plaintiff.

Plaintiff also relies upon Rules 402 and 403 of the Federal Rules of Evidence and respectfully submits that such evidence is either irrelevant and/or outweighed by its prejudicial effect on the proceedings. Plaintiff submits that introduction of his and/or the aforementioned witnesses convictions are irrelevant to the proceedings where Plaintiff does not seek to preclude

the Jury from learning that Plaintiff and the aforementioned named witnesses were and/or are incarcerated during all times material to the events underlying this case and stipulates to those facts. Accordingly, pursuant to FRE 402, evidence of these convictions is not admissible and should be excluded.

In addition, evidence of such convictions will unduly prejudice the jury and prevent Plaintiff from receiving fair consideration of his retaliation claims. The prejudice of admitting the convictions of the named witnesses into evidence would similarly outweigh any probative value such evidence may offer. Moreover, due to the nature of the convictions, any limiting instruction the Court may give the jury will not prevent undue prejudice to Plaintiff. Accordingly, pursuant to FRE 403, evidence of these convictions should be excluded.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that his motion *in limine* be granted and that Plaintiff be given such other and further relief as the Court deems fair and proper.

DATED: October 12, 2007

HISCOCK & BARCLAY, LLP

By: *s/Emanuela D'Ambrogio*
Emanuela D'Ambrogio
Bar Roll No. 512845

Attorneys for Plaintiff
Office and Post Office Address
One Park Place
300 South State Street
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Telephone (315) 425-2887
Facsimile (315) 703-7352

To: Senta B. Suida, Esq.
Attorney General of the State of New York
Attorney for the Defendants
Syracuse Regional Office
615 Erie Boulevard, West, Suite 102
Syracuse, New York 13204
VIA CM/ECF

Keith Silvera
Plaintiff
90-T-3701
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990
VIA US MAIL

PRELIMINARY STATEMENT

On September 18, 2002, Plaintiff, Arrello Barnes was severely injured when he bit into a sandwich containing razor sharp shards of glass. In the weeks and months prior to his injury, Plaintiff notified the Defendants, in writing, that his meals were inadequate, that his food was being tampered with, and that the guards failed to act in a professional manner. Despite this notice, Defendants, Correctional Officers Steven Schule, William Brown, and Jeremy McGaw—who were responsible for serving Plaintiff's meals—acted with deliberate disregard for the Plaintiff's safety by allowing the adulteration of Mr. Barnes's meals. The Defendants' gross indifference to the Plaintiff's safety culminated on September, 18, 2002 when the Plaintiff began spewing blood from his mouth as a result of glass embedded in his tuna fish. Mr. Barnes commenced the instant action seeking compensation for the injuries he suffered as a result of the nefarious contamination of his food. He has asserted claims under 42 U.S.C. § 1983 for violations of his rights under the Eighth and Fourteenth Amendments, including grossly negligent supervision of subordinates, failure to protect, and cruel and unusual punishment under and the Fifth, Fourteenth, and Eighth Amendment of the United States Constitution.

STATEMENT OF FACTS

On September 18, 2002, Plaintiff, Arrello Barnes, ("Mr. Barnes"), an inmate at Upstate Correctional Facility ("Upstate") was preparing for his lunch time meal. At approximately 11:30 a.m., Defendant Steven Schule ("Mr. Schule") arrived at Mr. Barnes' cell and served him a meal comprised of, among other things, a scoop of tuna fish, four slices of white bread, two packets of mayonnaise, lettuce, tomato, and a "spork" (combination spoon and fork) to spread the tuna fish. Mr. Schule handed Mr. Barnes the Styrofoam meal container and said "I hope you enjoy your lunch," before walking away.

Mr. Barnes was talking to his bunkmate while he scooped the tuna fish and mayonnaise on to the slices of bread, and the conversation caused him to divert his gaze from the food container while he made his sandwich. Moments later, Mr. Barnes began to eat. After one or two bites, he bit into a piece of glass in the tuna fish; his mouth surged with pain, and he started spitting the food out, splattering blood on to the tray. His bunkmate frantically called for the guards, who eventually called for the nurse. Thereafter, one of the guards said to Mr. Barnes, "we told you we would get you."

An investigation determined that the piece of glass originated from a medicine bottle in the medical facility. No glass was found in Mr. Barnes' cell, the kitchen, or on his person. Neither Mr. Barnes, nor his cellmate, nor any of the kitchen workers had been treated with the medicine that was determined to be the source of the glass.

Mr. Barnes will testify that he was experiencing problems with his meals at Upstate months prior to his injury. He will also testify that he made several written complaints to prison officials concerning the fact that he was being denied hot water for his tea, that the Corrections Officers on his block displayed a lack of professionalism, and that he was afraid his food was being contaminated.

As a result of the glass in his sandwich, Mr. Barnes suffered a cut to the back of his tongue, swelling, pain and numbness in his mouth immediately following the September 18, 2002 incident of food tampering, and for several weeks thereafter. Mr. Barnes continues to suffer numbness, pain, and inability to taste his food.

ARGUMENT

I. THE CONDUCT PLAINTIFF WAS SUBJECTED TO ESTABLISHES A CONSTITUTIONAL VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND PLAINTIFF WILL THEREFORE ESTABLISH A VIOLATION OF 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, a plaintiff "must show that: (1) the defendants acted under 'color of state law'; and (2) their conduct or actions deprived plaintiff of a right, privilege or immunity guaranteed by the Constitution or laws of the United States." *Rivera v. Goord,* 119 F. Supp. 2d 327, 335 (S.D.N.Y. 2000); (*citing, Shabazz v. Vacco,* F. Supp. 2d 1998 WL 901737 *2 (S.D.N.Y. 1998); (*citing, Pitchell v. Callan*, 13 F.3d 545, 547-48 (2d Cir. 1994). The first element is not subject to dispute. Defendants—all prison officials working at Upstate Correctional Facility at the relevant time—were clearly acting under color of state law, as they were on duty and responsible for serving Mr. Barnes' meals the day he was injured. As to the second element, placing glass in the plaintiff's food, if found by the jury, is sufficient to constitute cruel and unusual punishment under the Eight Amendment. Moreover, the defendants' deliberate indifference to the known threat faced by Mr. Barnes constitutes a violation of his Eighth and Fourteenth Amendment Rights.

The Eighth Amendment's prohibition of "cruel and unusual" punishments requires prison officials to "take reasonable measures to guarantee the safety of inmates." *Gowins v. Greiner* 2002 U.S. Dist. LEXIS 14098 at 20 (S.D.N.Y. 2002). An inmate who suffers an injury of constitutional dimensions as a result of a prison official's deliberate indifference to his safety may bring an action to recover damages for violation of his civil rights under the Eighth and Fourteenth Amendments. *Stubbs v. Dudley* 849 F.2d 83 (2d Cir. 1988). A failure to protect an inmate will be found where a prison official knows of and disregards an excessive risk to the health and safety of an inmate. *Id.*

The Eighth Amendment "requires that prisoners receive nutritionally adequate food prepared and served in conditions that do not present an immediate danger to the health of the inmates who consume it." *Chapdelaine v. Keller* 1998 U.S. Dist. LEXIS 23017 (N.D.N.Y. 1998). Moreover, serving an inmate a meal that has been contaminated with glass, rocks, dust or other foreign objects constitutes a violation of the Eighth Amendment. *see Robles v. Coughlin* 725 F.2d 12, 16 (2d Cir. 1983).

The plaintiff in the instant action has sued the defendants in their individual capacity. In such an action, the plaintiff must establish the defendants' personal involvement in the constitutional violations alleged. *Gowins v. Greiner* 2002 U.S. Dist. LEXIS 14098 (S.D.N.Y. 2002). Personal involvement can be established by evidence of (1) direct participation in the constitutional violation; (2) failure to remedy a wrong after learning of it; (3) creation or maintenance of a policy under which unconstitutional acts occurred; (4) gross negligence in managing subordinates who committed unconstitutional acts; or (5) deliberate indifference by failing to act on information indicating that unconstitutional acts were occurring. *Id.*

The plaintiff will present evidence and testimony showing that the defendants were personally responsible for the plot to place glass in plaintiff's tuna fish. Alternatively, even if the jury does not find that defendants adulterated plaintiff's meal, the evidence presented at trial will demonstrate that the defendants were deliberately indifferent to the substantial risk of injury from the adulteration of plaintiff's food by others. Specifically, Mr. Barnes will testify that he notified the defendants of his fear that his food was being tampered with, and the defendants failed to take any action to avert the imminent danger posed to Mr. Barnes.

II. PLAINTIFF IS ENTITLED TO RECOVERY OF DAMAGES, INCLUDING COMPENSATORY DAMAGES AND PUNITIVE DAMAGES

In this action, Mr. Barnes seeks various remedies available to him under 42 U.S.C. § 1983 including, *inter alia*, compensatory damages for mental anguish and emotional distress as well as punitive damages.[1]

A. Compensatory Damages

Compensatory damages are a form of relief available to a successful plaintiff under 42 U.S.C. § 1983. Fair and reasonable compensatory damages are appropriate where the plaintiff's injury was caused by the violation of a constitutional right. *Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407, 410 (S.D.N.Y. 1998). Mr. Barnes will ask the jury in this case to award him compensatory damages based upon his physical injuries, mental anguish and emotional distress suffered during his incarceration relative to the incidents which form the core of this case. Moreover, in this type of case, the testimony of a plaintiff alone provides a sufficient basis for a jury to award damages for mental anguish and emotional distress and punitive damages. *Courtney v. City of New York*, 20 F. Supp. 2d 655, 661 (S.D.N.Y. 1998) (holding that a plaintiff "is not required to corroborate [her] testimony regarding mental anguish in order to support a compensatory damage award." (*citation omitted*)).

B. Punitive Damages

Punitive damages may be awarded in § 1983 cases "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Mathie v. Fries*, 121 F.3d 808, 815 (2d Cir. 1997) (*quoting Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640 (1983)). Punitive

[1] Plaintiff will also seek an award of costs, including a reasonable attorneys' fee, and respectfully reserves the right to make an application for such an award following the entry of final judgment. *See* Fed. R. Civ. P. Rule 54(b)(2).

damages may also be awarded "in a proper case under § 1983 for the purpose of deterring or punishing a violation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 257 n. 11, 98 S. Ct. 1042, 1049 n. 11 (1978); *see also, In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1272 (2d Cir.), *cert. denied*, 502 U.S. 920, 112 S. Ct. 331 (1991) (reviewing history of punitive damages).

Here, Mr. Barnes' claims indicate that punitive damages are entirely appropriate. If the jury finds that the defendants were responsible for serving Mr. Barnes a meal contaminated with glass, mere compensatory damages would be insufficient to provide a true disincentive. *See, e.g., Grimm v. Lane* 895 F.Supp. 907 (S.D. Ohio 1995). *Duckworth v. Whisenant*, 97 F.3d 1393, 1395 (11th Cir. 1996). (awarding punitive damages against officers who conspired to administer a beating to prisoners who they felt needed an "attitude adjustment").

V. PRECLUSION OF EVIDENCE

A. Evidence of Prior Convictions

Mr. Barnes is a felon convicted of second degree murder and robbery in February, 2000. The Federal Rules of Evidence permit the impeachment of a witness by prior convictions punishable in excess of one year. *See* Fed. R. Evid. 609(a). However, the evidence is only admissible "if the court determines that the probative value . . . outweighs its prejudicial effect." Fed. R. Evid. 609(a). The following factors are considered in determining the balance between probative value and prejudicial effect: (1) the impeachment value of the prior crime, (2) the remoteness of the prior conviction, (3) the similarity between the past crime and the conduct at issue, and (4) the importance of the credibility of the witness.

The factors here indicate a finding of low probative value and high prejudice because any of evidence of Mr. Barnes' prior conviction is of relatively little impeachment value in an

unrelated civil action several years later, and does not relate to truthfulness or dishonesty. *See, e.g., East Coast Novelty Co., Inc v. City of New York*, 842 F. Supp. 117, 120 (S.D.N.Y. 1994). Moreover, the prior crime is unrelated to the alleged conduct that occurred here.

Even if Mr. Barnes' prior criminal record is found admissible under the balancing provision, revealing any evidence of the details of his crime will create unfair prejudice in the minds of the jurors. *See Daniels v. Loizzo*, 986 F. Supp. 245, 251 (S.D.N.Y. 1997). For this reason, courts in this circuit have limited the introduction of evidence to the fact and date of the conviction and have barred evidence of the nature of the conviction or the title of the crime. *See Morello v. James*, 797 F. Supp. 223, 228 (W.D.N.Y. 1992) (precluding questioning into nature of felony conviction beyond fact that plaintiff was a felon).

The risk of unfair prejudice is even greater in an unrelated civil case, such as in the instant action, where the particulars of the conviction do not pertain to any of the issues at hand. Thus, the details of Mr. Barnes' prior criminal history should be found inadmissible, regardless of the admissibility of the fact and date of the conviction, due to their severe prejudicial nature and total lack of relevance.

B. Testimony and/or Documentation Regarding Plaintiff's Disciplinary Record Should Be Deemed Inadmissible

As explained with regard to prior convictions, in order to be admissible at trial, evidence relating to a plaintiff's past disciplinary conduct while incarcerated must be relevant. *See* Fed. R. Evid. Rule 402. Here, any conduct prior to the relevant time period in this case which resulted in sanctioning is irrelevant to whether the Defendants violated Mr. Barnes' right to freedom from cruel and unusual punishment. Mr. Barnes' prior "bad acts" are irrelevant to the time period at issue here and Defendants should be precluded from introducing Mr. Barnes' disciplinary records or evidence relating to his conduct while incarcerated.

In addition to being irrelevant, the admission of prior "bad acts" is also objectionable under Fed. R. Civ. P. 404(b) on the basis that character evidence is not admissible to prove conformity therewith on a particular occasion. *See Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996). In *Hynes*, the court clearly signaled that prior disciplinary records should only be admitted when one of the enumerated exceptions of Rule 404 apply, such as to show intent, planning, motive, *et cetera*. Here, none of the exceptions apply and the evidence could only be used to impermissibly sway the jury into believing that Mr. Barnes was historically a disciplinary problem and somehow deserved the conduct he was subjected to. As explained, this use of the prior record is impermissible under Rule 404(b). Accordingly, Defendants should be precluded from introducing evidence relating to Mr. Barnes' prior conduct.

CONCLUSION

The testimony at trial shall establish that Mr. Barnes' rights were violated, and he should be fully compensated for such violations. Moreover, the Defendants should be precluded from introducing evidence any evidence as to Mr. Barnes' prior conviction or disciplinary record.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LUIS ROSALES,

Plaintiff,

vs.

Civil Action No.
9:03-CV-601-LES/RFT

TIMOTHY QUINN, JOSEPH GIANNOTTA, RICHARD PFLEUGER, WILLIAM MARTENS and RANDALL CALHOUN, et al.

Defendants.

PLAINTIFF'S VOIR DIRE FORM

Case Title: Rosales v. Quinn, et al.
Civil Action No.: 9:03-CV-601 (LES/RFT)
Assigned Judge: Hon. Lyle E. Strom

Names and addresses of all parties to the lawsuit:

Luis Rosales, Southport Correctional Facility, Pine City, New York 14871

Your name, firm name, address and the name of any partner or associate who may be at counsel table during the course of the trial:

Douglas J. Nash
Hiscock & Barclay, LLP
One Park Place
300 South State Street
Syracuse, New York 13221-2078

Set forth the date of the occurrence, the place of the occurrence and a brief statement of the events central to the litigation:

A series of occurrences are at issue in this litigation. The relevant timeframe for those occurrences is December, 2002 through May, 2003. All of the relevant occurrences were at the Auburn Correctional Facility, in Auburn, New York.

Events central to this litigation: The plaintiff claims that: (a) defendant Giannotta deprived the plaintiff of his first amendment right to petition the government for redress of grievances by placing the plaintiff in a three-day "keeplock" confinement simply because the plaintiff

had filed a grievance against Giannotta that Giannotta felt was untrue; (b) defendant Quinn deprived the plaintiff of his first amendment right to petition the government for redress of grievances by threatening the plaintiff with physical harm if he did not stop filing grievances against the other defendants; (c) defendant Pfleuger both deprived the plaintiff of his first amendment right to petition the government for redress of grievances and violated the plaintiff's right against cruel and unusual punishment by assaulting the plaintiff on two consecutive days in retaliation for a grievance the plaintiff previously had filed against defendant Pflueger; and (d) defendants Martens and Calhoun both deprived the plaintiff of his first amendment right to petition the government for redress of grievances and violated the plaintiff's right against cruel and unusual punishment by assaulting the plaintiff after the plaintiff refused to sign a release of a grievance the plaintiff previously had filed against defendants Pfleuger and Calhoun.

Set forth the names and addresses of all lay witnesses to be called:

1. Luis Rosales, Southport Correctional Facility, Pine City, New York 14871;
2. Barbara Rosales, 396 Kansas Street, Lindenhurst, New York 11757;
3. Timothy Quinn, residential address unknown; employed at Auburn Correctional Facility, , Auburn, New York 13021-1800;
4. Joseph Giannotta, residential address unknown; employed at Auburn Correctional Facility, , Auburn, New York 13021-1800;
5. Richard Pfleuger, residential address unknown; employed at Auburn Correctional Facility, , Auburn, New York 13021-1800;
6. William Martens, residential address unknown; employed at Auburn Correctional Facility, , Auburn, New York 13021-1800;
7. Randall Calhoun, residential address unknown; employed at Auburn Correctional Facility, , Auburn, New York 13021-1800;
8. Custodian of Records, New York State Department of Correctional Services, Building 2, 1220 Washington Avenue, Albany, New York 12226; and
9. Custodian of Records, Auburn Correctional Facility, Auburn, New York 13021-1800.

Set forth the names and addresses of all expert witnesses to be called:

The plaintiff has not identified any expert witnesses as of the submission of this report.

Set forth a brief description of each and every cause of action in the complaint:

First Cause of Action:

The plaintiff has asserted a claim against defendant Giannotta under 42 U.S.C. § 1983 for depriving the plaintiff of his first amendment right to petition the government for redress of grievances by placing the plaintiff in a three-day "keeplock" confinement simply because the plaintiff had filed a grievance against Giannotta that Giannotta felt was untrue.

Second Cause of Action:

Plaintiff has asserted a claim against defendant Quinn under 42 U.S.C. § 1983 for depriving the plaintiff of his first amendment right to petition the government for redress of grievances by threatening the plaintiff with physical harm if he did not stop filing grievances against the other defendants, and against defendant Pfleuger for both depriving the plaintiff of his first amendment right to petition the government for redress of grievances and violating the plaintiff's right against cruel and unusual punishment by assaulting the plaintiff on two consecutive days in retaliation for a grievance the plaintiff previously had filed against defendant Pfleuger.

Third Cause of Action:

Plaintiff has asserted a claim against defendants Martens and Calhoun under 42 U.S.C. § 1983 for depriving the plaintiff of his first amendment right to petition the government for redress of grievances and violating the plaintiff's right against cruel and unusual punishment by assaulting the plaintiff after the plaintiff refused to sign a release of a grievance the plaintiff previously had filed against defendants Pfleuger and Calhoun.

DATED: July 9, 2007

HISCOCK & BARCLAY, LLP

By: */s/ Douglas J. Nash*
Douglas J. Nash
Bar Roll No. 511889

Attorney for Plaintiff
Luis Rosales

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300 South State Street
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Email: dnash@hiscockbarclay.com

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

M. M. FARRAKHAN,

Plaintiff,

-vs-

J. BURGE, SUPERINTENDENT; M. L. BRADT, DEPUTY COMMISSIONER OF SECURITY; C. GUMMERSON, CAPTAIN; M. WITHER, SGT. R. HEWIT, CORRECTIONS OFFICER,

Defendants.

Civil Action No.
03-CV-0928 (NAM)(DRH)

PROPOSED JURY
VOIR DIRE QUESTIONS

Plaintiff, M.M. Farrakhan, in the above-named action, respectfully requests that the Court include the following questions in its voir dire:

Prepared on Behalf of Plaintiff:

1. Are you related to, or closely connected with, a correctional facility official or officer, or person employed in law enforcement?
2. Would the fact that the plaintiff is an inmate make it difficult for you to render a verdict in his favor?
3. Will the fact that the plaintiff is an inmate likely affect your decision in this matter?
4. Have you, or any of your family members, ever been the victim of a crime?
5. Have you, or any of your family members, ever been convicted of a crime?
6. Have you, or any of your family members, ever been incarcerated?
7. Have you, or any of your family members, experienced police brutality or official misconduct?
8. Do you feel that when a person goes to prison they essentially give up their Constitutional and Civil Rights?

9. Do you feel that inmates should be protected from attacks by other inmates by correctional officers or officials?

10. Do you think that there should be policies in effect that serve to protect inmates from attacks by other inmates?

DATED: November 1, 2005

Respectfully submitted,

COSTELLO, COONEY & FEARON, PLLC

By: /s/ Samuel C. Young
SAMUEL C. YOUNG
Bar No. 508916
Attorneys for the Plaintiff,
M. M. Farrakhan
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TO: **PATRICK F. MACRAE, ESQ.**
Attorneys for the Defendants,
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

M. M. FARRAKHAN,

Plaintiff,

-vs-

J. BURGE, SUPERINTENDENT; M. L. BRADT, DEPUTY COMMISSIONER OF SECURITY; C. GUMMERSON, CAPTAIN; M. WITHER, SGT. R. HEWIT, CORRECTIONS OFFICER,

Defendants.

Civil Action No.
03-CV-0928 (NAM)(DRH)

PROPOSED JURY VOIR DIRE QUESTIONS

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5. Have you, or any of your family members, ever been convicted of a crime?
6. Have you, or any of your family members, ever been incarcerated?
7. Have you, or any of your family members, experienced police brutality or official misconduct?
8. Do you feel that when a person goes to prison they essentially give up their Constitutional and Civil Rights?

9. Do you feel that inmates should be protected from attacks by other inmates by correctional officers or officials?

10. Do you think that there should be policies in effect that serve to protect inmates from attacks by other inmates?

DATED: November 1, 2005

Respectfully submitted,

COSTELLO, COONEY & FEARON, PLLC

By: /s/ Samuel C. Young
SAMUEL C. YOUNG
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TO: PATRICK F. MACRAE, ESQ.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,
Plaintiff,

v.

TROY MITCHELL, Corrections Sergeant, E. RIZZO, Corrections Officer, M. WOODARD, Corrections Officer, B. SMITH, Corrections Officer,
Defendants, **9:2004-CV-00989(LEK/RFT)**

__X__ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered..

Pursuant to the Jury Verdict returned in open court before the Hon. Lawrence E. Kahn, United States District Judge on March 21, 2007at the trial of this action in United States District Court for the Northern District of New York,

IT IS ORDERED AND ADJUDGED: That judgment is entered in favour of the defendants **TROY MITCHELL, E. RIZZO, M. WOODARD, B. SMITH,** and as against the plaintiff **AMARE SELTON,** and that the complaint is dismissed in its entirety.

Date: March 21, 2007

Lawrence K. Baerman
Clerk

/S/
(by) Phillip T. McBrearty
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMARE SELTON, Plaintiff, v. TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH, Defendants.	Civil Action Case No. 9:04-CV-0989 (LEK/RFT)

PLAINTIFF'S REQUEST TO CHARGE

HANCOCK & ESTABROOK, LLP

By: s/ Christopher G. Todd
Christopher G. Todd, Esq.
Bar Roll No. 512654
Thomas C. Cambier, Esq.
Bar Roll No. 513780
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INTRODUCTION [1]

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

You have two duties as a jury. Your first duty is to decide the facts of this case on the basis of the admitted evidence. This is your job, and yours alone. Once you have determined the facts, your second duty is to follow the law as I state it, and apply the law to the facts. You are not to consider one instruction alone as stating the law, but you are to consider the instructions as a whole. You must follow these instructions even if you do not agree with them.

You should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it. In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy toward any party. Both parties and the public expect you to carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

EVIDENCE [2]

As stated earlier, your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits marked in the record. Arguments and statements of lawyers, questions to witnesses, and evidence

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1 AUTHORITY: adapted from O'Malley, Grenig and Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 103.01 (5th ed. 2000); Devitt, Blackmar, Wolff and O'Malley, FEDERAL CIVIL JURY PRACTICE INSTRUCTIONS § 71.01 (1987 and 2000 Supp.).

2 AUTHORITY: adapted from O'Malley, Grenig and Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 103.30, 104.05 (5th ed. 2000) and Devitt, Blackmar, Wolff & O'Malley, FEDERAL CIVIL JURY PRACTICE INSTRUCTIONS, § 71.08 (1987 and 1999 Supp.)

excluded by my rulings are not evidence. When, however, the attorneys on both sides stipulated or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

The court may take judicial notice of certain facts or events. When the court declares it will take judicial notice of some fact or event, the jury must, unless otherwise instructed, accept the court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed.

In addition, during the trial, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may not consider any responses stricken from the record.

The function of lawyers is to call to your attention facts that are most helpful to their side of the case. What the lawyers say, however, is not binding on you, and in the final analysis, your own recollection and interpretation of the evidence controls your decision.

You must not infer from anything I have said during this trial that I hold any views for or against any party in this lawsuit; in any event, any opinion I might have is irrelevant to your decision.

While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common experience. The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts. As an example, direct evidence that it is raining is testimony from a witness who says "I was outside a minute ago and saw that it was raining." Circumstantial evidence that it is raining is the observation of someone entering the room with a wet umbrella.

The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

CREDIBILITY OF WITNESSES [3]

The law does not require you to accept all of the evidence that has been admitted even though it is competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each witness and determine the degree or weight that you choose to give to that testimony. The testimony of the witness may fail to conform to the facts as they occurred because the witness intentionally told a falsehood, because the witness did not accurately see or hear that about which he/she testified, because the witness' recollection of the events was faulty, or because the witness did not express himself or herself clearly in giving the testimony. There is no magic formula by which you may evaluate testimony. You bring with you into this Courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves the reliability or unreliability of statements made to you by others.

In general, you may consider the interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there is any, the age and appearance of the witness; the manner in which the witness gave his/her testimony on the stand; the opportunity that the witness had to observe the facts about which he/she testified; and the probability or improbability of the witness' testimony when viewed in light of all the evidence in the case, in determining the weight, if any, that you will assign to that witness' testimony.

If it appears that there is a discrepancy in the evidence, you must determine whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, you must determine which of the two conflicting versions you will accept. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not

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[3] AUTHORITY: adapted from Sand, Siffert, Reiss and Batterman, MODERN FEDERAL JURY INSTRUCTIONS ¶ 76-3 (2002);

limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw from facts which you find have been proven, such reasonable inferences as seem justified in light of your experience. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established in the case.

By the process which I have just described to you, you, as the sole judges of the facts, must determine which witnesses you will believe, what portions of their testimony you will accept, and what weight you will assign to their testimony.

DEPOSITION USE AS EVIDENCE [4]

During the trial of this case, certain testimony has been presented to you by way of a deposition consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand, may be presented in writing under oath or on a video recording (played on a television set). Such testimony is entitled to the same consideration and is to be judged as to credibility and weighed and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand.

ROLE OF ATTORNEYS

I should also discuss the role of the attorneys. We operate under an adversary system in which we hope that the truth will emerge through the competing presentation of adverse parties. It is the role of the attorneys to press as hard as they can for their respective positions. In fulfilling that rule, they have not only the right, but the obligation to make objections to the introduction of evidence they feel is improper. While the interruption caused by these objections may be irritating, the attorneys are not to be faulted, because they have a duty to make objections if they feel they are appropriate.

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[4] AUTHORITY: adapted from Devitt, Blackmar, Wolff & O'Malley, FEDERAL JURY PRACTICE INSTRUCTIONS, §73.02

The application of the rules of evidence is not always clear, and lawyers often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and are not to be considered as points scored for one side or the other.

Similarly, one cannot help becoming involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this is not a contest among attorneys but an attempt to rationally resolve a serious controversy among the parties and solely on the basis of the evidence. Accordingly, statements by the attorneys and characterizations by them of the evidence are not controlling. Insofar as you find them helpful, take advantage of them, but it is your memory and your evaluation of the evidence in the case that counts.

BURDEN OF PROOF

When a party has the burden of proof on a particular issue it means that, he must establish by a preponderance of the credible evidence that their claims, and the elements that comprise those claims are true. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance means the greater part of the evidence. The phrase refers to the quality of the evidence.

In this case, the Plaintiff seeks to recover damages under 42 U.S.C. § 1983 for alleged violations his Eighth Amendment Constitutional rights. The Plaintiff has the burden of proving by a fair preponderance of the evidence the elements which I will describe to you. For the Plaintiff to prevail, you must find the evidence that supports his claim is the more likely version of what occurred. If, however, you find the evidence supporting Defendants' case more persuasive, or if you are unable to find a preponderance of evidence on either side, then you must resolve the question in favor of the Defendants. You may only find in favor of the Plaintiff if the evidence supporting his claim outweighs the evidence opposing it.

Likewise, the Defendants bear the burden of proof on its affirmative defense of qualified immunity. The same rules I just described apply to the Defendants' burden of proof on their affirmative defense. I will talk more about the respective burdens of proof in this particular case a little later on.

Civil Actions Under 42 U.S.C. § 1983 [5]

The law to be applied in this case is the Federal Civil Rights Law which provides a remedy for individuals who have been deprived of their constitutional rights under color of state law. Section 1983 of Title 42 of the United States Code states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before Section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment and federal laws. Section 1983 was enacted to give people a federal remedy enforceable in federal court because it was feared that adequate protection of federal rights might not be available in state courts.

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[5] AUTHORITY: Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS " 87-65 - 66. (citing United States Supreme Court: Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) ; Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); Mitchum v. Foster, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) ; Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

Burden of Proof under Section 1983 [6]

I shall shortly instruct you on the elements of Plaintiff's Section 1983 claim, and on the elements of the Defendants' qualified immunity defense.

The Plaintiff has the burden of proving each and every element of his Section 1983 claim by a preponderance of the evidence. If you find that any one of the elements of Plaintiff's Section 1983 claim has not been proven by a preponderance of the evidence, you must return a verdict for the Defendants.

The Defendants have the burden of proving each element of their affirmative defense. I shall shortly instruct you on the elements of this defense. If you find that any one of the elements of Defendants' defense has not been proven by a preponderance of the evidence, you must disregard the defense.

Elements of a Section 1983 Claim for Excessive Use of Force [7]

Inmates are protected from cruel and unusual punishment under the Eighth Amendment of the United States Constitution. Plaintiff Garcia claims that the Defendant Correctional Officers, by using excessive and unnecessary force against him violated his Eighth Amendment constitutional rights. According to the Plaintiff, he was repeatedly struck with a nightstick, slapped, kicked, stomped and punched while he was restrained in handcuffs and leg irons on December 18, 1996.

In order to prove a violation under the Eighth Amendment, the Plaintiff must show the Defendant Corrections Officers unnecessarily and wantonly inflicted pain on the Plaintiff. Whether a use of force against a prison inmate is unnecessary or wanton depends on whether

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[6] AUTHORITY: Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS, 87-67 (citing Gomez v. Toledo, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)).

[7] AUTHORITY: O'Malley, *et al.*, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 5th ed., ' 166.23 (citing United States Supreme Court: *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992)).

force was applied in a good faith effort to maintain order or restore discipline, or whether it was done maliciously or sadistically to cause harm.

In order to prove a violation under the Eighth Amendment, the Plaintiff must prove all of the following elements by a preponderance of the evidence:

First: That the Defendant prison officials were acting under color of the law of the state of New York.

Second: That the Defendant prison officials used force against the Plaintiff maliciously and sadistically, for the very purpose of causing the Plaintiff harm; and

Third: That the Plaintiff suffered some harm as a result of the use of force by the Defendants.

If the plaintiff shall fail to prove any one of these elements, you must find for the Defendants. I shall now examine each of the three elements in greater detail.

First Element--Action Under Color of State Law [8]

The first element of the Plaintiff's claim is that the Defendants acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of Section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state (or territory or the District of Columbia). The term "state" encompasses any political subdivision of a state, such as a county or city, and also any state agencies or a county or city agency.

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[8] AUTHORITY: Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS, Form 87-69, (citing *American Mfrs. Mut. Ins. Co. v. Sullivan*, -- U.S. --, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) (and others) and ' Form 87-70 (citing *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)).

Action under color of state law means action that is made possible only because the actor is clothed with the authority of the State. It is not presently in dispute that the Defendants' actions were taken in their capacity as State officials. Therefore, I instruct you that, since the Defendant Correctional Officers were officials of the State of New York at the time of the acts in question, they were acting under color of state law. In other words, the first statutory requirement is satisfied.

Second Element – Generally [9]

The second element is to be evaluated by a subjective analysis of the Defendant Corrections Officers and their state of mind at the time of the incident. In deciding whether this element has been proved, you must give prison officials wide ranging deference to the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and to maintain internal security in the prison.

Some of the things you may want to consider in determining whether the Defendant Corrections Officers unecessarily and wantonly inflicted pain on the Plaintiff include:

1. The extent of injury suffered;
2. The need for the application of force;
3. The relationship between the need and the amount of force used;
4. The threat reasonably perceived by the Defendants at the time the force was used; and
5. Any efforts made to temper the severity of a forceful response.

Third Element - Use of Force [10]

In order to prevail on an excessive use of force claim a Plaintiff must show that the alleged use of force is objectively sufficiently serious or harmful enough to be actionable. This objective component is "context specific turning upon contemporary standards of decency." An excessive force claim may be established even if the victim does not suffer serious or significant

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[9] AUTHORITY: O'Malley, *et al.*, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 5th ed., §166.23 (citing United States Supreme Court: *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992)).

[10] *See Nunez v. Goord*, 172 F. Supp. 2d 417, 432 (S.D.N.Y. 2001).

injury if it can be demonstrated that the amount of force used is more than *de minimus* or otherwise involves force repugnant to the conscience of mankind.

Qualified Immunity [11]

Even if you find that the Defendants did violate Plaintiff's constitutional rights, however, the Defendants still may not be liable to the Plaintiff. This is so because the Defendants may be entitled to what is called a qualified immunity. If you find that they are entitled to such an immunity, you may not find them liable.

The Defendants will be entitled to a qualified immunity if, at the time force was used, they neither knew nor should have known that their actions were contrary to federal law. The simple fact that the Defendants acted in good faith is not enough to bring them within the protection of this qualified immunity. Nor is the fact that the Defendants were unaware of the federal law. The Defendants are entitled to a qualified immunity only if they did not know what they did was in violation of federal law and if a competent public official could not have been expected at the time to know that the conduct was in violation of federal law.

In deciding what a competent official would have known about the legality of Defendants' conduct, you may consider the nature of Defendants' official duties, the character of their official position, the information which was known to Defendants or not known to them, and the events which confronted them. You must ask yourself what a reasonable official in Defendants' situation would have believed about the legality of Defendants' conduct. You should not, however, consider what the Defendants' subjective intent was, even if you believe it was to harm the Plaintiff. You may also use your common sense. If you find that a reasonable official in Defendants' situation would believe their conduct to be lawful, then this element will

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[11] Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS, Form 87-86 (citing *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997) ; *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) ; *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998) ; *Velardi v. Walsh*, 40 F.3d 569 (2d Cir. 1994) ; *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990) ; *Gittens v. LeFevre*, 891 F.2d 38 (2d Cir. 1989) (and other cases) .

be satisfied. The Defendants have the burden of proving that they neither knew nor should have known that their actions violated federal law. If the Defendants convince you by a preponderance of the evidence that they neither knew nor should have known that their actions violated federal law, then you must return a verdict for the Defendants, even though you may have previously found that the Defendants in fact violated the Plaintiff's rights under color of state law.

Compensatory Damages [12]

Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not the Defendants should be held liable. If you return a verdict for the Plaintiff, then you must consider the issue of actual damages.

If you return a verdict for the Plaintiff, then you must award him such sum of money as you believe will fairly and justly compensate him for any injury you believe he actually sustained as a direct consequence of the conduct of the Defendants.

You shall award actual damages only for those injuries which you find that Plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find Plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by the Defendants in violation of Section 1983 and the Eighth Amendment. That is, you may not simply award actual damages for any injury suffered by Plaintiff – you must award actual damages only for those injuries that are a direct result of actions by the Defendants and that are a direct result of conduct by Defendants which violated Plaintiff's federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

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[12] Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS, Form 87-87 (citing *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) ; *Gibeau v. Nellis*, 18F.3d 107 (2nd Cir. 1994) (and other cases))

Nominal Damages [13]

If you return a verdict for the Plaintiff, but find that Plaintiff has failed to prove by a preponderance of the evidence that he suffered any actual damages, then you must return an award of damages in some nominal or token amount not to exceed the sum of One Dollar.

Nominal damages must be awarded when the Plaintiff has been deprived of a constitutional right by the Defendants, but has suffered no actual damage as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred is an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that Plaintiff has suffered no injury as a result of the Defendants' conduct other than the fact of a constitutional deprivation, you must award nominal damages not to exceed One Dollar.

Exemplary or Punitive Damages [14]

If you award the Plaintiff actual damages, then you may also make him a separate and additional award of exemplary or punitive damages. You may also make an award of punitive damages even though you find that Plaintiff has failed to establish actual damages. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, or to deter or prevent a defendant and others like him from committing such conduct in the future.

You may award the Plaintiff punitive damages if you find that the acts or omissions of the Defendants were done maliciously or wantonly. An act or failure to act is maliciously done

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[13] Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS, Form 87-88 (citing *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995), *cert. denied*, -- U.S. --, 116 S. Ct. 2546, 135 L. Ed. 2d 1067 (1996) (and other cases)

[14] Matthew Bender, MODERN FEDERAL JURY INSTRUCTIONS, Form 87-92 (citing *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) ; *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983 ; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) ; *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (and other cases)

if it is prompted by ill will or spite toward the injured person. An act or failure to act is wanton if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. The Plaintiff has the burden of proving, by a preponderance of the evidence, that Defendants acted maliciously or wantonly with regard to the Plaintiff's rights.

An intent to injure exists when the Defendants have a conscious desire to violate federal rights of which he is aware, or when the Defendants have a conscious desire to injure Plaintiff in a manner he knows to be unlawful. A conscious desire to perform the physical acts that caused Plaintiff's injury, or to fail to undertake certain acts, does not by itself establish that Defendants have a conscious desire to violate rights or injure Plaintiff unlawfully.

If you find by a preponderance of the evidence that the Defendants acted with malicious intent to violate the Plaintiff's federal rights or unlawfully injure him, or if you find that Defendants acted with a callous or reckless disregard of the Plaintiff's rights, then you may award punitive damages. An award of punitive damages, however, is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.

In making this decision, you should consider the underlying purpose of punitive damages. Punitive damages are awarded in the jury's discretion to punish Defendants for outrageous conduct or to deter them and others like them from performing similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether Defendants may be adequately punished by an award of actual damages only, or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish the wrongful conduct. You should also consider whether actual damages standing alone are likely to deter or prevent these Defendants from again performing any wrongful acts they may have performed, or whether punitive damages are necessary to provide deterrence. Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts similar to those Defendants may have committed.

If you decide to award punitive damages, these same purposes should be considered by you in determining the appropriate sum of money to be awarded as punitive damages. That is, in fixing the sum to be awarded, you should consider the degree to which Defendants should be punished for their wrongful conduct, and the degree to which an award of one sum or another will deter Defendants or persons like them from committing wrongful acts in the future.

The extent to which a particular sum of money will adequately punish Defendants, and the extent to which a particular sum will adequately deter or prevent future misconduct, may depend upon the financial resources of the Defendants against which damages are awarded. Therefore, if you find that punitive damages should be awarded against the Defendants, you may consider the financial resources of the Defendants in fixing the amount of such damages.

CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations.

Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. This DOES NOT mean that the foreperson's vote is entitled to any greater weight than the vote of any other juror. Your job as jurors is to reach a fair conclusion from the law and evidence. When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other. You must deliberate with a view to reaching an agreement, but only if you can do so without violating your individual judgment and conscience. Remember in your deliberations that the dispute between the parties is for them no passing matter. The parties and the Court are relying on you to give full and conscientious consideration to the issues and the evidence before you.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony or instructions read to you.

Should you desire to communicate with the Court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshall who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the Courtroom. I caution you, however, that in your communications with the Court, you should never state your numerical division.

Once you have reached a unanimous verdict and the verdict form has been completed, please inform the marshall that a verdict has been reached. Your verdict on each claim for relief must be unanimous, and it must also represent the considered judgment of each juror.

During your deliberations, do not hesitate to re-examine your views and change your mind. Do not, however, surrender your honest convictions because of the opinion of a fellow juror or for the purpose of returning a verdict. Remember, you are not partisans. You duty is to seek the truth from the evidence presented to you.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the marshall that a verdict has been reached.

Verdict forms have been prepared for you. You should review them after retiring to the jury room.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,

Plaintiff,

-against-

04-CV-0989

TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH,

(LEK)(RFT)

Defendants.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

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Date: November 6, 2006

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General Introduction - Province of Court and Jury

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me. You must follow and apply the law.

[The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference the law stated by the lawyers and as stated in these instructions, you are governed by these instructions.]

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform you duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §103.01 (5th Ed., 2000).

State not a defendant

Neither the State of New York, nor the New York State Department of Correctional Services are defendants in this case. The only defendants are those individuals who have been introduced to you as such.

Wilson v. Prasse, 325 F. Supp. 9 (WD Pa. 1971) *affirmed* 463 F.2d 109 (3d Cir. 1972).

Multiple Defendants

Although there is more than one defendant in this action, it does not follow from that fact alone that if one defendant is liable to the plaintiff, all defendants are liable. The law requires that a defendant be personally involved in conduct that deprived plaintiff of his constitutional rights before that defendant may be held liable for such deprivation. Thus, each defendant is entitled to a fair consideration of the evidence, and you may not find a defendant liable for the actions taken by any other person; nor may you award damages, if you reach the question of damages, against a defendant based upon actions taken by another individual. No defendant is to be prejudiced should you find against another defendant. Unless otherwise stated, all instructions I give you govern the case as to each defendant.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §103.14 (5th Ed., 2000); *McKinnon v. Patterson*, 568 F. 2d 930 (2d Cir. 1977) *cert. denied* 434 US 1087 (1978); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, §§71.03, 71.07 (3d Ed. 1977).

Attorney Objections

When one party asks a question or offers an exhibit into evidence and the other party thinks it is not permitted by the rule of evidence, that party or his lawyer may object. Counsel have not only the right, but the duty to make whatever legal objections there may be to the admission of evidence. If I overrule the objection, the question may be answered or the exhibit received into evidence. If I sustain the objection the question cannot be answered and the exhibit cannot be received into evidence.

If I sustain an objection to a question of the admission of an exhibit, you must ignore the question and must not guess what the answer to the question might have been. In addition, you must not consider evidence that I have ordered stricken from the record.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §101.49 (5th Ed., 2000); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, §10.13 (3d Ed. 1977).

What is not evidence

In deciding the facts of this case, you are not to consider the following as evidence: statements and arguments of the lawyers, questions and objections of the lawyers, testimony that I instruct you to disregard, and anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by on of the witnesses.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §101.44 (5th Ed., 2000).

Evidence in the case

The evidence in the case will consist of the following: (1) the sworn testimony of the witnesses, no matter who called that witness; (2) all exhibits received in evidence, regardless of who may have produced the exhibit; and (3) all facts that may have been judicially noticed and that you must take as true for purposes of this case.

Depositions may also be received in evidence. Depositions contain sworn testimony, with the lawyers for each party being entitled to ask questions. Deposition testimony may be accepted by you, subject to the same instructions that apply to witnesses testifying in open court.

Statements and arguments of the lawyers are not evidence in the case, unless made as an admission or stipulation of fact. A "stipulation" is an agreement between both sides that certain facts are true. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

I may take judicial notice of certain facts or events. When I declare that I will take judicial notice of some fact or event, you must accept that fact as true.

If I sustain an objection to any evidence or if I order evidence stricken, that evidence must be entirely ignored.

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other purpose.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the statements of the witnesses. In other words, you are not

limited solely to what you see and hear as the witnesses testified. You may draw from the facts that you find have been proved, such reasonable inferences or conclusions as you feel are justified in light of your experience.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §101.40 (5th Ed., 2000); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, §72.04 (3d Ed. 1977).

Preponderance of the Evidence

Plaintiff has the burden in a civil action, such as this, to prove every essential element of all claims by a preponderance of the credible evidence. If plaintiff should fail to establish any essential element on a particular claim by a preponderance of the credible evidence, you should find for defendants as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the credible evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the credible evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §104.01 (5th Ed., 2000).

Direct and Circumstantial Evidence Defined

Generally speaking, there are two types of evidence that are presented during a trial – direct evidence and circumstantial evidence. "Direct evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the credible evidence in the case, both direct and circumstantial.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §104.05 (5th Ed., 2000).

Presumption of Regularity

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §104.21 (5th Ed., 2000).

Credibility of Witnesses

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you accept or reject the testimony of any

witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §105.01 (5th Ed., 2000).

Inconsistent Statements/Falsus In Uno Falsus in Omnibus

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness' present testimony. If the witness is not a party to this action, such prior inconsistent out-of-court statements may be considered for the sole purpose of judging the witness' credibility; however, it may never be considered as evidence of proof of the truth of such statement.

On the other hand, where the witness is a party to the case, and by such statement or other conduct admits some fact or facts against the witness' interest, then such statement or other conduct if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness' other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §§105.04, 105.09 (5th Ed., 2000).

Impeachment – Conviction of a Felony

A witness may be discredited or impeached by evidence that the witness has been convicted of a felony, that is, an offense punishable by imprisonment for in excess of one year. If you believe that any witness has been impeached and thus discredited, it is your exclusive responsibility to give the testimony of that witness such credibility, if any, as you think it deserves.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §105.05 (5th Ed., 2000).

All Available Witnesses or Evidence Need not be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §105.11 (5th Ed., 2000).

Elements of a §1983 Claim

Plaintiff claims a right to recovery under Section 1983 of Title 42 of the United States Code which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state, subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

Plaintiff claims a deprivation of his rights under the Eighth Amendment of the United States Constitution which prohibits the infliction of "cruel and unusual punishments."

In order to prove this claim, the burden is upon the plaintiff to establish by a preponderance of the credible evidence the following three elements:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States (here the Eighth Amendment); and

Third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, Chap. 166 pp.662, 676 (5th Ed., 2000).

First Element – Action under Color of State Law

The first element of plaintiff's §1983 claim is that the defendants acted under color of state law. Although the defendants categorically deny plaintiff's allegations, it is not disputed in this case that the defendants, as employees and officials employed by the New York State Department of Correctional Services, acted under color of state law in the routine course of their duties.

Second Element – Deprivation of Rights under the Eighth Amendment

Inmates are protected from cruel and unusual punishments under the Eighth Amendment of the United States Constitution. Plaintiff claims that defendants used excessive and unnecessary force against him on March 14, 2004 at Auburn Correctional Facility in Auburn, New York. Specifically, plaintiff alleges that when he was subdued after he ran out of his cell in the SHU block that defendant Mitchell deliberately gouged his eye while plaintiff was being subdued on the floor by other correctional officers. Plaintiff further alleges that a few minutes later while in the MHU cell that the defendants attacked him and took turns punching him in the face and neck, repeatedly slammed his face into the bare metal platform of a bed in the cell, stripped him naked and then kicked him in the buttocks and genitals.

Defendant Mitchell denies that he gouged plaintiff's eye. And all the defendants deny ever using any force on plaintiff in the MHU cell. Defendants further maintain that any force used during the entire incident, from the time plaintiff left his cell in the SHU block through the time he was escorted to the MHU cell and examined by Nurse MacClellan, was not excessive, but was measured and limited to regaining or maintaining control of plaintiff.

In order to prove a violation under the Eighth Amendment, plaintiff must show that defendants unnecessarily and wantonly inflicted pain on him. Whether a use of force against a prison inmate is unnecessary and wanton depends on whether force was applied in a good faith effort to maintain or restore discipline, or whether it was done maliciously or sadistically to cause harm.

In order to prove a violation under the Eighth Amendment, plaintiff must prove two elements by a preponderance of the credible evidence. If plaintiff fails to prove either of these

elements, you must find for defendants. The elements are:

First: That defendant prison officials used force against plaintiff maliciously and sadistically, for the very purpose of causing plaintiff harm; and

Second: That plaintiff suffered some harm as a result of the use of force by defendant prison officials which was more than *de minimus* in nature.

"Maliciously" means intentionally injuring another without just cause or reason. To act "maliciously" means intentionally to do a wrongful act without just cause or excuse, with an intent to inflict injury or under circumstances that show an evil intent.

"Sadistically" means engaging in extreme or excessive cruelty or delighting in cruelty.

The first element, that defendants used force against plaintiff maliciously and sadistically for the very purpose of causing harm, is to be evaluated by a subjective analysis of the defendants' state of mind at the time. In deciding whether this element has been proved, you must give prison officials wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security in the prison. In addition, law enforcement officers are often required to make split-second judgments about the need for force and the amount of force needed in a particular situation. Therefore, you must not judge defendants' conduct with "20/20 hindsight." Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers or courtroom, violates a prisoner's constitutional rights, nor does every malevolent touch by an officer give rise to a federal cause of action.

Some of the factors to consider in determining whether force was applied in a good faith effort to maintain or restore discipline, or whether it was done maliciously or sadistically to cause

harm include:

1. The extent of any injury suffered;
2. The need for the application of force;
3. The relationship between the need and the amount of force used;
4. The threat reasonably perceived by the responsible officials; and
5. Any effort made to temper the severity of a forceful response.
6. Whether plaintiff provoked the defendants use of force against him.

I do not mean to imply from this list of factors that the Constitution was violated merely because plaintiff may have been injured. So long as force was applied in a good faith effort to maintain or restore discipline and not maliciously or sadistically to cause harm, you must find for defendants. Thus, even if plaintiff received some injury that is not proof, in and of itself, that defendants violated plaintiff's right to be free from "cruel and unusual punishments" under the Eighth Amendment.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.23, 166.30, 166.31, 166.33 (5th Ed., 2000); *Graham v.* Connor, 490 US 386, 395-397 (1988); Johnson *v. Glick*, 481 F.2d 1028,1033-34 (2nd Cir. 1973) *cert. denied* 414 US 1033 (1973); *Hudson v. McMillian*, 503 US 1, 9 (1992).

Third Element – Proximate Cause of Injury

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage to plaintiff, and that plaintiff's injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Plaintiff has the burden of proving each and every element of his claim by a preponderance of the credible evidence. If you find that plaintiff has not proved any one of the elements by a preponderance of the credible evidence, you must return a verdict for defendants.

In order to find for plaintiff, you must find that plaintiff's injuries were proximally caused by defendants.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.50 (5th Ed., 2000); Plaintiff's complaint paragraph 32.

Qualified Immunity

A government official sued in his individual capacity is entitled to qualified immunity: (1) if the conduct attributed to him is not prohibited by federal law, (2) where that conduct is so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time of the conduct, or (3) if the defendant's action was objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken.

The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense, i.e., the contours of the right must have been sufficiently clear that a reasonable official would understand that what he was doing violated that right. Even if the legal right asserted was clearly protected by federal law, the defendant is entitled to immunity if it was not clear at the time that the particular conduct at issue contravened that known legal right. The objective reasonableness test is met--and the defendant is entitled to immunity--if officers of reasonable competence could disagree on the legality of the defendant's actions. If there is a "legitimate question," qualified immunity attaches.

Three factors must be considered to determine whether plaintiff's alleged right was "clearly established": (1) whether the right in question was defined with "reasonable specificity;" (2) whether relevant decisional law supports the existence of the right in question; and (3) whether under preexisting law a reasonable government official would have understood that his actions were unlawful. Defendants have the burden of establishing entitlement to qualified immunity by a preponderance of the credible evidence.

It is clearly established in this case that plaintiff had a right not to be subjected to cruel and unusual punishments by the use of excessive force. However, if you find that it was

objectively reasonable for defendants to believe that they were not violating plaintiff's Eighth Amendment rights in light of the circumstances at the time, defendants are entitled to qualified immunity and, if you so find, you must return a verdict for the defendants.

Saucier v. Katz, 533 US 194 (2001); *Anderson v. Creighton*, 483 US 635, 640 (1987); *Mitchell v. Forsyth*, 472 US 511, 535 n12 (1985); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65-66 (2d Cir. 1999); *Danahy v. Buscaglia*, 134 F.3d 1185, 1190 (2nd Cir. 1998); *Lennon v. Miller* 66 F.3d 416,420 (2d Cir. 1995) (*quoting, Malley v. Briggs*, 475 US 335, 340-41 [1986]); *Cartier v. Lussier*, 955 F.2d 841, 844 (2d Cir 1992); *Finnegan v. Fountain*, 915 F.2d 817, 822-23 (2d Cir.1990); *Snow v. Village of Chatham*, 84 F.Supp.2d 322, 328-29 (NDNY 2000); *Abdush-Shahid v. Coughlin*, 933 F.Supp. 168, 185 (NDNY 1996) (*citing, Rodriguez v. Phillips*, 66 F.3d 470, 476 [2d Cir.1995]).

Actual (Compensatory) Damages

If you find in favor of plaintiff, then you must award plaintiff such sum as you find from the preponderance of the credible evidence will fairly and justly compensate plaintiff for any damages you find plaintiff sustained and is reasonably certain to sustain in the future as a direct result of the incident on December 5, 1997. The fact that I am instructing you on the question of damages does not mean that I think you should award any damages; that is entirely for you to decide.

A plaintiff is not automatically entitled to recover damages solely by virtue of the fact – if you find it to be a fact – that his constitutional rights were violated. He must also demonstrate that the constitutional deprivation proximately caused actual injury or loss. In determining such actual injury or loss, you should consider the physical pain plaintiff experienced and is reasonably certain to experience in the future; the nature and extent of the injury, whether the injury is temporary or permanent and whether any resulting disability is partial or total, and any aggravation of a pre-existing condition.

Throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages under this instruction by way of punishment or through sympathy.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §§166.60 (5th Ed., 2000).

Nominal Damages

If you find in favor of plaintiff under my instructions, but you find that plaintiff's damages have no monetary value, then you must return a verdict for plaintiff in the nominal amount of one dollar.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.61 (5th Ed., 2000).

Punitive Damages

(Defendants contend that the evidence does not warrant the submission of punitive damages instruction to the jury. Nevertheless, should the Court issue such a charge, defendants propose the following)

In addition to the damages mentioned in the other instructions, the law permits you to award an injured person punitive damages under certain circumstances in order to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. Punitive damages are not favored in law and are to allowed only with caution and within narrow limits.

If you find in favor of plaintiff and against defendants and if you find, further, that defendants' conduct was recklessly and callously indifferent to plaintiff then, in addition to any other damages to which you find the plaintiff is entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish defendants or deter defendants and others from like conduct in the future. Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion.

If you decide to award punitive damages against any defendant in this case, we will reconvene for a further hearing so that you may consider the amount of personal assets and liabilities of such individual defendant or defendants in fixing the amount of punitive damages you may decided to assess.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*,§§166.62 (5th Ed., 2000); *Smith v. Wade*, 461 US 30, 56 (1983); *Carey v. Piphus*, 435 US 247, 257 n.11 (1978); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978); *Gagne v. Town of Enfield*, 734 F.2d (2d Cir. 1984); *McFadden v. Sanchez*, 710 F.2d 907, 912-914 (2d Cir. 1983) *cert. denied* 464 US 961 (1983).

Dated: Albany, New York
November 6, 2006

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Excessive force
Failure to protect

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COREY HEATH,

Plaintiff,

v.

9:96-CV-1998
(FJS/RFT)

C.O. SADDLEMIRE, C.O. FOLEY,
C.O. REYES, C.O. PILATICH, C.O. DARLING,
C.O. MESSINA, C.O. HOTALING,
C.O. HODGES, C.O. SUPINA,
C.O. STROUD, C.O. ANGERAMI, C.O. CHEWENS,
C.O. CHASE, and SGT. PALMER,

Defendants.

JURY INSTRUCTIONS

I. INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I am now instructing you and apply that law to the facts as you find them. In doing so, you are not allowed to select some instructions and reject others, rather you are required to consider all the instructions together as stating the law. In that regard, you should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it.

In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards either party. The plaintiff and the defendants, as well as the general public, expect you to carefully and impartially consider all the evidence in this case, follow the law as stated by the Court, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion may be. It is not my function to determine the facts, that is your function.

II. ROLE OF ATTORNEYS

Our courts operate under an adversary system in which we hope that the truth will emerge through the competing presentations of adverse parties. The function of the attorneys is to call your attention to those facts that are most helpful to their side of the case. It is their role to press as hard as they can for their respective positions.

In that regard, one can easily become involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this is not a contest between attorneys. You are to decide this case solely on the basis of the evidence. Remember, the attorneys' statements and characterizations of the evidence are not evidence. Insofar as you find their opening and/or closing arguments helpful, take advantage of them; but it is your memory and your evaluation of the evidence in the case

that counts.

III. OBJECTIONS

In fulfilling their role, attorneys have the obligation to make objections to the introduction of evidence they feel is improper. The application of the rules of evidence is not always clear, and attorneys often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and are not to be considered as points scored for one side or the other.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against either the plaintiff or the defendants. In any event, any opinion I might have is irrelevant. You are the judges of the facts.

IV. EVIDENCE

As I stated earlier, your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits that I have received during trial. In addition, on occasion, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may not consider any responses which I ordered stricken from the record.

A. Multiple Defendants

Although there are multiple Defendants in this action, it does not follow from that fact alone that if one is liable the others are liable as well. Each Defendant is entitled to a fair consideration of his own defense, and a Defendant may not be prejudiced by the fact, if it should become a fact, that you find against another Defendant. Unless otherwise stated, all instructions I give to you govern the case as to each Defendant.

B. Direct and Circumstantial Evidence

While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common sense and experience. The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts. (SNOW EXAMPLE)

The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

V. EVALUATION OF THE EVIDENCE

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his testimony. You are the sole judges of the credibility of each witness and of the importance of his testimony.

In evaluating a witness' testimony, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party, as well as the interest the witness may have in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he testified, the accuracy of the witness' memory, his candor or lack of candor, the reasonableness and probability of the witness' testimony, the testimony's consistency or lack of consistency, and its corroboration or lack of corroboration with other credible testimony.

If you were to find that any witness willfully testified falsely as to any material fact, that is, as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the theory that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may accept so much of the witness' testimony as you deem true and disregard what you believe is false. By these processes you, as the sole judge of the facts, decide which of the witnesses you will

believe, what portion of their testimony you accept, and what weight you will give it.

Also, as stated earlier, the existence or non-existence of a fact is not determined by the number of witnesses called. Your concern is not with the quantity but the quality of the evidence.

In summary, what you must try to do in deciding credibility is to size up a witness in light of his demeanor, the explanations given, and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

A. Impeachment by Prior Inconsistent Statements

You have heard counsel argue that the witnesses made statements on earlier occasions which counsel maintains are inconsistent with those witnesses' trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence. However, any evidence of a prior inconsistent statement may be considered by you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who you find contradicted himself. If you find that the witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency

concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so, how much, if any, weight should be given to the inconsistent statement in determining whether to believe all or part of the witness' testimony.

B. Impeachment by Witness' conviction

Plaintiff is presently incarcerated as a result of being convicted of the crimes of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. In addition, you have heard evidence that, as a result of the incident that occurred on January 14, 1996, Mr. Heath was convicted of Promoting Prison Contraband in the First Degree, a Class D Felony, for unlawfully possessing a single edge razor blade and Assault in the First Degree, a Class C Felony, for causing serious physical injury to Defendant Saddlemire by cutting him with a single edge razor blade. In weighing the credibility of Mr. Heath's testimony, you may consider the fact that he was convicted of these crimes. However, the fact that Mr. Heath was convicted of these crimes does not necessarily destroy his credibility. It is, however, one of the circumstances you may consider in assessing Mr. Heath's credibility and, therefore, in determining the weight to

give to his testimony.

C. Testimony of Corrections Officers

You have heard the testimony of Corrections Officers. The fact that a witness is employed as a Corrections Officer does not mean that his testimony is deserving of any more or less consideration, or should be given any greater or lesser weight, than that of any other witness from whom you heard testimony.

At the same time, it is quite legitimate for counsel to attempt to attack the credibility of a Corrections Officer witness on the ground that his testimony may be tailored or colored by a professional or personal interest in the outcome of the case. It is your decision, after reviewing all of the evidence, to accept the testimony of the Corrections Officer witness or reject it, or to give it whatever weight you believe it deserves, just as you would with any other witness from whom you heard testimony.

D. Stipulated Facts

The parties also have presented some stipulated facts. A stipulated fact is simply one that all parties agree is true. You must accept any such stipulated facts as true.

VI. BURDEN OF PROOF

When a party has the burden of proof on a particular issue that means that

considering all the evidence in the case, that party's contention on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of it. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, its weight, and the effect that it has on your minds. The law requires that, in order for a party to prevail on an issue on which he has the burden of proof, the evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than the evidence opposed to his claim. (SCALE EXAMPLE) If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

In this case Plaintiff seeks to recover damages for alleged violations of his rights under the Eighth Amendment to the United States Constitution to be free from the use of excessive force and to be protected from the use of excessive force by others. Plaintiff has the burden of proving by a fair preponderance of the evidence the elements of the claims which I will describe to you. For Plaintiff to prevail, you must find that the evidence that supports his claims is the more likely version of what occurred. If, however, you find the evidence supporting Defendants' case more persuasive, or if you are unable to find a preponderance of evidence on either side, then you must resolve the

question in favor of Defendants. You may only find in favor of Plaintiff if the evidence supporting his claims outweighs the evidence opposing them.

VII. SUBSTANTIVE LAW

A. 42 U.S.C. § 1983

Plaintiff Corey Heath alleges constitutional claims pursuant to 42 U.S.C. § 1983, which provides that

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

I will refer to this statute simply as "Section 1983."

Section 1983 does not create any substantive rights in and of itself but rather serves as a means by which individuals can seek redress in this Court for alleged violations of their substantive rights under the United States Constitution. The constitutional right that Plaintiff alleges Defendants violated is his right to be free from cruel and unusual punishment pursuant to the Eighth Amendment of the United States Constitution.

Defendants in this case are corrections officers, who, at the time of the incident in question, were Corrections Officers at the Coxsackie Correctional Facility. They are being sued in their individual capacities. However, neither the State nor the Department of Correctional Services is a Defendant in this case.

B. Elements of Plaintiff's Eighth Amendment claims

While inmates in prison have forfeited certain rights and freedoms by virtue of their incarceration, the Eighth Amendment to the United States Constitution protects them from cruel and unusual punishment. When a State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. Plaintiff Heath alleges that Defendants used excessive and unnecessary force against him and/or failed to intervene to protect him from the use of excessive force by other Corrections Officers in an incident that occurred on January 14, 1996. The use of excessive force and the failure to protect an inmate from the use of excessive force by others may, under some circumstances, constitute cruel and unusual punishment.

1. Use of excessive force claim

To prove his claim of excessive force against Defendants, Plaintiff must prove each of the following elements by a preponderance of the evidence as to each Defendant:

(1) that the Defendant you are considering acted under "color of state law;" and (2) that the Defendant you are considering acted maliciously and sadistically; and (3) that Plaintiff suffered injury as a result of the conduct of the Defendant you are considering.

First Element: Color of State law

The parties agree that Defendants were acting under the "color of state law," i.e., that they were employees of the State at the time of the incident. Therefore, this element has been satisfied.

Second Element: Malicious and sadistic conduct

In the context of an excessive force claim, the key inquiry is whether the Defendant you are considering applied force in a good faith effort to maintain or restore discipline or whether that Defendant acted maliciously and sadistically for the very purpose of causing harm.

An act is maliciously done if it is done to cause pain or injury to another without justification. An act is done sadistically if it is done to obtain gratification by the infliction of physical or mental pain to another.

Your evaluation of this element involves an evaluation of the force used; that is, was the force reasonable in light of the circumstances of the case.

In deciding this, you should examine such facts as the extent of Plaintiff's injuries,

the need for the application of force, the relationship between that need and the amount of the force used, the threat reasonably perceived by the Defendant you are considering and any efforts made by that Defendant to temper the severity of a forceful response, i.e., to use only that force necessary to meet that threat. Again, in the context of a prison, it is necessary to realize that not every push or shove violates a prisoner's constitutional rights.

If an evaluation of these factors leads you to believe that the Defendant you are considering acted maliciously and sadistically, then Plaintiff has established this element. If, however, you find that the Defendant you are considering acted in a good faith effort to maintain and restore discipline, then Plaintiff has failed to meet this element.

Third Element: Injury caused by Defendant

If you find that the Defendant you are considering used force in a malicious and sadistic manner then you must consider whether such conduct was the proximate cause of an injury to Plaintiff. In an excessive force claim, this element may be established even if the victim does not suffer serious or significant injury, so long as he suffered some injury.

A proximate cause is an act or omission that, in a natural course, produces injury and without this act or omission the injury would not have occurred. Stated another way, before Plaintiff can recover damages for any injuries, he must first show by a preponderance of the evidence that such injury would not have come about were it not for the conduct of the Defendant you are considering.

2. Failure to protect claim

Under the Eighth Amendment, a Corrections Officer may not, with deliberate indifference, fail to intervene to protect the constitutional rights of a prisoner from infringements by another Corrections Officer in his presence. To prove his failure to protect claim, Plaintiff must prove each of the following elements by a preponderance of the evidence as to each Defendant.

First Element: Color of State law

The parties agree that Defendants were acting under the "color of state law," i.e., that they were employees of the State at the time of the incident. Therefore, this element has been satisfied.

Second Element: Other Corrections Officers were using excessive force against Plaintiff

Plaintiff must prove, by a preponderance of the evidence, that Corrections Officers, other than the Defendant you are considering, used excessive force against him during the incident that occurred on January 14, 1996.

In other words, before considering Plaintiff's failure to protect claim, you must have found that one or more of the Defendants used excessive force against Plaintiff.

Third Element: Defendant was deliberately indifferent to excessive force being used against Plaintiff by another Corrections Officer

Plaintiff must prove, by a preponderance of the evidence, that the Defendant you are considering was deliberately indifferent to excessive force being used against Plaintiff by another Corrections Officer. Deliberate indifference is established only if the Defendant you are considering had actual knowledge that another Corrections Officer was using excessive force against Plaintiff and disregarded that risk by intentionally refusing or failing to take reasonable measures to stop the use of excessive force. Mere inattention or inadvertence does not constitute deliberate indifference.

4. Fourth Element: Defendant had a realistic opportunity to intervene and prevent harm to Plaintiff

In addition to proving that the Defendant you are considering was deliberately indifferent to his safety, Plaintiff must also prove that the Defendant you are considering had a realistic opportunity to intervene and prevent the harm from occurring. Therefore, you must find that the Defendant you are considering had sufficient time to intervene and that, had he intervened, he would have been capable of preventing harm to Plaintiff.

5. Fifth Element: Injury caused by Defendant

If you find that the Defendant you are considering failed to protect Plaintiff from

the use of excessive force by another Corrections Officer, you may only find him responsible for the damages that he would have been able to prevent.

VIII. DAMAGES

If you find that Mr. Heath has proven by a preponderance of the credible evidence that the Defendant you are considering is liable on either of his claims, then you must determine the amount of damages to which Mr. Heath is entitled on those claims as to that Defendant. However, you should not infer that Mr. Heath is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide the issues of liability outlined above, and I am instructing you on damages only so that you will have guidance should you decide that Mr. Heath is entitled to recovery.

A. Compensatory Damages

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, resulting from the violation of Mr. Heath's rights. If you find that the Defendant you are considering is liable on either of Mr. Heath's claims, as I have explained them, then you must award Mr. Heath sufficient damages to compensate him for any injury proximately caused by that Defendant's conduct. An injury is proximately caused by an act, or a failure to act, whenever it appears from the

evidence in the case, that the act or omission was a substantial contributing factor in causing the injury. Mr. Heath need not prove, however, that the conduct of the Defendant you are considering was the sole cause of his injuries

A prevailing plaintiff is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of a defendant's unjustified conduct. You should not award compensatory damages for speculative injuries but only for those injuries that Plaintiff has proven resulted from the unjustified conduct. In other words, Plaintiff is not entitled to recover for injuries that resulted from the use of force that did not violate the Eighth Amendment.

B. Nominal Damages

Even if you find that Mr. Heath has failed to provide proof that he is entitled to compensatory damages on his claims, you may still be required to award nominal damages if you find that the Defendant you are considering violated Mr. Heath's constitutional rights, but you do not find that Mr. Heath is entitled to compensatory damages. In such a case, you must award Mr. Heath nominal damages in the amount of one dollar.

You may not award Mr. Heath both nominal and compensatory damages if you find that his constitutional rights were violated. In other words, if you find that Mr. Heath's constitutional rights were violated and that Mr. Heath was measurably injured,

you may award him compensatory damages. On the other hand, if you find that Mr. Heath's constitutional rights were violated but he was not measurably injured, you must award him nominal damages only.

C. Punitive Damages

Mr. Heath also seeks punitive damages. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, or to deter or prevent a defendant and others like him from committing similar acts in the future.

I must emphasize, however, that at this stage of the proceedings, you are only to consider whether or not you will award Mr. Heath punitive damages. If you decide to award punitive damages to Mr. Heath, you will be asked to determine the amount of such an award after a further hearing concerning this issue. Therefore, at this time, you are only to decide whether punitive damages are to be awarded.

IX. CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. The foreperson's vote, however, carries the

same weight as the vote of any other juror.

As jurors, you are required to discuss the issues and the evidence with each other. While you must deliberate with a view to reaching an agreement, you must not violate your individual judgment and conscience in doing so. The proper administration of justice requires you to give full and conscientious consideration to the issues and evidence before you in determining the facts of the case – and then apply the law that the Court gives you to those facts.

To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

During your deliberations, do not hesitate to re-examine your views and change your mind. Do not, however, surrender your honest convictions because of the opinion of a fellow juror or for the purpose of returning a verdict. Remember you are not partisans. You are the judges -- judges of the facts. Your duty is to seek the truth from the evidence presented to you, while holding the parties to their burdens of proof.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony read to you or my instructions further explained. I caution you, however, that the read-back of testimony may take some time and effort. You should, therefore, make a conscientious effort to resolve any questions as to testimony through your collective recollections.

Should you desire to communicate with the Court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshal who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the marshal that you have reached a verdict. A verdict form has been prepared for you. I will now review it with you.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

COREY HEATH,

Plaintiff,

v.

9:96-CV-1998
(FJS/RFT)

C.O. SADDLEMIRE, C.O. FOLEY, C.O. REYES,
C.O. PILATICH, C.O. DARLING,
C.O. MESSINA, C.O. HOTALING,
C.O. HODGES, C.O. SUPINA,
C.O. STROUD, C.O. ANGERAMI, C.O. CHEWENS,
C.O. CHASE, and SGT. PALMER,

Defendants.

VERDICT FORM

Please indicate your response to the following questions by placing an "X" on the appropriate lines.

QUESTION 1: **Has Plaintiff proven, by a preponderance of the evidence, that any of the Defendants listed below used excessive force against him in violation of the Eighth Amendment?**

Defendant Angerami	Yes	No
Defendant Chase	Yes	No
Defendant Darling	Yes	No
Defendant Foley	Yes	No
Defendant Hodges	Yes	No

Defendant Hotaling	_____ Yes	_____ No
Defendant Messina	_____ Yes	_____ No
Defendant Palmer	_____ Yes	_____ No
Defendant Pilatich	_____ Yes	_____ No
Defendant Reyes	_____ Yes	_____ No
Defendant Saddlemire	_____ Yes	_____ No
Defendant Stroud	_____ Yes	_____ No
Defendant Supina	_____ Yes	_____ No

If your answer to this question is "Yes" for any of the Defendants listed above, proceed to Question 2.

If your answer to this question is "No" for all of the Defendants listed above, proceed to Question 3.

QUESTION 2: **What, if any, compensatory or nominal damages is Plaintiff entitled to as a result of the conduct of the Defendant(s) for whom you answered "Yes" to Question 1?**

$ _____

With respect to the amount of compensatory or nominal damages you have indicated above, please indicate the percentage of that amount for which each of the following Defendants is liable.

Defendant Angerami _____ %

Defendant Chase _____ %

Defendant Darling _____ %

Defendant Foley _____ %

Defendant Hodges _____ %

Defendant Hotaling _____ %

Defendant Messina _____ %

Defendant Palmer _____ %

Defendant Pilatich _____ %

Defendant Reyes _____ %

Defendant Saddlemire _____ %

Defendant Stroud _____ %

Defendant Supina _____ %

QUESTION 3: **Has Plaintiff proven, by a preponderance of the evidence, that any of the Defendants listed below violated his Eighth Amendment rights by failing to protect him from the use of excessive force by other Corrections Officers?**

Defendant Angerami	_____ Yes	_____ No
Defendant Chase	_____ Yes	_____ No
Defendant Chewens	_____ Yes	_____ No
Defendant Darling	_____ Yes	_____ No

Defendant Foley	_____ Yes	_____ No
Defendant Hodges	_____ Yes	_____ No
Defendant Hotaling	_____ Yes	_____ No
Defendant Messina	_____ Yes	_____ No
Defendant Palmer	_____ Yes	_____ No
Defendant Pilatich	_____ Yes	_____ No
Defendant Reyes	_____ Yes	_____ No
Defendant Saddlemire	_____ Yes	_____ No
Defendant Stroud	_____ Yes	_____ No
Defendant Supina	_____ Yes	_____ No

If your answer to this question is "Yes" for any of the Defendants listed above, proceed to Question 4.

If your answer to this question is "No" for all of the Defendants listed above, proceed to Question 5.

QUESTION 4: **What, if any, compensatory or nominal damages is Plaintiff entitled to as a result of the conduct of the Defendant(s) for whom you answered "Yes" to Question 3?**

$ _____

With respect to the amount of compensatory or nominal damages you have indicated above, please indicate the percentage of that amount for which each of the following Defendants is liable.

Defendant Angerami _____ %

Defendant Chase _____ %

Defendant Chewens _____ %

Defendant Darling _____ %

Defendant Foley _____ %

Defendant Hodges _____ %

Defendant Hotaling _____ %

Defendant Messina _____ %

Defendant Palmer _____ %

Defendant Pilatich _____ %

Defendant Reyes _____ %

Defendant Saddlemire _____ %

Defendant Stroud _____ %

Defendant Supina _____ %

QUESTION 5: **If you have found any of the Defendants liable under either claim 1 (use of excessive force) or claim 2 (failure to protect), then you may consider whether Plaintiff should be awarded punitive damages as to any such Defendant.**

Defendant Angerami _____ Yes _____ No

Defendant Chase _____ Yes _____ No

Defendant Chewens	Yes	No
Defendant Darling	Yes	No
Defendant Foley	Yes	No
Defendant Hodges	Yes	No
Defendant Hotaling	Yes	No
Defendant Messina	Yes	No
Defendant Palmer	Yes	No
Defendant Pilatich	Yes	No
Defendant Reyes	Yes	No
Defendant Saddlemire	Yes	No
Defendant Stroud	Yes	No
Defendant Supina	Yes	No

Dated: _____

Foreperson _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,

Plaintiff,

v.

TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH,

Defendants.

Civil Action Case No.
9:04-CV-0989 (LEK/RFT)

PLAINTIFF'S TRIAL BRIEF

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PRELIMINARY STATEMENT

On March 16, 2004, Plaintiff, Amare Selton was severely beaten by several New York State Corrections Officers while housed in the Special Housing Unit ("SHU") at Auburn Correctional Facility. Plaintiff contends that these beatings were in retribution for his defiance of orders, resulting in an extraction from his cell aduring which Plaintiff struck Defendant Correctional Officer Woodard. Mr. Selton commenced the instant action seeking compensation for damages sustained as a result of this beating. Mr. Selton has asserted claims for use of excessive force under 42 U.S.C. 1983 and the Eighth Amendment of the United States Constitution.

STATEMENT OF FACTS

On March 16, 2004, Plaintiff Amare Selton ("Mr. Selton"), an inmate in the custody of the New York State Department of Corrections, was being housed at the SHU at Auburn Correctional Facility. In the preceding month, Mr. Selton had made grievances against, among others, Defendant Mitchell, claiming that they were harassing him by, *inter alia*, banging on the rear wall of his cell during sleeping hours, turning the water off and denying him access to the law library. Mr. Selton attempted to address his concerns regarding this harassment with Captain J. Gummerson, the Defendants' ranking officer. However, he was unable to convey his concerns in such a way as to prompt a solution. At about 12:20 p.m., Mr. Selton began blocking the view to his cell in an effort to gain Captain Gummerson's attention. Within a few minutes, the Defendant Corrections Officers decided forcibly extract Mr. Selton from his cell.

Upon the cell door's opening, Mr. Selton charged at Corrections Officer Rizzo and attempted to get past the riot shield. During the brief melee, Mr. Selton struck Corrections Officer Woodard in the forehead with his fist. Within seconds, other Corrections Officers,

including all of the named Defendants, were upon Mr. Selton. Mr. Selton was taken to the ground and placed in handcuffs and leg restraints. While helpless on the ground and restrained, Defendant Mitchell came around to his right side and viciously bored his finger into Mr. Selton's right eye.

Eventually, Mr. Selton was pulled up from the floor by the Defendants and dragged to the red door leading to the Mental Health Unit ("MHU"). While waiting for the door to open, Mr. Selton feebly attempted to raise his legs to kick at Defendant Mitchell. Mr. Selton was again placed on the ground and physically restrained until he offered no more resistance. Immediately thereafter, he was carried through the red door and into a cell, where there were no cameras to document events, and he was set upon and assaulted by Defendants Mitchell, Rizzo, Woodard and Smith, among other unnamed Corrections Officers, while still mechanically restrained and unable to defend or protect himself.

Mr. Selton sustained injuries to his back, shoulders, neck, head, eyes and face immediately following the beating and for several weeks thereafter. As a result of this beating, Mr. Selton has also suffered and continues to suffer from great emotional distress, night-terrors and a lack of respite.

ARGUMENT

I. The Defendants Used Excessive Force in Violation of the Constitution.

To prevail on a claim of excessive force, a plaintiff must prove two elements. First, that the alleged use of force is "objectively sufficiently serious or harmful enough to be actionable." *Rivera v. Goord*, 989 CIV 1683, 2003 U.S. Dist. Lexis 4889, *27-28 (S.D.N.Y., March 28, 2003) (*citations omitted*). This objective component is "context specific turning upon contemporary standards of decency." *Nunez v. Goord*, 172 F. Sup. 2d 417, 432 (S.D.N.Y., 2001) (*citations*

omitted). An excessive force claim may be established even if the victim does not suffer serious or significant injury if it can be demonstrated that the amount of force used is more than *de minimus* or otherwise involved force repugnant to the conscience of mankind. *Rivera*, 2003 U.S. Dist. Lexis 4889 at *28.

In addition to the objective component, a plaintiff alleging excessive force must also meet a subjective requirement by showing that the defendants acted wantonly and with "a sufficiently culpable state of mind." *Id.* Where a state official is accused of using excessive physical force against an inmate, the inquiry turns on whether the force was applied in a good faith effort to maintain or restore discipline, or instead, was applied maliciously and sadistically to cause harm. *Id.* at 29. A prison official's malicious and sadistic use of force is a *per se* violation of the Eighth Amendment because that conduct, regardless of injury, "always violates contemporary standards of decency." *Nunez*, 172 F. Supp. 2d at 432.

Here, the evidence will show that Mr. Selton was handcuffed and shackled immediately after being taken to the floor in the SHU. The evidence will also show that, contrary to the Defendants' assertions, Mr. Selton suffered a beating with fists and feet *after* being restrained. As the State's own video evidence shows, once restrained, Mr. Selton was easily controlled and the Defendants simply had no need to strike Mr. Selton to "restore discipline." The repeated blows and eye gouging suffered by Mr. Selton after being handcuffed were well in excess of the force necessary to "restore discipline" under any circumstances. *See Franklin v. City of Kansas City*, 959 F. Supp. 1380, 1383 (D. Kan. 1997) (conduct consisting of choking an arrestee who is not resisting arrest and who is already in handcuffs is clearly an objectively unreasonable use of force). Moreover, the attack upon a restrained Mr. Selton once he was removed from the SHU and taken to the Mental Health Unit in obvious retribution for striking a fellow corrections

officer is precisely the type of conduct that is repugnant to the conscience. Thus, Mr. Selton will be able to establish both the objective and subject components of his excessive force claim.

II. The Defendants Are Not Entitled to Qualified Immunity.

Qualified immunity is an affirmative defense that must be proven by the Defendants. *See Tellier v. Fields*, 230 F.3d 502, 511 (2d Cir. 2000). To establish a qualified immunity defense on an excessive use of force claim, an officer must establish either that the alleged conduct did not violate clearly established right of which a reasonable person would have known or that it was objectively reasonable to believe that the acts did not violate clearly establish rights. *See Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990). The right to be free from the use of excessive force was clearly established at the time of Mr. Selton's altercation with the Defendants. *See, e.g., Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). Moreover, the Defendants simply cannot claim it was objectively reasonable to believe that their conduct toward Mr. Selton (e.g., beating him and gouging his eyes) was permissible.

As an initial matter, Mr. Selton will testify and the video evidence will show that while he did strike Officer Woodard while exiting his cell, he did not resist the officers once taken to the ground and handcuffed. Moreover, it is clear that once Mr. Selton was handcuffed, there was no objectively reasonable basis for the Defendants to believe that continuing to hit and kick Mr. Selton was in any way permissible. *See, e.g., Samuels v. Dalsheim, et. al.*, 81 Civ 7050, 1995 U.S. Dist. Lexis 22044, * 52-54 (S.D.N.Y. Aug. 22 1995) (not objectively reasonable to believe that running inmate into the wall and hitting him after he was handcuffed was permissible.); *see also Naccarato v. Oliver*, 882 F. Supp. 297, 304 (E.D.N.Y. 1995) (noting that "if an officer kicked a handcuffed arresttee in the back, that act would violate a clearly established constitutional right and this Court would not grant immunity from liability for such conduct.)

III. Plaintiff Is Entitled to Recovery of Damages, Including Compensatory Damages and Punitive Damages

In this action, Mr. Selton seeks remedies available to him under 42 U.S.C. § 1983 including, *inter alia*, compensatory damages for pain and suffering, mental anguish and emotional distress, as well as punitive damages.[1]

A. Compensatory Damages

Compensatory damages are a form of relief available to a successful plaintiff under 42 U.S.C. § 1983. Fair and reasonable compensatory damages are appropriate where the plaintiff's injury was caused by the violation of a constitutional right. *Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407, 410 (S.D.N.Y. 1998). Mr. Selton will ask the jury in this case to award him compensatory damages based upon his physical injuries, mental anguish and emotional distress suffered during his incarceration relative to the incidents which form the core of this case. Moreover, in this type of case, the testimony of a plaintiff alone provides a sufficient basis for a jury to award damages for mental anguish and emotional distress and punitive damages. *Courtney v. City of New York*, 20 F. Supp. 2d 655, 661 (S.D.N.Y. 1998) (holding that a plaintiff "is not required to corroborate [her] testimony regarding mental anguish in order to support a compensatory damage award." (*citation omitted*)).

B. Punitive Damages

Punitive damages may be awarded in § 1983 cases "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Mathie v. Fries*, 121 F.3d 808, 815 (2d Cir. 1997) (*quoting Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640 (1983)). Punitive

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[1] Plaintiff will also seek an award of costs, including reasonable attorneys' fee, and respectfully reserves the right to make an application for such an award following the entry of final judgment. *See* Fed. R. Civ. P. Rule 54(b)(2).

damages may also be awarded "in a proper case under § 1983 for the purpose of deterring or punishing a violation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 257 n. 11, 98 S. Ct. 1042, 1049 n. 11 (1978); *see also, In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1272 (2d Cir.), *cert. denied*, 502 U.S. 920, 112 S. Ct. 331 (1991) (reviewing history of punitive damages).

Here, Mr. Selton's claims indicate that punitive damages are entirely appropriate. The Defendants' blatant disregard for Mr. Garcia's constitutional rights - including repeatedly gouging Mr. Selton's eyes, punching, kicking and stomping him all while he was mechanically restrained - and unable to protect himself - begs to be sanctioned as mere compensatory damages would be insufficient to provide a true disincentive. *See, e.g., Duckworth v. Whisenant*, 97 F.3d 1393, 1395 (11th Cir. 1996) (awarding punitive damages against officer who had kicked handcuffed Plaintiff in the groin area).

IV. Preclusion of Evidence

A. Evidence of Prior Convictions

Mr. Selton is a felon convicted of murder, robbery and escape. The Federal Rules of Evidence permit the impeachment of a witness by prior convictions punishable in excess of one year. *See* Fed. R. Evid. 609(a). However, the evidence is only admissible "if the court determines that the probative value . . . outweighs its prejudicial effect." Fed. R. Evid. 609(a). The following factors are considered in determining the balance between probative value and prejudicial effect: (1) the impeachment value of the prior crime, (2) the remoteness of the prior conviction, (3) the similarity between the past crime and the conduct at issue, and (4) the importance of the credibility of the witness.

The factors here indicate a finding of low probative value and high prejudice because any of the evidence of Mr. Selton's prior conviction is of relatively little impeachment value in an unrelated civil action over a decade later, particularly where the conviction does not relate to truthfulness or dishonesty. *See, e.g., East Coast Novelty Co., Inc v. City of New York*, 842 F. Supp. 117, 120 (S.D.N.Y. 1994). Moreover, the prior crime is unrelated to the alleged conduct that occurred here.

Even if Mr. Selton's prior criminal record is found admissible under the balancing provision, revealing any evidence of the details of his crime can create unfair prejudice in the minds of the jurors. *See Daniels v. Loizzo*, 986 F. Supp. 245, 251 (S.D.N.Y. 1997). For this reason, courts in this circuit have limited the introduction of evidence to the fact and date of the conviction and have barred evidence of the nature of the conviction or the title of the crime. *See Morello v. James*, 797 F. Supp. 223, 228 (W.D.N.Y. 1992) (precluding questioning into nature of felony conviction beyond fact that plaintiff was a felon).

The risk of unfair prejudice is even greater in an unrelated civil case, such as the instant action, where the particulars of the conviction do not pertain to any of the issues at hand. Thus, the details of Mr. Selton's prior criminal history should be found inadmissible, regardless of the admissibility of the fact and date of the conviction, due to their severe prejudicial nature and total lack of relevance.

B. Testimony and/or Documentation Regarding Plaintiff's Disciplinary Record Should Be Deemed Inadmissible

As explained *supra* with regard to prior convictions, irrelevant evidence relating to a plaintiff's past disciplinary conduct while incarcerated is inadmissible. *See* Fed. R. Evid. Rule 402. Here, any conduct prior to the relevant time period in this case which resulted in sanctioning is irrelevant as to whether the Defendants retaliated and used excessive force against

Mr. Selton. Accordingly, these prior "bad acts" are irrelevant to the time period at issue here and Defendants should be precluded from introducing Mr. Selton's disciplinary records or evidence relating to his conduct while incarcerated.

In addition to being irrelevant, the admission of prior "bad acts" is objectionable under Fed. R. Civ. P. 404(b) on the basis that character evidence is not admissible to prove conformity therewith on a particular occasion. *See Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996). In *Hynes*, the court clearly signaled that prior disciplinary records should only be admitted when one of the enumerated exceptions of Rule 404 apply, such as to show intent, planning, motive, *et cetera*. Here, none of the exceptions apply and the evidence could only be used to impermissibly sway the jury into believing that Mr. Selton was historically a disciplinary problem and thus deserving of the beatings by the Defendants. As explained, this use of the prior record is impermissible under Rule 404(b). Accordingly, Defendants should be precluded from introducing evidence relating to Mr. Selton's prior conduct.

CONCLUSION

The testimony at trial together with the documentary evidence shall establish that Mr. Selton's rights were violated, and that he should be fully compensated for such violations. Moreover, the Defendants should be precluded from introducing evidence any evidence as to Mr. Selton's prior conviction or disciplinary record.

DATED: November 6, 2006

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMARE SELTON,

Plaintiff,

-against-

TROY MITCHELL; E. RIZZO; M. WOODARD; B. SMITH,

Defendants.

04-CV-0989

(LEK)(RFT)

DEFENDANTS' PRETRIAL MEMORANDUM OF LAW

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Date: November 6, 2006

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Preliminary Statement

In this 1983 prisoner pro se action, plaintiff alleges in his one count amended complaint that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. Plaintiff specifically claims that defendants used excessive and unnecessary force against him on March 14, 2004 at Auburn Correctional Facility in Auburn, New York.

STATEMENT OF FACTS

On March 14, 2004, plaintiff, a State prisoner, was housed at Auburn Correctional Facility in Auburn, N.Y. Following lunch, plaintiff deliberately blocked the view into his cell, which was located in the Special Housing Unit ("SHU") at Auburn. Because plaintiff would not respond to then-Sgt. Troy Mitchell's questions about his well-being and Mitchell could not see plaintiff, Mitchell ordered a group of officers to extract plaintiff from his cell. A small number of officers then lined up behind a lead officer who held a plexiglass shield in the corridor outside plaintiff's cell. As the cell door was opened, plaintiff rushed out swinging his fists in an attempt to assault the waiting officers. Plaintiff was immediately subdued, handcuffed and escorted off the SHU block.

During the escort, while waiting for the back door to the SHU block to be opened, plaintiff attempted to kick Sgt. Mitchell. Plaintiff was subdued again and then carried horizontally out the door to a holding cell in the mental health unit ("MHU"). The events in the SHU block were recorded on videotape by prison security cameras.

A short time later, Nurse John MacClellan examined plaintiff in the MHU cell and found only minor injuries: i.e., abrasions on his upper back, one on his left cheek and one in the center of his forehead; some dried blood on his lips; and a small cut on his big toe. Color pictures taken of plaintiff right after the examination confirmed the nurse's findings.

Plaintiff claims, however, that while waiting for the nurse to arrive, the four officers who had escorted him to the MHU cell attacked him by taking turns punching him in the face and neck, repeatedly slamming his face into the bare metal platform of a bed in the cell, stripped him naked and then kicked him in the buttocks and genitals. As a result, he supposedly "suffered extreme and excruciating pain and suffered injuries, including numerous bruises and lacerations to his face, legs and feet . . . ." Am. Cplt ¶ 32.

The officers, on the other hand, deny they attacked plaintiff, maintain that nothing remarkable happened in the MHU cell and assert that no force was used against plaintiff there.

POINT I

DEFENDANT IS ENTITLED TO DISMISSAL UNDER RULE 50 (A) OF THE 8TH AMENDMENT CLAIM

As explained by Judge Howell in the Southern District:

> An Eighth Amendment claim for cruel and unusual punishment may proceed only if the governmental action identified by the prisoner caused him "unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986) (citations omitted). In the context of prison security measures, the infliction of pain "does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." Id. at 319. Particularly where a prison security measure is "undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff," the [jury] must evaluate "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Id. at 320.

Sales v. Barizone, 2004 U.S. Dist. LEXIS 24366, **34-37 (S.D.N.Y. November 29, 2004).

Excessive force claims, as further explained by the court, have two elements, one "objective" and the other "subjective":

> The Supreme Court has illuminated the contours of excessive force claims in recognizing that prison officials "must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates" whether reacting to a riot or a lesser disruption. Hudson v. McMillian, 503 U.S. 1, 6, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992). As such, a prisoner must satisfy both an objective and subjective component to assert an excessive force claim under the Eighth Amendment. First, the objective component "focuses on the harm done," and the "amount of harm that must be shown depends on the nature of the claim." Sims, 230 F.3d at 21. This standard is "contextual and responsive to contemporary standards of decency," such that alleging a serious injury is relevant, but not necessary, in stating an excessive force claim.... Hudson, 503 .S. at 8, 10 (remarking that "the absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it"). . . .
>
> Second, the subject[ive] component requires the prisoner to allege that prison officials acted with a "malicious or sadistic" state of mind since "decision[s] to use force [are] generally made in haste, under pressure, and frequently without the luxury of a second chance." Trammell v. Keane, 338 F.3d 155, 162 (2d Cir. 2003). In other words, the prisoner must show that prison officials "had the necessary level of culpability, shown by actions characterized by wantonness." Sims [v. Artuz], 230 F.3d [14,] 21 (quotations omitted). This is consistent with the view that "excessive force does not, in and of itself, establish malice or wantonness for Eighth Amendment purposes." Romano v. Howarth, 998 F.2d 101, 106 (2d Cir. 1993).

Id.

Here, plaintiff will not be able to satisfy either element of an excessive force claim. First, he cannot establish the objective element since the jury will find his injuries were only *de minimus*. Hudson v. McMillian, 503 U.S. at 9-10. The evidence will show that plaintiff's injuries were minor, especially considering the context in which he received them. Nurse MacClellan found only abrasions on plaintiff's upper back, another on his left cheek and one in the center of his forehead, some dried blood on his lips and a small cut on his big toe. Thus, the injuries plaintiff received show that he was subjected only to as much force as was necessary for the defendants to gain control of plaintiff, which meant they acted reasonably throughout the incident and, therefore, in good faith.

See Blyden v .Mancuso, 186 F.3d 252, 262 (2nd Cir. 1999)(excessive force is force not applied in "good-faith").

Second, plaintiff cannot satisfy the subjective element either. Among the factors considered are " 'the need for the application of force, the relationship between the need and the amount of force that was used, the threat reasonably perceived by the reasonable officials,' and 'any efforts made to temper the severity of a forceful response.' " Id. at 7. The extent of the injuries are relevant. Id., see also Romano v. Howarth, 998 F.2d 101, 105 (2nd Cir. 1993). An inmate's provocation of a correctional officer may be considered as well. Miller v. Leathers, 913 F.2d 1085 (4th Cir. 1990).

In this case, the evidence will show that plaintiff provoked the entire incident by deliberately obstructing the view into his cell and refusing to answer defendant Mitchell's questions about his well-being. When his cell door was opened, plaintiff rushed out and tried to hit the officers with his fists. He was immediately subdued. At no time did defendant Mitchell gouge plaintiff's eye as plaintiff claimed. Next, during the escort off the block and while waiting for the back door to SHU to be opened, plaintiff tried again to strike out by kicking at Sgt. Mitchell. He was immediately subdued and then carried horizontally through the door to the MHU cell for examination by Nurse John MacClellan.

Nothing remarkable happened in the MHU cell during the short time before Nurse MacClellan arrived. Plaintiff alleged that he suffered a severe, prolonged and humiliating beating there. That is belied, however, by the undisputed evidence of minor injuries Nurse MacClellan found when he examined plaintiff. This is also corroborated by the color photos taken of plaintiff following the examination.

Accordingly, plaintiff's 8th Amendment claim fails to state a cause of action and no liability will be found.

CONCLUSION
FOR THE REASONS SET FORTH ABOVE, JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE DEFENDANTS.

Dated: Albany, NY
November 6, 2006

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT BRODIE,

Plaintiff,

v. 9:95-CV-1537 (FJS/DEP)

LOUIS MANN, Superintendent of Shawangunk Correctional Facility; JIM FREER, Senior Counselor of Shawangunk Correctional Facility; and DONALD SELSKY, Director of Special Housing Units,

Defendants.

JURY INSTRUCTIONS

I. INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I am now instructing you and apply that law to the facts as you find them. In doing so, you are not allowed to select some instructions and reject others, rather you are required to consider all the instructions together as stating the law. In that regard, you should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it.

In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards any party. The plaintiff and the defendants, as well as the general public, expect you to carefully and impartially consider all the evidence in this case, follow the law as stated by the Court, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion may be. It is not my function to determine the facts, that is your function.

II. ROLE OF ATTORNEYS

Our courts operate under an adversary system in which we hope that the truth will emerge through the competing presentations of adverse parties. The function of the attorneys is to call your attention to those facts that are most helpful to their side of the case. It is their role to press as hard as they can for their respective positions.

In that regard, one can easily become involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this is not a contest between attorneys. You are to decide this case solely on the basis of the evidence. Remember, the attorneys' statements and characterizations of the evidence are not evidence. Insofar as you find their opening and/or closing arguments helpful, take

advantage of them; but it is your memory and your evaluation of the evidence in the case that counts.

OBJECTIONS

In fulfilling their role, attorneys have the obligation to make objections to the introduction of evidence they feel is improper. The application of the rules of evidence is not always clear, and attorneys often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and are not to be considered as points scored for one side or the other.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against either the plaintiff or the defendants. In any event, any opinion I might have is irrelevant. You are the judges of the facts.

III. MULTIPLE DEFENDANTS

Although there are multiple defendants in this action, it does not follow from that fact alone that if one is liable the others are liable as well. Each defendant is entitled to a fair consideration of his own defense, and a defendant may not be prejudiced by the fact, if it should become a fact, that you find against another defendant.

IV. EVIDENCE

As I stated earlier, your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits marked in the record. Arguments and statements of lawyers, questions to witnesses, and material excluded by my rulings, are not evidence. In addition, during the trial, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may not consider any responses which I ordered stricken from the record.

A. Direct and Circumstantial Evidence

While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common experience. The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts. (SNOW EXAMPLE)

The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

B. Stipulated Facts

The parties also have presented some stipulated facts. A stipulated fact is simply one that all parties agree is true. You must accept any such stipulated facts as true.

V. EVALUATION OF EVIDENCE

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

In evaluating a witness' testimony, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party, as well as the interest the witness may have in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he or she testified, the accuracy of the witness' memory, his or her candor or lack of candor, the reasonableness and probability of the witness' testimony, the testimony's consistency or lack of consistency, and its corroboration or lack of corroboration with other credible testimony.

If you were to find that any witness willfully testified falsely as to any material fact, that is, as to an important matter, the law permits you to disregard completely the

entire testimony of that witness upon the theory that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unworthy of belief. You may accept so much of the witness' testimony as you deem true and disregard what you believe is false. By these processes you, as the sole judge of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept, and what weight you will give it.

As stated in my preliminary instructions, the mere fact that a witness is a corrections official does not in and of itself create any greater or lesser credibility. The testimony of a corrections official has to be evaluated in the same light as that of all other witnesses.

Also, as stated earlier, the existence or non-existence of a fact is not determined by the number of witnesses called. Your concern is not with the quantity but the quality of the evidence.

In summary, what you must try to do in deciding credibility is to size up a witness in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

VI. BURDEN OF PROOF

When a party has the burden of proof on a particular issue that means that considering all the evidence in the case, that party's contention on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of it. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, its weight, and the effect that it has on your minds. The law requires that, in order for a party to prevail on an issue on which he has the burden of proof, the evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than the evidence opposed to his or her claim. (SCALE EXAMPLE) If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

In this case Plaintiff seeks to recover damages for an alleged violation of his due process rights provided by the United States Constitution. Plaintiff has the burden of proving by a fair preponderance of the evidence the elements of this claim which I will describe to you. For Plaintiff to prevail, you must find the evidence that supports his claim is the more likely version of what occurred. If, however, you find the evidence supporting a Defendant's case more persuasive, or if you are unable to find a

preponderance of evidence on either side, then you must resolve the question in favor of that Defendant. You may only find in favor of Plaintiff if the evidence supporting his claim outweighs the evidence opposing it.

VII. SUBSTANTIVE LAW

A. Constitutional Violations

Mr. Brodie has alleged a constitutional claim pursuant to 42 U.S.C. § 1983 which provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

I will refer to this statute simply as "Section 1983."

Section 1983 does not create any substantive right in and of itself but rather serves as a means by which individuals can seek redress in this Court for alleged violations of their substantive rights under the United States Constitution.

Plaintiff alleges that the Defendants violated his right to due process under the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law.

As I have indicated, the State is not a Defendant in this case -- the Defendants in this case are prison employees and officials whom the Plaintiff has named in the lawsuit. They are being sued in their individual capacities. The Plaintiff has named the following Defendants:

JIM FREER -- Senior Counselor of Shawangunk Correctional Facility

LOUIS MANN -- Superintendent of Shawangunk Correctional Facility

DONALD SELSKY -- Director of Special Housing Units

Plaintiff claims that the Defendants deprived him of liberty without due process law in violation of the Fourteenth Amendment. Specifically Plaintiff asserts that during the course of a prison disciplinary hearing to determine whether Plaintiff violated certain Rules of Inmate Conduct that the following actions on the part of the Defendant Hearing Officer Freer violated his constitutional right to due process:

(1) Defendant Freer denied Plaintiff the opportunity to give testimony in his own defense;

(2) Defendant Freer denied Plaintiff the opportunity to call nine requested witnesses without a reason that was reasonable or logically related to correctional goals;

(3) Defendant Freer did not provide Plaintiff with certain requested evidence that was relevant to Plaintiff's defense;

(4) Defendant Freer failed to personally re-interview two witnesses after they indicated they would testify and then reportedly refused to testify at the hearing;

(5) Defendant Freer sentenced Plaintiff based on insufficient evidence; and

(6) Defendant Freer did not provide Plaintiff a fair and impartial hearing because his guilt was predetermined prior to the start of the hearing.

Plaintiff asserts his due process claim against Defendant Mann and Defendant Selsky based on their position as supervisory officials of Defendant Hearing Officer Freer. I will explain in more detail the standard for supervisory liability in a moment.

To prove a claim against each individual Defendant, Plaintiff must establish, by a preponderance of the evidence, each of three elements:

1) that the conduct complained of was committed by a person acting under color of state law;

2) that the conduct deprived Plaintiff of his rights secured by the Constitution or laws of the United States, here the due process clause of the Fourteenth Amendment to the United States Constitution; and

3) that the Defendant's acts were the proximate cause of the deprivation.

I shall now examine each of the three elements in greater detail.

First Element: Color of State Law

The first element of any claim under section 1983 is that the acts of the defendant be done under "color of state law." In other words, the acts complained of must have occurred while the defendant was acting or purporting to act in the performance of his official duties. I instruct you, as a matter of law, that all Defendants were acting under color of state law and that Plaintiff has proven this element of all of his constitutional claim.

Second Element: Deprivation of Right

The second element of Plaintiff's claim is that he was deprived of a constitutional right to due process. A person is entitled to due process under the United States Constitution where has a constitutionally recognized liberty or property interest. As a matter of law, in the context of this case Plaintiff has a protected liberty interest under the Fourteenth Amendment to be free from confinement in the Special Housing Unit and, therefore, was entitled to due process protections before being so confined.

In order for Plaintiff to establish this element, he must show by a preponderance of evidence that a Defendant committed some act or acts as alleged by Plaintiff which

caused Plaintiff to be deprived of his due process rights and, that, in performing such act or acts the Defendant acted intentionally.

As I have outlined above, Plaintiff's claim arises from alleged violations of his due process rights during a prison disciplinary hearing. Inmates are guaranteed certain procedural due process protections during prison disciplinary hearings. The procedural due process that an inmate is entitled to is as follows:

(1) advance notice of the claims against him and a chance to prepare a defense;

(2) a statement by the hearing officer as to the evidence relied upon and the reasons for any disciplinary action taken;

(3) the opportunity to present evidence and call witnesses in his defense when doing so would not be unduly hazardous to institutional or correctional goals;

(4) a fair and impartial hearing and hearing officer;

(5) substantive assistance in collecting evidence and presenting a defense; and

(6) only face disciplinary action when the verdict is supported by some evidence.

With respect to Plaintiff's opportunity to present evidence in a disciplinary hearing, an inmate in prison has a right to call witnesses and present evidence in his defense where it would not be unduly hazardous to "institutional safety or correctional

goals." This is a flexible standard that balances the prisoner's right to due process against the institutional needs of the prison.

An inmate has no constitutional right of cross-examination of witnesses at prison disciplinary hearings, nor does he have a right to call witnesses whose testimony will be redundant or cumulative. Furthermore, an inmate does not have the right to be present when witnesses are examined by the hearing officer if there is reason to believe that the inmate's presence would be unduly hazardous to institutional safety or correctional goals.

A hearing officer is not required to call a witness if he reasonably concludes it would be redundant, cumulative, or futile, such as when an inmate witness refuses to testify. However, a hearing officer's decision not to call or interview witnesses must be logically or reasonably related to preventing undue hazards to institutional safety or correctional goals. In this regard, the burden is never upon the inmate to prove the hearing officer's conduct was arbitrary or capricious, but upon the official to prove the logical or rational basis for his position.

With respect to a fair and impartial hearing and hearing officer, that contemplates that the hearing be one in which the outcome is not arbitrarily and adversely predetermined.

In essence, in the context of a prison disciplinary hearing, due process is satisfied when the inmate is given adequate notice and an opportunity to be heard and the decision of the hearing officer is supported by "some evidence." In the present case, you must decide whether the manner in which Defendant Freer conducted Plaintiff's hearing was fair and impartial; provided the Plaintiff with the opportunity to present evidence; and whether the Hearing Officer's decision is supported by some evidence. Your job is not to retry the disciplinary hearing or to substitute your judgment for that of the Hearing Officer. Also, the state court decision referred to during the course of the trial may not be considered by you as evidence of a lack of due process. Whatever a state court may determine with respect to the appropriateness of the procedure involved is not relevant to the issue before you. That issue is whether there was a constitutional violation of Plaintiff's right to due process in light of the criteria set forth in these instructions.

Third Element: Proximate Cause of Plaintiff's Injury

Plaintiff must show that Defendants' actions caused a deprivation of Plaintiff's constitutional due process rights.

SUPERVISORY OFFICIALS:

As I stated earlier, Defendant Mann and Defendant Selsky are being sued due to their supervisory capacity. Therefore, if you find that the conduct of Defendant Hearing Officer Freer denied the Plaintiff his rights under federal law, you must consider whether Defendant Mann and/or Defendant Selsky, as supervisory officials, may be liable for that conduct as well.

You may not find any of the Defendants liable merely because of a supervisory position they may have held. You may not find them liable merely because of their position in the chain of command or because of the actions of their subordinates. A defendant must be "personally involved" in the deprivation of Plaintiff's constitutional rights.

There are several ways in which a supervisory official may be personally involved in a constitutional deprivation within the meaning of Section 1983. First, a defendant may have directly participated in the infraction. Second, a supervisory official, after learning of the violation through a report or appeal, may have failed to remedy the wrong. Third, a supervisory official may be liable because he has created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue. Finally, a supervisory official may be personally liable if he was grossly negligent in managing subordinates who caused the unlawful condition or event.

VIII. DAMAGES

If Plaintiff has proven by a preponderance of the credible evidence that a Defendant is liable on his claim, then you must determine the amount of damages to which Plaintiff is entitled for that claim. However, you should not infer that Plaintiff is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide the issues of liability outlined above, and I am instructing you on damages only so that you will have guidance should you decide that Plaintiff is entitled to recovery.

A. Compensatory Damages

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, resulting from a Defendant's violation of Plaintiff's rights. If you find that a Defendant is liable on Plaintiff's claim, as I have explained it, then you must award Plaintiff sufficient damages to compensate him for any injury proximately caused by that Defendant's conduct. An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission was a substantial contributing factor in causing the injury or damage.

These are known as compensatory damages. Compensatory damages seek to make Plaintiff whole--that is, to compensate him for any damage he may have suffered. A

prevailing plaintiff is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of a defendant's conduct.

In the present case, Plaintiff has alleged that he suffered physical and emotional injury as a result of his being held in the Special Housing Unit for 17 ½ months. Plaintiff has the burden of proof to show that his placement in the Special Housing Unit was proximately caused by the Defendants' violation of his rights to due process.

You are to use your sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.

B. Nominal Damages

Even if you find that Plaintiff has failed to provide proof that he is entitled to compensatory damages on his constitutional claim, you may still be required to award nominal damages in the amount of one dollar. Nominal damages must be awarded if you find that a Defendant violated Plaintiff's constitutional rights, even though Plaintiff suffered no injury as a result of this violation. In other words, you must award Plaintiff nominal damages in the amount of one dollar if you find that Plaintiff's constitutional rights were violated without any resulting physical or emotional damage.

IX. CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. This DOES NOT mean that the foreperson's vote is entitled to any greater weight than the vote of any other juror. Each juror's vote carries the same weight.

Your job as jurors is to reach a fair conclusion from the law and evidence. The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other. You must deliberate with a view to reaching an agreement, but only if you can do so without violating your individual judgment and conscience. Do not surrender your honest convictions just for the purpose of returning a verdict. On the other hand, do not hesitate to re-examine your views. Remember you are not partisans. You are the judges -- judges of the facts. Your duty is to seek the truth from the evidence presented.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony read to you or my instructions further explained. I caution you, however, that the read-back of testimony may take some time and effort. You should, therefore, make a conscientious effort to resolve any questions as to testimony through your collective recollections.

Should you desire to communicate with the Court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshal who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom. In any communications with the Court, you should never state your numerical division.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the marshal a verdict has been reached. A verdict form has been prepared for each of you. I will now review it with you before you retire to the jury room.

A proximate cause is an act or omission that, in a natural course, produces injury and without this act or omission the injury would not have occurred.

Plaintiff need not prove, however, that a Defendant's conduct was the sole cause of his injuries. It is sufficient if the Defendant's conduct caused an aggravation of a pre-existing injury.

In order for Plaintiff to establish this element, he must show these things by a preponderance of evidence: first, that a Defendant committed the acts alleged by Plaintiff; second, that those acts caused Plaintiff to suffer the loss of a federal right; and, third, that, in performing the acts alleged, the defendant acted intentionally.

BOILERPLATE FOR CASES THAT FALL WITHIN THE EXTRAORDINARY EXCEPTION CREATED BY PATTERSON:

However, if you find that Plaintiff's due process rights were violated specifically due to the failure of the Defendants to interview certain witnesses or to allow those witnesses to testify without a logical or rational basis, then the burden shifts to the Defendants to show that Plaintiff's placement in the Special Housing Unit would have occurred even if those witnesses had been interviewed or testified at the hearing.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMADO BRITO,

Plaintiff,

-vs-

GLENN S. GOORD, Commissioner; CLAIR BEE, Assistant Commissioner; SUPERINTENDENT HOLLINS, Oneida Correctional Facility; UNKNOWN BURGE, Superintendent, Auburn Correctional Facility; UNKNOWN RABIDEAU, First Deputy Superintendent of Auburn Correctional Facility; JOHN DOE, Correctional Officer at Oneida Correctional Facility; H. MOSS, Correctional Officer at Oneida Correctional Facility; AMINA AHSAN, Facility Health Services Director at Auburn Correctional Facility; ANN DRISCOLL, Acting Nurse Administrator at Auburn Correctional Facility,

Defendants.

Civil Action No.:
9:02-CV-1410 (FJS/RFT)

HISCOCK & BARCLAY, LLP

Plaintiff, by his attorney, Aaron J. Ryder, Esq., submits the following as his proposed instructions to be given to the jury in the trial of the above-entitled action.

Date: August 15, 2005

HISCOCK & BARCLAY LLP

By: *s/ Aaron J. Ryder*
Aaron J. Ryder
Bar Roll No. 512597

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INTRODUCTION

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Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I state it, and apply the law to the facts. You are not to consider one instruction alone as stating the law, but you are to consider the instructions as a whole.

You should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it. In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards any party. Both parties and the public expect you to carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a decision regardless of the consequences.

Nothing I say in these instructions are to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

EVIDENCE

Your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits marked in the record. Arguments and statements of lawyers, questions to witnesses, and evidence excluded by my rulings, are not evidence. In addition, during the trial, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may not consider any responses stricken from the record.

The function of lawyers is to call to your attention facts that are most helpful to their side of the case. What the lawyers say, however, is not binding on you, and in the final analysis, your own recollection and interpretation of the evidence controls your decision.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against any party in this lawsuit; in any event, any opinion I might have is irrelevant to your decision.

While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common experience. The law recognizes two types of evidence – direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts. The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

ROLE OF ATTORNEYS

I should also discuss the role of the attorneys. We operate under an adversary system in which we hope that the truth will emerge through the competing presentation of adverse parties. It is the role of the attorneys to press as hard as they can for their respective positions. In fulfilling that rule, they have not only the right, but the obligation to make objections to the introduction of evidence they feel is improper. While the interruption caused by these objections may be irritating, you cannot fault the attorneys because they have a duty to make objections that they feel are appropriate.

The application of the rules of evidence is not always clear, and lawyers often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case, and are not to be considered as points scored for one side or the other.

Similarly, one cannot help becoming involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this not a contest among attorneys but an attempt to rationally resolve a serious controversy between the parties, and solely on the basis of the evidence. Accordingly, statements by the attorneys and characterizations by them of the evidence are not controlling. Insofar as you find them helpful, take advantage of them. However, you should rely on your memory and your evaluation of the evidence.

STIPULATED FACTS

The parties also have presented some stipulated facts. A stipulated fact is simply one on which both parties agree. You must regard such agreed facts as true.

BURDEN OF PROOF

When a party has the burden of proof on a particular issue, s/he must establish, by a preponderance of the credible evidence, that his/her claims, and the elements that comprise those claims, are true. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance of the evidence means the greater part of the evidence. The phrase refers to the quality of the evidence.

In this case, plaintiff seeks to recover damages under 42 U.S.C. § 1983 for alleged violations his Constitutional rights. Plaintiff has the burden of proving by a fair preponderance of the evidence the elements which I will describe to you. For plaintiff to prevail, you must find that the evidence that supports his claim is the more likely version of what occurred. If, however, you find that the evidence supporting defendants' case is more persuasive, or if you are unable to find a preponderance of evidence on either side, then you must resolve the question in favor of defendants. You may only find in favor of plaintiff if the evidence supporting his claim outweighs the evidence opposing it.

Likewise, defendants bear the burden of proof with respect to their affirmative defenses. The same rules I just described apply to defendants' burden of proof on their affirmative defenses. I will talk more about the respective burdens of proof in this particular case a little later.

CONSIDERATION OF THE EVIDENCE – NEW YORK STATE'S ACTIONS AND EMPLOYEES

When the State of New York is involved, of course, it may act only through natural persons as its agents or employees; and in general any agent or employee of the state may bind the state by his acts and declarations made while acting within the scope of his authority delegated to him by the state or within the scope of his duties as an employee of the state. This instruction does not necessarily apply, however, in deciding whether to hold the state liable for the Constitutional violations allegedly committed by its employees. I will instruct you in a moment concerning the circumstances under which you should find the acts committed by its employees

HISCOCK & BARCLAY, LLP

[1]Devitt, Blackmar, Wolff and O'Malley, Federal Civil Jury Practice and Instructions, § 71.09 (1987 and 1999 Supp.)

CIVIL ACTIONS UNDER 42 U.S.C. § 1983

The law to be applied in this case is the federal civil rights law which provides a remedy for individuals who have been deprived of their constitutional rights under color of state law.

Section 1983 of Title 42 of the United States Code states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before section 1983 was enacted in 1971, people so injured were not able to sue state officials or persons acting under color or state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment and federal laws. Section 1983 was enacted to provide a federal remedy enforceable in federal court because it was feared that adequate protection of federal rights might not be available in state courts.[2]

[2] Mathew Bender, Modern Federal Jury Instructions §§ 87- 65 - 66 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Imbler v. Pachtman, 424 U.S. 409 (1976); Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167, (1961).

BURDEN OF PROOF UNDER SECTION 1983[3]

I shall shortly instruct you on the elements of plaintiff's Section 1983 claim, and on the elements of defendants' qualified immunity defense.

Plaintiff has the burden of proving each and every element of his Section 1983 claim by a preponderance of the evidence. If you find that any one of the elements of plaintiff's Section 1983 claim has not been proven by a preponderance of the evidence, you must return a verdict for defendants.

Defendants have the burden of proving each element of their affirmative defense. I shall shortly instruct you on the elements of this defense. If you find that any one of the elements of defendants' defense has not been proven by a preponderance of the evidence you must disregard the defense.

[3] Matthew Bender, Modern Federal Jury Instructions §§ 87-67 (citing Gomez v. Toledo, 446 U.S. 635 (1980)).

ELEMENTS OF SECTION 1983 CLAIM[4]

To establish a claim under Section 1983, plaintiff must establish, by a preponderance of the evidence, each of the following three elements:

1. that the conduct complained of was committed by a person acting under color of state law;

2. that this conduct deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws or the United States; and

3. that defendants actions and/or omissions were the proximate cause of the injuries and consequent damages sustained by plaintiff.

I shall now examine each of the three elements in greater detail.

[4] Matthew Bender, Modern Federal Jury Instruction § Form 87-68 (citing Parrat v. Taylor, 451 U.S. 527 (1981); Eagleston v. Guido, 41 F.3d 865 (2d Cir. 1994).

FIRST ELEMENT – ACTION UNDER COLOR OF STATE LAW[5]

The first element of plaintiff's claim is that defendants acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of Section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state (or territory or the District of Columbia). The term "state" encompasses any political subdivision of state, such as a county or city, and also any state agencies or a county or city agency.

Action under color of state law means action that is made possible only because the actor is clothed with the authority of the state. It is not presently in dispute that defendants' actions were taken in their capacity as state officials. Therefore, I instruct you that, since defendants were officials of the State of New York at the time of the acts in question, they were acting under color of state law. In other words, the first statutory requirement is satisfied.

[5] Matthew Bender, Modern Federal Jury Instructions § Form 87-68, (citing American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 977 (1999); Adickes v. S.H. Kress Co., 398 U.S. 144 (1970); Monroe v. Pape, 365 U.S. 167 (1961) and Form § 87-70 (citing Parratt v. Taylor, 451 U.S. 527 (1981); Monroe v. Pape, 365 U.S. 167 (1961).

SECOND ELEMENT – DEPRIVATION OF RIGHT[6]

The second element of plaintiff's claim is that he was deprived of a federal right by defendants. In order for plaintiff to establish the second element, he must show these things by a preponderance of the evidence:

1. That defendants committed the acts alleged by plaintiff;
2. That those acts caused plaintiff to suffer the loss of a federal right; and
3. That in performing the acts alleged defendants acted intentionally and/or recklessly.

Plaintiff claims that defendant correctional officers intentionally and recklessly assaulted him causing both physical and mental injuries and that the remaining defendants deliberately disregarded his complaints regarding inadequate medical care, thereby depriving him of his Federal Rights under the Eighth and Fourteenth Amendments.

If you find that defendants committed the acts alleged by plaintiff, the next step is to determine whether those acts caused plaintiff to suffer the loss of federal rights under the First, Eighth and Fourteenth Amendments.

Eighth Amendment

The Eighth Amendment to the Constitution provides that no cruel and unusual punishment may be inflicted.

Plaintiff alleges that defendants were deliberately indifferent to serious medical needs.[1] When prison officials are so deliberately indifferent to serious needs as to unnecessarily and wantonly inflict pain, they impose cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Plaintiff must demonstrate by a preponderance of the evidence that defendants knew of and disregarded an excessive risk to plaintiff's health and safety. In other words, defendants must have both

[6] Form 87-74.

been aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and they must have drawn an inference. Mere negligence is not enough, nor is it enough that a reasonable person would have known, or that defendants should have known, of plaintiff's serious medical needs.

Plaintiff has the burden of establishing by a preponderance of the evidence that:

1. Defendant prison officials knew or should have known that plaintiff was not receiving adequate medical attention for serious medical condition and that same would cause his medical condition to grow progressively worse;

2. Defendant prison officials were deliberately indifferent to plaintiff's constitutional right to be free of cruel and unusual punishment, either because defendant prison officials intended to deprive plaintiff of some right, or because they acted with reckless disregard of plaintiff's right to adequate medical attention;

3. Such acts violated plaintiff's constitutional right to be free from cruel and unusual punishment; and

4. Defendant prison officials' conduct was the proximate cause of injury and consequent damage to plaintiff.

A serious medical need is one that has been diagnosed by a physician as reaquiring treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.[2] Therefore, if you find that defendant prison officials were deliberately indifferent to plaintiff's medical condition, in light of the multiple letters to same defendants and grievances and complaints, you must find that plaintiff has established the second element.

The government has the obligation to provide medical care for the persons it incarcerates.[3] Deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors in

(..continued)
[1] Form 87-47D
[2] *Johnson v. Busby*, 953 F.2d 349 (8th Cir. 1991).
[3] *Estelle v. Gamble, supra.*

response to prison needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed.[4]

If you find that defendants' actions caused plaintiff to suffer the loss of his rights under the Eighth Amendment, you must then determine the state of mind of defendants. I instruct you that to establish a claim under section 1983, plaintiff must show that defendants acted recklessly, wantonly or with deliberate indifference.[5]

An act is reckless if done in conscious disregard of its known probable consequences.[6] In determining whether defendants acted with the requisite knowledge or recklessness, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or rails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

If you find by a preponderance of the evidence that defendants, whether recklessly or wantonly, inflicted serious physical injury upon Plaintiff, or with deliberate indifference, refused to medically treat those serious physical injuries, then you may find that Plaintiff's constitutional rights were violated.

[4] *Id.*
[5] Form 87-75
[6] Form 87-77

THIRD ELEMENT – PROXIMATE CAUSE[7]

The third element that plaintiff must prove is that defendants' acts were a proximate cause of the injuries sustained by plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of defendants' act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of defendants. If you find that defendants have proved, by a preponderance of the evidence, that plaintiff complains about an injury that would have occurred even in the absence of defendants' conduct, you must find that defendants did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

A defendant is not liable if plaintiff's injury was caused by a new or independent source of an injury that intervenes between defendants' act or omission and plaintiff's injury and which produces a result that was not reasonably foreseeable by defendants.

[7] Form 87-79

VIOLATION OF STATE REGULATIONS MAY BE EVIDENCED OF DUE PROCESS VIOLATIONS[9]

While the requirements of due process cannot be defined by the New York State Department of Correction Regulations, those regulations pertaining to disciplinary hearings were promulgated to ensure that prison disciplinary hearings in New York State met with constitutional due process standards. Accordingly, the failure by defendants to comply with their own regulations governing Tier III hearings, may be considered by you as evidence that due process was not satisfied.

[9] See Walker v. Bates, 23 F.3d 652, 657 (2d Cir. 1994); Patterson v. Coughlin, 761 F.2d 886, 891 (2d Cir. 1985); Giano v. Sullivan, 709 F. Supp. 1209, 1213 (S.D.N.Y. 1989);.

QUALIFIED IMMUNITY[11]

At the time of the incidents giving rise to the lawsuit, it was clearly established law that correctional officers were prohibited from using force against an inmate without just or probable cause and that prison officials could not ignore the medical needs of an inmate with a serious injury. (the law).

Even if you find that defendants did violate plaintiff's due process rights, however, defendants still may not be liable to plaintiff. This is so because defendants may be entitled to what is called a qualified immunity. If you find that he is entitled to such immunity, you may not find him liable.

Defendants will be entitled to qualify immunity if, at the time of the hearing, they neither knew nor should have known that their actions were contrary to federal law. The simple fact that Defendants acted in good faith is not enough to bring them within the protection of this qualified immunity. Nor is the fact that Defendants may have been unaware of the federal law. Defendants are entitled to a qualified immunity only if they did not know what they did was in violation of federal law and if a competent public officer could not have been expected at the time to know that the conduct was in violation of federal law.

In deciding what a competent official would have know about the legality of defendants' conduct, you may consider the nature of defendants' official duties, the charter of his official position, the information which was known to defendants or not known to him, and the events which confronted him. You must ask yourself what a reasonable official in defendants' situation would have believed about the legality of defendants' conduct. You should not, however, consider what defendants' subjective intent was, even if you believe it was to harm plaintiff. You may also use your common sense. If you find that

[11] Form 87-86 (citing Richardson v. McKnight, 521 U.S. 399 (1997); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986); Harlow v. Fitzgerald, 457 U.S. 800 (1982); LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998); Velardi v. Walsh, 40 F.3d 569 (2d Cir. 1994); P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990); Gittens v. LeFever, 891 F.2d 38 (2d Cir. 1989).

a reasonable official in defendants' situation would believe his conduct to be lawful, then this element will be satisfied. Defendants has the burden of proving that he neither knew nor should have known that his actions violated federal law. If defendants convinces you by a preponderance of the evidence the he neither knew nor should have known that his actions violated federal law, then you must return a verdict for defendants, even though you may have previously found that defendants in fact violated plaintiff's rights under color of state law.

COMPENSATORY DAMAGES[13]

Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not defendants should be held liable. If you return a verdict for plaintiff, then you must consider the issue of actual damages.

If you return a verdict for plaintiff, then you must award him such sum of money as you believe will fairly and justly compensate him for any injury you believe he *actually* sustained as a direct consequence of the conduct of defendants.

You shall award actual damages only for those injuries which you find that plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by defendants in violation of Section 1983. That is you may not simply award actual damages for any injury suffered by plaintiff – you must award actual damages only for those injuries that are a direct result of actions by this defendants and that are a result of conduct by defendants which violated plaintiff's federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

[2] Form 87-87 (citing Memphis Community School District v. Stachura, 477 U.S. 299 (1986); Gibeau v. Nellis, 18 F.3d 107 (2d Cir. 1994).

NOMINAL DAMAGES[14]

If you return a verdict for plaintiff, but find that plaintiff has failed to prove by a preponderance of the evidence that he suffered any actual damages, then you must return an award of damages in some nominal or token amount not to exceed the sum of one dollar.

Nominal damages must be awarded when plaintiff has been deprived by defendants of a constitutional right but has suffered no actual damage as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred in an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that plaintiff has suffered no injury as a result of defendants' conduct other than the fact of a constitution deprivation, you must award nominal damages not to exceed one dollar.

[14] Form 87-88 (citing Carey v. Piphus, 435 U.S. 247 (1978); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995), cert. denied 116 S. Ct. 2546 (1996).

CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. You first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. This DOES NOT mean that the foreperson's vote is entitled to any greater weight than the vote of any other juror. Your job as jurors is to reach a fair conclusion from the law and evidence. When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other. You must deliberate with a view to reaching an agreement, but only if you can do so without violating your individual judgment and conscience. Remember in your deliberations that the dispute between the parties is for them no passing matter. The parties and the court are relying on you to give full and conscientious consideration to the issues and the evidence before you.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony or instructions read to you.

Should you desire to communicate with the court during your deliberation, please put your message or question in writing. The foreperson should sign the note and pass it to the Marshall who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom. I caution you, however, that in your communications with the court, you should never state your numerical division.

Once you have reached a unanimous verdict and the verdict form has been completed, please inform the Marshall that a verdict has been reached. Your verdict on each claim for relief must be unanimous, and it must also represent the considered judgment of each juror.

During your deliberations, do not hesitate to re-examine your views and change your mind. Do not however, surrender your honest convictions because of the opinion of a fellow juror or for the purpose of returning a verdict. Remember you are not partisans. Your duty is to seek the truth from the evidence presented to you.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the Marshall that a verdict has been reached.

Verdict forms have been prepared for you. You should review them after retiring to the jury room.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMADO BRITO,

Plaintiff,

-against-

GLENN S. GOORD, Commissioner; CLAIR BEE, JR., Assistant Commissioner; SUPERINTENDENT HOLLINS, Oneida Correctional Facility; BURGE, Superintendent, Auburn Correctional Facility; RABIDEAU, First Deputy Superintendent of Auburn Correctional Facility; JOHN DOE, Correctional Officer at Oneida Correctional Facility; JOHN DOE, Correctional Officer at Oneida Correctional Facility; JOHN DOE, Correctional Officer at Oneida Correctional Facility; H. MOSS, Correctional Officer at Oneida Correctional Facility; AMINA AHSAN, Facility Health Services Director at Auburn Correctional Facility; ANN DRISCOLL, Acting Nurse Administrator at Auburn Correctional Facility,

9:02-cv-1410

(FJS)(RFT)

Defendants.

DEFENDANTS' PROPOSED JURY CHARGES

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THE STATUTE

The law to be applied in this case is the federal civil rights law which provides a remedy for individuals who have been deprived of their constitutional rights under color of state law. Section 1983 of Title 42 of the United States Code states:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

PURPOSE OF THE STATUTE

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment and federal laws.

Section 1983 was enacted to give people a federal remedy enforceable in federal court because it was feared that adequate protection of federal rights might not be available in state courts.

Authority

United States Supreme Court: *Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982); Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); Mitchum v. Foster, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

BURDEN OF PROOF

I shall shortly instruct you on the elements of plaintiff's section 1983 claim, and on the elements of defendant's qualified immunity defense.

The plaintiff has the burden of proving each and every element of his section 1983 claim by a preponderance of the evidence. If you find that any one of the elements of plaintiff's section 1983 claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendant.

The defendant has the burden of proving each element of his affirmative defenses. I shall shortly instruct you on the elements of this defense. If you find that any one of the elements of defendant's defenses have not been proven by a preponderance of the evidence, you must disregard the defense.

Authority

United States Supreme Court: *Gomez v. Toledo, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

ELEMENTS OF A SECTION 1983 CLAIM

To establish a claim under section 1983, plaintiff must establish, by a preponderance of the evidence, each of the following three elements:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and

Third, that the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.

Authority

United States Supreme Court: *Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).*

Second Circuit: *Eagleston v. Guido, 41 F.3d 865 (2nd Cir. 1994).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

FIRST ELEMENT - ACTION UNDER COLOR OF STATE LAW

ACTION UNDER COLOR OF STATE LAW - DEFINED

The first element of the plaintiff's claim is that the defendants acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of section 1983 , which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state. The term "state" encompasses any political subdivision of a state, such as a county or city, and also any state agencies or a county or city agency.

Action under color of state law means action that is made possible only because the actor is clothed with the authority of the state. Section 1983 forbids action taken under color of state law where the actor misuses power that he possesses by virtue of state law.

An actor may misuse power that he possesses by virtue of state law even if his acts violate state law; what is important is that the defendant was clothed with the authority of state law, and that the defendant's action was made possible by virtue of state law.

Authority

United States Supreme Court: *American Mfrs. Mut. Ins. Co. v. Sullivan, -- U.S. --, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999); Adickes v. S.H. Kress Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1361 (1941); Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913); Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676 (1880).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

FIRST ELEMENT - ACTION UNDER COLOR OF STATE LAW

STATE OFFICIAL ACTING UNDER COLOR OF STATE LAW

The plaintiff claims that the defendants were acting under color of the law of the State of New York when the defendant allegedly deprived the plaintiff of his constitutional right to be free of cruel and unusual punishment.

In order for an act to be under color of state law, the act must be of such nature and committed under such circumstances that it would not have occurred except for the fact that the defendant was clothed with the authority of the state--that is to say, the defendant must have purported or pretended to be lawfully exercising his official power while in reality abusing it.

The act of a state official in pursuit of his personal aims that is not accomplished by virtue of his state authority is not action under color of state law merely because the individual happens to be a state corrections officer.

Authority

United States Supreme Court: *Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

SECOND ELEMENT - DEPRIVATION OF RIGHT

GENERAL INSTRUCTION

Plaintiff claims that he was deprived of a federal right by each defendant. In order for the plaintiff to establish the second element against each defendant, he must show these things by a preponderance of the evidence: first, that each defendant committed the acts alleged by plaintiff; second, that those acts caused the plaintiff to suffer the loss of a federal right; and, third, that, in performing the acts alleged, each defendant acted with deliberate indifference to the plaintiff.

Authority

United States Supreme Court: *Conn v. Gabbert, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999); Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980); Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980); Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); Monell v. Department of Social Servs, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).*

Second Circuit: *Young v. County of Fulton, 160 F.3d 899 (2d Cir. 1998); Marshall v. Switzer, 10 F.3d 925 (2nd Cir. 1993).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

SECOND ELEMENT - DEPRIVATION OF RIGHT

DELIBERATE INDIFFERENCE

Plaintiff alleges that various defendants were deliberately indifferent to serious medical needs plaintiff claims to have had. When prison officials are so deliberately indifferent to serious medical needs as to unnecessarily and wantonly inflict pain, they impose cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The plaintiff must demonstrate by a preponderance of the evidence that each defendant knew of and disregarded an excessive risk to the plaintiff's health and safety--in other words, each defendant must have both been aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and each also must have drawn such an inference. Mere negligence is not enough, nor is it enough that a reasonable person would have known, or that each defendant should have known, of the serious medical needs.

Authority

United States Supreme Court: *Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).*

Second Circuit: *Hemmings v. Gorczyk, 134 F.3d 104 (2nd Cir. 1998); Koehl v. Dalsheim, 85 F.3d 86 (2nd Cir. 1996); Hayes v. New York City Dept. of Corrections, 84 F.3d 614 (2nd Cir. 1996); Hathaway v. Couglin, 37 F.3d 63 (2d Cir. 1994), cert. denied sub nom. Foote v. Hathaway, 513 U.S. 1154 (1995).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

SECOND ELEMENT - DEPRIVATION OF RIGHT

STATE OF MIND - GENERAL

I instruct you that, to establish a claim under section 1983, the plaintiff must show that each defendant acted intentionally or with reckless disregard of an excessive risk to the plaintiff. If you find that the acts of any defendant were merely negligent, then, even if you find that the plaintiff was injured as a result of those acts, you must return a verdict for that defendant or those defendants.

Authority

United States Supreme Court: *Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); Daniels v. Williams, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); Davidson v. Cannon, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

STATE OF MIND - INTENTIONAL ACTS

An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. In determining whether the defendant acted with the requisite knowledge, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

STATE OF MIND - RECKLESS ACTS

An act is reckless if done in conscious disregard that a known excessive risk is the probable consequence. In determining whether the defendant acted with the requisite recklessness, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

STATE OF MIND - NEGLIGENCE

An act is negligent if a defendant was under a duty or obligation, recognized by law, that required him to adhere to a certain standard of conduct to protect others against unreasonable risks, and he breached that duty or obligation.

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

THIRD ELEMENT - PROXIMATE CAUSE

PROXIMATE CAUSE - GENERALLY

The third element which plaintiff must prove against each defendant is that the defendant's acts were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of the defendant. If you find that the defendant has proved, by a preponderance of the evidence, that the plaintiff complains about an injury which would have occurred even in the absence of the defendant's conduct, you must find that the defendant did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

A defendant is not liable if plaintiff's injury was caused by a new or independent source of

an injury which intervenes between the defendant's act or omission and the plaintiff's injury and which produces a result which was not reasonably foreseeable by the defendant.

Authority

United States Supreme Court: *Grivhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979); Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).*

Second Circuit: *Gierlinger v. Gleason, 160 F.3d 858 (2d Cir. 1998).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

PROXIMATE CAUSE - SUPERVISORY OFFICIALS

If you find that the conduct of a subordinate denied the plaintiff a right guaranteed by federal law, you must consider whether the supervisor caused that conduct. If the supervisor did cause the conduct, then he is liable under section 1983 for the denial of plaintiff's constitutional right.

The standards for assessing whether the supervisor proximately caused plaintiff's constitutional injury are different from the standards for assessing the subordinate's liability. If the subordinate denied plaintiff a constitutional right, a supervisor is not liable for such a denial simply because of the supervisory relationship.

There are only two circumstances under which you may find that the supervisor has caused plaintiff's injury, and thus is liable for the illegal conduct of the subordinate. These are as follows:

First, if you find that the supervisor has done something affirmative to cause the injury to the plaintiff--for example, by directing the subordinate to do the acts in question--you should find that the supervisor caused the injury.

Second, if you find that the supervisor failed to carry out his duty to oversee the subordinate, knowing that his failure to do so probably would cause a deprivation of the plaintiff's rights by the subordinate, you should find that the supervisor caused the injury.

A finding of either circumstance is enough to establish that the supervisor caused the injury. I will explain each of these in detail.

To find that the supervisor did something affirmative to cause injury to the plaintiff, you must find by a preponderance of the evidence that the supervisor was personally involved in the conduct that caused plaintiff's injury. Personal involvement does not mean only that the defendant supervisor

directly, with his own hands, deprived plaintiff of his rights. The law recognizes that the supervisor can act through others, setting in motion a series of acts by subordinates that the supervisor knows, or reasonably should know, would cause the subordinates to inflict the constitutional injury. Thus, plaintiff meets his burden of proof as to the personal involvement of the supervisor in the subordinate's conduct if he proves by a preponderance of the evidence that the deprivation of his right took place at the supervisor's direction, or with the supervisor's knowledge, acquiescence or consent. The supervisor may give his consent expressly or his consent may be implied because of his knowledge of or acquiescence in the subordinate's unconstitutional conduct.

In the absence of personal involvement, you may still find that the supervisor caused the injury to the plaintiff if you find that he failed to carry out his duty to oversee the subordinate. To make such a finding, you must conclude by a preponderance of the evidence that the supervisor had a duty to oversee the subordinate, that he grossly disregarded that duty, and that a reasonable person in the supervisor's position would have known that his dereliction of duty probably would cause a deprivation of rights.

Authority

United States Supreme Court: *Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

QUALIFIED IMMUNITY

At the time of the incidents giving rise to the lawsuit, it was clearly established law that prison officials cannot be deliberately indifferent to serious medical needs of inmates in their custody. However, even if you find that any of the defendants were indifferent to the plaintiff's medical needs, those defendants still may not be liable to the plaintiff. This is so because those defendants may be entitled to what is called a qualified immunity. If you find that they are entitled to such an immunity, you may not find them liable.

The defendants will be entitled to a qualified immunity if, at the time of the plaintiff's need for medical treatment, they neither knew nor should have known that their actions were contrary to federal law. The simple fact that any of the defendants acted in good faith is not enough to bring them within the protection of this qualified immunity. Nor is the fact that the defendants were unaware of the federal law. The defendants are entitled to a qualified immunity only if they did not know that what they did was in violation of federal law.

In deciding what competent officials would have known about the legality of their conduct, you may consider the nature of defendants' official duties, the character of their official positions, the information which was known to them or not known to them, and the events which confronted them. You must ask yourself what a reasonable official in each defendant's situation would have believed about the legality of his conduct. You should not, however, consider what each defendant's subjective intent was, even if you believe it was to harm the plaintiff. You may also use your common sense. If you find that reasonable officials in each defendant's situation would believe his conduct to be lawful, then this element will be satisfied.

The defendants have the burden of proving that they neither knew nor should have known

that their actions violated federal law. If the defendants convince you by a preponderance of the evidence that they neither knew nor should have known that their actions violated federal law, then you must return a verdict for those defendants, even though you may have previously found that those defendants in fact violated the plaintiff's rights under color of state law.

Authority

United States Supreme Court: *Richardson v. McKnight, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)*; *Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*; *Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)*; *Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*; *Schuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).*

Second Circuit: *LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998)*; *Velardi v. Walsh, 40 F.3d 569 (2d Cir. 1994)*; *P.C. v. McLaughlin, 913 F.2d 1033 (2d Cir. 1990)*; *Gittens v. LeFevre, 891 F.2d 38 (2d Cir. 1989).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

DAMAGES

COMPENSATORY DAMAGES

Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not the defendants should be held liable.

If you return a verdict for the plaintiff, then you must consider the issue of actual damages.

If you return a verdict for the plaintiff, then you must award him such sum of money as you believe will fairly and justly compensate him for any injury you believe he actually sustained as a direct consequence of the conduct of those defendants you have held to be liable.

You may award actual damages only for those injuries which you find that plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by those defendants you have held liable for a violation of section 1983. That is, you may not simply award actual damages for any injury suffered by plaintiff--you must award actual damages only for those injuries that are a direct result of actions by those defendant you have held liable and that are a direct result of conduct by those defendant who violated plaintiff's federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.

Authority

United States Supreme Court: *Memphis Community School District v. Stachura, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986)*; *Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)*; *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)*.

Second Circuit: *Amato v. City of Saratoga Springs, 170 F.3d 311 (2d Cir. 1999)*; Gibeau v. Nellis, 18F.3d 107 (2nd Cir. 1994).

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

NOMINAL DAMAGES

If you return a verdict for the plaintiff, but find that plaintiff has failed to prove by a preponderance of the evidence that he suffered any actual damages, then you must return an award of damages in some nominal or token amount not to exceed the sum of one dollar.

Nominal damages must be awarded when the plaintiff has been deprived by defendant of a constitutional right but has suffered no actual damage as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred is an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that plaintiff has suffered no injury as a result of the defendant's conduct other than the fact of a constitutional deprivation, you must award nominal damages not to exceed one dollar.

Authority

United States Supreme Court: *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).*

Second Circuit: *Amato v. City of Saratoga Springs, 170 F.3d 311 (2d Cir. 1999); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2nd Cir. 1995), cert. denied, -- U.S. --, 116 S. Ct. 2546, 135 L. Ed. 2d 1067 (1996); Gibeau v. Nellis, 18 F.3d 107 (2nd Cir. 1994).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

CAUSATION AND DAMAGES

I have said that you may award damages only for those injuries which you find the plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by the defendants in violation of section 1983. You must distinguish between, on the one hand, the existence of a violation of the plaintiff's rights and, on the other hand, the existence of injuries naturally resulting from that violation. Thus, even if you find that the defendant deprived the plaintiff of his rights in violation of section 1983, you must ask whether the plaintiff has proven by a preponderance of evidence that the deprivation caused the damages that he claims to have suffered.

If you find that the damages suffered by the plaintiff were partly the result of conduct by the defendants that was legal and partly the result of conduct by them that was illegal, you must apportion the damages between the legal and illegal conduct--that is, you must assess the relative importance of the legal and the illegal conduct and allocate the damages accordingly.

Authority

United States Supreme Court: *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); Mount Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).*

Second Circuit : *Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

MITIGATION OF DAMAGES

If you find that the plaintiff was injured as a natural consequence of conduct by the defendant in violation of section 1983, you must determine whether the plaintiff could thereafter have done something to lessen the harm that he suffered. The burden is on the defendant to prove, by a preponderance of evidence, that the plaintiff could have lessened the harm that was done to him, and that he failed to do so. If the defendant convinces you that the plaintiff could have reduced the harm done to him but failed to do so, the plaintiff is entitled only to damages sufficient to compensate him for the injury that he would have suffered if he had taken appropriate action to reduce the harm done to him.

Authority

Second Circuit: *Miller v. Lovett, 879 F.2d 1066 (2d Cir. 1989).*

Source

Modern Federal Jury Instructions, Mathew Bender & Co., Inc., Chapter 87.

Dated: Syracuse, New York
April 5, 2002

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Medical Indifference
Retaliation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AMADO BRITO,

Plaintiff,

v.

9:02-CV-1410
(FJS/RFT)

Superintendent Hollins, Oneida Correctional Facility; Burge, Superintendent, Auburn Correctional Facility; H. Moss, Correctional Officer at Oneida Correctional Facility; Amina Ahsan, Facility Health Services Director at Auburn Correctional Facility; and Ann Driscoll, Acting Nurse Administrator at Auburn,

Defendants.

JURY INSTRUCTIONS

I. INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I am now instructing you and apply that law to the facts as you find them. In doing so, you are not allowed to select some instructions and reject others, rather you are required to consider all the instructions together as stating the law. In that regard, you should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply

the law as I give it to you, whether or not you agree with it.

In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards either party. The plaintiff and the defendants, as well as the general public, expect you to carefully and impartially consider all the evidence in this case, follow the law as stated by the Court, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion may be. It is not my function to determine the facts, that is your function.

II. ROLE OF ATTORNEYS

Our courts operate under an adversary system in which we hope that the truth will emerge through the competing presentations of adverse parties. The function of the attorneys is to call your attention to those facts that are most helpful to their side of the case. It is their role to press as hard as they can for their respective positions.

In that regard, one can easily become involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this is not a contest between attorneys. You are to decide this case solely on the basis of the evidence. Remember, the attorneys' statements and characterizations of the evidence are not evidence. Insofar as you find their opening and/or closing arguments helpful, take

advantage of them; but it is your memory and your evaluation of the evidence in the case that counts.

III. OBJECTIONS

In fulfilling their role, attorneys have the obligation to make objections to the introduction of evidence they feel is improper. The application of the rules of evidence is not always clear, and attorneys often disagree. It has been my job as the judge to resolve these disputes. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and are not to be considered as points scored for one side or the other.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against either the plaintiff or the defendants. In any event, any opinion I might have is irrelevant. You are the judges of the facts.

IV. EVIDENCE

As I stated earlier, your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits that I have received during trial. In addition, on occasion, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may

not consider any responses which I ordered stricken from the record.

A. Multiple Defendants

Although there are multiple Defendants in this action, it does not follow from that fact alone that if one is liable the others are liable as well. Each Defendant is entitled to a fair consideration of his or her own defense, and a Defendant may not be prejudiced by the fact, if it should become a fact, that you find against another Defendant. Unless otherwise stated, all instructions I give to you govern the case as to each Defendant.

B. Direct and Circumstantial Evidence

Although you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits which are justified in light of common sense and experience. The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events which points to the existence or nonexistence of certain facts. (SNOW EXAMPLE)

The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

C. All Available Evidence Need Not Be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in this case.

D. Testimony of Corrections Officers

You have heard the testimony of Corrections Officers. The fact that a witness is employed as a Corrections Officer does not mean that his testimony is deserving of any more or less consideration, or should be given any greater or lesser weight, than that of any other witness from whom you heard testimony.

You may consider the testimony of a Corrections Officer just as you would with any other witness from whom you heard testimony.

V. EVALUATION OF THE EVIDENCE

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his testimony. You are the sole judges of the credibility of each witness and of the importance of his testimony.

In evaluating a witness' testimony, you should use all the tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You

should consider any bias or hostility the witness may have shown for or against any party, as well as the interest the witness may have in the outcome of the case. You should consider the opportunity the witness had to see, hear, and know the things about which he testified, the accuracy of the witness' memory, his candor or lack of candor, the reasonableness and probability of the witness' testimony, the testimony's consistency or lack of consistency, and its corroboration or lack of corroboration with other credible testimony.

VI. BURDEN OF PROOF

When a party has the burden of proof on a particular issue that means that considering all the evidence in the case, that party's contention on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy to be believed. A preponderance means the greater part of it. It does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, its weight, and the effect that it has on your minds. The law requires that, in order for a party to prevail on an issue on which he has the burden of proof, the evidence that supports his claim on that issue must appeal to you as more nearly representing what took place than the evidence opposed to his claim. (SCALE EXAMPLE) If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either

side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

In this case Plaintiff seeks to recover damages for alleged violations of his rights under the First Amendment to the United States Constitution to be free from retaliation for exercising his right to file grievances about his conditions of confinement. He also seeks to recover damages for alleged violations of his rights under the Eighth Amendment to the United States Constitution to receive adequate medical attention for his serious medical needs. Finally, Plaintiff seeks to recover damages that he suffered as a result of Defendant Moss allegedly slapping him several times in the face.

Plaintiff has the burden of proving by a fair preponderance of the evidence the elements of the claims which I will describe to you. For Plaintiff to prevail, you must find that the evidence that supports his claims is the more likely version of what occurred. If, however, you find the evidence supporting Defendants' case more persuasive, or if you are unable to find a preponderance of evidence on either side, then you must resolve the question in favor of Defendants. You may only find in favor of Plaintiff if the evidence supporting his claims outweighs the evidence opposing them.

VII. SUBSTANTIVE CLAIMS

A. Deliberate indifference to serious medical needs claim

Plaintiff claims that Defendants Hollis, Burge, Ahsan and Driscoll violated the

Eighth Amendment by denying him medical treatment with deliberate indifference to his serious medical needs, following the incident that occurred on March 7, 2002. Specifically, he contends that Defendants Hollins, Burge and Ahsan were deliberately indifferent to his serious medical needs by failing to take corrective measures to stop the staff from denying him and/or delaying his receipt of adequate medical treatment for his serious medical needs. He also claims that Defendant Ahsan was deliberately indifferent to his serious medical needs by placing the responsibility for his medical treatment with an individual she knew, or should have known, was falsifying Plaintiff's medical records and was denying Plaintiff adequate medical attention. Finally, Plaintiff asserts that Defendant Driscoll was deliberately indifferent to his serious medical needs by denying him adequate medical attention for his serous medical needs and falsifying his medical records.

I instruct you that in the context of a prisoner's medical needs, an inmate who is the subject of the State's care and custody is entitled to have his medical needs addressed in a manner consistent with his rights under the United States Constitution.

To succeed on his claim that Defendants were deliberately indifferent to his serious medical needs, Plaintiff must prove each of the following elements by a preponderance of the evidence as to each Defendant:

(1) that the Defendant you are considering acted under "color of state law;" and

(2) that Plaintiff's condition presented a "serious medical need;" and

(3) that the Defendant you are considering acted with "deliberate indifference" to Plaintiff's serious medical need; and

(4) that the acts or omissions of the Defendant you are considering were the proximate cause of the injuries and consequent damages that Plaintiff sustained.

I shall now examine each of these elements in greater detail.

First Element: Color of State Law

The parties agree that Defendants were acting under the "color of state law," i.e., that they were employees of the State at the time of the incident. Therefore, this element has been satisfied.

Second Element: Serious Medical Need

In evaluating this element of Plaintiff's claim, you must determine whether Plaintiff's condition presented a "serious medical need." A serious medical need is one that contemplates a condition of urgency, one that may produce death, degeneration, or extreme pain.

In evaluating whether Plaintiff has established this element by a preponderance of the evidence, you should consider the testimony of the witnesses and the documentation and medical records that both sides produced in this case.

If you find that Plaintiff did not have a serious medical need, then your deliberations are to go no further and you must find in favor of Defendants. If, however, you find that Plaintiff's condition did, in fact, present a serious medical need, you must

then consider whether Defendants acted with the required culpable state of mind.

Third Element: Deliberate Indifference

The third element Plaintiff must prove by a preponderance of the evidence concerns Defendants' state of mind. To prevail on this element of his claim, Plaintiff must establish that the Defendant under consideration acted with "deliberate indifference" to Plaintiff's serious medical needs.

In this regard, I will instruct you that society does not expect that prisoners will have unqualified access to health care. Moreover, it is equally recognized that routine discomfort is part of the penalty that criminal offenders pay for their offenses against society and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation.

In considering this element of Plaintiff's claim, you must consider the "contemporary standards of decency" in the context of a penal setting. Deliberate indifference to an inmate's serious medical needs is either conduct that involves an unnecessary and wanton or reckless infliction of pain, or conduct that shocks the conscience, in other words, conduct that violates the contemporary standards of decency.

A merely inadvertent failure to adequately address Plaintiff's medical condition might be sufficient to make Defendant liable in a negligence action. However, such an inadvertent failure is not sufficiently reckless to establish a claim under the Eighth Amendment. Thus, if you find that the actions of the Defendant under consideration

reflect a simple lack of due care or negligence with respect to Plaintiff, then you must find in favor of that Defendant.

Fourth Element: Proximate Cause

If you find that Plaintiff suffered an injury, it is necessary for you to determine whether the injury that occurred resulted from the acts or omissions of one or more of the named Defendants. Plaintiff must prove, by a preponderance of the evidence, that the acts or omissions of the Defendant you are considering was the proximate cause of Plaintiff's injury or injuries. A proximate cause is an act or omission that, in a natural course, produces injury and without this act or omission the injury would not have occurred. Stated another way, before Plaintiff can recover damages for any injuries, he must first show by a preponderance of the evidence that such injury would not have come about were it not for Defendants' conduct.

B. First Amendment Retaliation Claim

In this case, Plaintiff claims that Defendants Hollins, Burge, Moss, and Driscoll, while acting "under color" of state law, violated his constitutional rights under the First Amendment to the United States Constitution.

Specifically, Plaintiff claims that Defendant Hollins transferred him out of the facility, thus ending any treatment he was receiving at that facility in retaliation for his having filed grievances concerning the conditions of his confinement. Plaintiff alleges

that Defendant Burge failed to take corrective measures to stop the staff from denying or delaying his receipt of adequate medical treatment in retaliation for his having filed grievances concerning the conditions of his confinement. Plaintiff contends that Defendant Moss slapped him in the face several times and denied him meals in retaliation for his having filed grievances concerning the conditions of his confinement. Finally, Plaintiff asserts that Defendant Driscoll denied him adequate medical care and falsified his medical records in retaliation for his having filed grievances concerning the conditions of his confinement.

Although a convicted prisoner loses some constitutional rights upon being found guilty of an offense, he keeps or retains other constitutional rights. One of the rights he retains is the right, under the First Amendment, to file grievances with the appropriate officials about the conditions of his confinement.

To prevail on his claim, Plaintiff must prove each of the following facts by a preponderance of the evidence. First, that Plaintiff filed his grievances about the conditions of confinement in good faith. Second, that Defendants intentionally retaliated against or punished Plaintiff because he exercised his right to file grievances.

If Plaintiff fails to establish either of these facts by a preponderance of the evidence, you must find in favor of the Defendant you are considering.

C. **Battery**

If a person intentionally touches another person without that person's consent and causes an offensive bodily contact, he commits a battery and is liable for all damages resulting from his act.

Intent involves the state of mind with which an act is done. The intent required for battery is the intent to cause a bodily contact that a reasonable person would find offensive. An offensive bodily contact is one that is done for the purpose of harming another or one that is otherwise wrongful.

Plaintiff alleges that Defendant Moss slapped him several times in the face. Defendant Moss denies slapping Plaintiff in the face. If you find that Plaintiff has proven, by a preponderance of the evidence, that Defendant Moss slapped him in the face and that Plaintiff found that slap offensive, you will find that Defendant Moss committed a battery. If, however, you find that Plaintiff has not proven, by a preponderance of the evidence, that Defendant Moss intentionally slapped Plaintiff in the face, you will find that Defendant Moss did not commit a battery.

VIII. DAMAGES

If you find that Mr. Brito has proven by a preponderance of the credible evidence that the Defendant you are considering is liable on any of his claims, then you must determine the amount of damages to which Mr. Brito is entitled on those claims as to that

Defendant. However, you should not infer that Mr. Brito is entitled to recover damages merely because I am instructing you on the elements of damages. It is exclusively your function to decide the issues of liability outlined above, and I am instructing you on damages only so that you will have guidance should you decide that Mr. Brito is entitled to recovery.

A. Compensatory Damages

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, resulting from the violation of Mr. Brito's rights. If you find that the Defendant you are considering is liable on any of Mr. Brito's claims, as I have explained them, then you must award Mr. Brito sufficient damages to compensate him for any injury proximately caused by that Defendant's conduct. An injury is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission was a substantial contributing factor in causing the injury. Mr. Brito need not prove, however, that the conduct of the Defendant you are considering was the sole cause of his injuries

A prevailing plaintiff is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of a defendant's unjustified conduct. You should not award compensatory damages for speculative injuries but only for those injuries that Plaintiff has proven resulted from the

unjustified conduct.

B. Nominal Damages

Even if you find that Mr. Brito has failed to provide proof that he is entitled to compensatory damages on his claims, you may still be required to award nominal damages if you find that the Defendant you are considering violated Mr. Brito's constitutional rights, but you do not find that Mr. Brito is entitled to compensatory damages. In such a case, you must award Mr. Brito nominal damages in the amount of one dollar.

You may not award Mr. Brito both nominal and compensatory damages if you find that his constitutional rights were violated. In other words, if you find that Mr. Brito's constitutional rights were violated and that Mr. Brito was measurably injured, you may award him compensatory damages. On the other hand, if you find that Mr. Brito's constitutional rights were violated but he was not measurably injured, you must award him nominal damages only.

C. Punitive Damages

If you find that Plaintiff's constitutional rights were violated and award nominal damages, you may also consider whether Plaintiff is entitled to an award of punitive damages. You may consider the issue of punitive damages whether or not you award

Plaintiff any compensatory damages on his constitutional claims.

Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, or to deter or prevent a defendant and others like him from committing similar acts in the future.

I must emphasize, however, that at this stage of the proceedings, you are only to consider whether or not Plaintiff is **entitled** to such an award of punitive damages. If you determine that Plaintiff is entitled to such an award, you will be asked to determine what amount such an award should be at a separate hearing concerning this issue. Therefore, you are **not** to consider the **amount** of punitive damages, if any, you believe Plaintiff is entitled to receive.

You may conclude that Plaintiff is entitled to punitive damages if you find that Defendants' acts or omissions were done maliciously or wantonly. An act or failure to act is maliciously done if it is prompted by ill will or spite towards the injured person. An act or failure to act is wanton if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. In order to justify an award of punitive damages, Plaintiff has the burden of proving, by a preponderance of the evidence, that Defendants acted maliciously or wantonly with regard to his rights. You may assess punitive damages against any or all Defendants or you may refuse to impose punitive damages.

Please remember that at this stage of the proceedings, you are only to consider whether or not Plaintiff is **entitled** to such an award of punitive damages. If you

determine that Plaintiff is so entitled, a separate hearing will be held at which you will hear evidence relevant to the proper amount of such damages. While many of the same considerations apply to a determination of the amount of a punitive damages award, the Court will have specific instructions for you regarding this determination, should it become necessary.

IX. CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. The foreperson's vote, however, carries the same weight as the vote of any other juror.

As jurors, you are required to discuss the issues and the evidence with each other. Although you must deliberate with a view to reaching an agreement, you must not violate your individual judgment and conscience in doing so. The proper administration of justice requires you to give full and conscientious consideration to the issues and evidence before you in determining the facts of the case – and then apply the law that the Court gives you to those facts.

To return a verdict, it is necessary that each juror agree. Your verdict must be

unanimous.

During your deliberations, do not hesitate to re-examine your views and change your mind. Do not, however, surrender your honest convictions because of the opinion of a fellow juror or for the purpose of returning a verdict. Remember you are not partisans. You are the judges -- judges of the facts. Your duty is to seek the truth from the evidence presented to you, while holding the parties to their burdens of proof.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony read to you or my instructions further explained. I caution you, however, that the read-back of testimony may take some time and effort. You should, therefore, make a conscientious effort to resolve any questions as to testimony through your collective recollections.

Should you desire to communicate with the Court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshal who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the marshal that you have reached a verdict. A verdict form has been prepared for you. I will now review it with you.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH THOMPSON,

Plaintiff

v.

J. BURGE, Superintendent,

Defendant.

9:02-CV-394

ORIGINAL

VERDICT FORM

July 25, 2007
Utica, New York

Court Exhibit No. 1

SECTION 1983 CLAIM

1. Do you find that plaintiff Kenneth Thompson had a serious medical need?

Yes _____ No ✓

If you answered "No" to Question 1, do not proceed any further. Turn to the last page, sign and date the verdict form, and notify the Marshall that you have reached a verdict.

If you answered "Yes" to Question 1, proceed to Question 2.

2. Do you find that defendant John Burge was deliberately indifferent to plaintiff Kenneth Thompson's serious medical need?

Yes _____ No _____

If you answered "No" to Question 2, do not proceed any further. Turn to the last page, sign and date the verdict form, and notify the Marshall that you have reached a verdict.

If you answered "Yes" to Question 2, proceed to Question 3.

3. Do you find that defendant John Burge's deliberate indifference to plaintiff Kenneth Thompson's serious medical needs was a proximate cause of compensatory or actual damages to plaintiff?

Yes _____ No _____

If you answered "No" to Question 3, proceed to Question 5.

If you answered "Yes" to Question 3, proceed to Question 4.

DAMAGES

Answer Question 4 or 5, but not both.

Compensatory or Actual Damages

4. State the amount of compensatory or actual damages, if any, that you award to plaintiff Kenneth Thompson for the deprivation of his constitutional rights:

Limitation on Quality of Life $ _____

Emotional Distress $ _____

TOTAL: $ _____

Nominal Damages

5. State the amount of nominal damages that you award to plaintiff Kenneth Thompson (not to exceed $1.00) for the violation of his constitutional rights:

$ _____

Proceed to Question 6.

Punitive Damages

6. State whether defendant John Burge is responsible for punitive damages to plaintiff Kenneth Thompson for the violation of his constitutional rights:

Yes _____ No _____

PROCEED TO THE LAST PAGE, SIGN IN THE SPACE PROVIDED, AND NOTIFY THE MARSHAL THAT YOU HAVE REACHED A VERDICT.

Please sign and date this verdict form.
YOUR VERDICT MUST BE UNANIMOUS.
ALL MUST SIGN.

Dated: July 25, 2007

(Foreperson)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LUIS ROSALES,

Plaintiff,

vs.

Civil Action No.
9:03-CV-601-LES/RFT

TIMOTHY QUINN, JOSEPH GIANNOTTA, RICHARD PFLEUGER, WILLIAM MARTENS and RANDALL CALHOUN, et al.

Defendants.

PLAINTIFF'S PROPOSED JURY CHARGES

Plaintiff, Luis Rosales, respectfully submits the following Proposed Jury Charges pursuant to the Court's Order of May 31, 2007:

INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case.

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I state it, and apply the law to the facts. You are not to consider one instruction alone as stating the law. You are to consider the instructions as a whole.

You should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it. In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice or sympathy towards any party. Both parties and the public expect you to carefully and impartially consider all the evidence in the case, follow the law as stated by me, and reach a decision regardless of the consequences.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case. It is your responsibility to determine the facts, not mine.

EVIDENCE

Your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses and exhibits marked in the record. Arguments and statements of lawyers, questions to witnesses, and evidence excluded by my rulings, are not evidence. In addition, during the trial, I sustained objections to questions and either prevented a witness from answering or ordered an answer stricken from the record. You may not draw inferences from unanswered questions and you may not consider any responses stricken from the record.

The function of lawyers is to call to your attention facts that are most helpful to their side of the case. However, what the lawyers say is not binding on you, and in the final analysis, your own recollection and interpretation of the evidence controls your decision.

In addition, you must not infer from anything I have said during this trial that I hold any views for or against any party in this lawsuit. In any event, any opinion I might have is irrelevant to your decision.

While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits that are justified in light of common experience. The law recognizes two types of evidence – direct and circumstantial. Direct evidence is the testimony of one who asserts personal knowledge, such as an eyewitness. Circumstantial or indirect evidence is proof of a chain of events that points to the existence or nonexistence of certain facts. The law does not distinguish between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You may rely on either type of evidence in reaching your decision.

ROLE OF ATTORNEYS

I should also discuss the role of the attorneys. We operate under an adversary system in which we hope that the truth will emerge through the competing presentation of adverse parties. It is the role of the attorneys to press as hard as they can for their respective positions. In fulfilling that rule, they have not only the right, but the obligation to make objections to the introduction of evidence they feel is improper. Although the interruption caused by these objections may be irritating or distracting, the attorneys are not to be faulted because they have a duty to make any objections that they feel are appropriate.

The application of the rules of evidence is not always clear, and lawyers often disagree. It has been my job as the judge to resolve evidentiary disputes. However, it is important for you to realize that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case, and are not to be considered as points scored for one side or the other.

Similarly, one cannot help becoming involved with the personalities and styles of the attorneys, but it is important for you as jurors to recognize that this not a contest among attorneys, but rather an attempt to rationally resolve a serious controversy about the parties, and solely on the basis of the evidence. Statements by the attorneys and characterizations by them of the evidence are not controlling. If you find such statements helpful, take advantage of them, but it is your memory and your evaluation of the evidence in the case that counts.

STIPULATED FACTS

The parties also have presented some stipulated facts. A stipulated fact is simply one that both parties agree is true. You must regard such agreed facts as true.

BURDEN OF PROOF

When a party has the burden of proof on a particular issue it means that he must establish by a preponderance of the credible evidence that his claims, and the elements that comprise those claims, are true. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance means the greater part of the evidence. The phrase refers to the quality of the evidence.

In this case the plaintiff seeks to recover damages under 42 U.S.C. § 1983 for alleged violations his Constitutional right to free speech and his right against cruel and unusual punishment. The plaintiff has the burden of proving by a fair preponderance of the evidence the elements that I will describe to you shortly. For the plaintiff to prevail, you must find the evidence that supports his claim is the more likely version of what occurred. If you find the evidence supporting defendants' case more persuasive, or if you are unable to find a preponderance of evidence on either side, then you must resolve the question in favor of the defendants. You may only find in favor of the plaintiff if the evidence supporting his claims outweighs the evidence opposing his claims.

Likewise, the defendants bear the burden of proof on their affirmative defense of qualified immunity. The same rules I just described apply to the defendants' burden of proof on their affirmative defense. I will talk more about the respective burdens of proof in this particular case a little later on.

CIVIL ACTIONS UNDER 42 U.S.C. § 1983

The law to be applied in this case is the federal civil rights law that provides a remedy for individuals who have been deprived of their constitutional rights under color of state law.

Section 1983 of Title 42 of the United States Code states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before section 1983 was enacted in 1971, people so injured were not able to sue state officials or persons acting under color or state law for money damages in federal court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the First Amendment and federal laws.

Section 1983 was enacted to give people a federal remedy enforceable in federal court because it was feared that adequate protection of federal rights might not be available in state courts.[1]

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[1] 87-65 *Modern Federal Jury Instructions-Civil*, P 87.03 (Matthew Bender 3d ed.) (hereinafter, "[Vol.]-[Ch.] Modern Federal Jury Instructions") (*citing Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)); and 87-66 Modern Federal Jury Instructions (*citing Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d **482** (1982)).

BURDEN OF PROOF UNDER SECTION 1983

Shortly I will instruct you on the elements of plaintiff's Section 1983 claim, and on the elements of defendants' qualified immunity defense.

The plaintiff has the burden of proving each and every element of his Section 1983 claim by a preponderance of the evidence. If you find that any one of the elements of plaintiff's Section 1983 claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendants.

The defendants have the burden of proving each element of their affirmative defense. If you find that any one of the elements of defendants' affirmative defense has not been proven by a preponderance of the evidence you must disregard the affirmative defense.[2]

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[2] 87-67 Modern Federal Jury Instructions (*citing Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980)).

ELEMENTS OF SECTION 1983 CLAIM

To establish a claim under Section 1983, plaintiff must establish, by a preponderance of the evidence, each of the following three elements:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws or the United States; and

Third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.[3]

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[3] 87-68 Modern Federal Jury Instruction (*citing Parrat v. Taylor*, 451 U.S. 527 (1981); *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994)).

FIRST ELEMENT – ACTION UNDER COLOR OF STATE LAW

The first element of the plaintiff's claim is that the defendants acted under color of state law. The phrase "under color of state law" is a shorthand reference to the words of Section 1983, which includes within its scope action taken under color of any statute, ordinance, regulation, custom or usage, of any state (or territory or the District of Columbia). The term "state" encompasses any political subdivision of state, such as a county or city, and also any state agencies or a county or city agency.

Action under color of state law means action that is made possible only because the actor is clothed with the authority of the state. Section 1983 forbids action taken under color of state law where the actor misuses power that he possesses by virtue of state law.

An actor may misuse power that he possesses by virtue of state law even if his acts violate state law; what is important is that the defendants were clothed with the authority of state law, and that the defendants' actions were made possible by virtue of state law.

Whether the defendants committed the acts alleged by the plaintiff is a question of fact for you, the jury, to decide. I will instruct you in a moment on how you will decide that issue. For now, assuming that the defendants did commit those acts, I instruct you that since the defendants were officials of the State of New York at the time of the acts in question, they were acting under color of state law. In other words, the first statutory requirement is satisfied.[4]

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[4] 87-69 Modern Federal Jury Instructions (*citing American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999); *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970); *Monroe v. Pape*, 365 U.S. 167 (1961); and 87-69 Modern Federal Jury Instructions (*citing Parratt v. Taylor*, 451 U.S. 527 (1981); *Monroe v. Pape*, 365 U.S. 167 (1961)).

SECOND ELEMENT – DEPRIVATION OF RIGHT

The second element of plaintiff's claim is that he was deprived of a federal right by the defendants.[5] More specifically, plaintiff claims that: (a) defendant Giannotta deprived the plaintiff of his first amendment right to petition the government for redress of grievances by placing the plaintiff in a three-day "keeplock" confinement simply because the plaintiff had filed a grievance against Giannotta that Giannotta felt was untrue; (b) defendant Quinn deprived the plaintiff of his first amendment right to petition the government for redress of grievances by threatening the plaintiff with physical harm if he did not stop filing grievances against the other defendants; (c) defendant Pfleuger both deprived the plaintiff of his first amendment right to petition the government for redress of grievances and violated the plaintiff's right against cruel and unusual punishment by assaulting the plaintiff on two consecutive days in retaliation for a grievance the plaintiff previously had filed against defendant Pfleuger; and (d) defendants Martens and Calhoun both deprived the plaintiff of his first amendment right to petition the government for redress of grievances and violated the plaintiff's right against cruel and unusual punishment by assaulting the plaintiff after the plaintiff refused to sign a release of a grievance the plaintiff previously had filed against defendants Pfleuger and Calhoun.

In order for the plaintiff to prove deprivation of his right to petition the government for redress of grievances, he must establish by a preponderance of the evidence, the following things:

First, that the activity in which he was engaged was constitutionally protected;

Second, that the defendants intentionally committed the acts alleged; and

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[5] 87-74 Modern Federal Jury Instructions (*citing Conn v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999)).

Third, that plaintiff's constitutionally protected activity was a substantial or motivating factor in the defendants' decision to commit such acts.[6]

I first instruct you as a matter of law that the plaintiff has a constitutionally protected right to petition the government for redress of grievances.[7] Therefore, you must determine whether the plaintiff has demonstrated by a preponderance of the evidence that (1) he was engaged in such conduct; (2) that the defendants intentionally retaliated against plaintiff as a result of such conduct; and (3) that the plaintiff's constitutionally protected activity was a substantial or motivating factor in the defendants' decision to commit such acts.

If plaintiff meets this initial burden, you must then determine whether defendants have proven by a preponderance of the evidence that they would have acted accordingly even in the absence of the plaintiff's grievances.[8]

If you find by a preponderance of the evidence that plaintiff has met his burden and that the defendants have failed to prove by a preponderance of the evidence that they would have acted accordingly even in the absence of the plaintiff's grievances, you may find that the plaintiff's Constitutional rights were violated.

In order for the plaintiff to prove deprivation of his right against cruel and unusual punishment, he must establish by a preponderance of the evidence, the following things:

First, that the defendants committed the acts alleged by plaintiff.

Second that those acts caused the plaintiff to suffer the loss of a federal right under the Eighth Amendment. This element requires some explanation.

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[6] *Franco v. Kelly*, 854 F.2d 584 (2d Cir. 1988); *Graham v. Henderson*, 89 F.3d 75 (2d Cir. 1996) *Gaston v. Coughlin*, 81 F. Supp. 2d 381 (N.D.N.Y. 1999);

[7] *Id.*

[8] *Hynes v. Squillace*, 143 F.3d 653 (2d Cir.) (per curiam), *cert. denied*, 525 U.S. 907, 119 S. Ct. 246 (1998).

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The cruel and unusual punishments clause was designed to protect those convicted of crimes. An express intent to inflict unnecessary pain is not required but of course if you find that any of the defendants acted with such intent, this will be enough.[9]

As I noted earlier, the plaintiff alleges that his Eighth Amendment right to be free of cruel and unusual punishment was violated in two ways. First, plaintiff claims that defendant Pfleuger assaulted the plaintiff on two consecutive days in retaliation for a grievance the plaintiff previously had filed against defendant Pfleuger. Second, the plaintiff claims that defendants Martens and Calhoun assaulted the plaintiff after the plaintiff refused to sign a release of a grievance the plaintiff previously had filed against defendants Pfleuger and Calhoun.

When an inmate alleges that prison officials violated his Eighth Amendment right to be free from cruel and unusual punishment by using unnecessary or excessive force on him, the legal standard for assessing the force used depends on whether or not force was used in an effort to maintain security in a prison. If prison officials use physical force against an inmate as part of a security measure, then the question of whether the force was excessive and in violation of the Eighth Amendment, depends on whether force was used in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[10]

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[9] 87-74 Modern Federal Jury Instructions; *Hendricks v. Coughlin*, 942 F.2d 109, 113 (2d Cir. 1991); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 620 (2d Cir. 1996); *Conn v. Gabbert*, 526 U.S. 286 (1999); *Young v. County of Fulton*, 160 F.3d 754 (2d Cir. 1998).
[10] *Id.*

PROXIMATE CAUSE – GENERALLY

The third element that plaintiff must prove is that the defendants' acts were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury; that is, if the injury or damage was a reasonably foreseeable consequence of the defendants' acts or omissions.[11]

[11] 87-79 Modern Federal Jury Instructions.

QUALIFIED IMMUNITY

The defendants will not be entitled to qualified immunity if, at the time of the hearing, they neither knew nor should have known that their actions we contrary to federal law. The simple fact that the defendants acted in good faith is not enough to bring him within the protection of this qualified immunity. Nor is the fact that the defendants were unaware of the federal law. The defendants are entitled to qualified immunity only if they did not know what they did was in violation of federal law and if a competent public officer could not have been expected at the time to know that the conduct was in violation of federal law.

In deciding what a competent official would have know about the legality of the defendants' conduct, you may consider the nature of the defendants' official duties, the charter of their official position, the information which was known to the defendants or not known to them, and the events which confronted them. You must ask yourself what a reasonable official in the defendants' situation would have believed about the legality of their conduct. You should not, however, consider what the defendants' subjective intent was, even if you believe it was to harm the plaintiff. You may also use your common sense. If you find that a reasonable official in the defendants' situation would believe their conduct to be lawful, then this element will be satisfied. The defendants have the burden of proving that they neither knew nor should have known that their actions violated federal law. If one or more of the defendants convince you by a preponderance of the evidence that they neither knew nor should have known that their actions violated federal law, then you must return a verdict for the defendant or defendants who convinced you of that fact, even

though you may have previously found that the defendant or defendants in question in fact violated the plaintiff's rights under color of state law.[12]

[12] 87-86 Modern Federal Jury Instructions.

COMPENSATORY DAMAGES

Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not the defendants should be held liable. If you return a verdict for the plaintiff, then you must consider the issue of actual damages.

If you return a verdict for the plaintiff, then you must award him such sum of money as you believe will fairly and justly compensate him for any injury you believe he actually sustained as a direct consequence of the conduct of the defendants.

You shall award actual damages only for those injuries that you find the plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by the defendant in violation of Section 1983. That is you may not simply award actual damages for any injury suffered by plaintiff – you must award actual damages only for those injuries that are a direct result of actions by these defendants and that are a result of conduct by the defendants that violated the plaintiff's federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence.[13]

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[13] 87-87 Modern Federal Jury Instructions (*citing Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986); *Gibeau v. Nellis*, 18 F.3d 107 (2d Cir. 1994).

EXEMPLARY OR PUNITIVE DAMAGES

If you award the plaintiff actual damages, then you may also make him a separate and additional award of exemplary or punitive damages. You may also make an award of punitive damages even though you find that plaintiff has failed to establish actual damages. Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, or to deter or prevent a defendant and others like him from committing such conduct in the future.

You may award the plaintiff punitive damages if you find that the acts or omissions of the defendant were done maliciously or wantonly. An act or failure to act is maliciously done if it is prompted by ill will or spite towards the injured person. An act or failure to act is wanton if done in a reckless or callous disregard of, or indifference to, this rights of the Injured person. The plaintiff has the burden of proving, by a preponderance of the evidence, that defendants acted maliciously or wantonly with regard to the plaintiff's rights.

An intent to injure exists when the defendants have a conscious desire to violate federal rights of which he is aware, or when the defendants have a conscious desire to injure the plaintiff in a manner they know to be unlawful. A conscious desire to perform the physical acts that caused the plaintiff's injury, or to fail to undertake certain acts, does not by itself establish that the defendants had a conscious desire to violate rights or injure the plaintiff unlawfully.

If you find by a preponderance of the evidence that the defendants acted with malicious intent to violate the plaintiff's federal rights or unlawfully injure him or if you find that the defendants acted with a callous or reckless disregard of the plaintiff's rights, then you may award punitive damages. An award of punitive damages, however, is discretionary; that is, if you find

that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.

In making this decision, you should consider the underlying purpose of punitive damages. Punitive damages are awarded in the jury's discretion to punish a defendant for outrageous conduct or to deter him and others like him from performing similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether the defendants may be adequately punished by an award of actual damages only, or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish the wrongful conduct. You should also consider whether actual damages standing alone are likely to deter or prevent these defendants from again performing any wrongful acts he may have performed, or whether punitive damages are necessary to provide deterrence. Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts similar to those the defendants may have committed.

If you decide to award punitive damages, these same purposes should be considered by you in determining the appropriate sum of money to be awarded as punitive damages. That is, in fixing the sum to be awarded, you should consider the degree to which the defendants should be punished for their wrongful conduct, and the degree to which an award of one sum or another will deter the defendants or persons like them from committing wrongful acts in the future.

The extent to which a particular sum of money will adequately punish a defendant, and the extent to which a particular sum will adequately deter or prevent future misconduct, may, depend upon the financial resources of the defendants against whom damages are awarded.

Therefore, if you find that punitive damages should be awarded against the defendants, you may consider the financial resources of the defendants in fixing the amount of such damages.[14]

[14] 87-89 Modern Federal Jury (*citing Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986); *Mathie v. Fries*, 121 F.3d 808 (2d Cir. 1997).

NOMINAL DAMAGES

If you return a verdict for the plaintiff, but find that plaintiff has failed to prove by a preponderance of the evidence that he suffered any actual damages, then you must return an award of damages in some nominal or token amount not to exceed the sum of one dollar.

Nominal damages must be awarded when the plaintiff has been deprived by the defendants of a constitutional right but has suffered no actual damage as a natural consequence of that deprivation. The mere fact that a constitutional deprivation occurred in an injury to the person entitled to enjoy that right, even when no actual damages flow from the deprivation. Therefore, if you find that the plaintiff has suffered no injury as a result of the defendants' conduct other than the fact of a constitution deprivation, you must award nominal damages not to exceed one dollar.[15]

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[15] 87-88 Modern Federal Jury Instructions (*citing Carey v. Piphus*, 435 U.S. 247 (1978); *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999).

MULTIPLE CLAIMS/DEFENDANTS

I have two more cautionary instructions to keep in mind when considering the types of damages more than once for the same injury. For example, if plaintiff were to prevail on two claims and establish a certain dollar injury, you could not award him the same dollar compensatory damages on each claim – he is only entitled to be made whole again, not to recover more than he lost. Of course, if different injuries are attributed to the separate claims, then you must compensate him fully for all of the injuries. With respect to punitive damages, you may make separate awards on each claim that is established.

Second, you must be careful to impose any damages that you may award on a claim solely upon the defendant or defendants who you find to be liable on that claim. Although there are five defendants in this case, it does not follow that if one is liable, all are liable as well. Each defendant is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other defendant. If you find that only one defendant is responsible for a particular injury, then you must impose damages for that injury only upon that defendant.

Nevertheless, you might find that more than one defendant is liable for a particular injury. If two or more persons unite in an act that violates another person's right, then all of those persons are jointly liable for the acts of each of them; the law does not require the injured party to establish how much of the injury was done by each particular defendant that you find liable. Thus, if you find that the defendants who you find to be liable acted jointly, then you may treat them jointly for purposes of assessing damages. You may find that one or more of the defendants are liable based on the use of improper physical force against the plaintiff, and that one or more additional defendants are liable

for the same injuries because of a failure to intervene to stop the use of force, despite a reasonable opportunity to do so.

If you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without breaking that figure down into individual percentages. You must, however, if you find punitive damages warranted, properly assess them separately against the individual defendants you find liable for punitive damages.[16]

[16] *McFadden v. Sanchez*, 710 F.2d 907, 914 n.6 (2d Cir. 1983); *Gagnon v. Ball*, 696 F.2d 17, 19 n.2 (2d Cir. 1982); *City of Richmond, VA v. Madison Management Group*, 918 F.2d 438,. 461 (4th Cir. 1990).

CONCLUSION

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. This does not mean that the foreperson's vote is entitled to any greater weight than the vote of any other juror. Your job as jurors is to reach a fair conclusion from the law and evidence. When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other. You must deliberate with a view to reaching an agreement, but only if you can do so without violating your individual judgment and conscience. Remember in your deliberations that the dispute between the parties is for them no passing matter. The parties and the court are relying on you to give full and conscientious consideration to the issues and the evidence before you.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony or instructions read to you.

Should you desire to communicate with the court during your deliberation, please put your message or question in writing. The foreperson should sign the note and pass it to the Marshall who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom. I caution you, however, that in your communications with the court, you should never state your numerical division.

Once you have reached a unanimous verdict and the verdict form has been completed, please inform the Marshall that a verdict has been reached. Your verdict on each claim for relief must be unanimous, and it must also represent the considered judgment of each juror.

During your deliberations, do not hesitate to re-examine your views and change your mind. Do not however, surrender your honest convictions because of the opinion of a fellow juror or for the purpose of returning a verdict. Remember you are not partisans. Your duty is to seek the truth from the evidence presented to you.

Once you have reached a unanimous verdict, your foreperson should fill in the verdict form, date and sign it, and inform the Marshall that a verdict has been reached.

Verdict forms have been prepared for you. You should review them after retiring to the jury room.

DATED: July 9, 2007

HISCOCK & BARCLAY, LLP

By: */s/ Douglas J. Nash*
Douglas J. Nash
Bar Roll No. 511889

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LUIS ROSALES,

Plaintiff,

9:03-CV-601
(LES)

-against-

LIEUTENANT QUINN; *et al.*

Defendants.

DEFENDANTS' SUPPLEMENTAL PROPOSED JURY CHARGES

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Second Element - Unlawful Use of Force Claims

With respect to plaintiff's claims that defendant Pfleuger used excessive force on him on February 17 and 18, 2003, and defendants Martens and Calhoun used excessive force on May 8, 2003, plaintiff must show, by a preponderance of the evidence, that the defendants intentionally committed the acts alleged. Plaintiff must also show that those acts violated his constitutional rights under the Eighth Amendment.

An unlawful use of physical force by a prison official against a prisoner may give rise to a federal constitutional claim. Even if some evidence in this case established physical contact between on of the defendants and the plaintiff which resulted in serious personal injury to the plaintiff is not proof in and of itself that the defendant acted beyond his lawful authority. The defendants, as law enforcement officers, had the lawful authority to use such physical force as may have been reasonably necessary to enforce compliance with proper instructions and to protect other prisoners and himself, as well, from physical harm at the hands of any prisoner, including the plaintiff himself.

Thus, even if you find from a preponderance of the evidence that certain of the acts alleged by the plaintiff were, in fact, knowingly done by a defendant, you should still find for the defendant if you also find that there was a plausible basis for the official's belief that the degree of force was necessary.

Not every push, shove or striking, even if it is hard, and even if it may later seem to be unnecessary while you sit here in court, is a constitutional violation. You must determine whether the defendant used force against plaintiff "in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of

causing harm." The Eighth Amendment excludes from its coverage "*de minimis* uses of physical force" provided they are not of a sort "repugnant to the conscience of mankind." The use of force in the course of a prison security measure does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree for force applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

To determine if a constitutional violation has occurred you must consider the circumstances surrounding the use of force, the need for decisive action by the defendant, the need for the use of force, the amount of force actually used and the extent of the injury inflicted. In evaluating the plaintiff's claims, you may also consider whether the plaintiff alleges any injury and whether the medical records support this.

If you do not find that defendants Pfleuger, Martens or Calhoun used excessive force against the plaintiff, then you must find for the defendants on that issue. If you find that one or more of those defendants did in fact use excessive force, then you must find in favor of the plaintiff.

Authority: *Whitley v. Albers*, 475 U.S. 312 (1986); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033 (1973); *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992).

Dated: July 26, 2007
Syracuse, New York

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Plaintiff's Pro Bono Trial Counsel

Luis Rosales (via U.S. Mail)
Plaintiff, *pro se*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LUIS ROSALES,

Plaintiff,

9:03-CV-601
(LES)

-against-

LIEUTENANT QUINN; *et al.*

Defendants.

DEFENDANTS' PROPOSED JURY CHARGES

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General Introduction/
Province of the Court and Jury

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the court in these instructions, you are of course to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 71.01 (4th ed. 1987)

Multiple Defendants

Each defendant is entitled to a fair consideration of his own defense. Now, keep in mind here that each of these defendants is chargeable only for his own individual actions. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 71.06 (4th ed. 1987); *Vetters v. Berry*, 575 F.2d 90, 95 (6th Cir. 1978)

State Not a Defendant

The State of New York is not a defendant in this case. This is a suit against individuals.

Authority: *Wilson v. Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971), *aff'd*, 463 F.2d 109 (3d Cir. 1972).

Defendant Must Be Personally Involved

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to each defendant in the case. As I have told you, you must consider each defendant individually. If I have instructed you to consider evidence only against one particular defendant you may not consider that evidence in considering whether plaintiff has met his burden of proving his claim against another defendant.

The law requires that a defendant be personally involved in conduct that deprived another person of his constitutional rights before that defendant may be held liable for such deprivation. You, therefore, may not find one defendant liable for the actions taken by another defendant; nor may you, in consideration of damages, if you reach the question, award damages against a defendant based on actions taken by another individual, whether or not the individual is a party in this case. You may not hold a defendant liable merely because of the position he holds.

Authority: *McKinnon v. Patterson*, 568 F.2d 930 (2d Cir 1977), *cert denied*, 434 US 1087 (1978); 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 71.03, 71.07 (4th ed. 1987).

Burden of Proof--Preponderance of Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 72.01 (4th ed. 1987).

Inferences Defined - Presumption of Regularity - Ordinary Course of Business - Obedience to Law

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 72.04 (4th ed. 1987).

Evidence--Direct and Indirect or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence--the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of *all* evidence in the case, both direct and circumstantial.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 72.03 (4th ed. 1987); Some Suggested General Instructions for Federal Civil Cases, Civ. 2.02, 28 F.R.D. 401, 416.

Objections--Stricken Testimony--Sidebar Conferences

As you know, the parties' counsel have made a number of objections throughout the trial, as they are required to do. The Court's rulings on objections made by counsel are not to be considered by you in any respect. Counsel have not only the right, but the duty, to make whatever legal objections there may be to the admission of evidence. And while interruptions of the testimony to voice and discuss objections may have been frustrating to you at times, you must recognize that the law provides for such a procedure in order to ensure a fair trial.

When the Court has sustained an objection, you must disregard the question and may not speculate as to what the answer would have been. Similarly, if the Court has overruled an objection and permitted a question, the Court has not expressed any opinion as to the weight or effect of the evidence.

Whenever testimony was stricken, the reason is of no concern to you, and such stricken testimony must be disregarded by you.

From time to time during the trial, "sidebar" conferences were held out of your hearing. They related to matters of law which do not concern you, and these conferences or their purposes may not enter into your consideration.

Admissions and Pleadings and Stipulated Facts

Prior to the trial of this case, the parties filed written statements of their claims, known as the pleadings. Statements in the pleadings are not evidence, but simply set forth the facts that the parties claim to exist.

[IF APPLICABLE:]

Before and during the trial of this case the parties entered into certain stipulations or agreements in which they agreed that certain facts could be taken as true without further proof. By this procedure it is often possible to save time.

Since the parties have so agreed, you are to take such facts as true for purposes of this case.

Authority: Adapted from 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § § 70.03, 70.04 (4th ed. 1987).

Credibility of Witnesses

When I explained the burden of proof a moment ago, you may recall that I said that plaintiff is required to prove certain elements by a preponderance of the *credible* evidence. Credible evidence means believable evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. That is, you must determine whether and to what extent you believe or do not believe each of the witnesses.

There are, however, various guidelines or factors to consider which may assist you in making these determinations of credibility. You start by using your everyday common sense. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. You should consider the candor, accuracy of recollection, appearance, background, and demeanor of each witness on the stand, to help you determine his or her frankness or lack of frankness in testifying. You may and should consider whether a witness's testimony is supported by or contradicted by other credible and believable evidence. Consider also the certainty and clarity with which each witness testifies as to given points. Consider any possible motive or lack of motive the various witnesses may have had for testifying in the way they did; any interest or lack of interest in the outcome of the trial which the witnesses may have; and any relation the witness may bear to either side of the case. Consider any inconsistencies between the testimony of the witness and any previous statements that the witness may have made. Consider the

factual probability or improbability of the witness's testimony and consider the witness's opportunity for observation or for acquisition of information with respect to the matter about which the witness has testified. In weighing the effect of any discrepancy, always consider whether the discrepancy pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

Evidence that plaintiff or any witness has been convicted of a crime may be considered in weighing credibility.

Authority: Adapted from 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 73.01, 73.05 (4th ed. 1987); Federal Rules of Evidence 609.

Impeachment - Inconsistent Statements or Conduct

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness, or give it such weight as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 73.04 (4th ed. 1987).

All Available Evidence Need Not be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Authority: 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions § 73.11 (4th ed. 1987).

Elements of a Claim Under Section 1983:

Plaintiff claims a right to recovery under Section 1983 of Title 42 of the United States Code which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state, subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

Plaintiff claims a deprivation of his rights under the First Amendment to the United States Constitution. The First Amendment provides in relevant part that "Congress shall make no law ... abridging the ... right of the people ... to petition the Government for a redress of grievances."

In order to prove this claim, the burden is upon the plaintiff to establish by a preponderance of the evidence the following three propositions:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and

Third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.

First Element - Action Under Color of State Law

Acts are done "under color of ... law" of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of any law," however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise his official powers.

Adapted from: Devitt & Blackmar, § 103.04.

Second Element - Generally

The second element of plaintiff's claim is that he was deprived of his federal rights by one or more of the defendants. In order for plaintiff to establish the second element of his claim, he must prove three things by a preponderance of the evidence: 1) that the defendants committed the acts alleged by plaintiff; 2) that those acts caused the plaintiff to suffer the loss of a federal right; and, 3) that, in performing the alleged acts the defendants acted intentionally.

An act is done intentionally if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. In determining whether a defendant acted knowingly or recklessly, you should remember that while witnesses may see and hear and be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

Second Element - First Amendment Retaliation Claim

The First Amendment to the United States Constitution permits all persons, including the plaintiff, to petition the government, without fear of retaliation. A plaintiff asserting a First Amendment retaliation claim must establish: (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action. In addition, plaintiff must show, by a preponderance of the evidence, that the defendants intentionally committed the alleged acts.

You must first determine whether the plaintiff engaged in protected speech or conduct that entitled him to First Amendment protection. In this case, the plaintiff asserts that the speech consisted of written and verbal complaints he filed with Auburn Correctional Facility staff. If you find that plaintiff's speech did not entitle him to First Amendment protection, then you must find in favor of the defendants and your deliberations are concluded. If you find that plaintiff's speech did entitle him to First Amendment protection, then your deliberations must continue.

If you continue your deliberations, you must next consider whether or not the defendants subjected the plaintiff to an adverse action. In order to establish an adverse action, a plaintiff must prove that the defendants subjected him to "conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." Otherwise, the retaliatory act is insignificant and not constitutionally protected. If the plaintiff cannot demonstrate a change in his behavior as a

result of the alleged retaliation, he cannot prove a subjective chilling of his constitutional rights and would not be able to recover in this action. In addition, the plaintiff must show, by a preponderance of the evidence, that the alleged actions were in fact taken by the defendants and that the alleged actions were intentionally taken by the defendants.

If you find that the plaintiff was not subjected to an adverse action by the defendants, then you must find for the defendants and cease your deliberations. If you find that one or more of the defendants subjected plaintiff to an adverse action, then your deliberations continue.

If you continue your deliberations, you must next determine whether or not there was a causal connection between the protected conduct and the adverse action. In other words, in order to prove his First Amendment retaliation claim, the plaintiff must show by a preponderance of the evidence, that retaliation for the exercise of the plaintiff's constitutional rights was a substantial or motivating factor in the alleged actions taken by the defendants. If you find that the plaintiff has not show by a preponderance of the evidence that retaliation for the exercise of the plaintiff's constitutional rights was a substantial or motivating factor in the alleged actions taken by the defendants, then you must find for the defendants and cease your deliberations. However, if you find that plaintiff has show by a preponderance of the evidence that retaliation for the exercise of the plaintiff's constitutional rights was a substantial or motivating factor in the alleged actions taken by one or more of the defendants, then your deliberations continue.

Now, if you find that the defendants intentionally acted as plaintiff alleges, and if

you find the plaintiff's complaints were a substantial or motivating factor in the actions taken by the defendants, there is still another factor you must consider - whether the defendants would have taken the same action even in the absence of the plaintiff's constitutionally protected conduct. In other words, even if prison officials such as the defendants actions were based, in part upon and improper retaliatory motive, defendants cannot be held to have violated an inmate's constitutional rights if they can show, by a preponderance of the evidence, that they would have taken the same action even in the absence of the plaintiff's complaints to prison staff. However, it is only after the plaintiff has first proven by a preponderance of the evidence both that defendants intentionally did the acts alleged, and that the complaints were a substantial or motivating factor in the defendants decision to act as plaintiff has alleged. Furthermore, the defendants can defeat a First Amendment claim by showing they would have reached the same result or taken the same action in the absence of the protected conduct.

Therefore, if you find that the defendants would have taken the adverse action even in the absence of the improper retaliatory motive, then you must find for the defendants. However, if you find that the defendants would not have taken the adverse action even in the absence of the improper reason, then you must find for the plaintiff.

Authority: *Dawes v. Coughlin*, 239 F.3d 489, 492 (2d Cir. 2001); *Freeman v. Rideout*, 808 F2d 949, 951 (2d Cir 1986); *Franco v. Kelly*, 854 F2d 584 (2d Cir 1988); *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274 (1988); *Lowrance v. Actyl*, 20 F3d 529 (2d Cir 1994); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Lowrance v. Achtyl*, 20 F.3d 529, 535 (2d Cir. 1994).

Third Element - Proximate Cause of Injury

The plaintiff must also show by a preponderance of the evidence that the defendants' acts and conduct were the proximate cause of the plaintiff's alleged injuries.

A proximate cause is one that in a natural course, a continuous sequence, unbroken by any intervening cause, produces the injury, and without which the injury would not have occurred.

Stated another way, before plaintiff may recover damages for any injuries, he must first show by a preponderance of the evidence that such injury would not have come about were it not for a defendant's conduct. But even if he shows that, he must then show by a preponderance of the evidence that the injury in question, although caused by a defendant's conduct, was not also caused by some other intervening conduct other than the defendant's conduct.

An intervening cause is one that constitutes a new and independent source of plaintiff's injury. A new factor of plaintiff's injury which is not foreseeable by defendants is an intervening cause which prevents a defendant from being liable for plaintiff's injury even if the defendant's conduct was one of the causes of these injuries.

If you find that any one of the three elements of plaintiff's claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendants.

Liability

If you determine that any of the defendants deprived the plaintiff of his constitutional rights, your verdict will be in favor of the plaintiff and you will go on to consider the damages to which the plaintiff is entitled. If you determine that the defendants did *not* deprive the plaintiff of his constitutional rights, your verdict will be in favor of the defendants. I remind you that your verdict, either for the plaintiff or for the defendants, must be unanimous.

Qualified Immunity

[In light of the Second Circuit's decision in *Stephenson v. Dingler*, 332 F.3d 68 (2d Cir. 2003), the defendants submit that the issue of qualified immunity is for the Court to decide. In the event the Court disagrees, defendants propose the following language for a qualified immunity charge.]

If you find the plaintiff has sustained his burden of proving all of these elements, you must then consider whether any or all of the defendants have established their affirmative defense of qualified immunity. For even if you find that a defendant's conduct violated plaintiff's rights, the defendants still may not be liable to the plaintiff.

A defendant is entitled to a qualified immunity if, at time he committed the acts and omissions alleged in the complaint, he did not know or could not be expected to know that what he did was in violation of plaintiff's constitutional rights. In other words, two factors must be found to exist. First, the defendant has a qualified immunity if he did not know that what the did was in violation of the plaintiff's constitutional rights and, secondly, if a public official could not have been expected at the time to know that the conduct was in violation of plaintiff's constitutional rights. Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct may violate some administrative regulation.

In deciding whether a defendant either knew or should have known that his conduct violated plaintiff's constitutional rights, you may consider the nature of the defendant's official duties, the character of his official position, the information that was

known to the defendant or not known to him, and the events which confronted him. You should not, however, consider what the defendant's subjective intent was even if you believe it was to harm the plaintiff. You should instead ask yourself what a reasonable official in the defendant's situation would have believed about the legality of his conduct.

If you find that a defendant did not know that his conduct violated plaintiff's constitutional rights and that a reasonable official in the defendant's situation would have believed his conduct to be lawful, then this element will be satisfied. A defendant has the burden of proving that he neither knew nor should have known that his actions violated federal law. If a defendant establishes by a preponderance of the evidence that he neither knew nor should have known that his actions violated plaintiff's constitutional rights, then you must return a verdict for the defendant even though you may have previously found that the defendant violated the plaintiff's rights while acting under color of state law.

Authority: *Stephenson v. Dingler*, 332 F.3d 68 (2d Cir. 2003), *Whitley v. Albers*, 475 U.S. 312 (1986); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033 (1973); *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992); *Martinez v. California*, 444 U.S. 277 (1980); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Beverly v. Connor*, 330 F. Supp. 18 (S.D. Ga. 1971); *Taylor v. Allis-Chalmers Manufacturing Company*, 320 F. Supp. 1381 (E.D. Pa. 1969), *aff'd*, 436 F.2d 416 (3d Cir. 1970); *Johnson v. Geer*, 477 F.2d 101 (5th Cir. 1973); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 107 S. Ct. 3034 (1987); *Davis v. Scherer*, 468 U.S. 183 (1984).

Damages

If your verdict is in favor of the plaintiff you must go on to consider the damages to which the plaintiff is entitled. If and only if you find that any defendant violated plaintiff's First Amendment rights under the standards I have described to you, then you should proceed to consider the question of damages. The fact that I so instruct you does not mean that I think you should award any damages, and does not mean that you must award any. That is entirely for you to decide under the standards I have described and will describe to you.

You must first consider whether or not the plaintiff has established that any of the defendant's actions caused him a physical injury. If you determine that the defendants' actions did not cause the plaintiff to suffer a physical injury, then you may only award the plaintiff nominal damages in the amount of $1.00. However, if you determine that the plaintiff did suffer a physical injury, then you may go on to calculate the amount of damages to award the plaintiff.

For each claim on which a defendant is liable, plaintiff is entitled to recover an amount that will reasonably compensate him for the *actual* loss and damage which he has proved by a preponderance of the evidence that he has suffered as a *proximate* result of that defendant's unlawful conduct. You are not permitted to award speculative damages.

A plaintiff is not automatically entitled to recover compensatory damages solely by virtue of the fact - if you should find it to be a fact - that his constitutional rights were violated. He must also demonstrate that the constitutional deprivation caused him some

actual injury. A plaintiff in a civil rights action such as this is not permitted to recover damages based upon the abstract value or importance of a constitutional right; rather, such an award may only compensate a plaintiff for an actual injury that he sustained, such as medical expenses (if any) and pain and suffering (if any).

If you find that plaintiff's First Amendment rights were violated, but he did not sustain any actual or compensatory damages as a result, you may then award the plaintiff nominal damages in the amount of $1.00.

You should not award compensatory damages more than once for the same injury. The plaintiff is only entitled to be made whole again, not to recover more than he lost.

You must also be careful to impose damages solely upon the defendant or defendants who you find to be liable on that claim. Although there are five (5) defendants in this case, it does not follow that if one is liable, all are liable as well. Each defendant is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other defendant. If you decide that any of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without breaking that figure down into individual percentages.

Authority: Adapted from 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions ch. 85 (4th ed. 1987); *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247, 253-67 (1978); *Smith v. Coughlin*, 698 F.2d 112 (2d Cir. 1983); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (as to nominal damages); 42 U.S.C. § 1997e(e); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Zehner v. Trigg*, 133 F 3d. 459, 462 (7th Cir. 1997) *affg.* 952 F. Supp 1318 (S.D. Ind. 1997); *Wright v. Dee*, 54 F.Supp.2d 199, 207 (S.D.N.Y 1999); *McFadden v. Sanchez*, 710 F.2d 907, 914 n. 6 (2d. Cir. 1983); *Gannon v. Bell*, 696 F.2d 17, 19, n. 2 (2d Cir. 1982).

Requested Punitive Damage Instruction

[Defendants contend that the evidence does not warrant the submission of the punitive damages issue to the jury. Therefore, the jury should not be charged on punitive damages. In the event the Court rejects this request, defendants propose the following language for a punitive damages charge]

Plaintiff has made a claim for punitive damages in this case. Punitive damages are not favored in law and are to be allowed only with caution and within narrow limits. They are to be awarded in cases brought under § 1983 only if you determine that plaintiff proved, by a preponderance of the evidence, that the conduct of the defendants was motivated by evil motive or intent or where it involved reckless indifference to the constitutionally protected rights of others. Punitive damages may be awarded only to deter or punish violations of constitutional rights. Punitive damages are awarded at the discretion of the jury in order to punish a defendant for extreme or outrageous conduct, or to prevent or deter a defendant or others in his position from engaging in such conduct in the future.

Provocation by plaintiff, while not a defense, may be considered in mitigation of damages, and to negate the award of punitive damages.

If you find that the plaintiff has failed to sustain the burden of showing that punitive damages are appropriate, you should indicate this finding on the verdict from.

If you decide to award punitive damages against either of the defendants in this case, we will reconvene for a further hearing so that you may consider the amount of

personal assets and liabilities of such individual defendant in fixing the amount of punitive damages which you may opt to assess.

Authority: *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978); *McFadden v. Sanchez*, 710 F.2d 907, 912-14 (2d Cir), *cert. denied*, 464 U.S. 961 (1983); *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Carey v. Piphus*, 435 U.S. 247, 257 n. 11 (1978); *Gagne v. Town of Enfield*, 734 F.2d 902 (2d Cir. 1984); 3 E. Devitt, C. Blackmar, M. Wolff, Federal Jury Practice and Instructions §§ 104.07, 105.03 (4th ed. 1987) (adapted).

Dated: July 9, 2007
Syracuse, New York

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Plaintiff, *pro se*

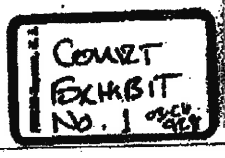
M.M. Farrakhan (Plaintiff)

v.

J. Burge,
M.L. Bradt,
C. Gunnerson, and
R. Hewit
(Defendants)

No. 03-CV-928

JURY INSTRUCTIONS



INTRODUCTION

Members of the jury, now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law. Rather, you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

The parties have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the parties and that stated by the Court in these instructions, you are, of course, to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. Rather, it is yours. You must perform that function without bias or prejudice as to any party. The law does not permit you to be governed by sympathy,

prejudice or public opinion. All parties expect that you will, carefully and impartially, consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Statements and arguments of the parties are not evidence in the case. If, however, the parties stipulate, or agree, to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proven.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded. If a party asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact. The party's statements are not evidence.

The case has been terminated as to defendant Wither. You should not concern

yourself with the disposition as to him but should consider the issues between the plaintiff and the remaining defendants in accordance with these instructions and the evidence in the case.

In this case, neither the State of New York nor the New York State Department of Correctional Services are defendants. This is a suit against four individual defendants. Although there are four defendants in this action, it does not follow, from that fact alone, that if one is liable, the others are also liable. Each defendant is entitled to a fair consideration of his own defense. A defendant is not to be prejudiced by the fact, if it should become a fact, that you find against another defendant. Unless otherwise stated, all instructions given you govern the case as to each defendant.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law. All persons are to be dealt with as equals in a court of justice.

BURDEN AND STANDARD OF PROOF

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, as to any defendant, you should find for that defendant.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief, that what is sought to be proven, is more likely true than not true. This rule does not, of course, require proof to any absolute certainty. Proof to an absolute certainty is seldom possible in any case. In determining whether any fact in issue has been proven by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

EVIDENCE

There are, generally speaking, two types of evidence from which you may properly find the truth as to the facts of the case. One is direct evidence -- such as the testimony of any eye witness. The other is indirect, or circumstantial, evidence -- the proof of a chain of circumstances pointing to the existence, or nonexistence, of certain facts. By way of example, assume that the cookie jar in a kitchen has been raided and you must determine who took the cookies. The brother says that he saw his sister take the cookies. That is direct evidence, and you must determine to what extent, if any, the brother's statement is worthy of belief. You also learn that cookie crumbs lead from the cookie jar to the sister's room. This is indirect or circumstantial evidence, and you must determine whether you can conclude from the fact of the cookie crumbs that the sister took the cookies.

As a general rule, the law makes no distinction between direct or circumstantial evidence. The law simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You are to consider only the evidence in the case. But, in your consideration of the

evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw from facts, which you find have been proven, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions, or conclusions, which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight that their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witnesses' intelligence, motive, state

of mind, and demeanor, or manner while on the stand. Consider the witnesses' ability to observe the matters as to which he or she has testified. Consider whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case. Consider the manner in which the witness might be affected by the verdict. Consider the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail. Also consider whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you think it deserves. You may accept or reject the testimony of any

witness in whole or in part.

A witness may be discredited, or impeached, in different ways. These include:

1. By contradictory evidence; or

2. By evidence that at some other time, the witness has said or done something, or has failed to say or do something, which is inconsistent with the witnesses' present testimony.

If you believe any witness has been impeached, and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at the trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

SECTION 1983

A. Essential Elements

The plaintiff has brought this lawsuit alleging a violation of his federal civil rights. The federal law that provides a remedy for individuals who have been deprived of constitutional rights is known as section 1983 of Title 42 of the United States Code and states in part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state ..., subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... for redress.

I shall instruct you in detail regarding the elements of the plaintiff's claim under section 1983. However, at this point, bear in mind, as I have indicated before, that the plaintiff has the burden of proving each and every element of the claim by a preponderance of the evidence as against the defendants.

To establish a claim under section 1983, the plaintiff must prove each of the following:

1. That the conduct complained of was committed by a person or persons acting under color of state law;

2. That this conduct deprived the plaintiff of rights secured by the Constitution and laws of the United States; and

3. That this conduct was a proximate cause of the injuries and consequent damages sustained by the plaintiff.

Because of the nature of this action, and because of the evidence that has been presented, I instruct you that if you find the conduct was in fact committed by any defendant, it was committed under the color of state law. Therefore, you need not decide the first element. Nonetheless, you must decide whether plaintiff has proven the other two elements of the claim.

In considering the second element of the plaintiff's claim that the plaintiff was deprived of a federal right, the plaintiff must establish by a preponderance of the evidence

that the defendant under consideration committed the acts alleged, that those acts resulted in a loss of a federal right, and that in performing those acts the defendant under consideration acted with deliberate indifference.

B. Failure to Protect

Prison officials have a duty to protect inmates from violence at the hands of other prisoners. In this case, the plaintiff claims that the defendants violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to a substantial risk of serious harm to the plaintiff. Specifically, the plaintiff] claims that on August 14, 2002, the defendants failed to protect him from an asault by other inmates at the Auburn Correctional Facility.

In order to establish his claim for violation of the Eighth Amendment, the plaintiff must prove each of the following three things by a preponderance of the evidence:

FIRST: There was a substantial risk of serious harm to the plaintiff — namely, a substantial risk that the plaintiff would be attacked by other inmates.

SECOND: the defendant under consideration was deliberately indifferent to that risk.

THIRD: The plaintiff would have suffered less harm if the defendant under consideration had not been deliberately indifferent.

As to the second of these three requirements, to show deliberate indifference, the plaintiff must show that the defendant under consideration knew of a substantial risk that the plaintiff would be attacked, and that the defendant under consideration disregarded that risk by failing to take reasonable measures to deal with it. The plaintiff must show that the defendant under consideration actually knew of the risk. However, the plaintiff need not prove that the defendant under consideration knew precisely which inmate would attack the plaintiff, so long as the plaintiff shows that the defendant under consideration knew that there was an obvious, substantial risk to the plaintiff's safety.

A defendant may take, or fail to take, such action either personally or in his capacity as a supervisor of others. As a supervisor, a defendant under consideration

may have failed to protect the plaintiff, for example, if he was grossly negligent in managing subordinates who committed the violation.

If a prison official knew of facts that he strongly suspected to be true, and those facts indicated a substantial risk of serious harm to an inmate, the official cannot escape liability merely because he refused to take the opportunity to confirm those facts. However, you must keep in mind that mere carelessness or negligence is not enough to make an official liable. It is not enough for the plaintiff to show that a reasonable person would have known, or that the defendant under consideration should have known, of the risk to the plaintiff. The plaintiff must show that the defendant under consideration actually knew of the risk.

If the plaintiff] proves that there was a risk of serious harm to him and that the risk was obvious, you are entitled to infer from the obviousness of the risk that the defendant under consideration knew of the risk. However, the defendants claim that even if there was an obvious risk, they were each unaware of that risk. If you find that the defendant under consideration was unaware of the risk, then you must find that he

was not deliberately indifferent.

C. Proximate Cause

As to the third element, an injury or damage is proximately caused by an act, whenever it appears from the evidence in the case that the act played a substantial part in bringing about, or actually causing, the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

DAMAGES

If you find in favor of the plaintiff, then you should award the plaintiff such an amount of money as you believe will fairly and justly compensate for any damages you believe the plaintiff sustained as a result of the injuries and damages established by the evidence.

The fact that I am instructing you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your

verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

If you return a verdict for the plaintiff, then you must award such sum of money as you believe will fairly and justly compensate for any injury you believe the plaintiff actually sustained as a direct consequence of the conduct of any defendant.

You shall award actual damages only for those injuries which you find that plaintiff has proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by any defendant you have found to be liable here. That is, you may not simply award actual damages for any injury suffered by the plaintiff -- you must award actual damages only for those injuries that are a direct result of actions by any defendant found to be liable and that are a direct result of conduct by such defendant.

Actual damages must not be based on speculation or sympathy. They must be

based on the evidence presented at trial and only on that evidence.

I have said that you may award damages only for those injuries which you find the plaintiff has proven by a preponderance of evidence to have been the direct result of conduct by any defendant here. You must distinguish between, on the one hand, the existence of a violation of the plaintiff's rights and, on the other hand, the existence of injuries naturally resulting from that violation. Thus, even if you find that any defendant deprived the plaintiff of his rights here, you must ask whether the plaintiff has proven by a preponderance of evidence that the deprivation caused the damages claimed to have been suffered.

If you find that the plaintiff was injured as a natural consequence of conduct by any defendant here, you must determine whether the plaintiff could thereafter have done something to lessen the harm that he suffered. The burden is on a defendant to prove, by a preponderance of evidence, that the plaintiff could have lessened the harm that was done to him, and that he failed to do so. If a defendant convinces you that the plaintiff could have reduced the harm done to him, but failed to do so, the plaintiff is

entitled only to damages sufficient to compensate for the injury that the plaintiff would have suffered if he had taken appropriate action to reduce the harm done to him.

Punitive Damages

If you award the plaintiff actual damages, then you may also make him a separate and additional award of exemplary, or punitive, damages. You may also make an award of punitive damages even though you find that plaintiff has failed to establish actual damages. Punitive damages are awarded in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, or to deter or prevent a defendant, and other like him, from committing such conduct in the future.

You may award the plaintiff punitive damages if you find that the acts or omissions of a defendant were done maliciously or wantonly. An act or failure to act is maliciously done if it is prompted by ill will or spite towards the injured person. An act, or failure to act, is wanton if done in a reckless or callous disregard of, or indifference to, the rights of the injured person. The plaintiff has the burden of proving, by a

preponderance of the evidence, that a defendant acted maliciously or wantonly with regard to the plaintiff's rights.

An intent to injure exists when a defendant has a conscious desire to violate federal rights of which he is aware, or when a defendant has a conscious desire to injure the plaintiff in a manner he knows to be unlawful. A conscious desire to perform the physical acts that caused the plaintiff's injury, or to fail to undertake certain acts, does not, by itself, establish that a defendant has a conscious desire to violate rights or injure the plaintiff unlawfully.

If you find by a preponderance of the evidence that a defendant acted with malicious intent to violate the plaintiff's federal rights, or unlawfully injure him, or if you find that a defendant acted with a callous or reckless disregard of the plaintiff's rights, then you may award punitive damages. An award of punitive damages, however, is discretionary. That is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.

In making this decision, you should consider the underlying purpose of punitive damages. Punitive damages are awarded, in your discretion, to punish a defendant for outrageous conduct or to deter him, and others like him, from performing similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether a defendant may be adequately punished by an award of actual damages only, or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish the wrongful conduct. You should also consider whether actual damages, standing alone, are likely to deter or prevent a defendant from again performing any wrongful acts he may have performed, or whether punitive damages are necessary to provide deterrence. Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts, similar to those a defendant may have committed.

VERDICT

The verdict must represent the considered judgment of each juror. In order to

return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a marshal signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or orally here in open court.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourselves in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony or instructions read to you. I am compelled to remind you, though, that this trial has lasted only a few days and the testimony and instructions should still be fresh in your minds. Therefore, before requesting to have testimony reread or to be re-instructed on any point of law, please draw upon your own recollections, both individually and collectively, before doing so.

You will note from the oath about to be taken by the marshal that they too, as

well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even the Court -- how the jury stands, numerically or otherwise, on the questions before you, unless after you have reached a unanimous verdict.

Upon retiring to the jury room, you will select one of your numbers to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court. A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

The special verdict reads as follows:

[READ SPECIAL VERDICT FORM]

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided under

each question.

Upon reaching your unanimous verdict, the foreperson will date and sign the verdict form and you will then return with it to the courtroom.

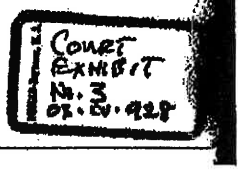
M.M. Farrakhan (Plaintiff)

v.

J. Burge,
M.L. Bradt,
C. Gunnerson, and
R. Hewit
(Defendants)

No. 03-CV-928

VERDICT FORM



1. As to each of the defendants listed below, do you find by a preponderance of evidence that with deliberate indifference he failed to protect the plaintiff from a substantial risk of serious harm on August 14, 2002?

J. Burge	__Yes	√ No
M.L. Bradt	__Yes	√ No
C. Gummerson	__Yes	√ No
R. Hewit	__Yes	√ No

If your answer as to all four defendants is "No," you need not answer any further questions and your verdict is complete.

If your answer as to any defendant is "Yes," you must answer the following questions.

---

2. What amount of compensatory (actual) damages do you award?

$_____

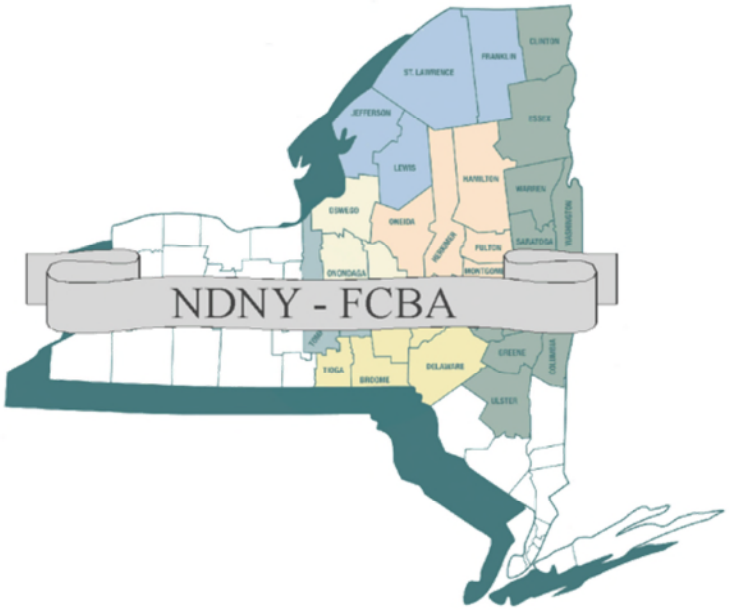
---

3. Without stating any amount, do you award punitive (exemplary) damages as to any defendant whom you found liable in Question No. 1?

J. Burge	__Yes	__No
M.L. Bredt	__Yes	__No
C. Gummerson	__Yes	__No
R. Hewit	__Yes	__No

DATED: December 7, 2006

JURY FOREPERSON



Ethical Issues Arising During the Handling of a Prisoner Case in the United States District Court for the Northern District of New York

October 2 and 4, 2019

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GENERAL PRINCIPLES

Under RPC 1.1(a), lawyers must provide competent representation to a client. Competent representation means that counsel must possess the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. In other words, when representing a prisoner (or any other client), a lawyer must be fully prepared and should not accept the assignment if the lawyer is not competent in the area or cannot become sufficiently familiar to raise and address all areas likely to arise in connection with the representation.

In this regard, Comment[1] 2 to RPC 1.1 is instructive:

> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

SCOPE OF REPRESENTATION

Successfully representing a prisoner (or any other client) requires communication as to the possible and expected results of the matter. Using a proper letter of engagement

[1] The RPC do not have "official" Comments. However, the New York State Bar Association's Committee on Standards of Attorney Conduct issued comments prior to the approval of the RPC by the Appellate Divisions. These comments, with amendments through June 1, 2018, are extremely helpful and may be found on the New York State Bar Association's web site.

[Appendix I] can help to manage expectations. If the client has unreasonable expectations, they must be addressed in writing with an explanation of the basis for your opinion (*e.g.*, explaining the concept of nominal damages in a civil rights action if no actual damages have been sustained or why punitive damages are not available against a municipality based upon Supreme Court precedent, etc.).

It is essential to properly document all issues and matters of significance. A basic rule of thumb for all aspects of the practice of law should always be "if it is not in writing, it never happened." Proper and timely communication with a client is mandated by RPC 1.4.

You must explain how often and in what manner you will communicate with the client and be wary that incarcerated prisoners may expect more of you than is reasonable in the circumstances. Be wary of the collect-calling client. N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 1144 (2018) permits lawyers to "place reasonable limitations on the timing and manner of client communications. [And] [w]hen there is a breakdown of communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client." [**Appendix II**].

Proper and effective communication between a lawyer and a client has many benefits to our clients, the firm as a whole, and to our individual lawyers. In order for any engagement to be successful, the client and the lawyer must have a full understanding of what each expects of the other and that there be no surprises. Clients hate surprises.

Clients should never be surprised by what occurs in the course of the engagement because their lawyers should be keeping them advised on an ongoing basis. Clients who are surprised by anything can properly wonder why their lawyer did not tell them that the "surprise" was a possibility.

This especially so when there is a negative result. Not explaining to clients that they can lose a case that they feel strongly about is asking for trouble.

> **Client to Lawyer**: What do you think of our chances in this case?
>
> **Lawyer to Client**: Our arguments are very strong and the facts are fully supportive of the claims that we are bringing. Unfortunately, there is no way to guarantee that we will prevail. We can expect that the defendants will make a motion to dismiss the complaint that should, based on the law, be denied. If the motion is denied on qualified immunity grounds, there could be an appeal which could delay the case for a year. I know that you told me that you were not interested in a settlement, but if the subject comes up, we really need to take a hard look at the merits and balance that against the delay that will be encountered in the lawsuit.

A client with unchecked unreasonable expectations is a problem waiting to happen. Similarly, having a client be surprised about how long an engagement may take is also something that can be avoided by proper communication.

DIVISION OF RESPONSIBILITY BETWEEN CLIENT AND LAWYER

RPC 1.2(a) provides in pertinent part that a lawyer "shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter."

RPC 1.4(a)(1)(iii) requires that a lawyer shall promptly inform the client of all material developments in the matter including settlement offers. The decision whether to settle is for the client and not the lawyer (although the lawyer should discuss the pros and cons of every settlement proposal so that the client can make an informed decision). Comment 5 to RPC 1.2 provides in pertinent part as follows:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation.

The lawyer must also explain the obligation of counsel in a litigated matter to only advance arguments that have a factual or legal basis. *See generally* RPC 3.1. The

requirement of reporting false testimony and evidence is now mandatory under RPC 3.3. It has been said that the duty of candor to a tribunal now trumps the attorney-client privilege. *See* RPC 3.3(c) (the duty of candor applies even if compliance requires disclosure of information otherwise protected under RPC 1.6).

For a discussion of counsel's obligations under RPC 3.3 (and its predecessor DR 7-102(B), the following sources should be consulted. New York State Bar Assoc. Comm. on Prof. Ethics Op. 837 (2010) **[Appendix III]**; New York County Lawyers Assoc. Comm. on Prof. Ethics Op. 741 (2010) **[Appendix IV]**; New York State Bar Assoc. Comm. on Prof. Ethics Op. 831 (2009) **[Appendix V]**. It is conceivable that a lawyer who knows that his client intends to offer deliberately false testimony might have to withdraw if he is unable to convince the client to refrain from doing so. Comment 15 to RPC 3.3 provides as follows;

> A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Certainly, withdrawal should be avoided if at all possible because of its obvious negative impact on the client.

An attorney who needs to withdraw from a litigated matter must do so upon motion. *See* N.D.N.Y. Local Rule 83.2(b). Local Rule 83.2(b) mirrors N.Y. CPLR 321(b).

Acceptance of a pro bono assignment requires a serious commitment to the case and the client. A client's civil rights, liberty or even life could be at stake. In *Maples v. Thomas*, 565 U.S. 266 (2012), the Supreme Court took the rare step of vacating a decision from the Eleventh Circuit denying as untimely a death penalty appeal because the New York City mega firm Sullivan & Cromwell missed a critical filing deadline. How was the deadline missed? Because the two associates at the firm who were handling the case left the firm and never notified the Court. Incredibly, no other attorney was assigned to take the case and the mail addressed to these attorneys arrived at the firm's mailroom and was returned unopened.

The District Court and the Eleventh Circuit refused to allow the condemned prisoner to press an untimely appeal. The Supreme Court, in a 7-2 decision, found that the conduct of the attorneys in question (abandoning their client) was tantamount to no representation at all. This is an extreme example but it points out the need for pro bono counsel to respect their clients and treat them as if they were paying clients.

In *MC v. GC*, 25 Misc. 3d 217, 881 N.Y.S.2d 845 (Sup. Ct., Bronx County 2009), the Plaintiff retained a not-for-profit organization representing women without charge in divorce cases and later claimed that she was pressured into a settlement that she did not understand. The Court granted the motion to vacate the settlement based upon

misrepresentations by the former attorney for the Plaintiff (who had never handled a divorce case) including that if the Plaintiff did not sign the settlement agreement, the attorney and the firm could simply "withdraw" from the case. The Court commented upon the need to make a proper motion to withdraw which may not always be granted as it rests within the sound discretion of the Court. The following comment by the Court bares on our topic:

> Notwithstanding this decision, the court applauds inMotion for its provision of legal services to low-income women, and appreciates that Ms. Smith and her firm were participating pro bono in that effort. However, legal representation should not be provided in a way which does not give individuals a full understanding of their rights and deprives them of their opportunity to be heard on the issues most important to them. In undertaking pro bono representation, Ms. Smith's firm should ensure that counsel taking on pro bono matters receive appropriate support and supervision, so that they can provide pro bono clients with the same careful legal representation that they provide to paying clients.

Id. at 229, 881 N.Y.S.2d at 854. Motions to withdraw are generally granted unless there is substantial prejudice to the client such as a motion made on the eve of trial. In the *MC v. GC* case, the attorney was likely frustrated by the client's refusal to settle in accord with the attorney's advice. Candidly, that is just too bad as the decision whether to settle (whether it be a divorce case in state court or a civil rights case in Federal Court is the client's and the client's alone.

CLIENT WITH A WEAPON OR WHO THREATENS TO ESCAPE OR COMMIT AN ACT OF VIOLENCE

If your client is in custody, there will be guards from the correctional institution where the client is housed physically present at all times. Deputy U.S. Marshals or Court Security Officers are also always present in a Courtroom any time that Court is in session. Whether you will be permitted to meet privately with your client in the Courthouse during breaks will be largely dependent upon the client's disciplinary record in the correctional institution and the nature of the acts for which the client is incarcerated.

It is customary for the guards to advise a lawyer of any special issues surrounding the client and provide warnings such as avoiding instances where the client can obtain items that could later be used as a weapon. When in doubt, ask the guards for instructions. The guards are professionals. Most will certainly recognize that a lawyer representing a prisoner has been assigned by the Court and is there to do a job. Do not, under any circumstances, provide the client with contraband or promise to do anything that is contrary to common sense or good judgment. The consequences can be severe. *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009), *cert. denied sub nom.*, *Sattar v. United States*, 559 U.S. 1031 (2010) (lawyer convicted of providing unlawful assistance to prisoner under special restrictions). Unwanted attention and inquiries may also occur. *See* **Appendix VI.**

In the unlikely event that you become aware of a client who intends to commit a crime or engage in an act of violence, RPC 1.6(b) provides that the information may, but

is not obligated to be disclosed by the lawyer. The Rule provides in pertinent part as follows:

> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm; [and]
>
> (2) to prevent the client from committing a crime.

Certainly, the lawyer should vigorously attempt to persuade the client not to commit a crime or engage in an act of violence, but such an attempt may be unsuccessful. In that case, the lawyer needs to engage in some serious soul searching to determine how to proceed. Self-preservation should, of course, be paramount. If time permits, consult with another lawyer outside of the proceeding or with a judicial officer not presiding over the matter. Counsel to the Grievance Committees welcome inquiries from attorneys who are presented with difficult questions. Although counsel cannot offer legal advice, they can point you in the right direction.

The Comments to RPC 1.6 provide some guidance about the decision to breach a client confidence:

> [6A] The lawyer's exercise of discretion conferred by paragraphs (b)(1) through (b)(3) requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to

the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client. When the lawyer reasonably believes that the client will carry out the threatened harm or crime, the lawyer may disclose confidential information when permitted by paragraphs (b)(1), (b)(2) or (b)(3). A lawyer's permissible disclosure under paragraph (b) does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. For a lawyer's duties when representing an organizational client engaged in wrongdoing, *see* Rule 1.13(b).

[6B] Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death. On the other hand, an event that will cause property damage but is unlikely to cause substantial bodily harm is not a present and substantial risk under paragraph (b)(1); similarly, a statistical likelihood that a mass-distributed product is expected to cause some injuries to unspecified persons over a period of years is not a present and substantial risk under this paragraph.

> [6C] Paragraph (b)(2) recognizes that society has important interests in preventing a client's crime. Disclosure of the client's intention is permitted to the extent reasonably necessary to prevent the crime. In exercising discretion under this paragraph, the lawyer should consider such factors as those stated in Comment [6A].

NON-COOPERATION

A client must cooperate with the lawyer. It should be addressed at the outset of the representation and can, in appropriate circumstances, lead to an ability or requirement that a lawyer must withdraw from representation under RPC 1.16. Rule 1.16(b) governs mandatory withdrawal and provides as follows:

> (b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:
>
> (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
>
> (3) the lawyer is discharged; or
>
> (4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

See also Comments 2 and 3 which provide as follows:

> [2] A lawyer ordinarily must decline or withdraw from representation under paragraph (a), (b)(1) or (b)(4), as the case may be, if the client demands that the lawyer engage in conduct that is illegal or that violates these Rules or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of

> conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.
>
> [3] Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and Rule 3.3.

With respect to permissive withdrawal, RPC 1.16(c) provides as follows:

> (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
>
> (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
>
> (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

> **(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively** [emphasis supplied]**;**
>
> (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;
>
> (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
>
> (10) the client knowingly and freely assents to termination of the employment;
>
> (11) withdrawal is permitted under Rule 1.13(c) or other law;
>
> (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
>
> (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

See also Comments 7, 7A and 8A which provide as follows:

> [7] Under paragraph (c), a lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action with which the lawyer has a fundamental disagreement.
>
> [7A] In accordance with paragraph (c)(4), a lawyer should use reasonable foresight in determining whether a proposed representation will involve client objectives or

> instructions with which the lawyer has a fundamental disagreement. A client's intended action does not create a fundamental disagreement simply because the lawyer disagrees with it. See Rule 1.2 regarding the allocation of responsibility between client and lawyer. The client has the right, for example, to accept or reject a settlement proposal; a client's decision on settlement involves a fundamental disagreement only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement. In addition, the client should be given notice of intent to withdraw and an opportunity to reconsider.
>
> [8A] Continuing to represent a client may impose an unreasonable burden unexpected by the client and lawyer at the outset of the representation. However, lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than clients unless they are attributable to client misconduct. That a representation will require more work or significantly larger advances of expenses than the lawyer contemplated when the fee was fixed is not grounds for withdrawal under paragraph (c)(5).

STAND-BY COUNSEL ISSUES

A lawyer may be appointed as "stand-by" counsel to a prisoner who insists upon self-representation. In such circumstances, the lawyer must communicate with the client and explain the lawyer's role and offer whatever advice is requested as well as whatever advice that the lawyer believes should be imparted. The nature of this type of representation will vary depending on the circumstances. The Rules relating to regular counsel apply with equal force.

GRIEVANCES

Complaints against lawyers to Grievance Committees are screened by investigators who routinely reject matters that do not involve issues involving the compliance with the Rules of Professional Conduct. Thus, a complaint that "I lost my case" is outside the jurisdiction of these Committees. The most common complaint raised against lawyers by incarcerated clients is the failure of the lawyer to communicate with the client as required by RPC 1.4. Simply put, if there is a good track record of communication (keep copies of every communication with the client), this type of grievance will be promptly dismissed without further proceedings.

There is an obligation to cooperate with the Committee, the failure of which is, itself, actionable. Prompt responses are appreciated. The failure to respond naturally arouses suspicion. Do not "freeze" if you see an envelope from the Grievance Committee.

APPENDIX I

MODEL LETTER OF ENGAGEMENT FOR PRISONER CASE

[Attorney Letterhead]

[Date]

[Client Name]
[Client Address]

Re: John Smith v. John Jones
N.D.N.Y. Civil Action No. [_____]

Dear Mr. Smith:

By Order of Hon. [_____] dated [_____, 201_], I was assigned to represent you in connection with the above-referenced matter. In order that our relationship of attorney and client will be one of mutual understanding and agreement, I am providing this letter of engagement to you for your review and signature. This letter sets forth the terms upon which I will represent you. Please sign and return one copy of this letter to me in the enclosed, self-addressed, stamped envelope. One copy of the letter should be signed and kept by you with your records.

As your assigned lawyer, I will represent your interests to the best of my abilities. In that regard, I will do the following:

1. Appear in court for any required proceedings.

2. Conduct such pretrial proceedings, including discovery, as I believe in my best judgment are necessary and appropriate for your case.

3. Make such motions as I believe in my best judgment are necessary and appropriate for your case.

4. Defend against such motions that I believe in my best judgment there is a basis upon which to oppose.

5. Prepare all necessary and appropriate pleadings and pretrial papers.

6. Conduct the trial and any post-trial motions

7. Consult with you about your case and explain to you about decisions that I make and the reasons why I did or did not follow any requests made by you.

8. I will abide by all professional and ethical rules that govern the conduct of lawyers. In that regard, you should be aware that lawyers cannot take positions or advance arguments that are without a legal or factual basis nor may they engage in conduct for improper purposes.

Because I was assigned by the Court, **I will not represent you in any other matter besides this one**. In addition, if there is an appeal to be taken following any adverse verdict or judgment, **I will not represent you on the appeal**. Instead, I will advise you as to the deadline for the filing of a notice of appeal and it will be up to you to file the notice of appeal and prosecute the appeal if you choose to follow that course.

As a client, you have certain rights and responsibilities that are more fully described as follows:

1. You will not have to pay for my legal fees or costs. If the Court determines that you are the prevailing party in the litigation and are entitled to an award of legal fees, I will make an application to have the other side pay for those legal fees and costs and you agree to support that request if asked. Regardless of whether you are the prevailing party in the litigation, the Court maintains a fund from which reimbursement for certain expenses can be sought. If such a request for reimbursement is made, you agree to support that request if asked.

2. You have the right to be informed about the progress of your case and to receive copies of pertinent documents including all decisions and orders of the Court.

3. You have the right to have questions about your case answered and your inquiries responded to as soon as possible. However, you must recognize that you are not my only client and that I have other cases and clients that also require my attention.

4. You must cooperate with me and assist me in the handling of your case. This cooperation includes being truthful about the facts of your case. If you do not cooperate in the handling of your case, I will ask the Court to relieve me from continuing to represent you.

5. If you provide me with any original documents or materials, I will return them to you at the conclusion of the case unless they have been submitted to the Court and accepted as evidence in which case I will provide you with copies if possible.

6. You will appear at all Court proceedings when requested to do so and cooperate with any authorities who may be required to participate in securing your appearance.

7. You must keep me advised of your current address and the most appropriate way to contact you at all times. If you change your address, you agree to let me know as soon as possible.

8. If you have a complaint about the way that I am handling your case, you will tell me about it as soon as possible and I will make every effort to address your concerns. If I am unable to satisfy your complaint, I will tell you how to address your complaint to the Court.

I look forward to working with you toward the successful conclusion of your case. Please sign a copy of this letter in the space indicated below. Thank you.

Very truly yours,

[Name]

I have read this letter of engagement and agree to its terms.

Date: _____, 201_

_____
[Client Name]

APPENDIX II

NEW YORK STATE BAR ASSOCIATION
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ETHICS OPINION 1144

ETHICS OPINION 1144

ETHICS OPINION 1144

New York State Bar Association
Committee on Professional Ethics

Opinion 1144 (1/29/2018)

Topic: Communications with Client; Withdrawal from Representation of Difficult Client

Digest: A lawyer may place time and manner limitations on communications with a client provided the lawyer promptly informs and consults with the client on matters within the lawyer's duty of communication. If a breakdown occurs in communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client subject to any applicable rule of court.

Rules: Rules 1.2(a), 1.4, 1.16, 1.14.

FACTS

1. A court assigned the inquirer to represent an individual who has been charged with several criminal offenses. Prior to the inquirer's assignment, the client had been represented by a number of other lawyers. The client has unsuccessfully moved to have the inquirer relieved as counsel.

2. The client has ongoing mental health issues for which the client receives treatment. According to the inquirer, the client is physically intimidating, verbally abusive, and often non-responsive. The inquirer wishes to impose some restrictions on the time and manner in which the client may communicate with the lawyer, including limiting communications to scheduled appointments and written communications. If the client does not abide by these limits, or otherwise continues to disrupt communications, then the lawyer wishes to consider withdrawing from the representation.

QUESTIONS

3. May a lawyer place reasonable restrictions on the time and manner of communications between the lawyer and client? Under what circumstances may a lawyer withdraw from representation of a difficult client?

OPINION

4. The New York Rules of Professional Conduct (the "Rules"), in Rule 1.4, entitled "Communication," sets out a lawyer's obligations concerning communicating with clients. The Rule says:

> (a) A lawyer shall:
>
> > (1) promptly inform the client of:
> >
> > > (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by the Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

5. Three core principles can be drawn from this Rule. First, a lawyer must keep the client apprised of material circumstances and developments in the matter. Second, a lawyer must comply with a client's reasonable requests for information. Third, a lawyer must reasonably consult with a client both about the means of accomplishing the client's objectives and about other decisions regarding the representation, some of which are within the client's province to decide. See Rule 1.2(a). On the first two of these – on developments in the matter and requests for information from the client – the lawyer must communicate promptly. Although a lawyer's obligations under this Rule are thus robust, neither Rule 1.4 nor other Rules prescribe a specific manner of communication, except when a Rule requires written instruments in specific circumstances, see, e.g., Rule 1.5(b), (c), (d)(5) (governing legal fees); Rule 1.7(b) (governing informed consent to conflicts); Rule 1.8(a) (governing business transactions with clients).

6. Rule 1.4's obligation that a lawyer keep the client "reasonably informed about the status of the matter" can be fairly read to require a lawyer to use methods of communication that are effective, timely, and not unduly burdensome to the client, but the Rule does not prevent a lawyer from selecting the manner of communication. Rule 1.4(a)(4) specifically indicates that a lawyer need comply only with reasonable requests for information, thereby allowing lawyers the flexibility to curtail conversations or meetings that stray beyond the relevant substance of the representation. This provision expresses the Rule's recognition that some clients may thrust upon their lawyers burdensome, immaterial requests for information and that lawyers need not meet such unreasonable demands.

7. Similarly, Rule 1.4 does not prohibit a lawyer from controlling the timing of client communications. Other than the general requirement that developments in the case and responses to reasonable requests for information be "promptly" communicated, the Rule does not curtail a lawyer's discretion to schedule the specific timing of lawyer-client communications. Notably, Comment [4] to Rule 1.4 provides that when a prompt response to a client's reasonable request for information is

not feasible, the lawyer (or a member of the lawyer's staff) should "acknowledge receipt of the request and advise the client when a response may be expected." That Comment is consistent with the notion that a lawyer – often balancing competing obligations – needs to have reasonable latitude to schedule the timing of client communications.

8. Consistent with the foregoing, we believe that the Rules do not prohibit a lawyer from responding to a challenging client by limiting the time and manner of communications with the client as long as the lawyer fulfills the substantive communicative requirements contained in Rule 1.4. Cf. N.Y. State 1124 (2017) (noting that no provision in the Rules mandates how lawyers must communicate with each other and that lawyers should work out between themselves the methods of communication that will best facilitate resolution of the matter at hand). Hence, a lawyer may limit communications to scheduled appointments or to some form of written transmission readily accessible to the client.

9. Whether and when a lawyer may seek to withdraw from representing a difficult client is controlled by Rule 1.16, which governs "declining or terminating representation." Rule 1.16(c) provides, in relevant part, that "except as stated in paragraph (d), a lawyer may withdraw from representing when, among other reasons, the "withdrawal can be accomplished without material adverse effects on the interests of the client," Rule 1.16(c)(1), "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the representation effectively, Rule 1.16(c)(7), or "the lawyer believes in good faith, in a matter before a tribunal, that the tribunal will find the existence of other good cause for withdrawal" Rule 1.16(c)(12). Rule 1.16(d), in turn, provides that "if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

10. Because the inquirer has already appeared as counsel for the client in the pending matter, the inquirer may withdraw only with the permission of the tribunal. The reasons for permissive withdrawal in Rule 1.16(c) are disjunctive, so any one of the reasons set forth there may suffice. The most obvious candidate emerging from the facts – and thus the most apparent reason why the inquirer may seek permission for withdrawal from the tribunal – is whether the client's conduct will prevent the inquirer from "carry[ing] out the representation effectively" under Rule 1.16(c)(7). In most representations, and certainly in defending against a criminal prosecution, effective representation requires meaningful communication between a lawyer and client. If the client's verbal abuse and non-responsiveness result in a collapse of meaningful communication, then effective representation is almost certainly not possible. See Roy D. Simon& Nicole Hyland, Simon's New York Rules of Professional Conduct Annotated, 959 (2017) (noting, as examples of client conduct that make it unreasonably difficult to carry out representation effectively, "a client's constant calls to talk about the case or request information beyond what is fruitful or reasonable" and "a client's abusive or threatening communications to the lawyer"); see also Cahill v. Donahoe, 2014 WL 3339787 (W.D.N.Y. 2014) (granting motion to withdraw where "the attorney-client relationship is no longer productive and . . . the discord that has characterized their relationship over many months appears irreparable."). If an irreparable disintegration in communication has occurred, the inquirer may ask the court for permission to withdraw.

11. That the client here has mental health issues for which the client is receiving ongoing treatments makes it appropriate to mention Rule 1.14, which governs a lawyer's responsibilities to clients with diminished capacity. See N.Y. State 949 ¶ 20 (2012). Under Rule 1.14, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. That a client suffers from mental illness does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2]. Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Rule 1.14, Cmt. [1]. "Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances." N.Y. State 986 ¶ 12 (2013). In N.Y. State 986, we added (at ¶ 13):

> Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

12. If the inquirer remains on the case, the inquirer will need to maintain a normal lawyer-client relationship "as far as reasonably possible," but, in evaluating the situation, the inquirer may conclude that protective actions are available to facilitate communication with the client so that the lawyer may enhance the prospect of effective representation.

CONCLUSION

13. A lawyer may place reasonable limitations on the timing and manner of client communications. When there is a breakdown of communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client.

(36-17)

APPENDIX III

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 741
Date Issued: March 1, 2010

TOPIC: Lawyer learns after the fact that a client has lied about a material issue in a civil deposition.

DIGEST:

A lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer discloses the client's false statement to the tribunal, the lawyer must seek to minimize the disclosure of confidential information. This opinion supersedes NYCLA Ethics Opinion 712.

RULES:

RPC 3.3, 1.6

QUESTION:

What are a lawyer's duties and obligations when the lawyer learns after the fact that the client has lied about a material issue in a civil deposition?

OPINION:

This opinion provides guidance under the newly promulgated New York Rules of Professional Conduct, 22 NYCRR 1200 et seq. (April 1, 2009) (RPC), for a lawyer who comes to know after the fact that a client has lied about a material issue in a deposition in a civil case. As explained in detail below, this opinion presupposes that the lawyer has actual knowledge of the falsity of the testimony. Actual knowledge, however, may be inferred circumstantially.

Lawyers are ethically obliged to represent their clients competently and diligently and to preserve their confidential information. At the same time, lawyers, as officers of the court, are ethically and professionally obliged not to assist their clients in perpetrating frauds on tribunals or testifying falsely. Balancing the duties of competent representation, client confidentiality and candor to the tribunal requires careful and thoughtful analysis.

Rules of Professional Conduct

Effective April 1, 2009, the New York Rules of Professional Conduct, in RPC 3.3 (a)(3), forbid a lawyer from offering or using known false evidence, and requires a lawyer to take reasonable remedial measures upon learning of past client false testimony:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Two other provisions of RPC 3.3 are also relevant here. RPC 3.3 (b) provides that a lawyer who "represents a client before a tribunal and knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In addition, a lawyer is duty bound to "correct a false statement of material fact previously made to the tribunal by the lawyer." RPC 3.3 (a) (1).

RPC 3.3 (c) requires a lawyer to remedy client false testimony "even if compliance requires disclosure of information otherwise protected by Rule. 1.6." The lawyer's duty of confidentiality is contained in RPC 1.6, which states that a lawyer shall not knowingly reveal confidential information, including information protected by the attorney-client privilege, except in six enumerated circumstances. One of those circumstances is "when permitted or required under these Rules or to comply with other law or court order." (RPC 1.6(b)(6).) Under the explicit language of RPC 3.3 (c), the lawyer's duty to remedy an admitted fraud on the court or known client false testimony or to correct prior false statements offered by the lawyer supersedes the lawyer's duty to maintain a client's confidential information under RPC 1.6.[1]

NYCLA Ethics Opinion 712 Is Superseded Because It Was Based upon the Old Code

The lawyer's duty to remedy false statements by disclosure of confidential information if necessary represents a change in the ethics rules, and requires us to revisit and withdraw our prior opinion on client false testimony in depositions.

In a prior opinion on this issue, we stated that a lawyer who learns of a client's past false testimony at a deposition must maintain the confidentiality of that information but cannot use it in settlement or trial of the case. The former Code's protection of client confidences formed the basis for NYCLA Ethics Opinion 712, www.NYCLA.org, 1996 WL 592653 (1996), which addressed the issue of admitted past client false testimony in a civil deposition. That opinion

[1] The Committee notes that Section 4503 of the New York Civil Practice Law and Rules ("C.P.L.R.") provides that unless the client waives the privilege, an attorney...shall not disclose or be allowed to disclose such communication. RPC 3.3 thus seemingly contradicts the C.P.L.R. The apparent contradiction between Section 4503 of the C.P.L.R. and the RPC 3.3 has not been addressed by any court thus far. Resolution of the contradiction is a matter of law, and Committee opinions do not address matters of law.

analyzed the conflict between the lawyer's duty to preserve client confidences under former DR 4-101, and the lawyer's competing duty to avoid using perjured testimony or false evidence under former DR 7-102. We concluded, in Ethics Opinion 712, that the lawyer may not use the admitted false testimony, but also may not reveal it: "The information that the testimony was false may not be disclosed by the lawyer." The lawyer could ethically argue or settle the case, provided that the lawyer refrained from using the false testimony.

NYCLA Ethics Opinion 712 was based upon the prior Code of Professional Responsibility, which was superseded by the Rules of Professional Conduct on April 1, 2009. In light of the adoption of RPC 3.3 on April 1, 2009, N.Y. County 712 is no longer valid, and accordingly does not provide guidance for conduct occurring after April 2009.[2]

Is a Deposition Tantamount to Testimony before a Tribunal?

An important question under the new rules is whether deposition testimony is considered to be different from trial testimony.

The text of the rules does not explicitly refer to depositions and other pretrial proceedings in civil cases. RPC 3.3 (a) (3) applies when a witness, the client or the lawyer "has offered material evidence" that the lawyer learns to be false, and RPC 3.3 (b) applies to "criminal or fraudulent conduct related to the proceeding." RPC 1.0 (w) defines "Tribunal" as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." RPC 1.0 (w).

The literal language of the RPC 3.3 (a) (3) applies when a lawyer "has offered material evidence," which the lawyer later comes to learn was false. While the phrase is not defined in the rules, the taking of a deposition is no different from calling a witness at a trial. Under certain circumstances, deposition testimony, which is offered under oath and penalty of perjury, is admissible evidence at trial.

While not formally adopted as part of the Rules, the comments to the New York Rules of Professional Conduct explicitly contemplate the applicability of Rule 3.3 to depositions:

> This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. ... It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

Rules of Professional Conduct 3.3 comment [1].

[2] The New York State Bar Association has opined (Opinion 831) that if client fraud occurred before the effective date of the New York Rules of Professional Conduct, April 1, 2009, and the fraud is protected as a client confidence or secret (DR 4-101(A)), then an attorney may not reveal the fraud.

We conclude that testimony at a deposition is governed by RPC 3.3, and is subject to the disclosure provisions of RPC 3.3 (c). False testimony at a deposition may be perjury, punishable as a crime. The victim of the perjury is the adversary party, which may rely on the false testimony, and the justice system as a whole even if the deposition is not submitted to a court, or not submitted to the court for months or even years after the testimony is reduced to transcript form.

Remediation of False Testimony at a Deposition

A lawyer's duty under RPC 3.3 comes into effect immediately upon learning of the prior testimony's falsity, and requires a lawyer to remedy the false testimony. As a first step, a lawyer should certainly remonstrate with the client in an effort to correct known false testimony.

Remonstrating with a client who has offered false testimony can be accomplished in various ways. The attorney should explore whether the client may be mistaken or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client's recollection, or demonstrate to the client that his testimony is not correct. If the client is acting intentionally, stronger remonstration may be required, including a reference to the attorney's duty under the Rules to disclose false testimony or fraudulent testimony to the court.

Also, the process of remonstration may take time. For example, in the case of a corporate client, the lawyer may report the known prior false testimony up the ladder to the general counsel, chief legal officer, board of directors or chief executive officer. See RPC 1.13 (organization as client).

Only if remonstration efforts fail should the lawyer take further steps. While there is no set time within which to remedy false testimony, it should be remedied before it is relied upon to another's detriment.

When faced with the necessity to remedy false deposition testimony, a lawyer no longer has the option to simply withdraw from representation while maintaining the client confidential information.[3] Prior to the adoption of the New York Rules of Professional conduct in April 2009, when remonstration failed, the attorney was presented with a dilemma. The attorney could not reveal a client confidence, and yet could not stand by and allow false testimony to be relied on by others. Withdrawal was the only option. The Committee now concludes that withdrawal from representation is not a sufficient method of handling false testimony by a client where prior remonstration has failed to correct the false deposition testimony. Withdrawal, without more, does not correct the false statement, and indeed increases the likelihood that the false statement, if unknown by a substituting attorney, will be presented to a tribunal or relied upon by the adverse party. Unless in withdrawing, the lawyer also communicates the problem sufficiently to enable the false testimony to be corrected, withdrawal from representation is no remedy.

Accordingly, a lawyer is required to remedy the false testimony. Depending on the circumstances a lawyer may be able to correct the false testimony or withdraw the false statement. RPC 3.4 directs a lawyer to abstain from preserving known false testimony. A lawyer may not "participate in the creation or preservation of evidence when the lawyer knows

[3] Pursuant to RPC 1.6, confidential information includes the definition of confidences and secrets contained in former DR 4-101(A).

or it is obvious that the evidence is false." RPC 3.4 (a) (5). Once the lawyer is aware of material false deposition testimony, the lawyer may not sit by idly while the false evidence is preserved, perpetuated or used by other persons involved in the litigation process. Thus, if a settlement is based even in part upon reliance on false deposition testimony, the lawyer may not ethically proceed with a settlement. The falsity must be corrected or revealed prior to settlement.

Ultimately the false testimony cannot be perpetuated. If remonstration is not effective, the attorney must disclose the false testimony. However, disclosure of client confidential information should be limited to the extent necessary to correct the false testimony.

Knowledge of Falsity under RPC 3.3 and 1.0

New York lawyers should note that the duty to correct client false testimony by revealing client confidential information comes into play only when the lawyer "comes to know of its falsity. . .." RPC 3.3 (a) (3). The lawyer may refuse to introduce, in a civil case, evidence "that the lawyer reasonably believes is false." RPC 3.3 (a) (3), (emphasis added). Thus, it is only when the lawyer knows that the prior testimony is false that the rules trigger a duty to take corrective action.

When does a lawyer "know" that a client's testimony is false? RPC 1.0 (k) defines knowledge as "actual knowledge of the fact in question," which "may be inferred from circumstances."

While there is no known precedent under the 2009 Rules, some guidance is provided by authorities decided under the prior rules. In *In re Doe*, the Second Circuit Court of Appeals articulated the standard of knowledge required to trigger reporting to the tribunal under former DR 7-102:

> [T]he drafters intended disclosure of only that information which the attorney reasonably knows to be a fact and which, when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal.
>
> To interpret the rule to mean otherwise would be to require attorneys to disclose mere suspicions of fraud which are based upon incomplete information or information which may fall short of clearly establishing the existence of a fraud. We do not suggest, however, that by requiring that the attorney have actual knowledge of a fraud before he is bound to disclose it, he must wait until he has proof beyond a moral certainty that fraud has been committed. Rather, we simply conclude that he must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention.

In re Doe, 847 F.2d 57, 63 (2d Cir. 1988). While the Court's discussion of a lawyer's duty to report a fraud on the tribunal dealt with a non-client's fraud, the Court's cogent analysis of the "knowledge" standard also applies to a lawyer's duty with respect to a client's fraud on a tribunal. It is clear that only actual knowledge triggers the duty to report the fraud on the tribunal. In *In re Doe*, the Court held that a lawyer's suspicion or belief that a witness had committed perjury was not sufficient to trigger the duty to report.

While the following case does not directly address the ethics rules, it may, nevertheless, provide further guidance by way of analogy, and illustrates the notion that actual knowledge may be gleaned from the circumstances. In *Patsy's Brand Inc. v. I.O.B. Realty et al.*,2002 U.S. Dist. LEXIS 491, (vacated by *In re Pennie & Edmonds LLP*, 2003 U.S. app LEXIS 4529 (2d Cir. 2003)) the United States District Court for the Southern District of New York sanctioned defense counsel for F. R.Civ. P. Rule 11 violations. There, a law firm having substituted as counsel for defendant offered an affidavit that prior counsel had disavowed in withdrawing. The Court stated that "rather than risk offending and possibly losing a client, counsel simply closed their eyes to the overwhelming evidence that statements in the client's affidavit were not true." The Court found that by the time the law firm substituted as counsel, the affidavit had been conclusively proven to be false in very material respects. Counsel was aware that their client had made prior false statements under oath. Although the law firm discussed the false statements and the affidavit with their client, and relied on the client's explanation, the Court determined that all of the facts available to the law firm "should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which they could rely on (their client's) statements.[4]

While *Patsy's Brands* was decided under Rule 11, a lawyer confronting the question of what may constitute actual knowledge may find some guidance in that opinion and in *Doe*, above.

Conclusion

A lawyer who comes to know that a client has lied about a material issue in a deposition in a civil case must take reasonable remedial measures, starting by counseling the client to correct the testimony. If remonstration with the client is ineffective, then the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal. If the lawyer does disclose the client's false statement to the tribunal, the lawyer must minimize the disclosure of client confidential information.

[4] The finding was reversed on appeal because the law firm had not been given an opportunity to withdraw the false affidavit before sanctions were levied.

NYSBA

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NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 837 (3/16/10)

Topic:	Confronting false evidence and false testimony
Digest:	Rule 3.3 of the New York Rules of Professional Conduct requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The exception in former DR 7-102(B)(1) exempting disclosure of information protected as a client "confidence or secret" no longer exists.
Rules and Code:	Rule 1.0(k); Rule 1.6; Rule 1.16; Rule 3.3; DR 4-101; DR 7-102
Comments:	Comment 3 to Rule 1.6, Comments 7, 8, 10 & 11 to Rule 3.3

QUESTION

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.

2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document and some of the client's testimony concerning the document were false.

3. Inquiring counsel raises the following questions:

(1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?

(2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are being withdrawn, and that he intends to proceed based on all other evidence properly before the tribunal?

(3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

OPINION

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Divisions and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

> A lawyer who receives information clearly establishing that:
>
> (1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the effected person or tribunal, *except when the information is protected as a confidence or secret*.

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

> If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

> A lawyer who represents a client before a tribunal and who knows that a person . . . is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(c) provides:

> The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[1]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

> perhaps the most radical break with the existing Code. Under DR 7-102(B) (1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret" -- which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1) . . . .

8. As noted in Comment [11] to Rule 3.3:

> A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See*, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual knowledge of the fact in question". Rule 1.0(k) defines "knowingly," "known,"

[1] Rule 1.6 ("Confidentiality of Information") governs a lawyer's obligation to safeguard "confidential information." "Confidential information" under the Rules includes what were formerly referred to under the Code as confidences and secrets. *Compare* former DR 4-101(A) of the Code, with Rule 1.6(a).

"know," or "knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

> The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See*, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[2]

12. Remedial measures are limited, however, by CPLR §4503(a)(1), the legislatively-enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR §4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

> The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C.

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[2] To the extent that this Committee's prior opinions in N.Y. State 674 (1994), N.Y. State 681 (1996), and N.Y. State 797 (2006) premised their results upon the inability of the Committee to ascertain whether a "fraud" had occurred or was occurring, or upon the existence of an "exception" which relieved an attorney of the obligation to disclose a fraud on a tribunal if the fraud was discovered by the attorney via a client confidence or secret, those results would today require re-analysis in light of the existing Rules.

Sisk, *Rule 1.6: Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics § 5:6(d)(4)(E) (2009 ed.).

13. As elaborated by Professor Sisk, *Rule 3.3: Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3) (2009 ed.):

> Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[3]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the United States Constitution. *See* Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

> The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in

[3] The attorney-client privilege itself would not cover material which falls under the crime-fraud exception to the attorney-client privilege. Because the crime-fraud exception has typically been applied in situations involving documentary discovery which are quite different from the scenarios contemplated by Rule 3.3, and because the crime-fraud exception has been interpreted to apply only to situations in which the client communication was itself in furtherance of the crime or fraud (*see, e.g., United States v. Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *Linde v. Arab Bank, PLC*, 608 F.Supp.2d 351, 357 (E.D.N.Y. 2009) (quoting *U.S. v. Richard Roe, Inc.* for the proposition that the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud), the precise nature of the interplay between Rule 3.3, the attorney-client privilege, and the crime-fraud exception to that privilege remains to be explored in future court decisions and ethics opinions.

criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. *See, e.g., People v. Andrades*, 4 N.Y.3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4) – (8)); *People v. DePallo*, 96 N.Y.2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury); *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel as not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the duty to take remedial measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding ...." The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." *See* Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. *Cf.*, N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n.4 (2009).

Application to the facts on this inquiry

17. Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also "material." While inquiring counsel has not specifically addressed the question of materiality, for purposes of this opinion we assume that the testimony and the documentary evidence at issue were "material." *See, e.g.*, N.Y. County 732 (2004) at p.5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. *See, e.g.*, N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding -- he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. *See People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation ... not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunalas is reasonably necessary to remedy the situation ....

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

22. Counsel remains under the continuing obligation of CPLR § 4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5.

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b) (1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

CONCLUSION

24. Rule 3.3 requires an attorney to take reasonable remedial measures even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by Rule 1.6. However, if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure.

(41-09, 46-09)

APPENDIX IV

APPENDIX V

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

Committee on Professional Ethics

Opinion 831 - 08/14/09

Topic:	Disclosure of fraud on the tribunal and fraudulent conduct
Digest:	Where a lawyer learns that a client, before April 1, 2009 (the effective date of the new N.Y. Rules of Professional conduct), had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, which generally did not permit disclosure of confidences or secrets, and not by rule 3.3 of the new Rules of Professional Conduct, which may require disclosure of confidential information necessary to remedy the fraud. Where the fraud occurred before April 1, 2009, this conclusion applies whether the lawyer learns of the fraud before or after April 1, 2009
Rules and Code:	Rules 1.0(i), 1.6, 1.7(b)(4), 1.9(a), 3.3(b); Code Definitions "fraud"; DR 4-101, 7-102(B)(1)

QUESTION

1. Where a lawyer, prior to April 1, 2009, represented a client in obtaining a conditional discharge of a misdemeanor charge, contingent on the client's not being arrested for a period of time, and then, after April 1, 2009, the lawyer learned from the client that the client had been arrested shortly before the plea, must the lawyer disclose the arrest to the prosecutor or the tribunal?

OPINION

2. The inquirer represented a defendant accused of a misdemeanor. The inquirer arranged a plea bargain under which the defendant pleaded guilty to a violation of disor-

derly conduct with a conditional discharge. Under the terms of the sentence of conditional discharge, the defendant avoided incarceration or probation as long as she was not arrested within the next six months. In the course of the plea, the client represented to the court and the prosecutor that she (the client) had "stayed out of trouble" since the misdemeanor arrest.

3. A short time later, but after April 1, 2009, the client told the inquirer that in fact she had been arrested the week before the plea in a different county. The inquirer asks whether he must inform the prosecutor or the court about the client's prior arrest.

4. New York adopted new Rules of Professional Conduct that became effective on April 1, 2009.[1] Both the new Rules and the former Code of Professional Responsibility have provisions addressing a lawyer's obligations where a client engages in fraudulent conduct before a tribunal. Both provisions require a lawyer to take remedial measures, but the rules differ on two significant points: First, and most clearly, the provisions differ on the critical question of whether a lawyer must disclose protected confidential information if required to remedy the fraud. Second, the definition of "fraudulent conduct" in the new rules differs from the interpretation we placed on the definition of "fraud" in the old rules with respect to whether fraudulent conduct includes misleading or deceptive conduct short of actual fraud under the applicable law.[2]

5. Under DR 7-102(B)(1) of the old Code, a lawyer who learned that a client had "perpetrated a fraud upon a person or tribunal" was required to "promptly call upon the client to rectify the same. If the client refuse[d] or [was] unable to do so," the lawyer was required to "reveal the fraud to the . . . tribunal, *except when the information is protected as a confidence or secret.*" (Emphasis added.)[3]

6. Rule 3.3(b) of the new Rules eliminates the exception for confidences and secrets (now called simply "confidential information"). Rule 3.3(b) provides:

> A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudu-

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1 Joint Order of the Appellate Divisions, December 30, 2008.

2 See paras. 9-10 below

3 The italicized language was added to the Code in 1976. *See* N.Y. State 454 (1976). This rule was not absolute. The exception extended only to information "protected" as a confidence or secret. We repeatedly held that information was not protected as a confidence or secret if one of the exceptions to disclosure in DR 4-101 applied. N.Y. State 797 ¶ 13 (2005); N.Y. State 781 (2004); N.Y. State 674 (1995); N.Y. State 466 (1977). In addition, the Court of Appeals stated that in certain circumstances "counsel has a duty to disclose witness perjury to the Court." *People v. Berroa*, 99 N.Y.2d 134, 142, 753 N.Y.S.2d 12, 18, 782 N.E.2d 1148, 1154 (2002) (*citing People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 (2001)).

lent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

7. Contrary to the Code exception for confidences and secrets, new Rule 3.3(c) expressly states that this duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." (Rule 1.6 defines the protections accorded to confidential information.)[4]

8. There is also a difference in the definitions of the applicable conduct that triggers this requirement, at least as we had interpreted it. The definition of the term "fraud" in the old Code was not a definition as such, but rather a clarification. It said:

> "Fraud" does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

9. In the absence of a Code definition of "fraud," we interpreted the term "fraud upon a tribunal" in DR 7-102(B) to refer to the term "fraud" in the law outside of the Code (except to the extent that any such law should require a mental state other than that set forth in the above definition). We said in N.Y. State 797 (2005), "Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee."[5]

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[4] It is unclear when the disclosure obligations under the new rule end. In past opinions, we appear to have assumed that the disclosure obligations in DR 7-102(B) where information was not "protected" as a confidence or secret ended when the proceeding in question concluded. N.Y. State 674 (discussing whether a lawyer must reveal perjury "discovered after the fact when the proceeding in which the perjury was committed (and later discovered) has not yet concluded"); N.Y. State 466 ("since the existence of the negotiable instrument is not relevant to any pending proceeding"). The New York State Bar Association proposal for the new rule, adopting the language of the ABA Model Rules, would have codified this interpretation in Rule 3.3. The proposal stated, "The duties stated in paragraphs (a) and (b) *continue to the conclusion of the proceeding* and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (emphasis added) (available at www.nysba.org/proposedrulesofconduct020108. As noted in the text, Rule 3.3 as adopted by the courts omits the phrase "continue to the conclusion of the proceeding and." There is thus an argument that the courts in adopting the rule intended the obligation to continue past the end of the proceeding and, potentially, indefinitely – or at least for some reasonable period of time. The broadest version of this interpretation seems to us implausible. We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding – but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, but could merely result in punishment of the client, we do not believe the Rule 3.3 disclosure duty applies.

[5] *But see* N.Y. State 681 (1996) ("Regardless of the legal determination of the criminal effect of the client's actions, it appears that the client may be using the lawyer's services to perpetuate a fraud on the tribunal.").

10. The definition of "fraud" or "fraudulent" in the new rule appears to be broader. It provides:

> "Fraud" or "fraudulent conduct" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or has a purpose to deceive*, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.[6]

While the new phrase "denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction" codifies our interpretation of "fraud" under the Code, the inclusion of the disjunctive "or has a purpose to deceive" would appear to draw in conduct beyond conduct that constitutes "fraud" under applicable law.[7]

11. In this case, any "fraud" or "fraudulent conduct" occurred prior to April 1, 2009. In N.Y. State 829 (2009), we opined that the new rules requiring that waivers of conflicts of interest be "confirmed in writing"[8] apply only to waivers given by clients after April 1, 2009. We relied both on the language of the particular rules at issue there as well as on the general rule that, unless otherwise clearly stated, statutes are to be construed as prospective in application only.[9]

12. The application of the effective date here is less straightforward. The language of the rule does not provide much guidance. Conceivably, because the rule speaks of a lawyer who "knows" of fraudulent conduct -- in the present tense -- it could be interpreted to refer to anyone who has such knowledge on or after the effective date, regardless of when the fraudulent conduct occurred and regardless of when the lawyer learned of that conduct. We do not believe this interpretation is correct. The new rule is a dramatic break from the prior understanding of a lawyer's duties in the face of improper conduct by a client or witness.

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6 Rule 1.0(i) (emphasis added).

7 The use of the disjunctive here was a change from the New York State Bar Association proposal. New York State Bar Association Proposed Rules of Professional Conduct, *supra* n.3, at 4 ("'Fraud' or 'fraudulent conduct' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *and* has a purpose to deceive . . . .") (emphasis added).

8 Rules 1.7(b)(4) and 1.9(a).

9 *Id.* ¶¶ 5, 6 & n.4 (citing *Hays v. Ward*, 179 A.D.2d 427, 429, 578 N.Y.S.2d 168, 169 (1st Dep't 1992) ("Where a statute states in clear and explicit terms, as here, that it takes effect on a certain date, it is to be construed as prospective in application."); *Murphy v. Board of Education*, 104 A.D. 796, 797, 480 N.Y.S.2d 138, 139 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856, 476 N.E.2d 651, 487 N.Y.S.2d 325 (1985)).

13. The presumption that new rules do not apply retroactively has particular strength where a person may rely on the pre-existing rules. Where the rules have changed, a client -- even a client who has engaged in fraud -- should be able to rely on the advice or warnings he or she may have received, or the correct understanding he or she had, regarding the "rules of the road" that govern the lawyer-client relationship. We believe the same should apply whether the lawyer learns of the fraud before or after April 1, 2009, as long as the client's fraudulent conduct occurred prior to that date. The client has committed himself or herself when the fraud occurred.[10]

14. In this case, as noted, the fraudulent conduct in question occurred before the effective date of the new rules. We therefore apply DR 7-102(B)(2) and not Rule 3.3(b) to determine whether the lawyer has an obligation to disclose the fact that the client was arrested a week before entering a conditional discharge plea. Even if the client's false representation that he had stayed out of trouble was a "fraud on the tribunal" within the meaning of DR 7-102(B)(1) -- as seems likely -- it is clear that the information that the lawyer subsequently acquired was a confidence or secret. The lawyer would therefore have an obligation to disclose the information only if the information was not "protected" under DR 4-101.[11] Here, no exception to the duty of confidentiality applies, and therefore the information remains "protected" as a confidence or secret. While under DR 4-101(C)(3) (as under new Rule 1.6(b)(2)) a lawyer may disclose information necessary to prevent a future crime, the inquirer here learned of the client's misrepresentation after it occurred, when it was past wrongdoing, not a future crime.[12]

15. Some writers have questioned whether Rule 3.3 is inconsistent with the protections afforded criminal defendants under the Fifth and Sixth Amendments of the United States Constitution.[13] There is also some question whether the new requirement of Rule 3.3, a court-adopted rule, can override the statutory protection to the attorney-client privi-

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[10] Of course, once the lawyer learns of the fraud, he or she cannot use the fraudulent testimony in argument or otherwise. That was true under DR 7-102 as it is under Rule 3.3.

[11] *See* note 2 *supra*.

[12] The answer might be different if the lawyer himself had made a "written or oral opinion or representation . . . believed by the lawyer still to be relied upon by a third person [and that] was based on materially inaccurate information or is being used to further a crime or fraud." In that circumstance, the confidence might not be protected to the extent disclosure is implicit in the lawyer's withdrawing the prior representation. DR 4-101(C)(5).

[13] *See, e.g.*, Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. L. ETHICS 133, 157-163 (2008); John Wesley Hall, Jr., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE 3d §§ 26:6, 26:21 n.8 (database updated July 2008); Joel Androphy, WHITE COLLAR CRIME § 20:12 (2d ed.) (database updated June 2008); 1 CRIMINAL PRACTICE MANUAL §§ 8:12, 8:23 (database updated March 2009); Formal Op. 92-2, Ethics Advisory Committee of National Association of Criminal Defense Lawyers.

lege afforded by CPLR § 4503(a).[14] In view of the result we reach, we express no opinion on these questions.

CONCLUSION

16. Where a lawyer learns that, prior to April 1, 2009, a client had committed fraud on a tribunal, the lawyer's obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, and not by Rule 3.3 of the new Rules of Professional Conduct. Unlike Rule 3.3, DR 7-102(B)(1) did not permit disclosure of information protected as a confidence or secret in these circumstances.

(16-09)

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[14] "Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing . . . ."

APPENDIX VI

DEPARTMENT OF DEFENSE
HEADQUARTERS, JOINT TASK FORCE GUANTANAMO
U.S. NAVAL BASE, GUANTANAMO BAY, CUBA
APO AE 09360

August 12, 2007

Mr. Clive Stafford-Smith
636 Baronne Street
New Orleans, LA 70113

Re: Discovery of Contraband Clothing in the Cases of Shaker AAmer, Detainee ISN 239, and Muhammed Hamid al-Qareni, Detainee ISN 269

Dear Mr. Stafford Smith,

Your client Shaker AAmer, detainee ISN 239, was recently discovered to be wearing Under Armor briefs and a Speedo bathing suit. Neither item was issued to the detainee by JTF-Guantanamo personnel, nor did they enter the camp through regular mail. Coincidentally, Muhammed Hamid al-Qareni, detainee ISN 269, who is represented by Mr. Katznelson of Reprieve, was also recently discovered to be wearing Under Armor briefs. As with detainee ISN 239, the briefs were not issued by JTF-Guantanamo personnel, nor did they enter the camp through regular mail.

We are investigating this matter to determine the origins of the above contraband and ensure that parties who may have been involved understand the seriousness of this transgression. As I am sure you understand, we cannot tolerate contraband being surreptitiously brought into the camp. Such activities threaten the safety of the JTF-Guantanamo staff, the detainees, and visiting counsel.

In furtherance of our investigation, we would like to know whether the contraband material, or any portion thereof, was provided by you, anyone else on your legal team, or anyone associated with Reprieve. We are compelled to ask these questions in light of the coincidence that two detainees represented by counsel associated with Reprieve were found wearing the same contraband underwear.

Thank you as always for your cooperation and assistance,

Sincerely,

[redacted]
Commander, JAGC, U.S. Navy
Staff Judge Advocate

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29th August, 2007

Commander XXXXXXXXXXXXXX
Staff Judge Advocate
Headquarters, Joint Task Force Guantanamo
U.S. Naval Base, Guantanamo, Cuba
APO AE 09360
XXXXXXXXXXXXXXXXXXXX

Re: The Issue of Underwear
("Discovery of 'Contraband Clothing' in the Cases of
Shaker Aamer (ISN 239) and Mohammed al Gharani (ISN 269)")

Dear Cmdr. XXXXXXXXXXX:

Thank you very much for your letter dated August 12, 2007, which I received yesterday. In it, you discuss the fact that Mr. Aamer was apparently wearing 'Under Armor briefs' and some Speedo swimming trunks and that, by coincidence, Mr. el Gharani was also sporting 'Under Armor briefs'.

I will confess that I have never received such an extraordinary letter in my entire career. Knowing you as I do, I hope you understand that I do not attribute this allegation to your personally. Obviously, however, I take accusations that I may have committed a criminal act very seriously. In this case, I hope you understand how patently absurd it is, and how easily it could be disproven by the records in your possession. I also hope you understand my frustration at yet another unfounded accusation against lawyers who are simply trying to do their job – a job that involves legal briefs, not the other sort.

Let me briefly respond: First, neither I, nor Mr. Katznelson, nor anyone else associated with us has had anything to do with smuggling 'unmentionables' into these men, nor would we ever do so.

Second, the idea that we *could* smuggle in underwear is farfetched. As you know, anything we take in is searched and there is a camera in the room when we visit the client. Does someone seriously suggest that Mr. Katznelson or I have been stripping off to deliver underpants to our clients?

Third, your own records prove that nobody associated with my office has seen Mr. Aamer for a full year. Thus, it is physically impossible for us to have delivered anything to him that recently surfaced on his person. Surely you do not suggest that in your maximum security prison, where Mr. Aamer has been held in solitary confinement almost continuously since September 24, 2005, and where he has been more closely monitored than virtually any prisoner on the Base, your staff have missed the fact that he has been wearing *both* Speedos *and* 'Under Armor' for 12 months?

Since your records independently establish that neither I nor Mr. Katznelson could not have been the one who delivered such undergarments to Mr. Aamer, this eliminates any 'coincidence' in the parallel underwear sported by Mr. el Gharani. Your letter implies, however, that Mr. Katznelson might have something to do with Mr. el Gharani's underthings. Mr. Katznelson has not seen Mr. el Gharani for four months. As you know, Mr. el Gharani has been forced to strip naked in front of a number of military personnel on more than one occasion, and presumably someone would have noticed his apparel then.

Without bringing this up with me, it was therefore patently clear that my office had nothing to do with this question of lingerie. However, I am unwilling to allow the issue of underwear to drop there: It seems obvious that the same people delivered these items to both men, and it does not take Sherlock Holmes to figure out that that members of your staff (either the military or the interrogators) did it. Getting to the bottom of this would help ensure that in future there is no shadow of suspicion cast on the lawyers who are simply trying to do their job, so I have done a little research to help you in your investigations.

I had never heard of 'Under Armor briefs' until you mentioned them, and my internet research has advanced my knowledge in two ways – first, *Under Armour* apparently sports a 'U' in its name, which is significant only because it helps with the research.

Second, and rather more important, this line of underpants are very popular among the military. One article referred to the fact that "*A specialty clothing maker is winning over soldiers and cashing in on war.*" See http://www.govexec.com/features/1005-15/1005-15na4.htm (emphasis in original). The article goes on to say:

> In August [2005], a Baltimore-based clothier popular among military service members got in on the trend. * * * Founded in 1996, *Under Armour* makes a line of tops, pants, shorts, underwear and other "performance apparel" designed for a simple purpose: to keep you warm in the cold and cool in the heat.

Id. This stuff is obviously good for the men and women stationed in the sweaty climate of Guantanamo, as we could all attest.

It would be worth checking whether this lingerie was purchased from the NEX there in GTMO, since the internet again leads one to suspect that the NEX would be purveyors of *Under Armour*:

> Tom Byrne, *Under Armour*'s director of new business development, told *Army*

> *Times* that "The product has done very well in PXes across the country and in the Middle East, and we have seen an increasing demand month after month. There is clearly a need for a better alternative than the standard-issue cotton T-shirt."

Id.

There must be other clues as to the provenance of these underpants. Perhaps you might check the label to see whether these are 'tactical' underwear, as this is apparently something *Under Armour* has created specially for the military:

> *Under Armour* has a line of apparel called Tactical that's modified for soldiers. It features the same styles as civilian tops and bottoms - LooseGear for all purpose conditions, HeatGear and ColdGear, meant for hot and cold weather, as well as a line for women. But Tactical items are offered in army brown, olive drab, midnight navy and traditional black and white. Also, the Tactical section of the *Under Armour* Web site features military models, not athletes. In one image, a soldier poised on one knee wears a LooseGear shirt, looking as if he'd just as soon take a hill as take off on a run. His muscular arms protrude from the tight, olive-colored fabric. He's a picture of soldierliness. And he's totally dry.

Id. I don't know the color of the underpants sported by Messrs. Aamer and el Gharani, but that might give you a few tips.

Indeed, I feel sure that your staff would be able to give you better information on this than I could (though I have done my best) as this *Under Armour* stuff apparently provokes rave reviews from your colleagues:

> Soldier testimonials are effusive. On Amazon.com, a convenient place to buy *Under Armour* online, a customer who calls himself Spc. Sublett says he's stationed in Afghanistan. Although his identity cannot be verified, Sublett does note the Tactical line's less apparent benefits. "Sometimes I have to go long times in hot weather without showers. *Under Armour* prevents some of the nasty side effects of these extreme conditions. All of my buddies out here use the same thing. They're soldier-essential equipment. The only thing that would make them better is if the Army would issue them."

I don't mean to say that it is an open and shut case proving that your military provided the underwear, as I understand that other people use *Under Armour*. One group I noticed on the web were the amateur weight lifters, who seem confused as to whether *Under Armour* give them a competitive advantage. *See, e.g.*, http://gohcavy.com/forums/colforum/index.cgi/noframes/read/661 ("I was wondering what the rule on *Under Armour* is? I wear the briefs with my squat suit -- it makes it *soooo* much easier to get over my thighs. My first USAPL meet is coming up and I wanted to get that squared away before I show up. -Thanks Andy Obermann").

However, in the grand scheme of things, I would think we can all agree that the interrogators or military officers are more likely to have access to Messrs. Aamer and el Gharani than the U.S. Amateur Power Lifting Association.

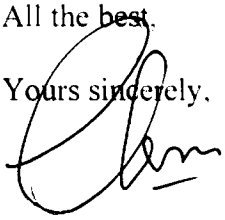
On the issue of Speedo swimming trunks, my research really does not help very much. I cannot imagine who would want to give my client Speedos, or why. Mr. Aamer is hardly in a position to go swimming, since the only available water is the toilet in his cell.

I should say that your letter brought to mind a sign in the changing room of a local swimming pool, which showed someone diving into a lavatory, with the caption, "We don't swim in your toilet, so please don't pee in our pool". I presume that nobody thinks that Mr. Aamer wears Speedos while paddling in his privy.

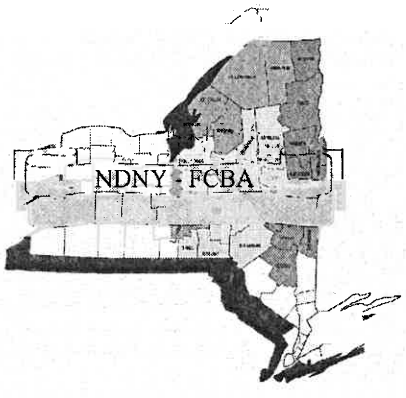
Please assure me that you are satisfied that neither I nor my colleagues had anything to do with this. In light of the fact that you felt it necessary to question whether we had violated the rules, I look forward to hearing the conclusion of your investigation. (It is faster to send me e-mails at clivess@mac.com, than use the rather lethargic postal system.)

All the best,

Yours sincerely,



Clive A. Stafford Smith



Substantive Law Materials

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The following recitation of elements is intended to guide trial counsel in a prisoner civil rights action (i.e., an action arising from events occurring during the plaintiff's post-conviction incarceration). Please note that the recitation was prepared in September of 2019, and the law may of course change by the time of trial. Please note also that the language used is not intended as a substitute for model jury instructions, the citation to which a trial judge may require in counsel's proposed jury instructions. *See, e.g.*, Leonard B. Sand, *Modern Federal Jury Instructions* (Matthew Bender); Kevin F. O'Malley, Jay E. Grenig & William C. Lee, *Federal Jury Practice and Instructions* (West).

I. CLAIMS

A. First Amendment

1. Retaliation

To establish a retaliation claim under the First Amendment, a prisoner must prove the following three elements: (1) the speech or conduct at issue was "protected"; (2) the defendant took "adverse action" against the prisoner–namely, action that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights; and (3) there was a causal connection between the protected speech and the adverse action–in other words, that the protected conduct was a "substantial or motivating factor" in the defendant's decision to take action against the prisoner. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009); *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004); *Dawes v. Walker*, 239 F.3d 489, 492 (2d. Cir. 2001).

With regard to the second element, note that, because this element is an objective one, it is irrelevant if the plaintiff himself was not actually deterred. *Gill*, 389 F.3d at 380-81; *Ford v. Palmer*, 539 F. App'x 5, 7 (2d Cir. 2013). Note also that, while some forms of misconduct toward an inmate such as verbal harassment are simply *de minimis* acts that, without more, fall outside the ambit of constitutional protection, it may be appropriate to consider the alleged retaliatory conduct broadly and in light of related acts of mistreatment. *Toliver v. New York City*, 530 F. App'x 90, 92-93 (2d Cir. 2013); *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003). For example, a campaign of harassment may suffice to deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights. *Toliver*, 350 F. App'x at 92-93. Moreover, the vague nature of a threat–depending on the context–might suffice to deter a similarly situated individual of ordinary firmness. *See Ford v. Palmer*, 539 Fed. App'x 5, 7 (2d Cir. 2013) ("[I]n this context, the vague nature of the alleged threat–i.e., not telling Ford when or how Officer Law planned to poison him–could have enhanced its effectiveness as a threat and increased the likelihood that a person of ordinary firmness would be deterred from filing additional grievances.").

With regard to the third element, claims of retaliation must be approached "with skepticism and particular care' because 'virtually any adverse action taken against a prisoner by a prison official . . . can be characterized as a constitutionally proscribed retaliatory act." *Davis*,

320 F.3d at 352. A number of factors may be considered in determining the existence of a causal connection between a prisoner's protected activity and a prison official's adverse action, including the following: (1) the temporal proximity between the protected activity and the alleged retaliatory act; (2) the inmate's prior good disciplinary record; (3) vindication at a hearing on the matter; and (4) statements by the defendant concerning his motivation. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Baskerville v. Blot*, 224 F. Supp.2d 723, 732 (S.D.N.Y. 2002). Note that adverse action taken for both proper and improper reasons may be upheld if the action would have been taken based on the proper reasons alone. *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir. 2003); *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Lowrance v. Achtyl*, 20 F.3d 529, 535 (2d Cir. 1994).

2. Access to Courts

To establish a claim for denial of access to the courts, a prisoner must prove the following three elements: (1) that the defendant's action were deliberate and malicious; (2) that the defendant's action hindered the prisoner's efforts to pursue a legal claim; and (3) that the prisoner suffered an actual injury such as the dismissal of an otherwise meritorious claim. *John v. New York Dep't of Corr.*, 130 F. App'x 506, 507 (2d Cir. 2005); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003); *Covino v. Reopel*, 108 F.3d 1369, at *1 (2d Cir. 1997).

With regard to the first element, note that an argument exists that the requirement of maliciousness is flawed, not appearing in Supreme Court case law (or other Circuit Courts' case law), and appearing in Second Circuit case law only because of the cases of *Duff v. Coughlin*, 794 F. Supp. 521, 524 (S.D.N.Y. 1992), and *Smith v. O'Connor*, 901 F. Supp. 644, 649 (S.D.N.Y. 1995) (Sotomayor, J.), which effectively created the requirement (not relying on any prior Supreme Court or Second Circuit case imposing the requirement).

With regard to the second element, a prisoner cannot establish a constitutional violation by simply claiming that prison officials destroyed his legal papers; instead, he must demonstrate that the misconduct actively hindered his efforts to pursue a legal claim. *Covino*, 108 F.3d 1369, at *1. Mere delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation. *John*, 130 F. App'x at 507; *Davis*, 320 F.3d at 352.

With regard to the third element, this actual injury requirement "is not satisfied by just any type of frustrated legal claim," because the Constitution guarantees only the tools that "inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). "'Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.'" *Lewis*, 518 U.S. at 355. In addition, the hindered legal claim must be "non-frivolous." *Eberhart v. Crozier*, 423 F. App'x 57, 58 (2d Cir. 2011).

3. Free Flow of Mail

To establish a free-flow-of-mail claim under the First Amendment, a prisoner must prove the following two elements: (1) that a prison official regularly interfered with the prisoner's incoming or outgoing mail; and (2) that the interference was unjustifiable. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

With regard to the first element, an isolated incident of mail tampering is usually insufficient to establish a constitutional violation. *Davis*, 320 F.3d at 351; *Washington v. James*, 782 F.2d 134, 1139 (2d Cir. 1986); *Morgan v. Montanye*, 516 F.2d 1367, 1371 (2d Cir. 1975). Rather, the prisoner must show that prison official regularly interfered with the incoming legal mail. *Davis*, 320 F.3d at 351; *Washington*, 782 F.2d at 1139. However, "as few as two incidents of mail tampering could constitute an actionable violation (1) if the incidents suggested an ongoing practice of censorship unjustified by a substantial government interest, or (2) if the tampering unjustifiably chilled the prisoner's right of access to the courts or impaired the legal representation received." *Davis*, 320 F.3d at 351.

With regard to the second element, an interference with a prisoner's mail may be justified but only if the interference (whether by regulation or mere practice) "furthers one or more of the substantial governmental interests of security, order, and rehabilitation . . . [and is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Ford v. Fischer*, 539 F. App'x 19, 19 (2d Cir. 2013); *Ahlers v. Rabinowitz*, 684 F.3d 53, 64 (2d Cir. 2012); *Davis*, 320 F.3d at 351; *Washington*, 782 F.2d at 1139. In balancing the competing interests implicated in restrictions on prison mail, generally greater protection should be afforded to legal mail than to non-legal mail, as well as greater protection to outgoing mail than to incoming mail. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989); *Washington*, 782 F.2d at 1138-39; *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982).

4. Free Exercise of Religion

The First Amendment guarantees the right to the free exercise of religion. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). "Prisoners have long been understood to retain some measure of the constitutional protection afforded by the First Amendment's Free Exercise Clause." *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003). This protection extends into aspects of prison life including that of an inmate's diet. *Ford*, 352 F.3d at 597. For example, recently the Second Circuit held that serving a Muslim detainee a religiously noncompliant meal containing pork ten times in a period of nine months (even outside of Ramadan) could constitute a substantial burden on the detainee's religious beliefs under the Free Exercise Clause. *Brandon v. Kinter*, No. 17-911, 2019 WL 4263361, at *8-10 (2d Cir. Sept. 10, 2019). However, this right is not absolute or unbridled, and, even if a regulation "impinges on inmates' constitutional rights, the regulation may be valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Generally, to assess a free exercise claim under the First Amendment, one must determine (1) whether the practice asserted is religious in the person's scheme of beliefs, and whether the belief is sincerely held, (2) whether the challenged practice of prison officials infringes upon the religious belief, and (3) whether the challenged practice of the prison officials furthers some legitimate penological objective. *Jova v. Smith*, 346 F. App'x 741, 743-44 (2d Cir. 2009); *Farid v. Smith*, 850 F.2d 917, 926 (2d Cir. 1988).

With regard to the threshold determination (i.e., whether the practice asserted is religious in the person's scheme of beliefs, and whether the belief is sincerely held), one must be wary of questioning the centrality of particular beliefs or practices to a faith, or a validity of particular litigants' interpretations of those creeds, and instead one may only consider whether the particular plaintiff holds a belief which is religious in nature. *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004). Stated another way, "[t]he freedom to exercise religious beliefs cannot be made contingent on the objective truth of such beliefs." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). Rather, a subjective test must be employed to determine whether the disputed conduct infringes on the plaintiff's sincerely held religious beliefs. *Ford*, 352 F.3d at 589-90.

Once a prisoner has shown that the challenged practice of prison officials infringes upon his sincerely held religious belief, the burden then shifts to the defendant to identify a legitimate penological purpose justifying the decision under scrutiny, which burden has been characterized as "relatively limited." *Hall v. Ekpe*, 408 F. App'x 385, 388 (2d Cir. 2010). In the event such a penological interest is articulated, its reasonableness is then subject to analysis under the test set out by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987). *Holland v. Goord*, 758 F.3d 215, 223 (2d Cir. 2014); *Salahuddin v. Goord*, 467 F.3d 263, 274 (2d Cir. 2006). Under *Turner*, one must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and whether the regulations are rationally related to that objective. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). Then one must determine whether the inmate is afforded adequate alternative means for exercising the right in question. *Thornburgh* , 490 U.S. at 417. Lastly, one must determine the impact that accommodation of the asserted constitutional right will have on others guards and inmates in the prison. *Id*. at 418.

B. Religious Land Use and Institutionalized Persons Act ("RLUIPA")

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq*, provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

With regard to the threshold issue presented in analyzing a RLUIPA claim (i.e., whether a "substantial burden" has been established), "[a] substantial burden is more than a mere inconvenience." *Gill v. DeFrank*, 98-CV-7851, 2000 U.S. Dist. LEXIS 9122, at *4-5 (S.D.N.Y. June 30, 2000).

With regard to the second issue presented in analyzing a RLUIPA claim (i.e., whether the imposition of the burden was in furtherance of a compelling governmental interest, and whether the least restrictive means of furthering that compelling governmental interest was used), an act by prison officials challenged by a prisoner under RLUIPA is examined under a test more restrictive than the reasonableness test governing a prisoner's free-exercise claim under the First Amendment. *Salahuddin v. Goord*, 467 F.3d 263, 274 (2d Cir. 2006).

Note that, while RLUIPA permits claims for injunctive and/or declaratory relief against states and state officials in their official capacities, RLUIPA does not permit claims for monetary damages against states or state officials in either their official or individual capacities. *Sossaman v. Tex.*, 563 U.S. 277, 285-86, 293 (2011); *Washington v. Gonyea*, 731 F.3d 143, 145-46 (2d Cir. 2013).

C. Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches . . . shall not be violated." U.S. Const. amend IV.[1] "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) [internal quotation marks and citation omitted]. "Thus, the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner*, 489 U.S. at 619 [internal quotation marks omitted]. In so doing, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) [citations omitted], *accord, Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992).

With respect to the first interest to be balanced (i.e., the intrusion of the individual's Fourth Amendment interest of privacy), generally, "given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retain[s] necessarily [is] of a diminished scope." *Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979). For example, the Fourth Amendment's proscription against unreasonable searches does not apply *at all* within the confines of a prison cell. *Hudson v. Palmer* 468 U.S. 517, 526 (1984); *see also Tinsley v. Greene*, 95-CV-1765, 1997 WL 160124, at *7 (N.D.N.Y. March 31, 1997) (Pooler, J., adopting Report-Recommendation of Homer, M.J.); *Demaio v. Mann*, 877 F. Supp. 89, 95 (N.D.N.Y.) (Kaplan, J., sitting by designation), *aff'd*, 122 F.3d 1055 (2d Cir. 1995). However, while the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell, inmates retain a limited right to bodily privacy under the Fourth Amendment.

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[1] To the extent that a pre-trial detainee seeks to rely on that portion of the Fourth Amendment which regards "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures" to assert a claim of excessive force, that claim is discussed below in note 3 of these materials.

Harris v. Miller, 818 F.3d 49, 57 (2d Cir. 2016); *Covino*, 967 F.2d at 77.

With respect to the second interest to be balanced (i.e., the legitimate Government interest promoted by the practice in question), generally, "[t]he Government's interest in regulating . . . its operation of a . . . prison . . . presents special needs beyond [the] normal [need for] law enforcement . . . ." *Skinner*, 489 U.S. at 619 [internal quotation marks and citation omitted]; *see also Roe v. Marcotte*, 193 F.3d 72, 80-82 (2d Cir. 1999) ("While convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement, the rights they retain are subject to restrictions dictated by concerns for institutional security, order, and discipline."). This is because, as the Supreme Court has recognized, "[a] detention facility is a unique place fraught with serious security dangers." *Bell*, 441 U.S. at 559.

D. Fifth Amendment

1. Due Process

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be . . . in any criminal case . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. Generally, no independent Fifth Amendment claim exists with respect to due process violations allegedly occurring at a state-prison disciplinary proceeding (other than a possible claim concerning the privilege against self-incrimination), for two reasons. First, such a proceeding is not a "criminal" proceeding under the Fifth Amendment. *See Baxter v. Palmigiano*, 425 U.S. 308, 316 (1975). Second, the Due Process Clause of the Fifth Amendment is inapplicable to state actors. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

Rather, it is the Fourteenth Amendment that applies to such due process violations allegedly occurring at a prison disciplinary hearing. *See, e.g.*, *Robinson v. Vaughn*, 92-CV-7048, 1993 U.S. Dist. LEXIS 15566, at *17 (E.D. Pa. Nov. 1, 1993) ("The rights secured to individuals by the Fifth Amendment are generally applicable against the states only through the Fourteenth Amendment. The court's consideration of [the prisoner plaintiff's] allegations that the defendants' actions toward him [in the prison disciplinary hearing] violated due process is subsumed within its Fourteenth Amendment analysis of his claims.").

2. Double Jeopardy

It is well settled in the Second Circuit that facing a hearing on a prison disciplinary charge cannot be construed as being "put in jeopardy of life or limb" for purposes of the Double Jeopardy Clause of the Fifth Amendment, because prison disciplinary proceedings are civil, not criminal, in nature. *See* U.S. Const. amend V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); *Porter v. Coughlin*, 421 F.3d 141, 149 (2d Cir. 2005) ("For all the reasons stated above, we find that the disciplinary proceeding was civil in nature and therefore presented no violation of the Double Jeopardy Clause.").

E. Eighth Amendment

1. Inadequate Medical Care

To establish a claim of deliberate indifference to serious medical needs under the Eighth Amendment, a prisoner must establish two elements: (1) that the prisoner had a *sufficiently serious* medical need; and (2) that the defendant was *deliberately indifferent* to that serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998).[2]

With regard to the first element, one must consider two inquiries in determining whether a deprivation of care is sufficiently serious. *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006). The first inquiry is "whether the prisoner was actually deprived of adequate medical care." *Salahuddin*, 467 F.3d at 279. Medical care is adequate where the care provided was a "reasonable" response to the inmate's medical condition. *Id*. The second inquiry is "whether the inadequacy in medical care is sufficiently serious." *Id*. at 280. In cases where there was a failure to provide any treatment, one examines whether the inmate's medical condition was sufficiently serious. *Smith v. Carpenter*, 316 F.3d 178, 185-86 (2d Cir. 2003). To be sufficiently serious for purposes of the Constitution, a medical condition must be "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011) (quotation marks omitted); *Chance*, 143 F.3d at 702; *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994), *cert. denied*, 513 U.S. 1154 (1995). Factors informing this inquiry include (1) whether a reasonable doctor or patient would find it important and worthy of comment, (2) whether the condition significantly affects an individual's daily activities, and (3) whether it causes chronic and substantial pain. *Salahuddin*, 467 F.3d at 280; *Chance*, 143 F.3d at 702. Importantly, it is "the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes." *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003). In cases where medical treatment was given, but was inadequate, "the seriousness inquiry is narrower." *Salahuddin*, 467 F.3d at 280. "For example, if the prisoner [was] receiving on-going treatment and the offending conduct [was] an

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[2] A claim of inadequate medical care based on events occurring during a pre-trial detention arises under the Due Process Clause of the Fourteenth Amendment, which provides protection at least as great as the protection that the Eighth Amendment provides to convicted prisoners. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983). To prevail on a claim, a pre-trial detainee must prove the following two elements: (1) that the deprivation was objectively sufficiently serious, such as a condition that may produce "death, degeneration, or extreme pain;" and (2) that the charged individual acted with deliberate indifference, which (in the Fourteenth Amendment context) requires showing that the official knew, *or should have known*, that failing to provide the complained of medical treatment would pose a substantial risk to the plaintiff's health, and nonetheless disregarded that risk. *Charles v. Orange Cty.*, 925 F.3d 73, 86-87 (2d Cir. 2019) (emphasis added); *Carter v. Broome Cty.*, 16-CV-0422, 2019 WL 3938088, at *7 (N.D.N.Y. Aug. 21, 2019) (Hurd, J.).

unreasonable delay or interruption in that treatment, the seriousness inquiry 'focus[es] on the challenged delay or interruption in treatment rather than the prisoner's underlying medical condition alone.'" *Id.* (quoting *Carpenter*, 316 F.3d at 185).

With regard to the second element, deliberate indifference describes a state of mind more blameworthy than negligence. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Estelle*, 429 U.S. at 106. Rather, deliberate indifference is a state of mind akin to *criminal recklessness*. *Farmer*, 511 U.S. at 827; *Wilson v. Seiter*, 501 U.S. 294, 301-03 (1991); *Salahuddin*, 467 F.3d at 280; *Hemmings v. Gorczyk*, 134 F.3d 104, 108 (2d Cir. 1998); *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). The prisoner must demonstrate that the defendant acted with conscious or reckless disregard to a known substantial risk of harm. *Farmer*, 511 U.S. at 836; *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003); *Chance*, 143 F.3d at 702.

2. Inadequate Prison Conditions

To establish a claim of inadequate prison conditions under the Eighth Amendment, a prisoner must prove two elements: (1) that the conditions of his confinement resulted in deprivation that was *sufficiently serious*; and (2) that the defendant acted with *deliberate indifference* to the plaintiff's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Willey v. Kirkpatrick*, 801 F.3d 51, 66 (2d Cir. 2015); *Davidson v. Murray*, 371 F. Supp.2d 361, 370 (W.D.N.Y. 2005).[3]

With regard to the first element, the prisoner must demonstrate that the conditions of his confinement, either alone or in combination, resulted in an "unquestioned and serious deprivation[] of [his] basic human needs" or "deprive[d] . . . [him] of the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013); *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996); *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985). In a prison setting, such needs or necessities include food, warmth, clothing, exercise, medical care, and safe and sanitary living conditions. *Wilson v. Seiter*, 501 U.S. 294, 301-03 (1991); *Rhodes*, 452 U.S. at 347; *Walker*, 717 F.3d at 125.

With regard to the second element, deliberate indifference describes a state of mind more blameworthy than negligence. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Estelle*, 429 U.S. at 106. Rather, deliberate indifference is a state of mind akin to *criminal recklessness*. *Farmer*, 511 U.S. at 827; *Wilson v. Seiter*, 501 U.S. 294, 301-03 (1991); *Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006); *Hemmings v. Gorczyk*, 134 F.3d 104, 108 (2d Cir. 1998); *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). The prisoner must demonstrate that the defendant acted with conscious or reckless disregard to a known substantial risk of harm. *Farmer*, 511 U.S.

[3] Note that a pretrial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth Amendment, rather than the Cruel and Unusual Punishments Clause of the Eight Amendment, because pretrial detainees have not been convicted of a crime and thus may not be punished in any manner. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017).

at 836; *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998).

3. Excessive Force

To establish a claim of excessive force under the Eighth Amendment, a prisoner must prove the following two elements, the first one subjective and the second one objective: (1) that the defendant had the necessary level of culpability, shown by actions characterized by "wantonness"; and (2) that the injury actually inflicted is sufficiently serious to warrant Eighth Amendment protection. *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991); *Blyden v. Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999); 3B O'Malley, Grenig & Lee, *Fed. Jury Prac. & Instr.* § 166.23 (6th ed. 2013).[4]

With regard to the first element, in excessive-force cases, the "wantonness" inquiry turns on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). To act "maliciously" means to do a wrongful act without just cause or reason, with the intent to inflict harm. 3B O'Malley, Grenig & Lee, *Fed. Jury Prac. & Instr.* § 166.31 (6th ed. 2013). To act "sadistically" means to engage in extreme or excessive cruelty or to take delight in cruelty. 3B O'Malley, Grenig & Lee, *Fed. Jury Prac. & Instr.* § 166.33 (6th ed. 2013). However, "*Hudson* does not limit liability to that subset of cases where 'malice' [or 'sadism'] is present. Rather, *Hudson* simply makes clear that excessive force is defined as force not applied in a 'good-faith effort to maintain or restore discipline.'" *Blyden*, 186 F.3d at 263. "The [Supreme] Court's use of the terms 'maliciously and sadistically' is, therefore, only a characterization of all 'bad faith' uses of force and not a limit on liability for uses of force that are otherwise in bad faith." *Id.* Some of the things that a jury may consider in determining whether force was used against a prisoner maliciously and sadistically to cause him harm (and not in a good-faith effort to maintain or restore discipline) include the following: (1) the need for the use of force; (2) the relationship between the need for force and the amount of force used; (3) the extent of the injury inflicted; (4) the threat reasonably perceived by the defendant; and (5) any efforts made to temper the severity of a forceful response. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *Scott v. Coughlin*, 344 F.3d 282, 291 (2d Cir. 2003); *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993); 3B O'Malley, Grenig & Lee, *Fed. Jury Prac. & Instr.* § 166.23 (6th

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[4] A claim of excessive force based on events occurring during a pre-trial detention arises under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 388, 391 (1989). Three elements must be objectively examined to determine whether such a claim has been established: "(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; and (3) the extent of the injury inflicted." *Graham*, 490 U.S. at 390, 397. It is essential to look at surrounding circumstances in each case, and analyze "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396. The "extent of intrusion on the suspect's rights" must be balanced against the "importance of governmental interests." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

ed. 2013).

With regard to the second element, it is true that corrections officers are given the lawful authority to use such physical force as may be reasonably necessary to enforce compliance with proper instructions and to protect themselves from physical harm from an inmate. 3B O'Malley, Grenig & Lee, *Fed. Jury Prac. & Instr.* § 166.23 (6th ed. 2013). However, when a corrections officer maliciously and sadistically uses force to cause harm to a prisoner, the result is cruel and unusual punishment under the Eighth Amendment, regardless of whether the prisoner suffers significant injury. *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (finding "minor" or non-"serious" injuries sufficient); *Hudson*, 503 U.S. at 9 (finding "[in]significant" injury sufficient); *Cole v. Fischer*, 379 F. App'x 40, 42 (2d Cir. 2010) (finding no physical injury required) (Summary Order); *Blyden v. Mancusi*, 186 F.3d 252, 263 (2d Cir. 1999) (finding "[in]significant" injury sufficient); 3B O'Malley, Grenig & Lee, *Fed. Jury Prac. & Instr.* § 166.23 (6th ed. 2013).

4. Sexual Assault

To establish a claim for sexual assault against a prison official under the Eighth Amendment, a prisoner must prove the following two elements, the first one objective and the second one subjective: (1) that the alleged deprivation was harmful enough or sufficiently serious to reach constitutional dimensions; and (2) that the prison official acted with a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015); *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).[5]

With regard to the first element, conduct that cannot be said to be cruel and unusual under contemporary standards of decency do not satisfy this element. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). However, sexual abuse can cause severe physical and/or psychological harm, and may violate contemporary standards of decency. *Boddie*, 105 F.3d at 861. As a result, severe or repetitive sexual abuse of a prisoner by a prison officer can be sufficiently serious for purposes of this element. *Id*. It is important to note that even "a single incident of sexual abuse, if sufficiently severe or serious, may violate an inmate's Eighth Amendment rights no less than repetitive abusive conduct. Recurrences of abuse, while not a prerequisite for liability, bear on the question of severity: Less severe but repetitive conduct may still be 'cumulatively egregious' enough to violate the Constitution." *Crawford*, 796 F.3d at 257. "To show that an incident or series of incidents was serious enough to implicate the Constitution, an inmate need not allege that there was penetration, physical injury, or direct contact with uncovered genitalia." *Id*.

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[5] When a pre-trial detainee asserts a claim of sexual assault occurring during the course of a criminal investigation or other form of governmental investigation or activity, that claim arises under the Fourth Amendment; however, when a pre-trial detainee asserts a claim of sexual assault occurring outside of a criminal investigation or other form of governmental investigation or activity, that claim arises under the Substantive Due Process Clause of the Fourteenth Amendment. *Poe v. Leonard*, 282 F.3d 123, 136 (2d Cir. 2002); *Love v. Town of Granby*, 03-CV-1960, 2004 WL 1683159, at *4 (D. Conn. July 12, 2004); *Doe v. City of Hartford*, 03-CV-1454, 2004 WL 1091745, at *2 (D. Conn. May 13, 2004).

With regard to the second element, deliberate indifference describes a state of mind more blameworthy than negligence. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Rather, deliberate indifference is a state of mind akin to *criminal recklessness*. *Farmer*, 511 U.S. at 827; *Wilson v. Seiter*, 501 U.S. 294, 301-03 (1991); *Salahuddin v. Goord*, 467 F.3d 263, 280 (2d Cir. 2006); *Hemmings v. Gorczyk*, 134 F.3d 104, 108 (2d Cir. 1998); *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996). The prisoner must demonstrate that the defendant acted with conscious or reckless disregard to a known substantial risk of harm. *Farmer*, 511 U.S. at 836; *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). Sexual contact between a prisoner and a prison guard serves no legitimate role and is simply not part of the penalty that criminal offenders pay for their offenses against society. *Boddie*, 105 F.3d at 861. Where no legitimate law enforcement or penological purpose can be inferred from the prison guard's alleged conduct, the abuse itself may, in some circumstances, be sufficient evidence of a culpable state of mind for purposes of this element. *Id*.

5. Failure to Intervene / Failure to Protect

a. Failure to Intervene

To establish a claim of failure to intervene in the violation of a prisoner's constitutional rights under the Eighth Amendment, a prisoner must prove the following four elements: (1) that excessive force was used against the prisoner; (2) that the officer knew, or deliberately ignored, the fact that excessive force was going to be, or was being, used; (3) that the officer had a reasonable opportunity to intervene and prevent the harm; and (4) that the officer did not take reasonable steps to intervene. *Curley v. Village of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001); *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994); *O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988); *Henry v. Dinelle*, 10-CV-0456, 2011 WL 5975027, at *4 (N.D.N.Y. Nov. 29, 2011) (Suddaby, J.).

With regard to the third and fourth elements, when considering the reasonableness of any opportunity to intervene, one must consider both (a) the duration of the use of excessive force, and (b) the officer's presence and proximity during the use of excessive force. Generally, an officer is excused from liability, despite his presence, if the assault is "sudden and brief," such that there is no real opportunity to prevent it. *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 129 (2d Cir.1997); *Jeffreys v. Rossi*, 275 F.Supp.2d 463, 474 (S.D.N.Y. 2003); *Parker v. Fogg*, 85-CV-0177, 1994 WL 49696, at *8 (N.D.N.Y. Feb. 17, 1993) (McCurn, J.). For example, generally, officers cannot be held liable for failure to intervene in incidents that happen in a "matter of seconds." *Parker*, 1994 WL 49696 at *8.

b. Failure to Protect

To establish a claim for failure to protect a prisoner from violence by another prisoner or by a guard (not in the prison official's presence) under the Eighth Amendment, a prisoner must

prove the following two elements: (1) that the alleged deprivation was objectively, sufficiently serious; and (2) that the prison official acted, or failed to act, with a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 834, 840-45 (1994).

With regard to the first element (i.e., the objective element), the prisoner must show "that he [was] incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. "In determining whether a substantial risk of harm existed, the Court should not assess a prison official's actions based on hindsight but rather should look at the facts and circumstances of which the official was aware at the time he acted or failed to act." *Hartry v. Cty. of Suffolk*, 755 F. Supp. 2d 422, 436 (E.D.N.Y. 2010) (internal quotations marks omitted).

With regard to the second element (i.e., the subjective element), the prisoner must show that the defendant acted with a mental state akin to "subjective recklessness as used in the criminal law," *Farmer*, 511 U.S. at 839-40. This requires a showing that "the official [knew] of and disregard [ed] an excessive risk to inmate health or safety; the official must both [have been] aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and he must also [have] draw[n] the inference." *Id*. at 837. "[D]eliberate indifference entails something more than mere negligence, . . . [but] something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id*. at 835.

Finally, as part of the second element, the prisoner must also show that the official responded unreasonably to the substantial risk of serious harm to the prisoner. *Farmer*, 511 U.S. at 844-45 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure reasonable safety.") (internal quotation marks omitted); *Ayers v. Coughlin*, 780 F.2d 205, 209 (2d Cir. 1985) ("The failure of custodial officers to employ reasonable measures to protect an inmate from violence by other prison residents has been considered cruel and unusual punishment.").

6. Verbal Harassment or Threats

A claim under 42 U.S.C. § 1983 for verbal harassment or abuse is not actionable without a showing of an actual injury. *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996); *Hendricks v. Boltja*, 20 F. App'x 34, 36 (2d Cir. 2001); *Johnson v. Eggersdorf*, 8 F. App'x 140, 143 (2d Cir. 2001); *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986).

Similarly, a claim under 42 U.S.C. § 1983 for verbal threats is not actionable without a showing of an actual injury. *Amaker v. Foley*, 94-CV-0843, 2003 WL 21383010, at *4 (W.D.N.Y. Feb. 13, 2003), *aff'd*, 117 F. App'x 806 (2d Cir. 2005); *Jermosen v. Coughlin*, 87-CV-6267, 1993 WL 267357, at *6 (S.D.N.Y. July 9, 1993), *aff'd*, 41 F.3d 1501 (2d Cir. 1994).

However, when verbal harassment or threats are coupled with appreciable injury, a claim may be stated. *Cole v. Fischer*, 379 F. App'x 40, 43 (2d Cir. 2010).

F. Fourteenth Amendment[6]

The Due Process Clause of the Fourteenth Amendment contains both a substantive component and a procedural component. *Zinernon v. Burch*, 494 U.S. 113, 125 (1990). The substantive component "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinernon*, 494 U.S. at 125 [internal quotations marks omitted]. The procedural component bars "the deprivation by state action of a constitutionally protected interest in life, liberty, or property . . . *without due process of law*." *Id*. at 125-126 [internal quotations marks and citations omitted; emphasis in original]. One of the differences between the two claims is that a substantive due process violation "is complete when the wrongful action is taken," while a procedural due process violation "is not complete unless and until the State fails to provide due process" (which may occur *after* the wrongful action in question). *Id*.

1. Procedural Due Process

"[Courts] examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State . . . ; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient . . . ." *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

With regard to the first step, liberty interests protected by the Fourteenth Amendment's Due Process Clause "will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 483-484 (1995). Atypicality in a *Sandin* inquiry is normally a question of law. *Colon v. Howard*, 215 F.3d 227, 230-31 (2d Cir. 2000); *Sealey v. Giltner*, 197 F.3d 578, 585 (2d Cir. 1999). When determining whether a prisoner possesses a liberty interest, district courts must examine the specific circumstances of confinement, including analysis of both the length and conditions of confinement. *Sealey*, 197 F.3d at 586; *Arce v. Walker*, 139 F.3d 329, 335-36 (2d Cir. 1998).

With regard to the second step, a violation of a state law, state regulation or DOCCS Directive, *in and of itself*, does not give rise to liability under 42 U.S.C. § 1983. *Doe v. Conn. Dept. of Child & Youth Servs*., 911 F.2d 868, 869 (2d Cir. 1990); *Patterson v. Coughlin*, 761 F.2d 886, 891 (2d Cir. 1985).

2. Substantive Due Process

"Substantive due process protects individuals against government action that is arbitrary, . . . conscience-shocking, . . . or oppressive in a constitutional sense, . . . but not against constitutional action that is incorrect or ill-advised." *Lowrence v. Achtyl*, 20 F.3d 529, 537 (2d

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[6] To the extent that a pre-trial detainee seeks to rely on the Fourteenth Amendment to assert a claim of inadequate medical care, that claim is discussed above in note 2 of these materials.

Cir. 1994) [internal quotations marks and citations omitted]. The first step in a substantive due process analysis is to identify the precise constitutional right at stake. The second step is to consider whether the state action was arbitrary in the constitutional sense and therefore violative of substantive due process.

A common problem with a substantive due process claim is that, "if a constitutional claim is covered by a specific constitutional provision . . . , the claim must be analyzed under the standard appropriate to that specific provision, not under the [more generalized notion] of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272, n.7 (1997) (citing *Graham v. Connor*, 490 U.S. 386, 392-94 [1989]); *see also Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (offering similar recitation of law before refusing to analyze claim of improper search under Fourteenth Amendment); *accord, Kia P. v. McIntyre*, 235 F.3d 749, 757-58 (2d Cir. 2000).

3. Equal Protection

To establish a violation of the Equal Protection Clause, a prisoner must prove the following two elements: (1) that he was treated differently from similarly situated individuals and (2) either (a) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person (called "selective prosecution" equal protection) or (ii) that there was no rational basis for the difference in treatment (called "class-of-one" equal protection). *Cobb v. Pozzi*, 363 F.3d 89, 109-10 (2d Cir. 2004); *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001).

In proving the second element, the prisoner must show that the alleged disparity in treatment cannot survive the appropriate level of scrutiny. *Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005).

More specifically, where the alleged classification involves a "suspect class" or "quasi-suspect class," the alleged classification is subject to "strict scrutiny" by a court. *Travis v. N.Y. State Div. of Parole*, 96-CV-0759, 1998 U.S. Dist. LEXIS 23417, at *11 (N.D.N.Y. Aug. 26, 1998) (Sharpe, M.J.), *adopted*, 96-CV-0759, Decision and Order (N.D.N.Y. filed Nov. 2, 1998) (McAvoy, C.J.). However, neither imprisonment nor disability is a suspect classification under the Equal Protection Clause. *Chick v. Cty. of Suffolk*, 546 F. App'x 58, 60 (2d Cir. 2013) ("[A] disability is not a suspect classification under the Equal Protection Clause."); *Lee v. Governor of N.Y.*, 87 F.3d 55, 60 (2d Cir. 1996) ("[P]risoners either in the aggregate or specified by offense are not a suspect class . . . .").

Where the alleged classification does not involve a "suspect class" or "quasi-suspect class" (or where the prisoner is asserting a "class of one" equal protection claim), the alleged classification is subject to only "rational basis scrutiny." *Travis*, 1998 U.S. Dist. LEXIS 23417, at *11-12. To survive such scrutiny, the alleged classification need only be "rationally related" to a "legitimate state interest." *Id.*; *Holley*, 2007 U.S. Dist. LEXIS 64699, at *23; *Coleman*, 363 F. Supp.2d at 902.

Finally, where a "class of one" equal protection claim is asserted, there must be "an extremely high degree of similarity" between the class-of-one plaintiff and the alleged comparators in order to succeed. *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005), *overruled on other grounds*, *Appel v. Spiridon*, 531 F.3d 138, 141 (2d Cir.2008). Specifically, such a plaintiff must establish that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake. *Ruston v. Town Bd. for the Town of Skaneateles*, 610 F.3d 55, 59-60 (2d Cir. 2010); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). The standard for determining whether another person's circumstances are similar to the plaintiff's must be whether they are *prima facie* identical. *Neilson*, 409 F.3d at 105.

H. Conspiracy Under 42 U.S.C. § 1983

To establish a conspiracy claim under 42 U.S.C. § 1983, a prisoner must prove the following three elements: (1) an agreement between two or more state actors; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages. *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002); *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir.1999).

I. Americans with Disabilities Act / Rehabilitation Act

The elements of a prisoner's claim for disability discrimination under Title II of the Americans with Disabilities Act ("ADA") and the elements of his claim for disability discrimination under Section 504 of the Rehabilitation Act are the same. *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir.1999) ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem.").

To establish a claim under either Title II of the ADA or Section 504 of the Rehabilitation Act ("the Acts"), a prisoner must prove the following three elements: (1) that he is a qualified individual with a disability; (2) that the defendant is subject to one of the Acts; and (3) that the prisoner was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant because of his disability. *McElwee v. Cty. of Orange*, 700 F.3d 635, 640 (2d Cir.2010); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

The only difference between the elements is that, under Section 504 of the Rehabilitation Act, a prisoner must also demonstrate that the benefit in question is part of a program or activity receiving Federal financial assistance. *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir.1998). Moreover, "a showing of discriminatory animus or ill will based on disability is necessary to recover damages under Title II [of the ADA] in a private action against a state." *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001).

A "disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A).

Under the Acts, a defendant discriminates when it fails to make a reasonable accommodation that would permit a qualified disabled individual "to have access to and take a meaningful part in public services." *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004).

II. DEFENSES

A. Non-Exhaustion of Available Administrative Remedies

The Prison Litigation Reform Act of 1995 ("PLRA") requires that prisoners who bring suit in federal court must first exhaust their available administrative remedies: "No action shall be brought with respect to prison conditions under §1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e.

In accordance with the PLRA, the New York State Department of Correctional Services ("DOCS") has made available a well-established inmate grievance program. 7 N.Y.C.R.R. § 701.7. Generally, the DOCS Inmate Grievance Program ("IGP") involves the following three-step procedure for the filing of grievances. 7 N.Y.C.R.R. §§ 701.5, 701.6(g), 701.7; *see also White v. The State of New York*, 00-CV-3434, 2002 U.S. Dist. LEXIS 18791, at *6 (S.D.N.Y. Oct 3, 2002).

First, an inmate must file a complaint with the facility's IGP clerk within a certain number of days of the alleged occurrence. (The term "a certain number of days" rather than a particular time period is used because [1] since the three-step process was instituted, the time periods imposed by the process have changed, and [2] the time periods governing any particular grievance depend on the regulations and directives pending during the time in question.) If a grievance complaint form is not readily available, a complaint may be submitted on plain paper. A representative of the facility's inmate grievance resolution committee ("IGRC") has a certain number of days from receipt of the grievance to informally resolve the issue. If there is no such informal resolution, then the full IGRC conducts a hearing within a certain number of days of receipt of the grievance, and issues a written decision within a certain number of days of the conclusion of the hearing.

Second, a grievant may appeal the IGRC decision to the facility's superintendent within a certain number of days of receipt of the IGRC's written decision. The superintendent is to issue a written decision within a certain number of days of receipt of the grievant's appeal.

Third, a grievant may appeal to the central office review committee ("CORC") within a certain number of days of receipt of the superintendent's written decision. CORC is to render a

written decision within a certain number of days of receipt of the appeal.

Moreover, there is an expedited process for the review of complaints of inmate harassment or other misconduct by corrections officers or prison employees. 7 N.Y.C.R.R. § 701.8. In the event the inmate seeks expedited review, he or she may report the misconduct to the employee's supervisor. The inmate then files a grievance under the normal procedures outlined above, but all grievances alleging employee misconduct are given a grievance number, and sent immediately to the superintendent for review. Under the regulations, the superintendent or his designee shall determine immediately whether the allegations, if true, would state a "bona fide" case of harassment, and if so, shall initiate an investigation of the complaint, either "in-house," by the Inspector General's Office, or by the New York State Police Bureau of Criminal Investigations. An appeal of the adverse decision of the superintendent may be taken to the CORC as in the regular grievance procedure. A similar "special" procedure is provided for claims of discrimination against an inmate. 7 N.Y.C.R.R. § 701.9.

These procedural requirements contain several safeguards. For example, if an inmate could not file such a complaint within the required time period after the alleged occurrence, he or she can apply to the facility's IGP Supervisor for an exception to the time limit based on mitigating circumstances. If that application is denied, the inmate can file a complaint complaining that the application was wrongfully denied. *Groves v. Knight*, 05-CV-0183, Decision and Order at 3 (N.D.N.Y. filed Aug. 4, 2009) (Suddaby, J.). Moreover, any failure by the IGRC or the superintendent to timely respond to a grievance or first-level appeal, respectively, can be appealed to the next level, including CORC, to complete the grievance process. 7 N.Y.C.R.R. § 701.6(g) ("[M]atters not decided within the time limits may be appealed to the next step.").

Generally, if a prisoner has failed to follow each of the required three steps of the above-described grievance procedure prior to commencing litigation, he has failed to exhaust his administrative remedies. *Ruggiero v. Cty. of Orange*, 467 F.3d 170, 175 (2d Cir. 2006) (citing *Porter*, 534 U.S. at 524).

In 2004, the Second Circuit held that a three-part inquiry is appropriate where a defendant contends that a prisoner has failed to exhaust his available administrative remedies, as required by the PLRA. *Hemphill v. State of New York*, 380 F.3d 680, 686, 691 (2d Cir. 2004), *accord*, *Ruggiero*, 467 F.3d at 175. First, "the court must ask whether [the] administrative remedies [not pursued by the prisoner] were in fact 'available' to the prisoner." *Hemphill*, 380 F.3d at 686 (citation omitted). Second, if those remedies were available, "the court should . . . inquire as to whether [some or all of] the defendants may have forfeited the affirmative defense of non-exhaustion by failing to raise or preserve it . . . or whether the defendants' own actions inhibiting the [prisoner's] exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense." *Id.* [citations omitted]. Third, if the remedies were available and some of the defendants did not forfeit, and were not estopped from raising, the non-exhaustion defense, "the Court should consider whether 'special circumstances' have been plausibly alleged that justify the prisoner's failure to comply with the administrative

procedural requirements." *Id*. [citations and internal quotations omitted].

However, in 2016, in *Ross v. Blake*, the Supreme Court abrogated the third prong of *Hemphill*. *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). Any inquiry which previously would have been considered under the third prong of *Hemphill* is now considered entirely within the context of whether administrative remedies were actually available to the aggrieved inmate. *Ross*, 136 S. Ct. at 1858. This is because, the Supreme Court explained, the PLRA "contains its own, textual exception to mandatory exhaustion." *Id.* More specifically, 42 U.S.C. § 1997e(a) provides that only those administrative remedies that "are available" must first be exhausted. *Id.* In the PLRA context, the Supreme Court determined that "availability" means that "an inmate is required to exhaust those, but only those, grievance procedures that are capable of use to obtain some relief for the action complained of." *Id.* at 1859 (quotation marks omitted).

The Supreme Court identified three circumstances in which a court could find that internal administrative remedies are not available to prisoners under the PLRA. *Id.* at 1859-60.[7] Under the first circumstance, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end--with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* at 1859. Under the second circumstance, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id*. The Court explained that, "[i]n this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it." *Id*. Under the third circumstance, "prison administrators [might] thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id*. at 1860.

Finally, one points bears mentioning regarding exhaustion. Given that non-exhaustion is an affirmative defense, the defendant bears the burden of proving that a prisoner has failed to exhaust his available administrative remedies. *See, e.g., Sease v. Phillips*, 06-CV-3663, 2008 WL 2901966, *4 (S.D.N.Y. July 25, 2008). However, once a defendant demonstrates that a prisoner has failed to exhaust his administrative remedies, the burden effectively shifts to the plaintiff to demonstrate unavailability, estoppel, or "special circumstances." *Compare Sease v. Phillips*, 06-CV-3663, 2008 WL 2901966, at *3, 5-6 (S.D.N.Y. July 25, 2008) (noting that defendants bear the "burden of proving that administrative remedies were in fact available") *with Verley v. Wright*, 02-CV-1182, 2007 WL 2822199, at *8 (S.D.N.Y. Sept. 27, 2007) ("[P]laintiff has failed to demonstrate that the administrative remedies were not, in fact, 'actually available to him.'"); *see also Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004) (noting that special circumstances must be "plausibly alleged, . . . justify[ing] the prisoner's failure to comply with administrative procedural requirements"); *Winston v. Woodward*, 05-CV-3385, 2008 WL 2263191, at *10 (S.D.N.Y. May 30, 2008) (suggesting that the plaintiff bears the "burden under *Hemphill* of demonstrating 'special circumstances'").

[7] According to the Second Circuit, "the three circumstances discussed in *Ross* do not appear to be exhaustive[.]" *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016).

B. Lack of Personal Involvement

"'[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.'" *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (quoting *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 [2d Cir. 1991]); *accord, McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Gill v. Mooney*, 824 F2d 192, 196 (2d Cir. 1987). In order to prevail on a cause of action under 42 U.S.C. § 1983 against an individual, a plaintiff must show some tangible connection between the alleged unlawful conduct and the defendant. *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986). If the defendant is a supervisory official, such as a DOCS Commissioner or Deputy Commissioner, a mere "linkage" to the unlawful conduct through "the prison chain of command" (i.e., under the doctrine of respondeat superior) is insufficient to show his or her personal involvement in that unlawful conduct. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003); *Wright*, 21 F.3d at 501; *Ayers v. Coughlin*, 780 F.2d 205, 210 (2d Cir. 1985). In other words, supervisory officials may not be held liable merely because they held a position of authority. *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996). Rather, supervisory personnel may be considered "personally involved" only if they (1) directly participated in the violation, (2) failed to remedy that violation after learning of it through a report or appeal, (3) created, or allowed to continue, a policy or custom under which the violation occurred, (4) had been grossly negligent in managing subordinates who caused the violation, or (5) exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that the violation was occurring. *Williams v. Smith*, 781 F.2d 319, 323-324 (2d Cir. 1986) (setting forth four prongs); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (adding fifth prong); *Wright*, 21 F.3d at 501 (adding fifth prong).

Generally, a supervisor is entitled to refer a prisoner's complaint to a subordinate, and rely on that subordinate to conduct an appropriate investigation and response. *See Brown v. Goord*, 04-CV-0785, 2007 WL 607396, at *6 (N.D.N.Y. Feb. 20, 2007) (McAvoy, J., adopting Report-Recommendation by Lowe, M.J., on *de novo* review) [citations omitted]; *see also Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997) (finding that a Department of Corrections Commissioner was not personally involved in alleged constitutional violation where he forwarded plaintiff's letter of complaint to a staff member for decision, and he responded to plaintiff's letter inquiring as to status of matter); *accord, Grullon v. City of New Haven*, 720 F.3d 133, 140 (2d Cir. 2013); *Swindell v. Supple*, 02-CV-3182, 2005 WL 267725, at *10 (S.D.N.Y. Feb. 3, 2005) ("[A]ny referral by Goord of letters received from [plaintiff] to a representative who, in turn, responded, without more, does not establish personal involvement."); *Garvin v. Goord*, 212 F. Supp.2d 123, 126 (W.D.N.Y. 2002) ("[W]here a commissioner's involvement in a prisoner's complaint is limited to forwarding of prisoner correspondence to appropriate staff, the commissioner has insufficient personal involvement to sustain a § 1983 cause of action.").

The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations[.]" *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir. 2013); *accord, Quick v. Annucci*, 16-CV-0958, 2016 WL 4532152, at *5, n.7 (N.D.N.Y. Aug. 29, 2016)

("The Second Circuit has not yet addressed how the Supreme Court's decision in *Iqbal* affected the standards in *Colon* for establishing supervisory liability") (Suddaby, C.J.).

C. Limited Municipal Liability

Note that this is usually not an issue in prisoner civil rights cases against state employees. But this might be an issue in prisoner civil rights cases against county employees.

A municipality may not be held liable in a Section 1983 action for the conduct of a lower-echelon employee solely on the basis of *respondeat superior*. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."); *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983) ("[A] [municipality] may not be held for the actions of its employees or agents under a theory of *respondeat superior*.").

Rather, to establish municipal liability under Section 1983 for unconstitutional acts by a municipality's employees, a plaintiff must show that the violation of [his or] her constitutional rights resulted from a municipal custom or policy. *See Monell*, 436 U.S. at 690-691 ("[L]ocal governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."); *Batista*, 702 F.2d at 397 ("[M]unicipalities may be sued directly under § 1983 for constitutional deprivations inflicted upon private individuals pursuant to a governmental custom, policy, ordinance, regulation, or decision.").

"Thus, to hold a [municipality] liable under § 1983 for the unconstitutional actions of its employees, a plaintiff is required to . . . prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Batista*, 702 F.2d at 397, *accord*, *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995), *Keyes v. County of Albany*, 594 F. Supp. 1147, 1156 (N.D.N.Y. 1984) (Miner, J.).

With regard to the first element (the existence of a policy or custom), a "[p]laintiff may establish the 'policy, custom or practice' requirement by demonstrating: (1) a formal policy officially endorsed by the municipality . . . ; (2) actions taken by government officials responsible for establishing municipal policies related to the particular deprivation in question . . . ; (3) a practice so consistent and widespread that it constitutes a 'custom or usage' sufficient to impute constructive knowledge to the practice of policymaking officials . . . ; or (4) a failure by policymakers to train or supervise subordinates to such an extent that it amounts to 'deliberate indifference' to the rights of those who come in contact with the municipal employees. . . ." *Dorsett-Felicelli, Inc.*, 371 F. Supp.2d 183, 194 (N.D.N.Y. 2005) (Kahn, J.) (citing three Supreme Court cases for these four ways), *accord*, *Dunbar v. County of Saratoga*, 358 F. Supp.2d 115, 133-134 (N.D.N.Y. 2005) (Munson, J.); *see also Clayton v. City of Kingston*, 44 F. Supp.2d 177, 183 (N.D.N.Y. 1999) (McAvoy, J.) (transposing order of second and third ways, and citing five more Supreme Court cases).

With regard to the second element (causation), a plaintiff must show "a direct causal link" or "an affirmative link" between the municipal policy or custom and the alleged constitutional deprivation (i.e., that the policy or custom was the "moving force" behind the deprivation). *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) ("[O]ur first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, n.8 (1985) ("The fact that municipal 'policy' might lead to 'police misconduct' is hardly sufficient to satisfy *Monell*'s requirement that the particular policy be the 'moving force' behind a constitutional violation. There must at least be an affirmative link between [for example] the training inadequacies alleged, and the particular constitutional violation at issue."); *Monell*, 436 U.S. at 694 ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation [at issue] . . . we must reverse the judgment below."); *Vippolis v. Village of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) ("A plaintiff who seeks to hold a municipality liable in damages under section 1983 must prove that . . . an official policy or custom [was] the cause of the deprivation of constitutional rights. . . . [T]he plaintiff must establish a causal connection–an affirmative link–between the policy and the deprivation of his constitutional rights.") [internal quotation marks and citation omitted]; *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983) ("Absent a showing of a causal link between an official policy or custom and the plaintiff's injury, *Monell* prohibits a finding of liability against the City.").

D. Intra-Corporate Conspiracy Doctrine

The "intracorporate conspiracy doctrine" essentially bars conspiracy claims against employees of entities such as DOCCS (when those employees are alleged to have conspired solely with each other) unless, pursuant to the doctrine's "scope of employment' exception, the employees were "pursu[ing] personal interests wholly separate and apart from the entity." *Graham v. Peters*, 13-CV-0705, 2013 WL 5924724, at *5 (W.D.N.Y. Oct. 31, 2013); *Cusamano v. Sobek*, 604 F. Supp.2d 416, 469-70 (N.D.N.Y. 2009) (Suddaby, J., adopting Report-Recommendation of Lowe, M.J.); *Orafan v. Goord*, 411 F.Supp.2d 153, 165 (N.D.N.Y. 2006) (Magnuson, J.), *vacated and remanded on other grounds sub nom., Orafan v. Rashid*, 249 F. App'x 217 (2d Cir. 2007).

To establish that employees were pursuing personal interests wholly separate and apart from the entity, more is required of a prisoner than simply showing that the employees were motivated by personal bias against the prisoner. *Cusamano*, 604 F. Supp.2d at 470; *Peters v. City of New York*, 04-CV-9333, 2005 WL 387141, at *3 (S.D.N.Y. Feb. 16, 2005); *Johnson v. City of New York*, 01-CV-1860, 2004 WL 502929, at *5 (E.D.N.Y. Jan. 12, 2004).

E. Qualified Immunity

"Once qualified immunity is pleaded, plaintiff's complaint will be dismissed unless defendant's alleged conduct, when committed, violated 'clearly established statutory or

constitutional rights of which a reasonable person would have known.'" *Williams v. Smith*, 781 F.2d 319, 322 (2d Cir. 1986) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 [1982]). As a result, a qualified immunity inquiry in a civil rights case generally involves two issues: (1) "whether the facts, viewed in the light most favorable to the plaintiff establish a constitutional violation"; and (2) "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted." *Sira v. Morton*, 380 F.3d 57, 68-69 (2d Cir. 2004) [citations omitted], *accord*, *Higazy v. Templeton*, 505 F.3d 161, 169, n.8 (2d Cir. 2007) [citations omitted].

In determining the second issue (i.e., whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted), courts in this circuit consider three factors:

> (1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991) [citations omitted], *cert. denied*, 503 U.S. 962 (1992); *see also Pena v. DePrisco*, 432 F.3d 98, 115 (2d Cir. 2005); *Clue v. Johnson*, 179 F.3d 57, 61 (2d Cir. 1999); *McEvoy v. Spencer*, 124 F.3d 92, 97 (2d Cir. 1997); *Shechter v. Comptroller of City of New York*, 79 F.3d 265, 271 (2d Cir. 1996); *Rodriguez v. Phillips*, 66 F.3d 470, 476 (2d Cir. 1995); *Prue v. City of Syracuse*, 26 F.3d 14, 17-18 (2d Cir. 1994); *Calhoun v. New York State Division of Parole*, 999 F.2d 647, 654 (2d Cir. 1993). "As the third part of the test provides, even where the law is 'clearly established' and the scope of an official's permissible conduct is 'clearly defined,' the qualified immunity defense also protects an official if it was 'objectively reasonable' for him at the time of the challenged action to believe his acts were lawful." *Higazy v. Templeton*, 505 F.3d 161, 169-70 (2d Cir. 2007) [citations omitted]. This "objective reasonableness" part of the test is met if "officers of reasonable competence could disagree on [the legality of defendant's actions]." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective reasonableness of the action.'") [citation omitted]; *Davis v. Scherer*, 468 U.S. 183, 190 (1984) ("Even defendants who violate [clearly established] constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."); *Benitez v. Wolff*, 985 F.2d 662, 666 (2d Cir. 1993) (qualified immunity protects defendants "even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights"). As the Supreme Court has explained,

> [T]he qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . Defendants will not be immune if, on an objective basis, it is

> obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Malley, 475 U.S. at 341; *see also Hunter v. Bryant*, 502 U.S. 224, 299 (1991) ("The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.") [internal quotation marks and citation omitted].

Note that, although the Court may ask the jury to answer certain interrogatories regarding qualified immunity, whether or not the doctrine of qualified immunity protects a defendant from liability is, in the end, a legal question for the Court to decide, not the jury. *See, e.g.*, *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir. 2003) (explaining that, after the district court receives "the jury['s] . . . deci[sion as to] what the facts were that the officer faced or perceived," the court then may "make the ultimate legal determination of whether qualified immunity attaches on those facts") (internal quotation marks omitted); *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995) (finding that the ultimate question of entitlement to qualified immunity is one of law for the court to decide "[o]nce disputed factual issues are resolved") (internal quotation marks omitted).

F. Sovereign Immunity

Note that this defense is available to states and state employees but not counties and county employees.

The Eleventh Amendment has long been construed as barring a citizen from bringing a suit against his or her own state in federal court, under the fundamental principle of "sovereign immunity." *See* U.S. Const. amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *Hans v. Louisiana*, 134 U.S. 1, 10-21 (1890); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). State immunity extends not only to the states, but to state agencies. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf*, 506 U.S. 139, 142-47 (1993); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-06 (1984).

Furthermore, the Eleventh Amendment bars a suit for damages against a state official acting in his official capacity. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) ("Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself. . . . We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest

is the entity."); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993) ("The immunity to which a state's official may be entitled in a § 1983 action depends initially on the capacity in which he is sued. To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state."); *Severino v. Negron*, 996 F.2d 1439, 1441 (2d Cir. 1993) ("[I]t is clear that the Eleventh Amendment does not permit suit [under Section 1983] for money damages against state officials in their official capacities.").

However, the Eleventh Amendment does not bar a suit for damages against a state official in his individual or personal capacity. *See Farid v. Smith*, 850 F.2d 917, 921 (2d Cir. 1988) ("The eleventh amendment bars recovery against an employee who is sued in his official capacity, but does not protect him from personal liability if he is sued in his 'individual' or 'personal' capacity.").

In addition, the Eleventh Amendment does not bar a suit for prospective injunctive relief against a state official in his official capacity. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *Caruso v. Zugibe*, 646 F. App'x 101, 105 (2d Cir. 2016). However, as a practical matter, such claims are usually dismissed before trial because, by then, the prisoner has been transferred to another facility and the low-ranking defendants cannot provide the relief that the prisoner is seeking. *Barnes v. Furman*, 629 F. App'x 52, 57 (2d Cir. 2015).

Finally, where it has been successfully demonstrated that a defendant is entitled to sovereign immunity under the Eleventh Amendment, the federal court lacks subject matter jurisdiction over the case, and "the case must be stricken from the docket." *McGinty v. State of New York*, 251 F.3d 84, 100 (2d Cir. 2001) [citation omitted]; *see also* Fed. R. Civ. P. 12(h)(3).

G. Statute of Limitations

Claims arising under 42 U.S.C. § 1983 are governed by state statutes of limitations. *Wilson v. Garcia*, 471 U.S. 261, 266-267 (1985). "The applicable statute of limitations for § 1983 actions arising in New York requires claims to be brought within three years." *Pinaud v. County of Suffolk*, 52 F.3d 1138, 1156 (2d Cir. 1995) [citations omitted]; *see also Connolly v. McCall*, 254 F.3d 36, 40-41 (2d Cir. 2001) ("[Plaintiff's] federal constitutional claims, brought pursuant to 42 U.S.C. § 1983, are governed by New York's three-year statute of limitations for personal injury actions . . . .") [citations omitted].

Accrual of the claim is a question of federal law. *Ormiston v. Nelson*, 117 F.3d 69, 71 (2d Cir. 1997). Under federal law, *generally*, a claim arising under 42 U.S.C. § 1983 "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of his action." *Pearl v. City of Long Island Beach*, 296 F.3d 76, 80 (2d Cir. 2002); *accord, Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001) [internal quotation marks and citation omitted]. "The reference to 'knowledge of injury' [in the above-described standard] does not suggest that the statute [of limitations] does not begin to run until the claimant has received judicial verification that the defendants' acts were wrongful." *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1995) [citations

omitted], *accord*, *Shannon v. Selsky*, 04-CV-1939, 2005 U.S. Dist. LEXIS 3823, *13 (S.D.N.Y. March 10, 2005); *see also Abbas v. Dixon*, 480 F.3d 636, 641 (2d Cir. 2007) ("We have held . . . that a plaintiff's pursuit of a state remedy, such as an Article 78 proceeding, does not toll the statute of limitations for filing a claim pursuant to section 1983.") [citations omitted]; *accord*, *Littman v. Senkowski*, 05-CV-1104, 2008 WL 420011, at *5 (N.D.N.Y. Feb. 11, 2008) (Kahn, J., adopting Report-Recommendation by Lowe, M.J.); *LeBron v. Swaitek*, 05-CV-0172, 2007 U.S. Dist. LEXIS 81587, at *7, n.5 (N.D.N.Y. Nov. 2, 2007) (Sharpe, J.). Having said that, the Supreme Court has recently held that the statute of limitations for a county commissioner's fabricated-evidence claim under 42 U.S.C. § 1983 began to run when the criminal proceedings against him terminated in his favor, that is, when he was acquitted at the end of his second trial, and not when the evidence was used against him. *McDonough v. Smith*, 139 S. Ct. 2149, 2154-55 (2019).

There are some limited exceptions to the general rule that a claim arising under 42 U.S.C. § 1983 "accrues" when the plaintiff knows or has reason to know of the injury which is the basis of his action.

1. Continuing-Violation Doctrine

One such limited exception is embodied in what is known as the "continuing violation doctrine." *Nat'l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 107 (2002).

Generally, under the continuing-violation doctrine, where there is an "ongoing discriminatory policy or practice," the accrual time for the statute of limitations may be delayed until the last act in furtherance of the policy. *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999); *see also Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) ("The continuing violation exception applies when there is evidence of an ongoing discriminatory policy or practice . . . ."); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993) ("The continuing violation exception applies to cases involving specific discriminatory policies or mechanisms . . . .") [citations omitted]; *Gomes v. Avro Corp.*, 964 F.2d 1330, 1333 (2d Cir. 1992) (doctrine applies if plaintiff has experienced a "continuous practice and policy of discrimination") [citation omitted].

Despite the fact that it is largely a creature of Title VII employment discrimination law, the continuing-violation doctrine may conceivably be applied in Section 1983 civil rights actions that do not involve allegations of discrimination (at least claims arising under the Eighth Amendment). *See Shomo v. City of New York*, 579 F.3d 176, 18-82 (2d Cir. 2009) ("We have not before explicitly held that the continuing violation doctrine can delay accrual of an Eighth Amendment claim alleging a policy of deliberate indifference to serious medical needs. . . . We agree that the continuing violation doctrine can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of deliberate indifference to serious medical needs."); *cf. Albritton v. Morris*, 13-CV-3708, 2016 WL 1267799, at *10, n.12 (S.D.N.Y. March 30, 2016) ("It merits observation that courts have not seen it as a foregone conclusion that the continuing violation doctrine, which was developed in the context of Title VII claims, could even apply to §

1983 First Amendment retaliation claims. . . . However, the Second Circuit's recent decision in *Gonzalez v. Hasty* provides some support for the notion that there is no per se bar to applying the continuing violation doctrine to non-employment-based § 1983 First Amendment retaliation claims: There, the plaintiff inmate attempted to save his otherwise untimely First Amendment retaliation claims through the continuing violation doctrine, but the Second Circuit rebuffed his efforts, not on the grounds that the doctrine was wholly inapplicable, but rather because he had not sufficiently alleged any retaliatory decisions after the statute-of-limitations cutoff date. ") (citing cases).

2. Equitable-Tolling Doctrine

Another such limited exception is embodied in what is known as the "equitable tolling" doctrine. *Walker v. Jastremski*, 430 F.3d 560, 564 (2d Cir. 2005); *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996).

Generally, equitable tolling applies where necessary to prevent unfairness to a plaintiff who is not at fault for his lateness in filing." *Gonzalez v. Hasty*, 651 F.3d 318, 322 (2d Cir. 2011); *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004); *Nyack Hosp.*, 86 F.3d at 12. More specifically, equitable tolling applies where "extraordinary circumstances" prevented a party from timely performing a required act, and that the party acted with reasonable diligence throughout the period he sought to toll. *Gonzalez*, 651 F.3d at 322; *Walker v. Jastremski*, 430 F.3d 560, 564 (2d Cir. 2005); *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004).

3. Fraudulent-Concealment Doctrine

The "fraudulent concealment" doctrine is related to, but somewhat distinct from, the equitable-tolling doctrine, focusing on the defendant's alleged concealment of a claim instead of the plaintiff's alleged ignorance of a claim. *See Majid v. Fielitz*, 700 F. Supp. 704, 707 (S.D.N.Y. 1988) ("Thus, it must be determined whether the doctrine of fraudulent concealment or equitable tolling can be applied when a plaintiff is unable to ascertain information pertinent to a claim, and the defendant is not at fault for the plaintiff's lack of information. The doctrine of equitable tolling focuses on plaintiff's purported ignorance of a claim rather than on defendant's alleged concealment of the claim.").

Generally, under the fraudulent-concealment doctrine, "when the defendant fraudulently conceals the wrong, the time does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action." *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir. 1983). As a result, "[a] plaintiff who seeks to invoke the doctrine of fraudulent concealment must plead and prove (1) the wrongful concealment by the defendant of its actions, (2) the failure by the plaintiff to discover the operative facts underlying the action within the limitations period, and (3) the plaintiff's due diligence to discover the facts." *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423, 1443 (S.D.N.Y.1986).

H. Failure to Prosecute / Failure to Name and Serve Doe Defendant

Rule 41 of the Federal Rules of Civil Procedure permits the Court to *sua sponte* dismiss an action for failure to prosecute and/or failure to comply with the Federal Rules of Civil Procedure or an Order of the Court. Fed. R. Civ. P. 41(b); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962); *Saylor v. Bastedo*, 623 F.2d 230, 238-239 (2d Cir. 1980); *Theilmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972); *see also* N.D.N.Y. L.R. 41.2(a) ("Whenever it appears that the plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge *shall* order it dismissed.") [emphasis added]; *cf.* Fed. R. Civ. P. 16(f) ("If a party . . . fails to obey a scheduling or pretrial order . . . the judge, upon motion or *in the judge's own initiative*, may make such orders with regard thereto as are just . . . .") [emphasis added].

The Second Circuit has identified five factors that it considers when reviewing a district court's order to dismiss an action for failure to prosecute under Fed. R. Civ. P. 41(b):

> [1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard and [5] whether the judge has adequately assessed the efficacy of lesser sanctions.

See Shannon v. GE Co., 186 F.3d 186, 193 (2d Cir. 1999) (affirming Fed. R. Civ. P. 41[b] dismissal of plaintiff's claims by U.S. District Court for Northern District of New York based on plaintiff's failure to prosecute the action) [citation and internal quotation marks omitted]; *see also Drake v. Norden Sys.*, 375 F.3d 248, 254 (2d Cir. 2004) (articulating same standard in slightly different form), *accord*, *Ruzsa v. Rubenstein & Sendy Attys at Law*, No. 07-0089, 2008 WL 706693, at *1 (2d Cir. March 17, 2008).

As a general rule, no single one of these five factors is dispositive. *Nita v. Conn. Dep't of Env. Protection*, 16 F.3d 482 (2d Cir. 1994).

Generally, dismissal of a claim under Fed. R. Civ. P. 41(b) for failure to prosecute is appropriate "where discovery has closed and the Plaintiff has had ample time and opportunity to identify and serve John Doe defendants" but has failed to do so. *Jones v. Rock*, 12-CV-0447, 2015 WL 791547, at *21 (N.D.N.Y. Feb. 24, 2015) (Mordue, J., adopting report and recommendation by Dancks, M.J.) (quotation marks and alteration omitted); *Delrosario v. City of N.Y.*, 07-CV-2027, 2010 WL 882990, at *5 (S.D.N.Y. Mar. 4, 2010) (*sua sponte* dismissing claims against John Doe Defendants for failure to prosecute "[w]here discovery was closed and the Plaintiff has had ample time and opportunity to identify and serve John Doe Defendants"); *Coward v. Town & Vill. of Harrison*, 665 F.Supp.2d 281, 301 (S.D.N.Y. 2009) ("Where a plaintiff has had ample time to identify a John Doe defendant but gives no indication that he has made any effort to discover the defendant's name, the plaintiff simply cannot continue to maintain a suit

against the John Doe defendant.").

I. Collateral Estoppel / Res Judicata

It is appropriate to begin by observing that the affirmative defenses of collateral estoppel and res judicata are not absolutely barred when a defendant fails to raise them in its answer. *See Doe v. Pfrommer*, 148 F.3d 73, 80 (2d Cir. 1998) ("[W]hile [res judicata] or similar defenses are ordinarily not to be recognized when not in the answer, no absolute bar to the consideration of such claims exists.") (internal quotation marks and ellipsis omitted); *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993) ("The failure of a defendant to raise res judicata in answer does not deprive a court of the power to dismiss a claim on that ground. While that or similar defenses are 'ordinarily' not to be recognized when not raised in the answer . . . , no absolute bar to the consideration of such claims exists.").

Rather, generally, such an affirmative defense may be permitted (in the Court's discretion) when two conditions are met: (1) the affirmative defense has been raised during the pretrial stage by either the defendant or the Court *sua sponte*, and (2) the plaintiff has been given an opportunity to rebut the defense. *See Scherer v. Equitable Life Assurance Soc'y of U.S.*, 347 F.3d 394, 400 (2d Cir. 2003) ("Res judicata, unlike other defenses, can be raised by the district court *sua sponte* to determine that jurisdiction does not exist and is, therefore, equivalent to being non-waivable as the court and not the defendant is in control of the issue."); *Salahuddin*, 992 F.2d at 449 ("The failure of a defendant to raise res judicata in answer does not deprive a court of the power to dismiss a claim on that ground."); *Carino v. Town of Deerfield (Oneida Cty., N.Y.)*, 750 F. Supp. 1156, 1162 n.9 (N.D.N.Y. 1990) (McCurn, J.) ("This Circuit has recognized, however, "[t]hat in the interest of efficient and expeditious judicial administration, the defense of res judicata can be raised and considered at the pretrial stage. . . . This is particularly true where, as here, the issue is raised by way of motion for summary judgment so that the plaintiff is provided with an adequate opportunity to present arguments rebutting the defense . . . ."), *aff'd sub nom. Carino v. Town of Deerfield*, 940 F.2d 649 (2d Cir. 1991).

1. Collateral Estoppel or Issue Preclusion

"In New York, issue preclusion (or collateral estoppel) can be applied in a later case only if (1) there has been a final determination on the merits of the issue sought to be precluded; (2) the party against whom the issue preclusion is sought had a full and fair opportunity to contest the decision involved as dispositive in the later controversy; and (3) the issue sought to be precluded by the earlier suit is the same issue involved in the later action." *Davis v. Halpern*, 813 F.2d 37, 39 (2d Cir. 1989). Stated another way, "application of the doctrine of collateral estoppel to any given issue is carefully circumscribed by two key requirements: (1) the issue in the subsequent suit must be identical to the issue actually decided in the prior suit and (2) the determination of the issue in the prior suit must have been necessary and essential to the judgment in that action." *RX Data Corp. v. Dept of Soc. Servs.*, 684 F.2d 192, 197 (2d Cir. 1982).

2. Res Judicata or Claim Preclusion

"Under both New York law and federal law, the doctrine of res judicata, or claim preclusion, provides that [a] final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 195 (2d Cir. 2010) (alterations in original) (internal quotation marks omitted). More specifically, res judicata precludes a party from asserting a claim in subsequent litigation if "(1) the previous action involved an adjudication on the merits[,] (2) the previous action involved the plaintiffs or those in privity with them[, and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000). "Whether a claim that was not raised in the previous action could have been raised therein 'depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499 (2d Cir. 2014) (quoting *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 [2d Cir. 1992]). "To determine whether two actions arise from the same transaction or claim, [courts] consider 'whether the underlying facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *TechnoMarine SA*, 758 F.3d at 499 (quoting *Pike v. Freeman*, 266 F.3d 78, 91 [2d Cir. 2001]).

J. Success of Claim Would Demonstrate Invalidity of Conviction

To recover damages under § 1983 for an unconstitutional conviction or imprisonment, a plaintiff "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . , or called into question by . . . the issuance of a [federal] writ of habeas corpus." *Warren v. Fischl*, 674 F. App'x 71, 73 (2d Cir. 2017) (quoting *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)). *Heck* bars a plaintiff's claim where success on the claim would "demonstrate the invalidity of his conviction." *Warren*, 674 F. App'x at 73.

K. No Physical Injury Under PLRA

The Prison Litigation Reform Act of 1995 ("PLRA") provides, in pertinent part, as follows: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

A "physical injury" under the PLRA need not be significant but must be more than *de miminis*. *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1998) (citing *Silgar v. Hightower*, 112 F.3d 191, 193 [5th Cir. 1997]); *Harvey v. Farber*, 09-CV-0152, 2011 WL 5373736, at *3 (N.D.N.Y. Nov. 4, 2011) (D'Agostino, J.); *May v. Donneli*, 06-CV-0437, 2009 WL 3049613, at *3 (N.D.N.Y. Sept. 18, 2009) (Report-Recommendation by Treece, M.J., adopted by Sharpe, J.);

Voorhees v. Goord, 05-CV-1407, 2006 WL 1888638, at *10, n.2 (S.D.N.Y. Feb. 24, 2006); *Romer v. Morgenthau*, 119 F. Supp.2d 346, 364 (S.D.N.Y. 2000); *Warren v. Westchester Cty. Jail*, 106 F.Supp.2d 559, 570 (S.D.N.Y. 2000); *Leon v. Johnson*, 96 F. Supp.2d 244, 248 (W.D.N.Y. 2000).

For example, mere superficial and temporary irritations or abrasions do not constitute "physical injury" under the PLRA. *See Dolberry v. Levine*, 567 F. Supp.2d 413, 417-18 (W.D.N.Y. 2008) (finding that mere skin rash suffered by prisoner, allegedly due to lack of showers, was a *de minimis* injury insufficient to constitute a physical injury under the PLRA); *Espinal v. Goord*, 00-CV-2242, 2001 WL 476070, at *3-4, 12-13 (S.D.N.Y. May 7, 2001) (finding that "red face" suffered by an inmate after a correctional officer "struck [him] a couple times," "punch[ing] [him] in the head and face," did not constitute a physical injury under the PLRA); *Warren*, 106 F. Supp.2d at 563, 569 (finding that minor scratches suffered by a jail inmate as a result of two to three punches by guard, including two scratches to inmate's face, and very small cut inside mouth, did not constitute a physical injury cognizable under the PLRA).

However, generally, a sexual assault does qualify as a "physical injury" under the PLRA. *Liner*, 196 F.3d at 135.

Even if Section 1997e(e)'s "physical injury" requirement applies (thus barring recovery of compensatory damages), it does not preclude the award of nominal and punitive damages. *Toliver v. City of New York*, 530 F. App'x 90, 93, n.2 (2d Cir. 2013); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002).

Nor does it preclude claims for declaratory or injunctive relief. *Knight v. Keane*, 247 F.Supp.2d 379, 388 (S.D.N.Y. 2002).

L. Three Strikes Under 28 U.S.C. § 1915

Under the so-called "Three Strikes Rule" set forth in the federal statute governing *in forma pauperis* proceedings,

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is *frivolous, malicious, or fails to state a claim upon which relief may be granted*, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g) [emphasis added].

The power of a federal district court to invoke this rule is not limited to the outset of a litigation but extends all throughout the pendency of the proceeding. In other words, a federal

district court has the authority to rescind or revoke the *in forma pauperis* status that it has previously bestowed upon a plaintiff, if the court discovers that the status had been improvidently granted. *See, e.g.*, *Eady v. Lappin*, 05-CV-0824, 2007 WL 1531879, at *1 & n.1 (N.D.N.Y. May 22, 2007) (Mordue, C.J., adopting Report-Recommendation by Lowe, M.J.); *Gill v. Pidlypchak*, 02-CV-1460, 2006 WL 3751340, at *5 (N.D.N.Y. Dec. 19, 2006) (Scullin, J.); *Polanco v. Burge*, 05-CV-0651, 2006 WL 2806574, at *2 (N.D.N.Y. Sept. 28, 2006) (Kahn, J., adopting Report-Recommendation by Homer, M.J.); *Demos v. John Doe*, 118 F. Supp.2d 172, 174 (D. Conn. 2000); *McFadden v. Parpan*, 16 F. Supp.2d 246, 247 (E.D.N.Y. 1998); *see also Rolle v. Garcia*, 04-CV-0312, Report-Recommendation (N.D.N.Y. Jan. 29, 2007) (Lowe, M.J.), *adopted on other grounds*, 2007 WL 672679 (N.D.N.Y. Feb. 28, 2007) (Kahn, J.).

M. Failure to Satisfy State Law Notice-of-Claim Requirement

New York State notice-of-claim requirements apply to state law claims brought in federal court. *Tyk v. Police Officer Eric Surat*, 675 F. App'x 40, 42 (2d Cir. 2017); *Hardy v. New York City Health & Hosps. Corp.*, 164 F.3d 789, 793 (2d Cir. 1999).

N. Discretion to Not Exercise Supplemental Jurisdiction Over State Law Claims

"Where a district court has dismissed all claims over which it has original jurisdiction, the court may decline to exercise jurisdiction over state law claims" pursuant to 28 U.S.C. § 1367(c)(3). *Hurley v. Cnty. of Yates*, 04-CV-6561, 2005 WL 2133603, at *3 (W.D.N.Y. Aug. 31, 2005) (citing 28 U.S.C. § 1367[c][3]), *accord, Middleton v. Falk*, 06-CV-1461, 2009 WL 666397, at *9 (N.D.N.Y. Mar. 10, 2009) (Suddaby, J. adopting Report-Recommendation of Homer, M.J.).

The decision is a discretionary one, and its justification lies in considerations of judicial economy, convenience and fairness to litigants. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if . . . not present a federal court should hesitate to exercise jurisdiction over state claims."); *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) ("Once a district court's discretion is triggered under § 1367(c)(3), it balances the traditional values of judicial economy, convenience, fairness, and comity, in deciding whether to exercise jurisdiction.") (internal quotation marks omitted); *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 214 (2d Cir.2004) ("[W]here at least one of the subsection 1367(c) factors is applicable, a district court should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote the values [of] economy, convenience, fairness, and comity.").

New York State Department of Corrections and Community Supervision Materials

New York State Department of Corrections and Community Supervision

Facilities Management System

Facilities Listing

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518-891-1343/*12-230-0000
Jeffrey Tedford, Superintendent
Andrew Boyd, Deputy Supt/Security
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Chris Liberty, Deputy Supt/Programs
Virginia Marsh, Steward
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Albion Correctional Facility
3595 State School Road
Albion, NY 14411-9399 (Orleans Co.)
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585-589-5511/*12-090-0000
Susan Squires, Superintendent
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555 Devils Den Road
P.O. Box 3000
Altona, NY 12910-2090 (Clinton Co.)
Fax:*10-540-2099
518-236-7841/*12-540-0000
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Tammy Daggett, Deputy Supt/Admin
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Kendall Matott, Captain

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639 Exchange Street
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Attica, NY 14011-0149 (Wyoming Co.)
Fax:*10-000-2099
585-591-2000/*12-000-0000
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Catherine Licata, Asst. Deputy Supt. Corr. Mental H
Debra Farley, Steward
Robert Mitchell, Captain
Paul J. Trowbridge III, Captain
Sean White, Captain

Auburn Correctional Facility
135 State Street
Auburn, NY 13024-9000 (Cayuga Co.)
Fax:*10-010-2099
(Inmate Mail: P.O. Box 618, 13021)
315-253-8401/*12-010-0000
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Bradley Babin, Deputy Supt/Admin
Gayln Schenk, Deputy Supt/Programs
Stuart Fowler, Asst. Deputy Supt. Corr. Mental Hea
Marcus Butler, Asst. Deputy Supt/PREA
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Bare Hill Correctional Facility
181 Brand Road
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Malone, NY 12953-0020 (Franklin Co.)
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518-483-8411/*12-560-0000
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Debbie Kemp, Deputy Supt/Admin
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914-241-3100/*12-120-0000
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Elaine Velez, Asst. Deputy Supt/PREA
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36560 State Route 12E
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315-654-4100/*12-580-0000
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Cayuga Correctional Facility
2202 State Route 38A
P.O. Box 1150
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(Inmate Mail: P.O. Box 1186, 13118)
315-497-1110/*12-550-0000
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1156 Route 374
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Dannemora, NY 12929-2000 (Clinton Co.)
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_____, Captain
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716-532-4588/*12-470-0000
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P.O. Box 200
Coxsackie, NY 12051-0200 (Greene Co.)
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518-731-2781/*12-130-0000
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121 Red Schoolhouse Road
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Fishkill, NY 12524-0445 (Dutchess Co.)
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30 Institution Road
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Napanoch, NY 12458-0338 (Ulster Co.)
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Teresa Smith, Steward
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Gowanda, NY 14070-0350 (Erie Co.)
Fax:*10-450-2099
(Inmate Mail: P.O. Box 311, 14070-0311)
716-532-0177/*12-450-0000
Susan Kickbush, Superintendent
Sanford Bunn, Deputy Supt/Security
Seth Zawadzki, Deputy Supt/Admin
Andrea Schneider, Deputy Supt/Programs
Tisha Loney, Asst. Deputy Supt. Prg.
Jacy Woodworth, Asst. Deputy Supt/PREA
Melisa Stitzel, Steward
Donald Lockwood, Captain
Allen Strasser, Captain

Great Meadow Correctional Facility
11739 State Route 22
P.O. Box 51
Comstock, NY 12821-0051 (Washington Co.)
Fax:*10-040-2099
518-639-5516/*12-040-0000
Christopher Miller, Superintendent
Donita McIntosh, First Dep. Superintendent
Gerard Caron, Deputy Supt/Security
Jocasa Relf, Deputy Supt/Admin
David Barringer, Deputy Supt/Programs
Jason Ryan, Asst. Deputy Supt. Prg.
Melissa Collins, Asst. Deputy Supt. Corr. Mental He
Aaron Torres, Asst. Deputy Supt/PREA
Carla Cole, Steward
_____, Captain
Colin Fraser, Captain
Jeffrey LaMay, Captain

Green Haven Correctional Facility
594 Route 216
Stormville, NY 12582-0010 (Dutchess Co.)
Fax:*10-080-2099
845-221-2711/*12-080-0000
Mark Royce, Superintendent
Phil Melecio, First Dep. Superintendent
Anthony Russo, Deputy Supt/Security
Brian Kelly, Deputy Supt/Admin
Marlyn Kopp, Deputy Supt/Programs
Vernon Baldwin, Deputy Supt/H.C.
_____, Asst. Deputy Supt. Prg.
Danielle Medbury, Asst. Deputy Supt. Corr. Mental
Katherine Swain, Steward
Duncan Bey, Captain
Floyd Norton, Captain

Greene Correctional Facility
165 Plank Road
P.O. Box 8
Coxsackie, NY 12051-0008 (Greene Co.)
Fax:*10-670-2099
(Inmate Mail: P. O. Box 975, 12051-0975)
518-731-2741/*12-670-0000
Brandon Smith, Superintendent
Mark Miller, First Dep. Superintendent
Roger Murphy, Deputy Supt/Security
James Nearey, Deputy Supt/Admin
Marie Hammond, Deputy Supt/Programs
Antoinette Allen, Asst. Deputy Supt. Prg.
Pamela Kulyniak, Steward
_____, Captain
Armand Caringi, Captain

Groveland Correctional Facility
7000 Sonyea Road
P.O. Box 50
Sonyea, NY 14556-0050 (Livingston Co.)
Fax:*10-460-2099
585-658-2871/*12-460-0000
Shawn Cronin, Superintendent
Mark Passage, Deputy Supt/Security
David Kuhn, Deputy Supt/Admin
Kishon Walker, Deputy Supt/Programs
Pamela Wyckoff, Steward
William Harris, Captain
Randy Kiser, Captain

Hale Creek Correctional Facility
279 Maloney Road
Johnstown, NY 12095-3769 (Fulton Co.)
Fax:*10-850-2099
(Inmate Mail: P.O. Box 950, 12095)
518-736-2094/*12-850-0000
Peggy Lotz, Superintendent
Glenn Scarafile, Deputy Supt/Security
Randy Gross, Deputy Supt/Admin
William Close, Deputy Supt/Programs
_____, Steward

Hudson Adolescent Offender Facility/Hudson Work Release Fac
50 East Court Street
P.O. Box 576
Hudson, NY 12534-0576 (Columbia Co.)
Fax:*10-270-2099
518-828-4311/*12-270-0000
Donna Lewin, Superintendent
Adam Ramirez, Deputy Supt/Security
David Infantino, Deputy Supt/Admin
Anita Tomlin, Deputy Supt/Programs
Joanne Stickles, Steward
William Glasser, Captain

Lakeview Shock Incar. Corr. Fac.
9300 Lake Avenue
P.O. Box T
Brocton, NY 14716-9798 (Chautauqua Co.)
Fax:*10-600-2099
716-792-7100/*12-600-0000
Brian Kubik, Superintendent
Walter Moss, Deputy Supt/Security
Christine Parmerter, Deputy Supt/Admin
Anita Ortiz, Deputy Supt/Programs
Judith Kurtzworth, Steward
Kenneth Keane, Captain
Robert Muller, Captain

Lincoln Correctional Facility
31-33 West 110th Street
New York, NY 10026-4398 (NY Co.)
Fax:*10-360-2099
212-860-9400/*12-360-0000
Delta Barometre, Superintendent
Shaunte Mitchell, Asst. Deputy Supt. Prg.
Sharon Colding, Steward
Phillip Detraglia, Captain

Livingston Correctional Facility
7005 Sonyea Road
P.O. Box 49
Sonyea, NY 14556-0049 (Livingston Co.)
Fax:*10-800-2099
(Inmate Mail: P.O. Box 91, 14556)
585-658-3710/*12-800-0000
_____, Superintendent
Douglas Lowrey, Deputy Supt/Security
Louis Bower IV, Deputy Supt/Admin
Lewis Urban, Deputy Supt/Programs
_____, Asst. Deputy Supt/PREA
_____, Steward
Christina Loverde, Captain

Marcy Correctional Facility
9000 Old River Road
P.O. Box 5000
Marcy, NY 13403-5000 (Oneida Co.)
Fax:*10-490-2099
(Inmate Mail: P.O. Box 3600, 13403)
315-768-1400/*12-490-0000
Patrick Reardon, Superintendent
Michael Spina, Deputy Supt/Security
Daniel Crossway, Deputy Supt/Admin
Mark Kinderman, Deputy Supt/Programs
James Donahue, Deputy Supt Corr Mental Health
Denise Jordan, Steward
Wayne Carter, Captain
William Snyder, Captain
Vito Valenzano, Captain

Mid-State Correctional Facility
9005 Old River Road
P.O. Box 216
Marcy, NY 13403-0216 (Oneida Co.)
Fax:*10-480-2099
(Inmate Mail: P.O. Box 2500, 13403)
315-768-8581/*12-480-0000
_____, Superintendent
William Burns, Deputy Supt/Security
Sandra O'Connor, Deputy Supt/Admin
Deborah Kinderman, Deputy Supt/Programs
Teri Kozak, Asst. Deputy Supt. Prg.
Michele DeBraccio, Asst. Deputy Supt/PREA
Patricia Reilley, Steward
_____, Captain
Harold Moss, Captain

Mohawk Correctional Facility
6514 Route 26
P.O. Box 8450
Rome, NY 13442 (Oneida Co.)
Fax:*10-390-2099
(Inmate Mail: P.O. Box 8451)
315-339-5232/*12-390-0000
John Harper, Jr., Superintendent
Alfred Montegari, Deputy Supt/Security
Richard Calidonna, Deputy Supt/Admin
Karen Phillips, Deputy Supt/Programs
Patricia Henderson, Deputy Supt/H.C.
Roxanne Bradley, Steward
Jeffery St. Louis, Captain
Nathan Thomas, Captain

Moriah Shock Incar. Corr. Fac.
75 Burhart Lane
P.O. Box 999
Mineville, NY 12956-0999 (Essex Co.)
Fax:*10-510-2099
518-942-7561/*12-510-0000
Boyce Rawson, Superintendent
Diana Cosey, Steward
Kimberly Walker, Prog. Administrator
Wendell Hughes, Captain

Ogdensburg Correctional Facility
One Correction Way
Ogdensburg, NY 13669-2288 (St. Lawrence Co.)
Fax:*10-350-2099
315-393-0281/*12-350-0000
_____, Superintendent
Tony Baker, Deputy Supt/Security
_____, Deputy Supt/Admin
Tanya Demers, Deputy Supt/Programs
_____, Steward
_____, Captain

Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199 (Orleans Co.)
Fax:*10-640-2099
585-589-6820/*12-640-0000
Karen Crowley, Superintendent
Stephen Casaceli, Deputy Supt/Security
Matthew Schramm, Deputy Supt/Admin
Krista Vasile, Deputy Supt/Programs
Eilah Vanburen, Steward
Eric Raczkowski, Captain
Jeffrey Shepanski, Captain

Otisville Correctional Facility
57 Sanitorium Road
P.O. Box 8
Otisville, NY 10963-0008 (Orange Co.)
Fax:*10-290-2099
845-386-1490/*12-290-0000
Kathleen Gerbing, Superintendent
Peter Early, Deputy Supt/Security
Albert Helms, Deputy Supt/Admin
Angelene Stevenson, Deputy Supt/Programs
Barbara Jaekel, Steward
James Frawley, Captain

Queensboro Correctional Facility
47-04 Van Dam Street
Long Island City, NY 11101-3081 (Queens Co.)
Fax:*10-170-2099
718-361-8920/*12-170-0000
Dennis Breslin, Superintendent
Linda Carrington-Allen, Deputy Supt/Security
Edward Jones, Deputy Supt/Admin
Michelle A. Yon, Deputy Supt/Programs
Karen Myers, Steward

Riverview Correctional Facility
1110 Tibbits Drive
P.O. Box 158
Ogdensburg, NY 13669-0158 (St. Lawrence Co.)
Fax:*10-570-2099
315-393-8400/*12-570-0000
Brian McAuliffe, Superintendent
_____, Deputy Supt/Security
Marcia Cleveland, Deputy Supt/Admin
Robert Brabant, Jr., Deputy Supt/Programs
_____, Steward
Kenneth Buckley, Captain

Rochester Correctional Facility
470 Ford Street
Rochester, NY 14608-2499 (Monroe Co.)
Fax:*10-300-2099
585-454-2280/*12-300-0000
_____, Superintendent
Christopher Ellison, Asst. Deputy Supt. Prg.

Shawangunk Correctional Facility
200 Quick Road
P.O. Box 750
Wallkill, NY 12589-0750 (Ulster Co.)
Fax:*10-680-2099
(Inmate Mail: P.O. Box 700)
845-895-2081/*12-680-0000
Jaifa Collado, Superintendent
Daniel Carey, Deputy Supt/Security
Ronald Farah, Deputy Supt/Admin
Joan Taylor-Stewart, Deputy Supt/Programs
Rebecca Scaringi, Steward
John Werlau, Captain

Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442 (Westchester Co.)
Fax:*10-070-2099
914-941-0108/*12-070-0000
Michael Capra, Superintendent
Kevin Winship, First Dep. Superintendent
_____, Deputy Supt/Security
James Pagano, Deputy Supt/Admin
Lesley Malin, Deputy Supt/Programs
Sonji Henton, Deputy Supt/H.C.
Shanikqua Harrison, Asst. Deputy Supt. Prg.
_____, Asst. Deputy Supt. Corr. Mental Health
Elizabeth Mastroieni, Asst. Deputy Supt/PREA
Monica Marchese, Steward
_____, Captain
Michael Barnes, Captain

Southport Correctional Facility
236 Bob Masia Drive
P.O. Box 2000
Pine City, NY 14871-2000 (Chemung Co.)
Fax:*10-630-2099
607-737-0850/*12-630-0000
Paul Piccolo, Superintendent
Timothy Heath, Deputy Supt/Security
_____, Deputy Supt/Admin
Lisa Stickney, Deputy Supt/Programs
Elise Speck, Steward
Joseph Bradley, Captain
Bart Wagner, Captain

Sullivan Correctional Facility
325 Riverside Drive
P.O. Box 116
Fallsburg, NY 12733-0116 (Sullivan Co.)
Fax:*10-690-2099
845-434-2080/*12-690-0000
William Keyser Jr., Superintendent
Garry Sipple, Deputy Supt/Security
Josh Krom, Deputy Supt/Admin
Angel Justiniano, Deputy Supt/Programs
Elizabeth Garber, Deputy Supt Corr Mental Health
Calvin Hill, Asst. Deputy Supt/PREA
_____, Steward
_____, Captain
Paul Mace, Captain

Taconic Correctional Facility
250 Harris Road
Bedford Hills, NY 10507-2497 (Westchester Co.)
Fax:*10-250-2099
914-241-3010/*12-250-0000
Tanya Mitchell-Voyd, Superintendent
Thomas Melville, Deputy Supt/Security
Sharon Frost, Deputy Supt/Admin
Dominica Piazza, Deputy Supt/Programs
Kimberly VanVlack, Steward
Shawn Murphy, Captain

Ulster Correctional Facility
750 Berme Road
P.O. Box 800
Napanoch, NY 12458-0800 (Ulster Co.)
Fax:*10-610-2099
845-647-1670/*12-610-0000
Rosemarie Wendland, Superintendent
Roy Snyder, Deputy Supt/Security
Tracy Obryan, Deputy Supt/Admin
Stacie Bennett, Deputy Supt/Programs
Rebecca Garlinghouse, Steward
Tammil Chaboty, Captain

Upstate Correctional Facility
309 Bare Hill Road
P.O. Box 2000
Malone, NY 12953 (Franklin Co.)
Fax:*10-840-2099
(Inmate Mail: P.O. Box 2001)
518-483-6997/*12-840-0000
Donald Uhler, Superintendent
Paul Woodruff, Deputy Supt/Security
Sandra L. Danforth, Deputy Supt/Admin
Joanne Fitchette, Deputy Supt/Programs
Denise Sauther, Asst. Deputy Supt/PREA
Jennifer Terriah, Steward
Stacy Dominic, Captain
Albert Gravlin, Captain

Wallkill Correctional Facility
50 McKenderick Road
P.O. Box G
Wallkill, NY 12589-0286 (Ulster Co.)
Fax:*10-060-2099
845-895-2021/*12-060-0000
Catherine Jacobsen, Superintendent
Roger Harris, Deputy Supt/Security
Deborah Fleury, Deputy Supt/Admin
Vilma Berrios-Webbe, Deputy Supt/Programs
Lisa Ogden, Steward
Kenneth Cady, Captain

Washington Correctional Facility
72 Lock Eleven Lane
P.O. Box 180
Comstock, NY 12821-0180 (Washington Co.)
Fax:*10-650-2099
518-639-4486/*12-650-0000
Teresa Tynon, Superintendent
_____, Deputy Supt/Security
Mark Walker, Deputy Supt/Admin
David Debejian, Deputy Supt/Programs
_____, Asst. Deputy Supt. Prg.
Ann Fiorini, Steward
William Scanlon, Captain

Watertown Correctional Facility
23147 Swan Road
Watertown, NY 13601-9340 (Jefferson Co.)
Fax:*10-030-2099
315-782-7490/*12-030-0000
Elizabeth O'Meara, Superintendent
Stephen Woodward, Deputy Supt/Security
Shelly Lloyd, Deputy Supt/Admin
Cynthia Tourville, Deputy Supt/Programs
Kris Brown, Steward
Todd Leichty, Captain

Wende Correctional Facility
3040 Wende Road
Alden, NY 14004-1187 (Erie Co.)
Fax:*10-430-2099
716-937-4000/*12-430-0000
Stewart Eckert, Superintendent
Leanne Latona, First Dep. Superintendent
Kevin Brown, Deputy Supt/Security
Ernest Lowerre, Deputy Supt/Admin
Betty Jo Gabel, Deputy Supt/Programs
Robin Neal, Deputy Supt/H.C.
_____, Asst. Deputy Supt. Corr. Mental Health
Tim Franclemont, Asst. Deputy Supt/PREA
Karen Thuman, Steward
Edward Meyer, Captain
Gregory Stachowski, Captain

Willard Drug Treatment Campus
7116 County Route 132
P.O. Box 303
Willard, NY 14588-0303 (Seneca Co.)
Fax:*10-820-2099
607-869-5500/*12-820-0000
Rickey Bartlett, Superintendent
Harry Hetrick, Deputy Supt/Security
Kelly Smith, Deputy Supt/Admin
Martin Titus, Deputy Supt/Programs
Jacqueline MacDonald, Steward
Scott Morris, Captain

Woodbourne Correctional Facility
99 Prison Road
P.O. Box 1000
Woodbourne, NY 12788-1000 (Sullivan Co.)
Fax:*10-140-2099
845-434-7730/*12-140-0000
Lynn Lilley, Superintendent
_____, Deputy Supt/Security
Denisha Goodman, Deputy Supt/Admin
David Howard, Deputy Supt/Programs
Karen Smith, Steward
Charles Madison, Captain

Wyoming Correctional Facility
3203 Dunbar Road
P.O. Box 501
Attica, NY 14011-0501 (Wyoming Co.)
Fax:*10-660-2099
585-591-1010/*12-660-0000
Thomas Sticht, Superintendent
Christopher Yehl, Deputy Supt/Security
Melinda Samuelson, Deputy Supt/Admin
Michael Hill, Deputy Supt/Programs
Vicki Hansen, Steward
Craig Balcer, Captain
Chad Higgins, Captain

FACILITY	SUB	NAME	TITLE	PHONE EXT	FAX EXT
Adirondack	230	Hayes-Ryan, Deanna	IRC I	4100	4199
Adirondack	230	Carter, Billie Jo	OA II	4110	4199
Albion	090/091	Perl, Amy	IRC II	4100	4199
Albion	090/091	Viza, Amy	OA II	4105	4199
Altona	540	Fellionrock, Amy	IRC I	4100	4199
Altona	540	Brown, Debra	OA II	4105	4199
Attica	000	Pastwik, Lynette	IRC II	4108	4199
Attica	000	VACANT	IRC I	4101	4199
Auburn	010	Guzylak, Sherri	IRC II	4100	4199
Auburn	010	VACANT	IRC I	4102	4199
Bare Hill	560	LeClair, Sherry	IRC II	4100	4199
Bare Hill	560	Hazen, Joanne	IRC I	4112	4199
Bedford Hills	120	Bryden, Nancy	IRC II	4100	4199
Bedford Hills	120	Forero, Monica	IRC I	4112	4199
Cape Vincent	580	Germain, Annmarie	IRC II	4105	2099
Cape Vincent	580	Mackay, Meredith	OA II		2099
Cayuga	550	Reynolds, Patricia	IRC II	4100	4199
Cayuga	550	Stark, Normajean	IRC I	4105	4199
Central Office		Blancha, Mary	IRC II	518-485-7231	518-453-8472
Central Office		VACANT	IRC I	518-485-7231	518-453-8472
Clinton	020	King, Wendy	IRC II	4100	4199
Clinton	020	Hawksby, Hilary	IRC I	4105	4199
Collins	470	Preston, Kim	IRC II	4100	4199
Collins	470	Gawronski, Brenda	IRC I	4105	4199
Coxsackie	130	Green, Anne	IRC II	4100	4199
Coxsackie	130	Proper, Lillian	IRC I	4104	4199
Downstate	240	Hart, Noreen	IRC II	4100	4199
Downstate	240	VACANT	IRC I	4115	4199
Downstate Rec	240	DiCastro, Dana	IRC I	4116	4199
Eastern	100	Fredenburg, Stacey	IRC II	4100	4199
Eastern	100	Jennings, Elizabeth	IRC I	4125	4199
Edgecombe	320	Grant, Catherine	IRC I	4105	4199
Edgecombe	320	Washington, Pamela	OA II	4115	4199
Elmira	110	Paluch, Jennifer	IRC II	4110	4196
Elmira	111	Pipe, Karen	IRC I	4130	4196
Elmira	110	VACANT	IRC I	4131	4196
Fishkill	050	Rhoades, Laura	IRC II	4100	4199
Fishkill	050	Hulse, Heather	IRC I	4102	4199
Five Points	370	Crane, Nichole	IRC II	4100	4199
Five Points	370	Hill, Andrea	IRC I	4101	4199
Franklin	530	Jock, Ellen	IRC II	4100	4199
Franklin	530	Zeldenrust, Christine	IRC I	4125	4199
Gouverneur	810	Crawford, Lamona	IRC II	4105	4199
Gouverneur	810	Orr, Gina	IRC I	4100	4199
Gowanda	450	Villa, Candice	IRC II	4100	4199
Gowanda	450	Smith, Melissa	IRC I	4101	4199
Great Meadow	040	Edwards, Janine	IRC II	4100	2099
Great Meadow	040	Stone, Heather	IRC I	4102	2099
Green Haven	080	Loiodice, Michelle	IRC II	4100	2199
Green Haven	080	Murphy, Carol Ann	IRC I	4101	2199
Greene	670	Norton, Jessica	IRC II	4100	4199
Greene	670	Surrano, Kimberly	IRC I	4105	4199
Groveland	460	Scheible, Laura	IRC II	4101	4199
Groveland	460	Cox, Dawn	OA II	4100	4199
Hale Creek	850	Layne, Susan	IRC I	4100	2099
Hale Creek	850	Francisco, Marybeth	OA II	4125	2099
Hudson	270	Hotaling, Jennifer	IRC I	4100	4199
Hudson	270	Severance, Evan	OA II	4101	4199
Lakeview	600	Sword, Debbie	IRC II	4100	4199
Lakeview	600	Opacinch, Janet	IRC I	4111	4199
Lincoln	360	Green, Juanita	IRC I	4100	3699
Lincoln	360	VACANT	OA II	4105	3699

FACILITY	SUB	NAME	TITLE	PHONE EXT	FAX EXT
Livingston	800	Warner, Andrea	IRC II	4100	4199
Livingston	800	Eddy, Valerie	OA II	4102	4199
Marcy	490	Sayles, Carol	IRC II	4100	4199
Marcy	490	Schafer, Angela	IRC I	4105	4199
Mid-State	480	Graveline, Lissa	IRC II	4100	4199
Mid-State	480	Dowsland, Debbie	IRC I	4110	4199
Mohawk	390	Abel, Suzanna	IRC II	4100	4199
Mohawk	390	Kupiec, Theresa	IRCI	4102	4199
Moriah	510	Simpson, Billie Jo	IRC I	4110	2099
Moriah	510	Slattery, Christina	OA II	4100	2099
Ogdensburg	350	Murray, Mary Anne	IRC I	4100	4199
Ogdensburg	350	VACANT	OA II	4102	4199
Orleans	640	Fox, Karen	IRC II	4100	4199
Orleans	640	Cook, Carol	IRC I	4105	4199
Otisville	290	Sinistorie, Susan	IRCI	4100	2099
Otisville	290	Lopez, Debra	OA II	4110	2099
Queensboro	170	Rivera, Wilda	IRC II	4100	4199
Queensboro	170	Duarte, Beverly	IRC I	4103	4199
Rikers		Thayer, Maria	IRC II	718-546-4549	718-546-4849
Rikers		Somra, Singh	OA II	718-546-4517	718-546-4849
Rikers		Roman, Catherine	OA II	718-546-4579	718-546-4849
Rikers		Carlisle, Lorraine	OA II	718-546-4845	718-546-4849
Rikers		Michael, Denise	OA II	718-546-4827	718-546-4849
Riverview	570	Ross, Helga	IRC II	4100	4199
Riverview	570	Coplen, Kara	OA II	4121	4199
Rochester	300	VACANT	IRC I	4100	585-232-8329
Rochester	300	Hillier, Brittany	OA II	4110	585-232-8329
Shawangunk	680	Hansen, Karen	IRC II	4100,4103	2099
Shawangunk	680	Iocovello, Angela	IRC I	4101	2099
Sing Sing	070	Pagan, Gladys	IRC II	4100	4199
Sing Sing	070	Feroce, Diane	IRC I	4109	4199
Southport	630	VACANT	IRC II	4100	4199
Southport	630	Wojnarek, Cara	IRC I	4113	4199
Sullivan	690	Pomeroy, Tanya	IRC II	4100	4199
Sullivan	690	Lake-Dresch, Geri	OA II	4104	4199
Taconic	250	Wonsang, Lauren	IRC I	4101	4199
Taconic	250	VACANT	OA II	4100	4199
Ulster	610	Phillips-Stangel, Valerie	IRC II	4100	4199
Ulster	610	McAndrews, Lisa	IRC I	4120	4199
Upstate	840	Mainville, Donna	IRC II	4100	4199
Upstate	840	Dumas, Jennifer	IRC I	4102	4199
Wallkill	060	Masiello, Kathleen	IRC I	4100	4199
Wallkill	060	Brunetti, Cathy	OA II	4102	4199
Walsh	390	On Mohawk Grounds			
Washington	650	Brower, Mary	IRC II	4100	4199
Washington	650	Peltz, Kathryn	OA II	4105	4199
Watertown	030	Bush-Muncy, Wanda	IRC II	4100	4199
Watertown	030	Maitland-Roberts, Angela	IRC I	4130	4199
Wende	430	Knoop, Paula	IRC II	4115	4199
Wende	430	Ferron, Cindy	IRC I	4110	4199
Willard	820	Keller, Brenda	IRC II	4130	4199
Willard	820	Ripa, Kelly	IRC I	4105	4199
Woodbourne	140	Smith, Amanda	IRC II	4105	2099
Woodbourne	140	Puccio, Gina	OA II	4110	2099
Wyoming	660	Quinn, Barbara	IRC II	4100	4199
Wyoming	660	Lilac, Kay	IRC I	4110	4199

TRANSPORTATION COORDINATORS

Central Office	Erlwein, Michael	518-485-7231	518-453-8472
Central Office	Johnson, Shantilet	518-485-7231	

FACILITY	SUB	NAME	TITLE	PHONE EXT	FAX EXT
COORDINATORS OF INMATE MOVEMENT					
Central Office		Bartlett, Ashley		518-485-7231	518-453-8472
Central Office		Keppler, Tamatha		518-485-7231	
Central Office		Norton, Christine		518-485-7231	
Central Office		van Erp, Brandy		518-485-7231	
Central Office		Sweet, Christine		518-485-7231	
REGIONAL COORDINATORS OF INMATE MOVEMENT					
Clinton/Watertown HUB	230	Burman, Tammy		4120	4199
Elmira HUB	010	Ervolina, Cindy		4125	4199
Grt. Meadow/Oneida HUB	390	Palmer, Judy		3954	4199
Green Haven/Sullivan HUB	240	Bowers, Theresa		5601	4199
NYC HUB/Bedford/Taconic	070	Fish, Katie		4190	4199
Wende HUB	000	Prusak, Sandy		4815	4199

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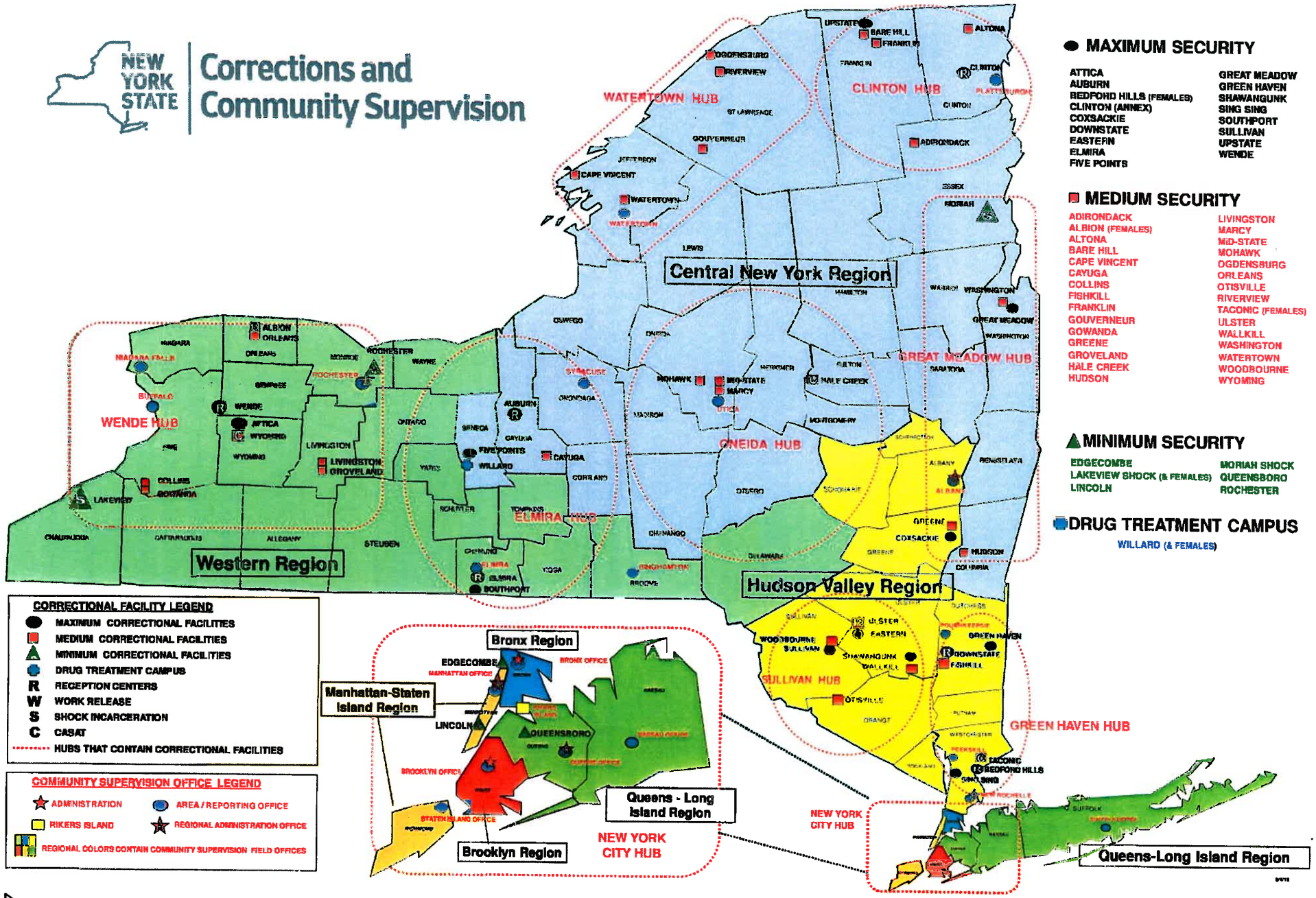
NEW YORK STATE
Corrections and Community Supervision
WATERTOWN HUB
CLINTON HUB
Central New York Region
GREAT MEADOW HUB
WENDE HUB
ONEIDA HUB
ELMIRA HUB
Western Region
Hudson Valley Region
SULLIVAN HUB
GREEN HAVEN HUB
NEW YORK CITY HUB
Bronx Region
Manhattan-Staten Island Region
Queens - Long Island Region
Brooklyn Region
Queens-Long Island Region
MAXIMUM SECURITY
ATTICA
AUBURN
BEDFORD HILLS (FEMALES)
CLINTON (ANNEX)
COXSACKIE
DOWNSTATE
EASTERN
ELMIRA
FIVE POINTS
GREAT MEADOW
GREEN HAVEN
SHAWANGUNK
SING SING
SOUTHPORT
SULLIVAN
UPSTATE
WENDE
MEDIUM SECURITY
ADIRONDACK
ALBION (FEMALES)
ALTONA
BARE HILL
CAPE VINCENT
CAYUGA
COLLINS
FISHKILL
FRANKLIN
GOUVERNEUR
GOWANDA
GREENE
GROVELAND
HALE CREEK
HUDSON
LIVINGSTON
MARCY
MID-STATE
MOHAWK
OGDENSBURG
ORLEANS
OTISVILLE
RIVERVIEW
TACONIC (FEMALES)
ULSTER
WALLKILL
WASHINGTON
WATERTOWN
WOODBOURNE
WYOMING
MINIMUM SECURITY
EDGECOMBE
LAKEVIEW SHOCK (& FEMALES)
LINCOLN
MORIAH SHOCK
QUEENSBORO
ROCHESTER
DRUG TREATMENT CAMPUS
WILLARD (& FEMALES)
CORRECTIONAL FACILITY LEGEND
MAXIMUM CORRECTIONAL FACILITIES
MEDIUM CORRECTIONAL FACILITIES
MINIMUM CORRECTIONAL FACILITIES
DRUG TREATMENT CAMPUS
R RECEPTION CENTERS
W WORK RELEASE
S SHOCK INCARCERATION
C CASAT
HUBS THAT CONTAIN CORRECTIONAL FACILITIES
COMMUNITY SUPERVISION OFFICE LEGEND
ADMINISTRATION
AREA / REPORTING OFFICE
RIKERS ISLAND
REGIONAL ADMINISTRATION OFFICE
REGIONAL COLORS CONTAIN COMMUNITY SUPERVISION FIELD OFFICES

Motion In Limine Materials

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July 10, 1997

Honorable Frederick J. Scullin, Jr.
United States District Judge
United States District Court
Northern District of New York
100 S. Clinton Street
P.O. Box 7367
Syracuse, NY 13261-7367

RE: *Slater v. Menard, et. al.*,
95-CV-897 (FJS)

Dear Judge Scullin:

Please consider this letter plaintiff Michael Slater's motion *in limine* on the following evidentiary issues:

(1) the admissibility of plaintiff's prison disciplinary history, and the questioning of plaintiff about his prison disciplinary dispositions;

(2) the admissibility of plaintiff's criminal convictions, as well as the questionning of plaintiff about the factual background of his criminal convictions; and

(3) the admissibility of evidence concerning a prior §1983 judgment against defendant [redacted] for excessive use of force;

(4) the admissibility of cross-examination of defendant [redacted] concerning prior instances of discipline for providing false testimony to the Inspector General, filing a false report, and providing false information to his superiors.

I ask that this Court kindly rule prior to commencement of trial that evidence of a the §1983 judgment against defendant [redacted]; as well as evidence of the past discipline against defendant [redacted] be admitted at trial. I also ask that the court order that evidence of plaintiff's prison disciplinary record, with the exception of one "false information" charge, and evidence of plaintiff's criminal conviction is not admissible.

Admissibility Of Plaintiff's Prison Disciplinary History

Defendants' counsel may seek to inquire into plaintiff's past prison disciplinary history. Plaintiff thus seeks an advance ruling from this Court that defendants not be allowed to inquire into plaintiff's institutional disciplinary dispositions, or otherwise admit evidence concerning such dispositions.

Under F.R.E. 404(b), prior bad act character evidence is not admissible to prove that a person acted in similar fashion in the case at bar. Rule 404(b) only allows for admission of evidence to prove such things as motive, intent, lack of accident, and the other reasons listed in the Rule. Such evidence must also be relevant. F.R.E. 402; *see also*, F.R.E. 404(b) advisory committee note. That is, motive, intent, lack of accident, etc., "must in fact be at issue in the case to justify admission of such evidence." *Lewis v. Velez*, 149 F.R.D. 474, 479 (S.D.N.Y. 1993). Likewise, even when relevant such evidence may be excluded on the ground that its probative value is substantially outweighed by its potential for unfair prejudice. *United States v.Levy*, 731 F.2d 997, 1002 (2d Cir. 1984).

Courts have repeatedly held that evidence of a prisoner plaintiff's disciplinary history is not admissible in a §1983 civil rights excessive force claim. Most recently, the Second Circuit made clear that such evidence is not admissible in such a case. *Hynes v. LaBoy*, 79 F.3d 285, 290-93 (2d Cir. 1996). After carefully examining each of the defendants' arguments for admission of the evidence, the Second Circuit soundly rejected them, finding the district court's admission of such evidence reversible error. *See also, Eng v. Scully*, 146 F.R.D. 74, 78 (S.D.N.Y. 1993) (court held that the plaintiff's prison disciplinary history was not relevant in excessive force claim, and therefore inadmissible); *Lewis, supra*, 149 F.R.D. at 481 (prisoner's disciplinary history inadmissible because it was irrelevant to any of the 404(b) exceptions. In *Lataille v. Ponte*, 754 F.2d 33 (1st Cir. 1985), a district court was also held to have committed reversible error, by admitting into evidence the past disciplinary record of a prison inmate. As the Circuit Court aptly stated:

> The sole issue here is who was the aggressor, plaintiff or defendants. There can be no question that evidence of the kind admitted here, which suggests that one party is a consistently violent aggressor, is of central importance to a case involving assault . . . It is also clear that such evidence is prejudicial.

Id. at 38. In a similar case, the Second Circuit upheld a district court's refusal to permit into evidence civilian complaints directed against a police officer. Although the records had been proffered to demonstrate the officer's "sadistic," "malicious," and "aggravated" state of mind, the appeals court noted that "this proffer amounts to nothing more than a veiled attempt to do what Rule 404(b) expressly prohibits -- introducing evidence of bad acts to show the defendant's

propensity to commit such acts." *Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2nd Cir. 1991).

The principal issue in the instant case is whether defendants use of force was excessive. The jury must determine whether force was applied in a good faith effort to restore order, or whether it was applied maliciously and sadistically for the purpose of causing harm. *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 999, 117 L.Ed.2d 156, 165-166 (1992). Here, plaintiff claims that he did not assault or attempt to assault either defendant. Instead, he alleges that he was attacked by defendant Menard, and then further viciously assaulted by both defendants after being placed in hand restraints. If the jury finds that plaintiff was assaulted in the manner alleged, such conduct on the part of defendants would clearly constitute excessive force. There would simply be no justification whatsoever for their actions. Thus as in *Hynes*, *supra*, and the other above-cited cases, evidence of plaintiff's intent, motive, or the like, has no bearing in this case, and such evidence will not aid the finder of fact in determining the type or level of force used.

Moreover, even were such evidence to have any relevance at all, its introduction would violate F.R.E. 403, since its prejudicial impact clearly outweighs its probative value. *Hynes, supra*, 79 F.3d at 290; *Levy*, *supra*, 731 F.2d at 1002; *Lataille*, *supra*, 754 F.2d at 38; *Berkovich*, *supra*, 922 F.2d at 1022. *See also*, *Avila v. Knight*, 475 F.Supp. 1054, 1055 (S.D.N.Y. 1979) (introduction of inmate's prior criminal and institutional records outweighed by prejudice).

Lastly, the court in *Lewis*, *supra*, also noted that besides the non-applicability of the 404(b) exceptions, the prisoner's disciplinary history was not admissible to impeach his credibility, since none of the acts set forth in his disciplinary history involved dishonesty or deceit. *Id.* at 481 In the present case, however, plaintiff admittedly does have a disposition on his record from September 1989 for "false information." As such, plaintiff cannot object to cross-examination concerning this matter, in the same manner defendants should not object to plaintiff's inquiry into defendant Maldonado's prior discipline for providing false information. Under Rule 608(b), while extrinisic evidence of the false information charge is not admissible, this may be inquired upon through cross-examination. As for any of plaintiff's other prison disciplinary dispositions, none of them involved false information, dishonesty or deceit. Thus the remainder of plaintiff's disciplinary dispositions are not in any way probative of his credibility, and for the above-cited reasons are inadmissible.

Accordingly, defendants should not be allowed to question plaintiff about his disciplinary dispositions, or otherwise admit his disciplinary history into evidence, with the exception of the single "false information" rule violation.

Admissibility of Evidence Concerning Plaintiff's Criminal Convictions

Defendants should not be permitted to introduce plaintiff's criminal record into evidence for the purpose of impeaching his credibility as a witness. This includes both the nature of his

present criminal convictions for which he is incarcerated, as well as the underlying details of those convictions.

First, defendants should not be allowed to question plaintiff about the factual background of his criminal convictions. F.R.E. 609(a)(1) allows impeachment of a witness by evidence of conviction of a crime. However, Rule 609 speaks only of "evidence that the witness has been convicted of a crime." (emphasis added). The Rule never allows any inquiry into the underlying details of the criminal conviction. *United States v. Biaggi*, 705 F.Supp. 848, 850 (S.D.N.Y. 1988) (limiting cross-examination on prior crimes to type of crime, time and place of conviction, and punishment received). *Campbell v. Greer*, 831 F.2d 700 (7th Cir. 1987); *U.S. v. Cox*, 536 F.Supp. 65 (5th Cir. 1976); *U.S. v. Plante*, 472 F.2d 829 (1st Cir. 1973), *cert. den'd*, 411 U.S 950 (1974).

Second, the nature of plaintiff's particular criminal convictions should likewise not be admissible in this case. In 1989, plaintiff was convicted of four charges: second degree murder, burglary, sodomy, and criminal possession of a weapon. The only possible probative value of plaintiff's convictions would be the argument that they may potentially bear upon his propensity to tell the truth. The prejudicial effect is that this information may also bias the jury against him on the merits of his claim, even if not admitted for that purpose. In this case, there is no probative value of this information. *See*, *Eng v. Scully*, *supra*, 146 F.R.D. at 78 ("murder is not necessarily indicative of truthfulness, and the probative value of a murder conviction is substantially outweighed by the danger of unfair prejudice"). As the *Eng* Court stated in finding the prisoner plaintiff's crime inadmissible in his excessive force claim, "[t]he jury will have knowledge that Plaintiff is not of unblemished character; Plaintiff is presently a prisoner and will be at the time of the trial." *Id.* The same is true in the present case. Plaintiff is serving time in a state prison, and unfortunately that alone can be sufficient to bias a jury against him.

Additionally, none plaintiff's convictions are indicative of plaintiff's propensity to tell the truth. These crimes have nothing to do with deceit or dishonesty within the meaning of Rule 609(a)(2). In using the words "dishonesty" and "false statement" in the Rule, Congress did not intend crimes such as murder or rape to be included. As *Eng* noted, "[t]he Reports of the House and Senate Conference Committees state that the words of this statute encompass crimes such as perjury, false statement, fraud, or offenses in the nature of *crimen falsi* which involve deceit, untruthfulness, or falsification, thus bearing on propensity for truthfulness." *Id.* at 79.

Accordingly, this Court should order that defendants may not question plaintiff or otherwise introduce into evidence neither any information about the underlying factual details of his criminal conviction, nor the type and nature of the particular criminal convictions for which plaintiff is incarcerated.

Section 1983 Judgment Against Defendant [redacted]

Plaintiff seeks and should be permitted to question defendant [redacted] about a prior §1983 judgment against him, finding that he used excessive force against another prison inmate at Clinton. In March, 1989, in *Hayden v.* [redacted], 82-CV-[redacted] (N.D.N.Y.), Judge Munson found that defendant [redacted] used excessive force upon inmate John Hayden, maliciously and sadistically for the very purpose of causing harm.

Federal Rule of Evidence 404(b) expressely provides for the admission of evidence of other wrongful acts, either prior to or subsequent to the incident in question, which are relevant to an actual issue in the case. Thus while such similar act evidence may not be used to show the character of the defendant to establish that he acted in conformity therewith, such evidence is admissible for other relevant purposes, such as to show motive, intent, opportunity, pattern, etc. *Ismail v. Cohen*, 706 F.Supp. 243, 252, *aff'd*, 899 F.2d 183 (2d Cir. 1990). "The Second Circuit has long been committed to the 'inclusionary' approach to the admissibility under Fed. R. Evid. 404(b) of similar act evidence." *Id.* at 252.

Rule 404(b) requires a two-part analysis for the introduction of similar act evidence: First, there must be consideration as to whether the evidence sought to be admitted fits within one of the exceptions listed in 404(b). Second, there must be a balancing of the probative value of the evidence against the likelihood of undue prejudice, along the lines of Rule 403.

Additionally, similar act evidence will be admitted so long as there is "sufficient evidence to support a finding by the jury that the defendant committed the similar act." *Id.* (citing *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)). In this case, that standard is clearly met since plaintiff seeks to introduce evidence of a prior §1983 judgment. Still, such proof that the defendant committed the act is not even necessary, as it is well-established that "no criminal conviction, civil judgment, or administrative finding that the defendant committed the act is necessary," nor need the court even make a preliminary finding that the defendant committed the other act. *Id.*

There are several cases directly on point which support plaintiff's motion to introduce evidence of the *Hayden* judgment against defendant [redacted]. In *O'Neill v. Krzeminski*, 839 F.2d 9 (2d Cir. 1988), Judge Newman held that a prior §1983 judgment for excessive force against one of the defendant police officers was admissible to show that the defendant had the intent to use excessive force and the intent to inflict needless injury (i.e. maliciously and sadistically for the very purpose of causing harm). *O'Neill*, 839 F.2d at 11. Thus the court upheld the district court's admission of the prior excessive force judgment under 404(b) to show the officer's intent and aggravated state of mind. *Id.*

Another case which supports admission of the *Hayden* judgment against defendant [redacted] is the case of *Ismail v. Cohen*, 706 F.Supp. 243 (S.D.N.Y. 1989), *aff'd*, 899 F.2d 183 (2d Cir. 1989). The district court, again upheld by the Second Circuit, permitted plaintiff to introduce a civilian complaint against one of the defendant police officers for using excessive force. The court held that the complaint could be offered to demonstrate both a relevant pattern and intent of misconduct on the part of the defendant under Rule 404(b). *Ismail*, 706 F.Supp. at 253. The complaint against the defendant officer demonstrated a relevant pattern of the officer's lashing out physically when he feels his authority is being challenged by a citizen with whom he is dealing on the street. It was also offered to show the officer's wrongful intent to abuse his public office and to lie about it thereafter. *Id.*

As to the second part of the analysis under Rule 403, the *Ismail* court also held that the probative value of the evidence far outweighs any prejudice which might ensue. *Id.* Further, noting that the Second Circuit has repeatedly recognized the efficacy of cautionary instructions, the court stated that it would "guard against any such prejudice by cautioning the jury that the proof was offered for the sole and limited purpose of establishing a wrongful intent or motive or a relevant pattern of conduct." *Id.* Finally, it is noteworthy that under Rule 403, this Court "is provided with broad discretion" in determining whether the probative value of this evidence is outweighed by the danger of unfair prejudice.

Based upon the above caselaw, evidence of the §1983 judgment against defendant [redacted] in *Hayden* should be admissible. As in *O'Neil* and *Ismail*, such evidence is admissible to show defendant [redacted]'s intent to use force, intent to inflict needless injury (i.e. to use force maliciously and sadistically for the very purpose of causing harm), intent to abuse his public office and to lie about it afterward.

Additionally, plaintiff alleges defendant [redacted] concocted a false misbehavior report in order to conceal his assault upon plaintiff. Evidence of this prior excessive force finding against defendant [redacted] should also be admissible to show his motive to lie and cover up the assault upon plaintiff. That is, evidence that he had been previously found liable for assaulting another inmate at Clinton is probative of his knowledge that he could be sued again, thus providing a motive to take affirmative steps to cover up and conceal his assault on plaintiff. In addition, as set forth in detail below, defendant [redacted] has a disciplinary history with the department, and thus an additional motive for covering up his actions here.

It should be noted that this Court has broad discretion in whether to grant plaintiff's request to admit this evidence against defendant [redacted]. A decision permitting plaintiff to offer the above evidence would be reversed only for abuse of discretion. *Ismail*, 899 F.2d at 188 (citing *Fiacco v. City of Rensselaer*, 783 F.2d 319, 327-28, (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987)). Thus plaintiff requests this Court's favorable exercise of discretion.

Prior Disciplinary Actions Against Defendant [redacted]

There are two particular instances where defendant [redacted] provided false testimony and false information to DOCS officials. Under F.R.E. 608, plaintiff should be permitted to cross-examine defendant [redacted] about these matters for purposes of impeaching his credibility. While barring admission of extrinisic evidence in such instances, Rule 608(b) permits cross-examination of specific instances of the conduct of a witness for purposes of attacking the witness' credibility, where such instances of conduct concern "the witness' character for truthfulness or untruthfulness." F.R.E. 608(b)(1).

First, in December 1985, DOCS sought defendant [redacted]'s dismissal as a result of an incident in which it was alleged he and other officers used excessive force upon a number of inmates in the hospital area at Clinton Correctional Facility. During the course of the investigation of that incident, it was charged that defendant [redacted] filed a false report and provided false information and testimony to the Inspector General. Following arbitartion proceedings, defendant [redacted] was found not guilty of excessive force, but guilty of providing a false and inaccurate report of the incident and giving false statements to the Inspector General on two occasions. As a result, he was suspended for twenty-one days.

Under Rule 608(b), such information is clearly relevant and probative to defendant [redacted]s character for untruthfulness. In *Hayden v.* [redacted], *supra*, Judge Munson also permitted plaintiff's counsel to cross-examine him on these grounds as well. At that time, the arbitration proceedings were still pending and the charges unresolved. As a result, Judge Munson indicated that the information was therefore not particularly helpful to the court as finder of fact in that case. However, since the *Hayden* trial defendant [redacted] was found guilty of the charges of filing a false report and providing false statements. This evidence is certainly relevant and probative evidence for a jury's consideration, and thus plaintiff should be permitted to cross examine him about these matters.

Second, in [redacted] 1985, defendant [redacted] was also reprimanded and docked one day's pay for providing false information as to his whereabouts on [redacted] 21 of that year. Defendant [redacted]'s personnel files contain a memorandum from the First Deputy Superintendent at Clinton indicating that a photograph in the [redacted] issue of the Plattsburgh newspaper raised serious questions as to the authenticity of an alleged personal illness and absence from work on the previous day. The memo indicates that the First Deputy had confirmed that the photograph of defendant [redacted] working at a chicken barbecue was taken during his normal duty hours on the 21st when he had claimed he was ill. The First Deputy noted "I would say that 'spreading it on thick' is a particularly apropo heading for this photograph." There is a second memo dated several days later from the First Deputy deducting one day's pay from defendant [redacted], in light of his failure to submit the requested documentation of his illness.

While not nearly as serious a matter as the above filing of a false and inaccurate report and providing false statements to the Inspector General during the course of an excessive force investigation, this matter does reflect upon defendant [redacted]'s character for untruthfulness. Accordingly, in the same way defendants may inquire into plaintiff's discipline for false information, plaintiff should be permitted to cross-examine defendant [redacted] on both instances where he was disciplined for false information.

For all the above reasons, plaintiff respectfully requests that this Court grant this motion *in limine* in its entirety. If the Court wishes a telephone conference with counsel concerning these issues prior to ruling, please so advise.

Thank you for your attention and consideration.

Yours truly,

Michael Cassidy
Managing Attorney

cc: Senta Siuda, Esq.
Assistant Attorney General
State of New York
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January 12, 1995

Honorable Ralph W. Smith, Jr.
United States Magistrate Judge
United States District Court
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway – Room 314
Albany, NY 12201

RE: *Murray v. Cross, et. al.*
93-CV-1007

Dear Judge Smith:

Please consider this letter plaintiff Keith Murray's motion *in limine* on the following two evidentiary issues:

(1) the admissibility of evidence concerning a prior section 1983 judgment against defendant [redacted] for excessive use of force, and

(2) questioning plaintiff on the factual background of his criminal conviction.

Plaintiff requests that the court rule that evidence of the prior section 1983 judgment against defendant [redacted] is admissible, and that inquiry into the factual background of plaintiff's criminal convictions is not admissible.

Section 1983 Judgment Against Defendant [redacted]

Plaintiff seeks and should be permitted to question defendant [redacted] about a prior section 1983 judgment against him, finding he used excessive force against another prison inmate at Clinton. As you are aware, this court found on October 24, 1994, that in the case of *Otero, et. al. v. Babbie, et. al*, 92-CV-1064, defendant [redacted] used excessive force upon inmate Julio Villanueva, maliciously and sadistically for the very purpose of causing harm.

Federal Rule of Evidence 404(b) expressely provides for the admission of evidence of other wrongful acts, either prior to or subsequent to the incident in question, which are relevant to an actual issue in the case. Thus while such similar act evidence may not be used to show the character of the defendant to establish that he acted in conformity therewith, such evidence is

admissible for other relevant purposes, such as to show motive, intent, opportunity, pattern, etc. *Ismail v. Cohen*, 706 F.Supp. 243, 252, *aff'd*, 899 F.2d 183 (2d Cir. 1990). "The Second Circuit has long been committed to the 'inclusionary' approach to the admissibility under Fed. R. Evid. 404(b) of similar act evidence." *Id.* at 252.

Rule 404(b) requires a two-part analysis for the introduction of similar act evidence. First, there must be consideration as to whether the evidence sought to be admitted fits within one of the exceptions listed in 404(b). Second, there must be a balancing of the probative value of the evidence against the likelihood of undue prejudice, along the lines of Rule 403.

Additionally, similar act evidence will be admitted so long as there is "sufficient evidence to support a finding by the jury that the defendant committed the similar act." *Id.* (citing *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)). In this case, that standard is clearly met since plaintiff seeks to introduce evidence of a prior section 1983 judgment. However, such proof that the defendant committed the act is not needed, as it is well-established that "no criminal conviction, civil judgment, or administrative finding that the defendant committed the act is necessary," nor need the court even make a preliminary finding that the defendant committed the other act. *Id.*

There are several cases directly on point which support plaintiff's motion to introduce evidence of the *Otero* judgment against defendant [redacted]. In *O'Neill v. Krzeminski*, 839 F.2d 9 (2d Cir. 1988), Judge Newman held that a prior section 1983 judgment for excessive force against one of the defendant police officers was admissible to show that the defendant had the intent to use excessive force and the intent to inflict needless injury (i.e. maliciously and sadistically for the very purpose of causing harm). *O'Neill*, 839 F.2d at 11. Thus the court upheld the District Court's admission of the prior excessive force judgment under 404(b) to show the officer's intent and aggravated state of mind. *Id.*

Another case which supports admission of the *Otero* judgment against defendant [redacted] is the case of *Ismail v. Cohen*, 706 F.Supp. 243 (S.D.N.Y. 1989), *aff'd*, 899 F.2d 183 (2d Cir. 1989). The District Court, again upheld by the Second Circuit, permitted plaintiff to introduce a civilian complaint against one of the defendant police officers for using excessive force. The court held that the complaint could be offered to demonstrate both a relevant pattern and intent of misconduct on the part of the defendant under Rule 404(b). *Ismail*, 706 F.Supp. at 253. The complaint against the defendant officer demonstrated a relevant pattern of the officer's lashing out physically when he feels his authority is being challenged by a citizen with whom he is dealing on the street. It was also offered to show the officer's wrongful intent to abuse his public office and to lie about it thereafter. *Id.*

As to the second part of the analysis under Rule 403, the *Ismail* court also held that the probative value of the evidence far outweighs any prejudice which might ensue. *Id.* Further, noting that the Second Circuit has repeatedly recognized the efficacy of cautionary instructions, the court stated that it would "guard against any such prejudice by cautioning the jury that the proof was offered for the sole and limited purpose of establishing a wrongful intent or motive or a relevant pattern of conduct." *Id.* Finally, it is noteworthy that under Rule 403, this court "is provided with broad discretion" in determining whether the probative value of this evidence is outweighed by the danger of unfair prejudice.

Based upon the above caselaw, it is clear that evidence of the section 1983 judgment against defendant [redacted] in *Otero* is admissible. As in *O'Neil* and *Ismail*, such evidence is admissible to show defendant [redacted]'s intent to use force, as well as intent to inflict needless injury (i.e. to use force maliciously and sadistically for the very purpose of causing harm).

Evidence of the *Otero* judgment may also be offered to show a relevant pattern. In *Berkovich v. Hicks*, 922 F.2d 1018 (2d Cir. 1991), a civil rights plaintiff sought to introduce seven civilian complaints against a police officer who he claimed had falsely arrested and imprisoned him and assaulted him during the arrest. *Id.* at 1021. However, the court found that the officer had been exonerated of six of the seven complaints which plaintiff sought to introduce as evidence of his malicious and sadistic state of mind. *Id.* at 1022. The only complaint still standing was that of abusive language, which plaintiff argued should have been admitted to show the officer's pattern of misconduct. *Id.* In holding the remaining complaint inadmissible, the court held that to merit the admission under 404(b), "the extrinsic acts must share 'unusual characteristics' with the act charged or represent a 'unique scheme'." *Id.* (citing *U.S. v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978).

As required under *Berkovich* for establishing such pattern under 404(b), the acts attributed to [redacted] in *Otero* share "unusual characteristics" with the act charged by plaintiff in this case. Specifically, and as this court is fully aware, the inmate in the *Otero* case, Julio Villanueva, alleged that during the course of the beating defendant [redacted] and another officer removed his shoes and struck the bottoms of his feet with batons. Plaintiff in this case is alleging that defendant [redacted] did precisely the same thing to him. Clearly, such conduct represents "unusual characteristics," as well as a "unique scheme."

Accordingly, plaintiff seeks to establish the following through cross examination of defendant [redacted] in order to show intent and pattern: (1) that on October 24, 1994, this court found that defendant [redacted], along with three other officers and two sergeants, used excessive force upon inmate Julio Villanueva at Clinton on June 4, 1992, (2) that inmate Villanueva claimed that during the course of that beating his shoes were removed and he was beat with batons on the bottoms of his feet, (3) that this court awarded inmate Villanueva a monetary award to

compensate him for his injuries, and finally, (4) that this court found that defendant [redacted]'s conduct, as well as that of the other three officers and two sergeants, merits an award of punitive damages to punish him for his misconduct and to deter him and others from engaging in such conduct in the future.

Of note, this court has broad discretion in whether to grant plaintiff's request to admit this evidence against defendant [redacted]. A decision permitting plaintiff to offer the above evidence would be reversed only for abuse of discretion. *Ismail*, 899 F.2d at 188 (citing *Fiacco v. City of Rensselaer*, 783 F.2d 319, 327-28, (2d Cir. 1986), *cert. denied*, 480 U.S. 922 (1987)). Thus plaintiff requests this court's favorable exercise of discretion.

Questioning Plaintiff On The Factual Background of His Criminal Convictions

Defendants should not be allowed to question plaintiff about the factual background of his convictions. Rule 609 speaks only of "evidence that the witness has been *convicted* of a crime." (emphasis supplied). It is merely the fact of the conviction which may be established in order to impeach the witness. Rule 609 simply does not allow inquiry into the underlying details of the criminal conviction. *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987); *U.S. v. Cox*, 536 F.2d 65, 71 (5th Cir. 1976); *U.S. v. Plante*, 472 F.2d 829, 832 (1st Cir. 1973), *cert. denied*, 411 U.S. 950 (1974).

For the above reasons, plaintiff asks that you grant this motion *in limine*. Thank you for your consideration of these matters.

Yours truly,

Michael Cassidy
Staff Attorney

cc: Deirdre Roney
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December 15, 1994

Deirdre Roney
Assistant Attorney General
State of New York
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Albany, NY 12224

RE: *Murray v. Cross, et. al.*,
93-CV-1007

Dear Deirdre:

This letter is to advise you of the IG/Labor/personnel file materials I plan to use at trial. First, I expect that I may use for impeachment purposes the IG interview notes of the defendants taken in connection with the investigation of this incident (#1587/91). Obviously I cannot be more specific than that, as it will depend upon defendants' direct testimony in this case.

Second, I plan to question defendant [redacted] about the incident and IG investigation in the R[redacted] incident (#[redacted]). As you are aware, the IG concluded that [redacted] used excessive and unnecessary force upon Mr. R[redacted] "for revenge." This material is relevant for a couple reasons. One, it goes to truth and falsity regarding [redacted]'s accuracy of reporting the use of force in that case. See FRE 608(b). Two, it is admissible as a prior bad act. Mr. Murray's allegation is that he was assaulted for having sex with Nurse [redacted] (i.e. out of revenge). Thus this R[redacted] "prior bad act" information goes to establishing motive, intent, opportunity and pattern under FRE 404(b). See also *Ismail v. Cohen*, 899 F.2d 183 (2d Cir. 1990).

Third, I plan to question defendant [redacted] about the incident and IG investigation in the D[redacted] case (#[redacted]). In that case, the IG concluded that the injuries were not supported in the force used as claimed by [redacted]. Again, this goes to truth and falsity under 608(b) as well as motive, intent and opportunity under 404(b).

That's it. Thanks.

Yours truly,

Michael Cassidy
Staff Attorney

David C. Leven, *Executive Director*

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September 6, 1994

Honorable Daniel Scanlon, Jr.
United States Magistrate Judge
United States District Court
Northern District of New York
407 Key Bank Building
200 Washington Street
Watertown, NY 13601

RE: Cay v. Burleigh and Dubrey,
89-CV-878

Dear Magistrate Judge Scanlon:

Please consider this letter plaintiff Nelson Cay's motion in limine regarding defendants' stated intent to introduce evidence of his psychiatric history. I ask that you rule, prior to commencement of trial, that these matters are inadmissible.

Defendants seek to introduce evidence of plaintiff's psychiatric history to try and show that his mental condition caused him to initiate a violent encounter with the defendant correction officers. Defendants also seek to introduce these materials as probative of plaintiff's credibility.

The first ground upon which defendants seek to introduce plaintiff's psychiatric history, that plaintiff's mental state caused him to initiate a violent confrontation with defendants, is clearly inadmissible under Rule 404(b) of the Federal Rules of Evidence. Rule 404(b) expressly prohibits the introduction of evidence of other acts "to prove the character of a person in order to show action in conformity therewith." That is, evidence of what are commonly referred to as "prior bad acts" may not be admitted to show a propensity on the person's part to commit such acts.

Defendants claim there exists evidence that plaintiff has a history of acting out through aggressive and assaultive behavior, and seek to admit such evidence they believe is contained in his mental health records. Case law makes abundantly clear that in an inmate civil rights section 1983 action for excessive force, such evidence is inadmissible.

Although defendants are not seeking to introduce plaintiff's disciplinary history per se, the manner in which they intend to use his psychiatric records, defendants are in essence seeking to introduce the same information as would be contained in a disciplinary record. Either way, this is "no more than a veiled attempt to do what Rule

404(b) expressly prohibits -- introducing evidence of bad acts to show [the plaintiff's] propensity to commit such acts." Berkovich v. Hicks, 922 F.2d 1018, 1022-23 (2d Cir. 1991).

In Lewis v. Velez, 149 F.R.D. 474, 479 (S.D.N.Y. 1993), the court held that under 404(b) the inmate plaintiff's disciplinary records "may not be admitted to show a propensity for violence." (string cite of cases omitted). The court, citing Lataille v. Ponte, 754 F.2d 33, 37 (1st Cir. 1985), further stated that a "disciplinary record of a section 1983 plaintiff should be excluded if offered to show that the plaintiff is a 'violent person and that he, therefore, must have been the aggressor and precipitatied the assault.'" In Lataille, the Circuit Court held that the district court had committed reversible error in admitting such evidence.

Thus defendants should not be permitted to introduce such evidence, absent their ability to meet one of the exceptions set forth in Rule 404(b). Rule 404(b) permits evidence of other acts to show motive, opportunity, intent or one of the other listed reasons.

However, as in Lewis, supra, and the cases cited therein, there is no such independent Rule 404(b) basis for introducing such evidence in the instant case. Accordingly, defendants may not introduce such evidence at trial for purposes of showing character and action in conformity therewith. Again, to do so would be reversible error. See Lataille, supra.

The second basis upon which defendants seek to introduce evidence of plaintiff's psychiatric history is for its alleged probative value of credibility. The Second Circuit has held that evidence about [a witness'] prior condition of mental instability that provides some significant help to the [factfinder] in its efforts to evaluate the witness' ability to perceive or recall events or to testify accurately is relevant." Chnapkova v. Koh, 985 F.2d 79, 81 (2d Cir. 1993) (citations omitted). The records in issue in Chnapkova indicated the plaintiff there, unlike Mr. Cay, had been diagnosed a paranoid schizophrenic.

As the court in Lewis, 149 F.R.D. at 484, noted, "Chnapkova is properly read to sanction the admission of those aspects of a witness' psychiatric history that truly bear upon credibility by illuminating the witness' powers of perception and ability to testify with accuracy." Thus, while those portions of a witness' psychiatric history which describe hallucinations, delusions and the like are admissible, "other aspects of his psychiatric records, such as notes regarding his antisocial personality, relate only to a propensity for violence and must be excluded."

In the instant case, while there are mental health records indicating that plaintiff Cay has been seen and evaluated by mental health officials during his incarceration,

there is no indication whatsoever of any specific psychiatric diagnosis of paranoia, schizophrenia or the like. Thus plaintiff's psychiatric records do not in any way bear upon his credibility with respect to his ability to perceive and testify accurately.

For the above reasons, I ask that this court hold that any evidence referring to plaintiff's psychiatric history is inadmissible.

Thank you for your attention to this matter.

Yours truly,

Michael Cassidy
Staff Attorney

cc: Terrence Tracy, Esq.
Assistant Attorney General
State of New York
Department of Law
Albany, NY 12224

July 22, 1998

Honorable Lawrence E. Kahn
United States District Judge
United States District Court
Northern District of New York
James T. Foley US Courthouse
445 Broadway -- Room 424
Albany, NY 12201

RE: *Matthews v. Armitage, et. al.*,
93-CV-1166 (LEK)

Dear Judge Kahn:

Please consider this letter plaintiff's pretrial motion *in limine* concerning the following evidentiary issues:

(1) the admissibility of Mr. Matthews' criminal conviction;

(2) the admissibility of Mr. Matthews' prison disciplinary history;

(3) the admissibility of information relating to the cause of Mr. Matthews' death; and

(4) the admissibility of subsequent remedial measures, relating to changes in some procedures in Clinton's protective custody unit since this incident.

I would ask the Court to kindly rule prior to commencement of trial that evidence of plaintiff's criminal conviction, disciplinary history, and cause of death is not admissible. I would also ask that the Court permit plaintiff to question witnesses concerning the subsequent remedial measures, for the limited purpose of impeachment and feasibility.

Admissibility of Evidence Concerning Plaintiff's Criminal Convictions

In anticipation of defendants possibly seeking to admit such evidence, plaintiff seeks an order that defendants not be permitted to introduce plaintiff's criminal record into evidence for any purpose. This includes both the nature of his present criminal conviction for which he was

incarcerated, as well as the underlying details of that conviction.

F.R.E. 609(a)(1) normally allows impeachment of a witness by evidence of conviction of a crime. Further, Rule 609 speaks only of "evidence that the witness has been convicted of a crime." (emphasis added). The Rule never allows any inquiry into the underlying details of the criminal conviction. *United States v. Biaggi*, 705 F.Supp. 848, 850 (S.D.N.Y. 1988) (limiting cross-examination on prior crimes to type of crime, time and place of conviction, and punishment received). *Campbell v. Greer,* 831 F.2d 700 (7th Cir. 1987); *U.S. v. Cox*, 536 F.Supp. 65 (5th Cir. 1976); *U.S. v. Plante*, 472 F.2d 829 (1st Cir. 1973), *cert. den'd*, 411 U.S. 950 (1974).

As the Court is aware, however, Mr. Matthews is deceased and thus will not be testifying in this trial. Mr. Matthews widow, Deborah Matthews, has been substituted as the plaintiff in this action. Accordingly, this provision seems wholly inapplicable, since Mr. Matthews will not be testifying.

Evidence of plaintiff's criminal conviction would do nothing other than to prejudice the jury against plaintiff's claim. Even were he alive and going to testify, no evidence of his criminal conviction would be admissible. In 1974 Mr. Matthews was sentenced to 25 years to life upon a conviction for murder. The only possible probative value of this conviction, *were Mr. Matthews going to testify*, would be the argument that it may potentially bear upon his propensity to tell the truth. The prejudicial effect is that this information may also bias the jury against him on the merits of his claim, even if not admitted for that purpose. In this case, there is no probative value of this information. *See*, *Eng v. Scully*, *supra*, 146 F.R.D. at 78 ("murder is not necessarily indicative of truthfulness, and the probative value of a murder conviction is substantially outweighed by the danger of unfair prejudice"). As the *Eng* Court stated in finding the prisoner plaintiff's crime inadmissible in his civil rights claim, "[t]he jury will have knowledge that Plaintiff is not of unblemished character; Plaintiff is presently a prisoner and will be at the time of the trial." *Id.* The same is true in the present case, with the exception that Mr. Matthews is no longer even alive.

Additionally, plaintiff's conviction for murder would not be indicative of plaintiff's propensity to tell the truth, even were he going to testify, or were his credibility somehow in issue. Mr. Matthews' crime has nothing to do with deceit or dishonesty within the meaning of Rule 609(a)(2). In using the words "dishonesty" and "false statement" in the Rule, Congress did not intend crimes such as murder to be included. As *Eng* noted, "[t]he Reports of the House and Senate Conference Committees state that the words of this statute encompass crimes such as perjury, false statement, fraud, or offenses in the nature of *crimen falsi* which involve deceit, untruthfulness, or falsification, thus bearing on propensity for truthfulness." *Id.* at 79. Again, there is simply nothing about this claim which makes relevant in any way Mr. Matthews' credibility.

Admissibility Of Plaintiff's Prison Disciplinary History

Defendants' counsel may also seek to admit evidence of Mr. Matthews prison disciplinary history. Plaintiff thus seeks an advance ruling from this Court that defendants not be allowed to inquire into plaintiff's institutional disciplinary dispositions, or otherwise admit evidence concerning such dispositions.

Under F.R.E. 404(b), prior bad act character evidence is not admissible to prove that a person acted in similar fashion in the case at bar. Rule 404(b) only allows for admission of evidence to prove such things as motive, intent, lack of accident, and the other reasons listed in the Rule. Such evidence must also be relevant. F.R.E. 402; *see also*, F.R.E. 404(b) advisory committee note. That is, motive, intent, lack of accident, etc., "must in fact be at issue in the case to justify admission of such evidence." *Lewis v. Velez*, 149 F.R.D. 474, 479 (S.D.N.Y. 1993). Likewise, even when relevant, such evidence may be excluded on the ground that its probative value is substantially outweighed by its potential for unfair prejudice. *United States v. Levy*, 731 F.2d 997, 1002 (2d Cir. 1984).

This case involves allegations that prison officials failed to take reasonable steps to protect Mr. Matthews from assault from a fellow inmate with a long history of violence and an alleged propensity for assaultiveness. There is simply no basis upon which Mr. Matthews' disciplinary history is even relevant in any way.

Even in excessive force claims, where the issue may often be who was the aggressor in a situation resulting in a use of force, courts have repeatedly held that evidence of a prisoner plaintiff's disciplinary history is not admissible. Most recently, the Second Circuit made clear that such evidence is not admissible that type case. *Hynes v. LaBoy*, 79 F.3d 285, 290-93 (2d Cir. 1996). After carefully examining each of the defendants' arguments for admission of the evidence, the Second Circuit soundly rejected them, finding the district court's admission of such evidence reversible error. *See also*, *Eng v. Scully*, 146 F.R.D. 74, 78 (S.D.N.Y. 1993) (court held that the plaintiff's prison disciplinary history was not relevant in excessive force claim, and therefore inadmissible); *Lewis*, *supra*, 149 F.R.D. at 481 (prisoner's disciplinary history inadmissible because it was irrelevant to any of the 404(b) exceptions. In *Lataille v. Ponte*, 754 F.2d 33 (1st Cir. 1985), a district court was also held to have committed reversible error, by admitting into evidence the past disciplinary record of a prison inmate. As the Circuit Court aptly stated:

> The sole issue here is who was the aggressor, plaintiff or defendants. There can be no question that evidence of the kind admitted here, which suggests that one party is a consistently violent aggressor, is of central importance to a case involving assault . . . . It is also clear that such evidence is prejudicial.

Id. at 38. In a similar case, the Second Circuit upheld a district court's refusal to permit into evidence civilian complaints directed against a police officer. Although the records had been proffered to demonstrate the officer's "sadistic," "malicious," and "aggravated" state of mind, the appeals court noted that "this proffer amounts to nothing more than a veiled attempt to do what Rule 404(b) expressly prohibits -- introducing evidence of bad acts to show the defendant's propensity to commit such acts." *Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2nd Cir. 1991).

Once again, the principal issue in the instant case is simply whether defendants were aware of a substantial risk of serious harm and whether they consciously disregarded that risk by failing to take reasonable measures to abate the risk. *Farmer v. Brennan*, 511 U.S. 825, ___, 114 S.Ct. 1970, ___, 128 L.Ed.2d 811, 832 (1994). Thus as in *Hynes*, *supra*, and the other above-cited cases, evidence of plaintiff's intent, motive, or the like, simply has no bearing in this case, and such evidence will not aid the finder of fact in determining whether defendants were deliberately indifferent to plaintiff's safety. Moreover, even were such evidence to have any relevance at all, its introduction would violate F.R.E. 403, since its prejudicial impact clearly outweighs any possible probative value. *Hynes*, *supra*, 79 F.3d at 290; *Levy*, *supra*, 731 F.2d at 1002; *Lataille*, *supra*, 754 F.2d at 38; *Berkovich*, *supra*, 922 F.2d at 1022.

Admissibility of Evidence Relating To The Cause of Mr. Matthews' Death

In July, 1994, Mr. Matthews died of a drug overdose at the Great Meadow Correctional Facility. His death was wholly unrelated to the events which transpired in this case in 1991 at Clinton. In the event defendants even intend to admit evidence concerning the nature and cause of his death, plaintiff's brings this motion.

Evidence concerning the nature and cause of Mr. Matthews' death is not only irrelevant to this case, but any possible probative value is greatly outweighed by the potential unfair and prejudicial effects of such evidence. There is a great deal of prejudice, ignorance, and fear in our society against people with substance abuse problems. In the prison context, an association with such ideas and images would likely only lead to an even greater potential for such prejudice. This should be avoided, particularly since the manner of Mr. Matthews death some three years after the incident is entirely unrelated to the claims in this case. All prisoners, regardless of why they are incarcerated and regardless of other problems they may have, such as a substance abuse problem, are entitled to reasonable protection from harm by other prisoners.

Admissibility of Subsequent Remedial Measures

At the time of this incident, inmates awaiting an IPC hearing were designated "IPC keeplock" status. This was the same status given IPC inmates who had been found guilty of rule violations in internal disciplinary proceedings and who had been given a penalty of keeplock time. All IPC keeplock inmates then recreated together in the IPC yard, including those pending

an IPC hearing. All other IPC inmates on non-keeplock status also recreated together but separately from the IPC keeplock inmates. Mr. Matthews was in IPC keeplock, pending his hearing, and was thus allowed to be outside of his cell at the same time as the disciplinary IPC keeplock inmates. It was at this time which Mr. Matthews was then stabbed by IPC disciplinary keeplock inmate Aaron Breazil.

Further, IPC keeplock inmates were not frisked upon their immediate release from their cells to go to the yard. Such inmates were not pat frisked for weapons until they all walked up to the front of the gallery of cells, and only then were they frisked for weapons a couple times per week.

Subsequent to this incident, changes were made in these procedures. Inmates placed in IPC pending a hearing are no longer considered "keeplocked," and thus are now kept separated from IPC disciplinary keeplock inmates. Changes were also made in the frisking procedures for inmates on their way to the yard.

Under F.R.E. 407, subsequent remedial measures are not admissible to prove culpability. However, they are admissible for other purposes such as to show ownership, control and feasibility. Here, plaintiff seeks to admit evidence and question witnesses about these changes in procedure. Plaintiff does not seek to prove liability with such evidence, but instead the feasibility of such changes. Defendants have intimated in depositions that they will take the position that they did the best they could at the time, and that different procedures were not feasible. In anticipation of this, plaintiff would like to question defendants and other witnesses about these changes in procedures to show the changes' feasibility. There also may be some basis to impeach witnesses in their depositions as well. Thus plaintiff requests permission to question the defendants and witnesses about these measures.

For the above stated reasons, plaintiff respectfully requests that this Court rule that defendants may not introduce any evidence concerning Mr. Matthews' criminal conviction, disciplinary history, or the nature of his death. Likewise, plaintiff requests an advance ruling that he may question witnesses about subsequent remedial measures, for the limited purposes of impeachment and feasibility. Thank you for your attention and consideration.

Yours truly,

Michael Cassidy
Managing Attorney

Biographies

Hon. Brenda K. Sannes

Brenda K. Sannes is a United States District Judge for the Northern District of New York. At the time of her appointment in 2014 she was the Appellate Chief in the United States Attorney's Office in that district. Judge Sannes earned her B.A. degree magna cum laude, with distinction in the English Department. from Carleton College in 1980. She earned her J.D. degree magna cum laude from the University of Wisconsin Law School in 1983 where she was an articles editor for the law review and was elected to the Order of the Coif. From 1983 to 1984, Judge Sannes clerked for the Honorable Jerome Farris on the Ninth Circuit Court of Appears. From 1984 to 1988, she was litigation associate in a law firm in Los Angeles. In 1988, she became an Assistant United States Attorney in Los Angeles. During her time in that office she served as a Deputy Chief in the Narcotics Section and later as the Anti-Terrorism Advisory Council Coordinator. She moved to Central New York in 1994 and was an Assistant United States Attorney in the Northern District of New York from 1995 until her judicial appointment in 2014. She served as the Appellate Chief from 2005 until her appointment to the bench.

Hon. Mae Avila D'Agostino

Hon. Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy. After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault. Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers. Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

Hon. Therese Wiley Dancks

Hon. Therese Wiley Dancks is a United States Magistrate Judge for the Northern District of New York. At the time of her appointment in February of 2012, she was a founding partner in the law firm of Gale & Dancks, LLC, where her practice centered on civil litigation and trial work. She was associated with the Syracuse law firm of Mackenzie Hughes, LLP from 1991 to 1997. Judge Dancks graduated magna cum /aude from Le Moyne College In 1985 and earned her J.D. degree cum laude from Syracuse University College of Law in 1991. She serves on district-wide court committees, U.S. Second Circuit court committees, and Federal Magistrate Judges Association committees. She is a native Central New Yorker, and assists local community and professional organizations, with an emphasis on helping providers of legal services to the indigent and poor, bar associations, and educational institutions.

Hon. Daniel Stewart

Hon. Daniel Stewart is a United States Magistrate Judge for the Northern District of New York, and was appointed in 2015. Judge Stewart, a native of Warren County, received his Bachelor of Arts Degree from the University of Notre Dame in 1985, and his J.D. from Albany Law School in 1988. He was a trial attorney and partner at the law firm of Dreyer, Boyajian LLP for 15 years, and then with Brennan & White LLP in Queensbury NY for 10 years until the time of his appointment. Judge Stewart has taught Civil Rights Litigation at Albany Law School since 1995, and has lectured extensively on the law of §1983.

Michael Sciotti

Partner

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Education

- Syracuse University College of Law, *summa cum laude*, LLM
- Syracuse University College of Law, *cum laude*, JD
- Rochester Institute of Technology, *summa cum laude*, BA

Practices & Industries

- Cannabis
- Health & Human Services Providers
- Health Care
- Labor & Employment

Admitted to Practice

- New York
- District of Columbia
- US District Court for the Northern District of New York
- US District Court for the Southern District of New York
- US District Court for the Eastern District of New York
- US District Court for the Western District of New York
- US Court of Appeals for the Second Circuit
- US Supreme Court

Biography

Michael is a trusted advisor, trainer, and litigator to hundreds of employers on labor and employment matters. His practice includes defending employers, owners, and members of management in all types of discrimination, harassment, whistleblower, and retaliation claims brought under Title VII, ADEA, ADA, FMLA, GINA, NYS Human Rights Law, and Labor Law. Michael also defends wage-and-hour actions and claims, including class-action lawsuits, brought under federal and state law. He has tried nearly two dozen cases to verdict in federal and state court and before the NYS Division of Human Rights.

Michael also provides day-to-day counseling for employers on all aspects of labor and employment law and conducts internal investigations; audits; and supervisory and employee training , including sexual harassment-prevention training, on a regular basis. He has given over 700 labor and employment presentations to organizations that include the Society for Human Resource Management, the American Payroll Association, the American Corporate Counsel Association, the New York State Society of Certified Public Accountants, the Northern District of New York Federal Bar Association, the New York State Bar Association, and Lorman Education Services.

Bar Associations

- American Bar Association
- Northern District of New York Federal Court Bar Association, Pro Bono Committee Chair and Former President, Vice President, and Trustee
- New York State Bar Association, Labor Law Section
- Onondaga County Bar Association
- Washington DC Bar Association

Selected Memberships & Affiliations

- US District Court for the Northern District of New York, Alternative Dispute Resolution Committee Member and Court-Appointed Mediator
- American Payroll Association
- Society of Human Resource Management

Representative Experience

- Successfully defended a trucking company at trial and in the subsequent appeal to the NYS Supreme Court, Appellate Division, Third Department from an attempt by the NYS Department of Labor to reclassify 300 independent contractor truck drivers as employees.
- Resolved a highly contentious sexual-harassment claim for a physician group by convincing plaintiff's counsel to mediate as opposed to litigating. The claim was resolved much quicker and cheaper than if the matter had been litigated.
- Won a summary-judgment motion and subsequent appeal by the plaintiff to the US Court of Appeals for the Second Circuit for a large school district on an age-discrimination claim under federal law.
- Won an appeal before the NYS Supreme Court, Appellate Division, Fourth Department on behalf of an employer, dramatically reducing the sexual-harassment verdict rendered by the NYS Division of Human Rights.
- Tried a case in the US District Court for the Northern District of New York for a nursing home where the male plaintiff claimed he was a victim of workplace sexual harassment. The court dismissed all of the plaintiff's claims at the conclusion of his case under Rule 50(a) of the Federal Rules of Civil Procedure. The dismissal was subsequently affirmed by the US Court of Appeals for the Second Circuit.
- Resolved a dispute through negotiation for an employer where the NYS Workers' Compensation Board served an overbroad subpoena *duces tecum*.
- Served as mediator in a hotly litigated class-action lawsuit that resulted in a settlement after 18 hours of mediation.
- Successfully defended an employer from a workers' compensation discrimination claim tried before the NYS Workers' Compensation Board.
- Settled a series of claims for an employer brought by the Occupational Safety and Health Administration before the Occupational Safety and Health Review Commission.
- Handled numerous I-9 audits for employers.

Prior Experience

- Hiscock & Barclay, LLP, Partner
- Hancock Estabrook, LLP, Partner
- AWI Environmental Services, Inc., General Counsel and Human Resources Director
- Paravati, Karl, Green & Eisenhut, LLP, Associate

Selected Community Activities

- Rochester Institute of Technology Alumni Network, Board of Directors Member
- Rochester Institute of Technology, Capital Campaign Committee Member
- Syracuse University College of Law, Former Associates Council Advisory Board Vice Chair
- The Hemophilia Connection, Former Board of Directors Member
- Meals on Wheels of Syracuse, Former Board of Directors Member

Selected Honors

- Selected to *Super Lawyers* Upstate New York: Employment Litigation: Defense, 2019; Employment & Labor, 2007-2018
- *The Best Lawyers in America*®, Syracuse Lawyer of the Year: Employment Law—Management 2015-2016
- *The Best Lawyers in America*®, Syracuse Lawyer of the Year: Labor Law—Management, 2014 and 2016
- US District Court for the Northern District of New York, Pro Bono Service Award, 2012-2014
- New York State Bar Association, Pro Bono Service Award, 2008

Selected Speaking Engagements

- American Payroll Association New York State Conference Keynote Address, “New York State’s Sexual Harassment Prevention Law”
- Cornell Cooperative Extension, Agricultural Workforce Development Program, “Wage & Hour Laws Impacting Agricultural Employers”
- Society of Human Resource Management, “New York State Paid Family Leave Act”
- Gilroy, Kernan & Gilroy, Inc., “Salary History Discrimination”
- Chemung County Chamber of Commerce, “Sexual Harassment Training - Education, Prevention, and Investigation: The Trifecta of a Defense”

Selected Publications & Media

- *Buffalo Law Journal*, “New York Enacts Sweeping Sexual Harassment Legislation”
- American Bar Association, *The Fair Labor Standards Act 2005-2007 Cumulative Supplement*, Contributing Editor
- American Bar Association, “Report of the Equal Pay Act Subcommittee,” Contributing Author
- New York State Bar Association Labor & Employment Newsletter, “The NYS Flag Discrimination Statute”
- *NY Litigator*, “Sexual Harassment: To What Extent Need the Conduct Be Sexual in Nature”

Selected Alerts & Blog Posts

- Component 2 EEO-1 Online Filing System Update
- EEO-1 Component 2 Data Update
- New York Enacts Sweeping Sexual Harassment Legislation Part Two: Sexual Harassment Certification Requirements and NYS Contract Bidding
- New York Enacts Sweeping Sexual Harassment Legislation
- Employer Obligations Under the NYSPFLA

Robert Barrer

Chief Ethics and Risk Management Partner

Syracuse
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Education

- Syracuse University College of Law, *Magna Cum Laude*, JD
- Skidmore College, *With Honors*, BA

Practices & Industries

- Commercial Litigation
- Professional Liability
- Torts & Products Liability Defense

Admitted to Practice

- New York
- US District Court for the Northern District of New York
- US District Court for the Southern District of New York
- US District Court for the Eastern District of New York
- US District Court for the Western District of New York
- US Court of Appeals for the Second Circuit
- US Supreme Court

Biography

Robert is Barclay Damon's chief ethics and risk management partner and is responsible for all ethics, conflicts, loss-prevention, and CLE activities. In this senior leadership position, he counsels attorneys and provides analysis and advice on ethical questions involving conflicts of interest, privileges, and legal issues implicating the Rules of Professional Conduct.

Robert also supervises the firm's CLE programs, lectures on a wide variety of ethics and practice-management topics, and is responsible for designing and implementing programs and policies to improve the provision of high-quality legal services for firm clients.

Robert has over 36 years of trial and appellate experience in the state and federal courts and serves as a mediator for court-directed and private mediation clients. Over the course of his career, Robert represented large and small corporations, governmental and agency clients as well as individuals.

In addition to his role at Barclay Damon, Robert is a Syracuse University College of Law adjunct.

Bar Associations

- American Bar Association
- New York State Bar Association, Standards of Attorney Conduct Committee Member
- Northern District of New York Federal Court Bar Association
- Onondaga County Bar Association

Selected Memberships & Affiliations

- American Board of Trial Advocates, Elected Member
- Association of Professional Responsibility Lawyers
- NYS Supreme Court, Appellate Division, Fourth Department, Fifth Judicial District: Former Chair and Grievance Committee Member
- NYS Commission on Judicial Conduct, Referee

Representative Experience

- Regularly represents lawyers and law firms as respondents in professional-discipline matters before attorney grievance committees.
- Obtained summary judgment a municipality that provided emergency medical services in response to a 911 call concerning the plaintiff, who suffered a massive heart attack. While at the scene, the defibrillator and the pads allegedly malfunctioned. A lawsuit was brought against the client and the manufacturer and distributors of the defibrillator and pads. In the absence of a special relationship, and none was established, there was no municipal liability. The plaintiff appealed, and the dismissal of the action was affirmed.
- Obtained dismissal of a prolific *pro se* plaintiff's federal civil-rights claim against a law firm that represented other parties in state court litigation. The plaintiff, whom the federal district court judge termed "a disbarred and disgruntled former attorney," commenced a lawsuit against a host of state court judges, state court officials, and private law firms. Successfully argued that the lawsuit was frivolous against the law firm because it was not a "state actor" within the meaning of the controlling federal civil-rights statute.
- Obtained summary judgment for a third-party benefits provider for self-funded health- and risk-management plans in a pair of federal civil-rights actions commenced by retired disabled police officers who were challenging the manner in which their medical benefits were paid under Section 207-c of the NY General Municipal Law. The decision granting summary judgment was affirmed by the US Court of Appeals for the Second Circuit. One of the plaintiffs then commenced a near-identical action in NYS Supreme Court against the client. Obtained dismissal of most of the claims in an initial motion, and then obtained summary judgment dismissing the remaining claims. The decision granting summary judgment was then affirmed by the Appellate Division, Fourth Department.
- Obtained summary judgment and dismissal of a legal-malpractice action against a law firm and its principal attorney based upon the failure of the plaintiff to schedule the claim in his pre-action bankruptcy petition.

- Represented a manufacturer of motorcycles and off-road vehicles in a challenge to the manufacturer's decision to terminate the franchisee based upon its failure to meet the standards contained in the franchise agreement. Following a six-week jury trial in the US District Court for the Northern District of New York, the jury returned a verdict in favor of the client, thereby validating the decision to terminate the franchise.
- Defended a manufacturer of precision medical devices in an action brought by a purchaser of a $2.25 million nuclear-magnetic-resonance system. After the client performed and indicated its readiness to deliver the system, the purchaser attempted to cancel the agreement and sought a refund of its deposit. Obtained a decision from the US District Court for the Northern District of New York, affirmed by the Second Circuit, that the purchaser breached the agreement and there was no right to a refund of the deposit.
- Represented a wholesale pharmaceutical-services company in connection with its successful attempt to enjoin a former salesperson from unlawfully competing by contacting customers and using confidential information and trade secrets. Successfully proved during a federal court preliminary-injunction hearing that the scope and duration of a restrictive covenant were reasonable and should be enforced. Once the preliminary injunction was granted, the salesman consented to all the relief the client was seeking for the duration of the agreement.
- Successfully defended two municipal agencies and one of its officers in a federal civil-rights action arising out of the declaration that multi-story dwelling in a college town was not up to the local housing code and therefore unsuitable for use as a college fraternity. Following a six-week trial, the jury in the US District Court for the Northern District of New York returned a verdict in favor of the clients despite the fact the former owners of the home were found liable for fraud. The Second Circuit affirmed the verdict in all respects.
- Successfully defended an attorney charged with malpractice and fraud. The spouse, who was not represented by the client, sued him, claiming he was guilty of malpractice and fraud in the context of a contentious matrimonial action. Established proper conduct on the client's part and this, coupled with a lack of privity, led the court to grant summary judgment to our client.
- Represented a municipal fair association that sponsored an automobile race at a local fair. The plaintiff was injured when a tire separated from a race car and struck him in the leg. Because the plaintiff had executed a waiver of liability to permit him to be in the pit area and had not paid a fee for admission, he was not considered a user within the meaning of the NY General Obligations Law. Prevailed on appeal and had that victory affirmed by the NY Court of Appeals in its first application of this statute.

- Represented the individual seller of a technology company who claimed he was wrongfully denied compensation for the sale of products following the purchase of his business by a competitor. Arbitration and litigation followed parallel tracks and, after completing the arbitration hearing, the arbitrator awarded the client $1.4 million (the full amount sought).
- Obtained summary judgment for clients that manufactured warming blankets for use during surgery and had been sued when a young patient developed compartment syndrome on his legs following kidney surgery. Established that the warming blanket functioned properly and did not cause or contribute to the compartment syndrome.
- Successfully defended a client was accused of legal malpractice arising out of his representation of an accused in a criminal case. Under NY law, a former client of an attorney who was convicted in a criminal case cannot claim legal malpractice against the attorney without first establishing actual innocence. The incarcerated former client made no claim or showing of innocence, and therefore, summary judgment was obtained for our client.
- Successfully defended a manufacturer of folding ladders in a claim by an insurance-company claims adjuster that the ladder failed, causing him to fall and sustain personal injuries. Relying upon expert testimony from a wood materials and ladder expert, convinced the jury that the ladder was not defective and the sole cause of the fall and injury was the negligence of the plaintiff. The jury returned a verdict of 'no cause for action' following a four-day trial.
- Obtained summary judgment for the owner and operator of a daycare center in an action commenced by the parents of a two-year-old who sustained a serious injury when a piece of furniture upon which the child was climbing tipped over. The court granted the motion for summary judgment and dismissed both the action against daycare center as well as all cross-claims asserted by the manufacturer. The argument of the manufacturer that the daycare center was guilty of negligent supervision was summarily rejected.
- Defended a physician accused of professional misconduct and fraud in an 18-day administrative proceeding before a panel of the State Board of Professional Medical Conduct. The board accused the physician of multiple instances of misconduct involving 10 different patients, arising out of alleged deviations from the standard of care, inadequate recordkeeping, and fraud for billing for procedures not undertaken.
- Obtained summary judgment for medical-device manufacturers by establishing that the product at issue had been a part of a line of business sold to another company. Because the agreement memorializing the sale excluded retained liabilities, the court held that there was no liability to the plaintiff, who claimed to have suffered severe damages from an overdose of radiation during cancer treatment.

Prior Experience

- Hiscock & Barclay, LLP, Partner
- US District Court for the Northern District of New York to Judge Howard Munson, Law Clerk

Selected Community Activities

- Syracuse University College of Law, Adjunct

Selected Honors

- Selected to *Super Lawyers* Upstate New York: Professional Liability: Defense, 2018-2019
- Selected to *Super Lawyers* Upstate New York: Business Litigation, 2007-2017
- Burton Awards, Law360 Distinguished Writing Award for "Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents," and "Careless Keystrokes and Bad Decisions—New York Law on Inadvertent Disclosure," 2006 and 2017
- Northern District of New York Federal Court Bar Association, Pro Bono Service Award, 2010
- Martindale-Hubbell AV Preeminent Peer Review Rated for Very High to Preeminent Ethical Standards and Legal Ability, 2002-2018

Selected Speaking Engagements

- 17th Annual Hinshaw & Culbertson Legal Malpractice/Risk Management National Conference, "Navigating Troubled Waters: Dealing With the Impaired Lawyer"
- New York State Bar Association, "Ethics 2017: Legal Ethics in the Real World" CLE
- New York State Bar Association, "Legal Malpractice 2017" CLE
- American Law Institute National, "The Efficient and Ethical Use of Email in Law Practice" Webinar
- County Attorneys' Association of the State of New York Annual Meeting, "Disciplinary Consequences of Lawyer Impairment"

Selected Publications & Media

- *New York Legal Ethics Reporter*, “Careless Keystrokes & Bad Decisions: New York Law on Inadvertent Disclosure”
- *New York Legal Ethics Reporter*, “Ethical Implications and Best Practices for the Use of Email”
- *New York State Bar Association Journal*, “Removal of Personal Injury Actions to New York Federal District Courts”
- *New York State Bar Association Journal*, “Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents”
- *Warren’s Negligence in the New York Courts*, “Parties Negligent” Ch. 3 Editor

Selected Alerts & Blog Posts

- Appellate Division Affirms Dismissal of Negligence Claim Against Municipality Providing Emergency Medical Services
- Police Encounter with Dog Walker Leads to Important Ruling on Fed. R. Civ. P. 68 Offers of Judgment in Civil Litigation
- The Cover Up is Worse than the Crime

AAG GREGORY J. RODRIGUEZ

AAG Gregory Rodriguez has served with the New York State Attorney General's office in the Albany Litigation Bureau for over thirteen years (1995-2001; 2011-present). He recently became the Deputy Bureau Chief of the Albany Litigation Bureau. Prior to that, he was the Section Chief for the Federal Inmate Litigation Section since 2015, during which time he managed AAG's in that section and was responsible for overall training in the handling of inmate Section 1983 litigation. He also acts as liaison with the court personnel in the Northern District of New York and personnel at the New York State Department of Corrections and Community Service (DOCCS). Prior to his employment with the Attorney General's Office, Greg was a Partner, at the law firm of Thorn, Gershon, Tymann and Bonanni, LLP in Albany, NY from 2001-2011 where he handled civil litigation in the areas of product liability, medical malpractice and general insurance defense. He is a 1988 graduate of Siena College and a 1993 graduate of the Claude W. Pettit College of Law, Ohio Northern University.

Michael E. Cassidy

Michael E. Cassidy is the Managing Attorney of the Plattsburgh Office of Prisoners' Legal Services of New York (PLS), as well as the statewide PLS Litigation Coordinator.

He received his *Juris doctor, cum laude,* from Vermont Law School in 1991 and his B.A. in Political Science from the University of Vermont in 1987. He served as a staff attorney at PLS from 1991-1996 and Managing Attorney for Litigation from 1996-1998. He engaged in private practice in Burlington, Vermont and Portland, Maine from 1998-2002, before returning to the PLS as the Plattsburgh Office Managing Attorney. Since 2017 he has also served as the statewide Litigation Coordinator for PLS, which has offices in Albany, Ithaca, Buffalo, and Plattsburgh.

He is admitted to the state bars of New York, Vermont and Maine. He is also admitted to practice in the United States District Courts for the District of Vermont, the District of Maine, the Northern District of New York, and the Western District of New York, as well as the United States Courts of Appeals for the First, Second, and D.C. Circuits.

Charles Quackenbush

Charles Quackenbush joined DOCCS Counsel's Office as an Associate Counsel in January of 2014. He was appointed Director of Litigation, responsible for maintaining the Department's relations with the Office of the Attorney General, with federal and state courts, and with outside law enforcement agencies. In April of 2017 he was promoted to Deputy Counsel. He continues to handle Director of Litigation duties while contributing to internal/external policy discussions, guiding and supporting legal staff and advising facility executives statewide. Before joining DOCCS, Quackenbush served from 1998 to 2014 with the Office of the New York State Attorney General, Albany Litigation Bureau where he spent 16 years handling trial and appellate work in the New York state and federal courts as well as courts of the state of Connecticut. Previously, Quackenbush served from 1987 to 1998 with the Office of Robert M. Morgenthau, District Attorney for New York County, where he spent 11 years prosecuting offenses ranging from misdemeanors to homicides. From 1989 to 1998 he was Attorney in Charge of Project Focus, a program in which ADAs in Trial Bureau 50 provided close support to the 33 and 34 Precincts to penetrate and prosecute narcotic trafficking enterprises. Quackenbush holds a J.D. from Quinnipiac University School of Law and a B.A. in Psychology from Mount Saint Mary's College.

David Burch

Partner

"My highest honor is partnering with clients every day to plan and implement strategies to achieve their goals, even in the most difficult circumstances."

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Overview

Biography

David is an experienced litigator who routinely handles complex disputes, particularly in commercial litigation, internal investigations, and white collar defense. Whether the final goal is a negotiated settlement or a complete victory after trial, he strives to keep clients' business goals and challenges at the forefront when designing paths to a final resolution. David has served as lead counsel in situations ranging from governmental investigations to multi-action matters with industry-wide import.

As an advocate for clients before regulators, in the courtroom, and those facing criminal accusations, David litigates in state, federal, and administrative courts and has handled countless administrative tax hearings and appeals and Article 78 proceedings as well as state and federal civil and criminal cases and private arbitrations. He has represented clients challenging decisions made by the US Department of Transportation, the US Department of Health & Human Services, the NY Attorney General, the NYS Public Service Commission, the NYS Department of Taxation &

Finance, the NYS Department of Environmental Conservation, and the Department of Economic Development as well as additional federal and state agencies.

David has extensive experience representing businesses in energy industry disputes before state regulators and between private parties in diverse areas, with clients that include Energy Service Companies (ESCOs), renewable- and fossil-fuel-generation asset owners and operators, utilities, and others. He routinely handles securities litigation and arbitration matters, contract disputes, environmental litigation, and trade secret litigation, among other areas. David also handles criminal matters involving health care fraud, federal and state tax issues, securities laws, environmental crimes, the federal False Claims Act and state analogues, and mail and wire fraud. He additionally conducts internal investigations and counsels companies on implementing and improving compliance plans.

In addition to his legal practice, David serves as Barclay Damon's hiring partner, providing strategic guidance and oversight for firm-wide hiring efforts.

Bar Associations

- New York State Bar Association

Experience

Representative Experience

Commercial Litigation

- Represented a cable television provider in a dispute regarding millions in late fees assessed by municipalities. Won a favorable judgment following trial, reducing penalties by over 95 percent. Settled on favorable terms while the appeal was pending.
- Represented a food-production company investor with respect to embezzlement by an officer. Obtained a temporary restraining order, followed by a negotiated resignation.
- Represented a business owner in the break-up of numerous interconnected operating and partnership agreements. Settled on favorable terms.
- Obtained the summary dismissal of a federal civil-rights complaint against an individual in district court and on appeal to the circuit court.
- Represented medical professionals involved in litigation regarding an asset-purchase agreement and alleged defamation.
- Resolved numerous disputes regarding student discipline and academic fraud through both negotiated settlements and final judgments in litigated matters.
- Successfully defended appeal of estate matter regarding the disposition of liquid and real estate assets.

Energy

- Represents an industry group of Energy Service Companies (ESCOs) in ongoing proceedings before the NY Public Service Commission (PSC) and in parallel judicial proceedings.

- Led negotiations on behalf of an industry group under supervision of the NY PSC regarding cybersecurity issues and terms of data-security agreements.
- Represented a solar developer in arbitration regarding breaches of a development agreement by an engineering, procurement, and construction (EPC) contractor. Settled on favorable terms.
- Represented a utility company in a challenge by a developer to tariff the reimbursement rate. Obtained summary dismissal of the complaint by the court.
- Represented a municipally owned power plant in wide-ranging litigation regarding breaches of an operating agreement by a private operator. Settled on favorable terms.
- Successfully defended an adversaries' appeal of a lower court's denial of an Article 78 petition that sought to reverse the Public Service Commission's denial of retroactive reimbursements to a group of residential developers for certain trenching work used to install utility service. The Appellate Division's decision to affirm the lower court order was particularly important to the utility client because an adverse decision would have potentially caused other developers to also seek retroactive reimbursements, opening the client up to additional claims and damages.

White Collar

- Represented a business under criminal investigation by the NY Attorney General’s Antitrust Bureau for numerous violations of antitrust laws under threatened penalties of millions, incarceration for top executives, and forced closure of business. Negotiated a civil resolution favorably with no criminal charges imposed.
- Represented a business owner charged with 21 felony counts of criminal sales-tax fraud involving amounts approaching $750,000. Successfully reduced the counts to one misdemeanor charge of failure to maintain adequate records, and successfully negotiated the abatement of civil-fraud penalties.
- Represented a physician accused of health care fraud, including fraudulent billing and falsification of records. Successfully negotiated a civil resolution with no criminal charges imposed. Assisted in instituting a practice-wide compliance program.
- Represented a law firm partner accused of fraud by the US Department of Justice and US Department of Labor. No charges or civil penalties were imposed.
- Represented a private NYS university in connection with criminal investigations involving accusations against staff members.
- Represented a private NYS university in connection with a NCAA investigation.
- Defended an owner of an employee-leasing company charged with tax evasion and failing to pay withholding tax.
- Represented a not-for-profit development corporation charged with federal tax evasion through sentencing and post-sentencing supervision.
- Represented countless witnesses in connection with interviews and testimony in state and federal criminal investigations.

Tax Controversies

- Represented numerous companies in litigation with the NYS Department of Taxation & Finance to protest notices of deficiency arising out of denial of Empire Zones program credits. Obtained reductions in assessments following a hearing before the Division of Tax Appeals aggregating in tens of millions.
- Represented numerous companies in litigation regarding the denial of Qualified Emerging Technology Company tax credits (QETC). Settled cases on favorable terms.
- Represented a power-plant developer in an audit of Brownfield Tax Credits. Resulted in payment of a multi-million credit as claimed by the taxpayer.
- Represented a manufacturer of automotive parts in negotiations and litigation with the NYS Department of Taxation & Finance regarding income taxes with respect to disputes over Empire Zone tax credits.
- Represented a real estate developer in a real-property-tax dispute, leading to a 60 percent reduction in real-property-tax assessments.
- Represented a boat dealer in civil tax litigation on parallel course with criminal tax prosecution involving the collection and remittance of sales tax.

Regulatory and Compliance

- Represented numerous businesses in summary Article 78 proceedings resulting in the reversal of the actions of numerous New York State agencies.
- Represented individuals in the closing of the purchase of all the assets of a trucking company in a heavily regulated industry and in ensuring the new owners were in full compliance with federal, state, and local regulations.
- Represented a nursing home operator in the correction of 401(k) plan tax-qualification failures under the IRS' Employee Plans Compliance Resolution System (EPCRS).
- Represented a software company in the correction of breaches of fiduciary duties under the Department of Labor’s Voluntary Fiduciary Correction Program (VFCP).
- Assisted in compliance and termination of a paper-products manufacturer’s employee benefit plans ESOPs, 401(k) plans, and 403(b) plans—each with more than 100 participants.
- Represented a health care provider in a government audit of Medicare and Medicaid billing practices.
- Defended a health care provider against an assessment for overpayment of Medicaid reimbursement.
- Represents universities and individuals in connection with National Collegiate Athletic Association (NCAA) compliance matters.

Cannabis

- Represented a client in a dispute over the ownership of a medical marijuana licensee, resulting in a nearly $1 million buyout.

Prior Experience

- Hiscock & Barclay, LLP, Partner
- Green & Seifter, Attorneys, PLLC, Associate

- Office of Federal Magistrate Judge David R. Homer, Intern

Selected Community Activities

- Cazenovia Preservation Foundation, Former Vice President and Board of Directors Member

Selected Honors

- *Central New York Business Journal*, 40 Under 40, 2019
- Selected to *Super Lawyers* Upstate New York Rising Stars: Business Litigation, 2015-2017

Knowledge

Selected Speaking Engagements

- New York State Society of CPAs, “Tax Litigation”
- Syracuse Annual Tax Conference and Accounting & Auditing Update, “New York Consolidated Funding Application Process and Incentives”
- NYSSCPA Syracuse Chapter Annual Tax Conference, “Available NYS Incentives With a Focus on START-UP NU Program”
- NDNY Federal Court Bar Association, “Discovery Updates and Trends”
- Annual Tax Conference for the Syracuse Chapter of the New York State Society of CPAs, “Economic Incentives and Tax Controversy Issues <http://marketing.barclaydamon.com/files/Uploads/Documents/CPA%20Presentation%20-%20November%202013%20Presentation.pdf> ”

Selected Publications & Media

- Politico, "Energy Retailers Face Off Against Regulators Before State Court of Appeals" <https://subscriber.politicopro.com/_pro-login?base=https://subscriber.politicopro.com/&redirect=/_pro-login&logout=/_logout&lRedirect=true&sRedirect=https://subscriber.politicopro.com/&js=false>
- *Marijuana Venture*, “Banking Considerations and the Law of Unintended Consequences” <https://www.marijuanaventure.com/tag/burch/>
- *Albany Business Review*, “Not So Fast, Attorney Says Potential Change in New York Tax Law Doesn’t Guarantee Tax Credits”
- Law360, “Start-Up NY Seeks to Avoid Empire Zone-Era Tax Hiccups” <https://www.law360.com/articles/483195>
- New York State Bar Association *Hot Topics in Real Property Law and Practice*, “The Empire Zone: Are Economic Development Incentives Alive in New York State?

Selected Alerts & Blog Posts

- The Supreme Court Clarifies the Meaning of a Personal Benefit in Insider Trading Cases
- Upstate Revitalization Initiative Region Winners are Announced - Now What?
- Update On Governor Cuomo's Proposed Corporate Franchise Tax Proposals

Education

- Albany Law School, JD, *Cum Laude*
- State University of New York at Albany, BA, *Summa Cum Laude*

Practices & Industries

- Commercial Litigation
- White Collar
- Energy
- Project Development
- Oil & Gas
- Cannabis

Admitted to Practice

- New York
- US District Court for the Northern District of New York
- US District Court for the Southern District of New York
- US District Court for the Eastern District of New York
- US District Court for the Western District of New York
- US Court of Appeals for the Second Circuit

Robert C. Whitaker, Jr.

PARTNER

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Practice Areas

- Labor & Employment
- Education
- Intellectual Property
- Construction
- Military
- Nonprofit

Education

- University at Buffalo Law School, J.D., 2005
  - *Buffalo Law Review*
- State University of New York College at Oswego, B.A., *cum laude*, 2002

Admissions

- Military Trial Courts
- New York
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Western District of New York
- U.S. Supreme Court

Robert C. Whitaker, Jr. is a partner in the Labor & Employment, Construction and Intellectual Property Practices. He is Chair of the Firm's Labor & Employment Department and Leader of the Military Law Practice, and formerly served as Chair of the Hiring Committee. Mr. Whitaker focuses his practice on representing private employers in all aspects of state and federal labor and employment law. Mr. Whitaker regularly defends employers before state and federal agencies and in the courts regarding claims under Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, Fair Labor Standards Act, Uniformed Services Employment and Reemployment Rights Act, New York State Human Rights Law and all other New York state labor laws. He also has experience litigating other employment disputes regarding employment contracts, including enforcement of non-compete agreements and other restrictive covenants. In addition, he regularly enforces copyrights in federal court on behalf of national and international musical composers, authors and lyricists.

Prior to joining the Firm, Mr. Whitaker served as a Defense Attorney for the Navy Judge Advocate General's Corps (Navy JAG Corps), representing active duty military personnel in military federal courts throughout the southeastern United States. He also served as Deputy Staff Judge Advocate and Prosecutor for the Commanding General of the 2nd Marine Logistics Group in Al Anbar, Iraq. Since joining the Firm, Mr. Whitaker has continued to serve in the Navy Reserve where he holds the rank of Lieutenant Commander. In this capacity, Mr. Whitaker has served as an instructor at the Naval Justice School teaching newly commissioned attorneys how to best litigate administrative separation boards and perform legal assistance services. Mr. Whitaker continues to represent clients in matters involving Veteran Benefits, Administrative Separation Boards, Courts-Martial, Boards of Inquiry, Non-Judicial Punishment (Article 15s) and correction of military records, including discharge upgrades.

Representative Matters

- Successfully defended defense jury verdict and partial summary judgment on appeal to the Second Circuit, affirming dismissal of all claims of employment discrimination and retaliation (Second Circuit, 2018)
- Obtained summary judgment for employer, resulting in dismissal of state and federal law claims of age and disability discrimination (U.S. District Court, Northern District of New York 2017).
- Obtained defense jury verdict for large corporate client dismissing all claims of retaliation by a former employee under the ADA, ADEA and NYS Human Rights Law

(U.S. District Court, Northern District of New York 2017).

- Obtained full dismissal and defeated subsequent appeal on behalf of the State of New York in a multi-million dollar USERRA and NY Military Law class action (NYS Supreme Court, 2014, aff'd Third Dep't 2016).
- Obtained summary judgment for employer, resulting in dismissal of all discrimination claims under the ADA and Title VII (U.S. District Court, Northern District of New York 2016).
- Obtained a favorable jury verdict as co-counsel for a pharmacist who was unlawfully discriminated and retaliated against by his employer based on a disability. The jury awarded the client just over $2.6 million in total damages (U.S. District Court, Northern District of New York 2015).
- Obtained summary judgment declaring an employment agreement and the related restrictive covenants void and unenforceable as a matter of law, allowing a nurse practitioner to work for a new employer (NYS Supreme Court, 2015).
- Successfully defended large manufacturer against action seeking to void various restrictive covenants in employment agreement (NYS Supreme Court, 2014).
- Obtained a full dismissal of discrimination claims based on pregnancy and disability following an administrative trial before a New York State Division of Human Rights Administrative Law Judge (2013).
- Obtained a favorable jury verdict as co-counsel for a senior administrator of a large police department against various claims of discrimination and retaliation pursuant to the ADA, Title VII, First Amendment § 1983 and New York State Human Rights Law (U.S. District Court, Northern District of New York 2010).
- Obtained a favorable jury verdict against the State of New York for a pro se plaintiff in a pro bono matter, based on claims of First Amendment retaliation and Eighth Amendment unlawful conditions of confinement (U.S. District Court, Northern District of New York 2010).
- Obtained a full dismissal of discrimination claims, based on gender and disability following an administrative trial before a New York State Division of Human Rights Administrative Law Judge (2009).
- Obtained numerous findings of No Probable Cause for employers against charges of retaliation and discrimination, based on gender, race, religion and disability before the New York State Division of Human Rights as well as administrative dismissals by the EEOC.
- Successfully represented various employers during investigations by the New York State Department of Labor for alleged wage and hour violations, resulting in either closure of the investigation without further action or favorable settlements.
- Successfully represented various employers in numerous hearings and appeals before the New York State Unemployment Insurance Appeal Board, resulting in the denial of unemployment benefits to former employees.
- Obtained numerous dismissals for various employers against charges of workers compensation discrimination following administrative hearings before the New York State Workers Compensation Board.
- Obtained multiple judgments (including reimbursement of attorney's fees), permanent injunctions and favorable settlements for numerous national and international artists and musicians in federal court for copyright infringement pursuant to the Copyright Act.
- Successfully led a class action petition to a Navy BCNR, resulting in the retroactive

promotion and back pay of 30 Naval Officers.

- Successfully petitioned a Navy BCNR, resulting in a full reinstatement of lifetime pension benefits, including back pay, for the surviving widow of a veteran.
- See the Military Law Practice page for more information on Mr. Whitaker's representation of active military personnel and veterans.

Professional Credentials

- Member, Clear Path for Veterans Advisory Board
- Co-Chair, Onondaga County Bar Association Veterans' Rights & Military Law Section
- Member, Cornell University Cooperative Extension of Onondaga County
- Member, Onondaga County Volunteer Lawyers Project
- Member, Syracuse City Court Small Claims Arbitration Program
- Member, New York State Bar Association
- Member, Onondaga County Bar Association
- Member, Northern District of New York Federal Court Bar Association Pro Bono Committee
- Member, Northern District of New York Federal Court Bar Association

Press & Publications

News

- What Employers Need to Know About Recent Changes to New York's Sexual-Harassment Laws
- The Importance of Making Your Website Compliant with the ADA, "Central New York Business Journal
- "The First Amendment Fallacy: Collin Kaepernick's 'Constitutional Right' to Protest", law.com

Publications

- Labor & Employment and Education Law Alert: NYS Prohibits Race Discrimination Based on Hairstyle
- Labor & Employment Law Alert: NYSDOL Issues Revised Proposed Scheduling Regulations
- Labor & Employment Law Alert: New York State Releases Sexual Harassment Training Videos and Overview Webinar
- Labor & Employment Law Alert: New York State Issues Final Model Sexual Harassment Policy and Training Requirements
- Labor & Employment Law Alert: New York State Issues Draft Model Sexual Harassment Policy and Training
- Labor & Employment Law Alert: Changes to New York's Sexual Harassment Laws

Speaking Engagements

- Hancock Estabrook's 15th Annual Labor & Employment Symposium

- JAG Panel
- Labor & Employment Sexual Harassment Policy and Training Session
- Labor & Employment Sexual Harassment Policy and Training Session
- Labor & Employment Sexual Harassment Policy and Training Session
- Tompkins County SHRM, “Disability Rules Under the ADA & NYSHRL”
- Labor & Employment Sexual Harassment Policy and Training Session
- Recently Enacted Sexual Harassment Laws
- Hancock Estabrook 14th Annual Labor & Employment Law Symposium
- New York State Harassment Laws – What Employers Should Know
- New York State Sexual Harassment Laws Update
- Hancock Estabrook Sixth Annual Advisors to Small Business Symposium
- Labor & Employment Breakfast Club, “Recent Changes to NYS Sexual Harassment Laws”
- Handling a Prisoner Case: Trial Advocacy for Pro Bono Lawyers: Albany
- Handling a Prisoner Case: Trial Advocacy for Pro Bono Lawyers: Syracuse
- Tompkins County Workforce Development Board, “New York State’s Paid Family Leave”
- Hancock Estabrook’s 13th Annual Labor & Employment Law Symposium
- Labor & Employment Breakfast Club, “New York’s War on Non-Compete and Non-Solicitation Agreements: How to Prevent Unlawful Competition”
- REVISED TOPIC – Labor & Employment Breakfast Club, “What the Recent Injunction on the DOL’s Overtime Rule Means for Employers”
- Lorman Education Services Webinar, “Protect Your Company from Employee Poaching”
- Hancock Estabrook 12th Annual Labor & Employment Law Symposium
- Labor & Employment Breakfast Club, “Preparing for the New Year: 2016 Changes to the New York State Human Rights and Labor Laws”
- Hancock Estabrook Second Annual Advisors to Small Business Symposium
- Hancock Estabrook’s Ninth Annual Labor & Employment Law Symposium