CHAPTER 6

AN INTRODUCTION TO LEGAL DOCUMENTS*

A. Introduction

If you want to represent yourself in court without the aid of an attorney, you have the right to bring the lawsuit "pro se." This means that you must bring the lawsuit yourself and take on all legal responsibilities.[1] Although it is always helpful to have a lawyer, it can be difficult to get legal assistance, especially at the beginning of a lawsuit. If you plan to bring a lawsuit *pro se*, it is important that you learn what documents you will need to submit to the court. Courts require that you prepare and file certain documents at specific times in order to begin and continue a lawsuit.

The purpose of this Chapter is to introduce you to some of these legal documents and explain how to use them. This Chapter is divided into three parts. **Part A**—the Introduction you are reading now—provides a general overview of lawsuits. **Part B** describes the different legal documents you will need to prepare if you decide to bring a lawsuit. Finally, **Part C** concludes with a summary of the steps you should take if you decide to bring a lawsuit. The Appendices at the end of this Chapter provide additional resources. **Appendix A** summarizes the legal documents associated with particular types of lawsuits. **Appendix B** includes a sample memorandum of law (or legal brief) that you can use as a sample if you need to draft your own memorandum of law for your lawsuit.

Each type of lawsuit described in the *JLM* has at least one "plaintiff" or "petitioner" (the person bringing the lawsuit) and at least one "defendant" or "respondent" (the person being sued).[2] In some lawsuits, there may be more than one plaintiff. For example, if several incarcerated people were all mistreated in the same way, they could bring a lawsuit together, and every incarcerated person would be a separate plaintiff. Your lawsuit may be stronger if you can show that several people suffered the same mistreatment.

You may even be able to bring a lawsuit for a group of people without having to ask all of them to join your lawsuit as plaintiffs. Such a lawsuit is called a "class action."[3] A class action can be very powerful, especially because it may help the case stay in court. For example, let us say you are bringing a lawsuit against prison officials for mistreating you and several other incarcerated people, but you are the only named plaintiff. In this case, the prison officials can have the case thrown out simply by treating you better—they do not have to improve the treatment of anyone else. This is because the court only has power over the people named in the lawsuit—whoever is a plaintiff/petitioner or defendant/respondent. Once the prison officials have improved conditions for you, your problem is solved and your case will be dismissed. If this happens, the court cannot do anything about the conditions or mistreatment of the other incarcerated people unless they bring a lawsuit for themselves. On the other hand, if you bring a class action lawsuit on behalf of all affected incarcerated people,

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* This Chapter was revised by Sohan Manek based on previous versions written by Taryn A. Merkl, Colleen Romaka, and other former members of the *Columbia Human Rights Law Review*.

[1] New York Prisoners' Legal Services publishes a newsletter entitled *Pro Se*, which discusses how to proceed *pro se* in various contexts. Many libraries have it. The newsletter is also available from Prisoners' Legal Services. To subscribe, send a request with your name, DIN number, and facility to: Pro Se, 114 Prospect Street, Ithaca, NY 14850. The newsletter can also be found online, *available at* https://plsny.org/pro-se/ (last visited Sept. 16, 2023). For questions about the newsletter, send a letter to: Pro Se, 41 State Street, Suite M112, Albany, NY 12207.

[2] The terms "plaintiff" and "petitioner" are both used to refer to the person who brings a lawsuit (the person who sues). Similarly, the terms "defendant" and "respondent" are both used to refer to the person who is being sued. Which terms are used will change depending on the court in which the case is brought.

[3] A "class action" is a lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group. *See* FED. R. CIV. P. 23 (the Federal Rule of Civil Procedure laying out the procedures for class actions); N.Y. C.P.L.R. 901–909 (McKinney 2006) (the rule laying out the procedures for class actions in New York State courts).

prison officials may have to improve conditions for everyone before the court can dismiss the case. You should try to find a lawyer if you want to bring a class action case.

Whether you bring a class action or not, you may sue more than one defendant. Under the rule of employer liability ("*respondeat superior*"), an employer may sometimes be liable for the illegal acts of his employees. Therefore, you should not only name the individual who injured you as a defendant, but also that individual's bosses or superiors, up to the Commissioner of Corrections.

If you are a plaintiff, you begin your lawsuit by telling the court and the person you are suing (the defendant) that you plan to bring suit. You do this by filing papers with the court (discussed in more detail below). In these papers, you explain the problem you are having and what you would like the court to do about it. Once the court receives these papers, the person you are suing is allowed to defend himself by filing papers with the court that respond to your claims. At this point, you are usually given another opportunity to file more papers, in which you respond to what your opponent has stated in his papers. In most cases, this exchange of claims and responses to the charges occurs before the court makes any decisions on the content (also called the "merits") of the lawsuit itself.

B. The Legal Documents

All lawsuits, regardless of type, require the same basic legal documents. These documents usually fall into five categories: (1) papers you need to start the lawsuit, (2) papers supporting your claims, (3) miscellaneous papers, (4) the answer from the defendants, and (5) your reply to the defendant's answer. The names of these documents may differ depending on the particular lawsuit you choose to file, even though they serve the same purposes. For example, in a federal habeas corpus action, the paper needed to start a lawsuit is called a "petition," while, in a criminal appeal, it is called a "notice of appeal."

Chapters 2–5 of the *JLM* describe the various types of lawsuits that you may bring in detail and provide instructions on how to prepare the forms that you need for each type of lawsuit. A summary of different types of lawsuits, based on New York procedure, is also given in *JLM*, Chapter 5, "Choosing a Court and a Lawsuit: An Overview of the Options."

This Part provides an overview of the legal documents you will need to prepare if you decide to bring one of the lawsuits discussed in the *JLM*. The chart at the end of this Chapter matches the names of the five basic categories of papers to each type of lawsuit that you may bring.

When people think about a lawsuit, they usually think about arguing in a courtroom in front of a judge and jury. However, before any case actually gets into court, certain legal documents must be prepared and filed with the court. If you are bringing a lawsuit pro se (without a lawyer), you are responsible for preparing the necessary documents. Therefore, it is important that you read Chapters 2–5 of the *JLM* and carefully follow the directions on how to prepare the necessary documents. This Part discusses the functions of the five basic types of legal documents that you will need to start and continue the different types of lawsuits.

1. Papers Needed to Start a Lawsuit (Starting Papers)

Once you have figured out what type of lawsuit you would like to bring, you must file papers (called "pleadings") with the court that explain why you are seeking help (or "relief") from the court. In these documents, you will usually state what the defendant has done to you and what you want the court to do about it. For example, if the defendant has injured you, you will tell the court how the injury occurred and tell them that you want money to pay for your medical bills. You will also explain why the court has the jurisdiction (power) to decide your case. Depending on what type of lawsuit you bring, the names of the papers may differ. The chart in Appendix A of this Chapter provides the names of these papers for each type of lawsuit. You should refer to the chapter of the *JLM* describing your legal problem in detail to determine how these documents should be prepared.

2. Supporting Papers

In the papers that you file to start a lawsuit, you will make claims about what the defendant did to you and why you are seeking help from the court. At this point in most lawsuits, the court will need

some sort of evidence that supports your claims. Two types of supporting evidence are discussed below, called affidavits and memorandums:

(a) Affidavits

A supporting document often takes the form of an affidavit. An affidavit is a sworn written statement, by you or by a witness, supporting the claims that you made in your starting papers. An affidavit must be notarized. This means that it must be signed by a notary public, or "friend of the court," a person who has been authorized to "notarize" official documents. The purpose of an affidavit is to provide the court with some factual evidence that supports your claims. Therefore, it should contain specific facts.[4] It may consist of your own testimony or that of someone else who witnessed or knows about the facts of your claim. You must make sure that all claims in an affidavit are true. If you lie in an affidavit, you may be prosecuted for perjury, which is the offense of willfully lying under oath.

(b) Memorandum of Law

In some suits, a legal memorandum is required. A legal memorandum (also called a "brief") is a statement of the law on a particular legal issue (as opposed to the facts, which would be in an affidavit). A memorandum discusses the legal arguments upon which your claim is based. In your memorandum, you compare your case to cases with similar facts. The memorandum of law serves a purpose similar to that of the affidavit—it supports the claims that you made in your starting papers, but it uses the law to make the argument instead of only facts. The legal memorandum should begin with a statement of the facts of your case. An example appears in Appendix B of this Chapter. The rest of the memorandum should deal with all of the legal issues that you think arise from the facts of your case. When trying to figure out what legal issues are important, you will need to research your legal rights and responsibilities. You should research these questions of law and explain to the court how other cases have dealt with issues similar to yours. *JLM*, Chapter 2, "Introduction to Legal Research," explains how to research an issue in the law library.

3. Miscellaneous Papers

You may also file miscellaneous papers, which usually deal with questions of legal procedure (the process by which your case is decided). These questions of law differ from "substantive questions of law" (the legal rights that you claim the defendants have violated). However, procedural questions can still affect your chances of success in the lawsuit. For example, miscellaneous papers may include a request for a lawyer, whose expertise could make the difference between whether you win or lose your case. They may also include a request to file as a "poor person," known as *in forma pauperis*. This would free you from having to pay the normal fees and filing costs necessary to bring a lawsuit.[5] The miscellaneous papers that you will need to file will be different depending on the type of lawsuit you are bringing. You should refer to the chart in Appendix A at the end of this Chapter to determine what papers are necessary and appropriate for your particular lawsuit. You should also refer to the specific section of the *JLM* that discusses your legal problem in detail in order to determine how to prepare these documents.

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[4] Include as many details as you can, and make them as specific as you can. For example, describe specific injuries (where on your body, what did the injury look like, did it receive a medical diagnosis, etc.); mention specifically what was done to you, who did it, what time of day, and what day of the week; describe what you were doing before the other person wronged you and what they were doing before and after. Try to think of the event like a movie and explain it with the detail that you would see if the event was being played on a movie screen in front of you.

[5] Under the Prison Litigation Reform Act ("PLRA"), incarcerated people filing claims in court are required to pay full court filing fees. The full fee will gradually be deducted from your prison account. For a full discussion of the PLRA and how it affects your rights, see *JLM* Chapter 14, "The Prison Litigation Reform Act."

4. Answering Papers from the Defendant

The defendant that you sue is required to answer your starting papers. There are several ways the defendant might answer. The defendant may simply admit or deny the claims in your papers. The defendant may also state that he does not know if your statements are true. This is the same as a denial.[6] If the person you have sued answers without replying to one of your factual allegations, the court will conclude that he has admitted that your allegation is true.[7]

Another option that the defendant has is to attack your starting papers by raising certain defenses.[8] The defendant will usually raise these types of defenses in a "motion to dismiss" your complaint. If the defendant wins such a motion to dismiss your complaint, the court has the option of either dismissing your case or granting you the opportunity to amend (change) your complaint to fix your argument. If you are given a chance to amend your complaint, you should think of the amended complaint as new starting papers, which your opponent needs to answer again.

(a) Motion to Dismiss for Failure to State a Claim

An example of a defendant's answer that would attack your starting papers is a "motion to dismiss for failure to state a claim." By filing this motion, your opponent argues that you have no legal claim.[9] For example, you might want to sue a prison official because you feel you do not get to spend enough time outside. But if no law says prison officials must let you outside for a certain amount of time, your claim could be dismissed. This is because, no matter what the facts were, you could not show that the official violated a law. In this example, the judge would look at the pleadings (the papers you filed to start the case and your opponent's motion to dismiss) and dismiss your case because there would be no law that requires the prison official to give you a certain amount of time outside.

(b) Motion for Summary Judgment

Another type of answer that your opponent can submit is a "motion for summary judgment." Note that you (the plaintiff) or a defendant may file a motion for summary judgment, but it is very rare that plaintiffs are successful. That is why we describe the motion for summary judgment as the defendant's motion, but keep in mind that the same standards apply to plaintiffs. In a motion for summary judgment, the defendant argues that, even if your facts are true, he has not violated a law. Therefore, he is entitled to "judgment as a matter of law."[10] This means that a judge may decide the case without the case ever going before a jury.

For example, you might bring a Section 1983 action[11] claiming that a prison guard hit you and therefore violated your constitutional right under the Eighth Amendment to be protected against "cruel and unusual punishment." The defendant might file a summary judgment motion arguing that one violent incident does not establish "cruel and unusual punishment" within the meaning of the Eighth Amendment.[12] The judge will read the legal papers and will assume that the facts you claimed

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[6] *See* FED. R. CIV. P. 8(b) (rule on defenses and forms of denials for actions in federal court); N.Y. C.P.L.R. 3018(a) (McKinney 2010) (rule for denials and defenses in New York State courts).

[7] *See* FED. R. CIV. P. 8(b)(6) (federal rule regarding the effect of a party's failure to deny allegations); N.Y. C.P.L.R. 3018(a) (McKinney 2010) (rule regarding the effect of a party's failure to deny allegations in New York State courts).

[8] For a list of the seven defenses that may be made by motion under the Federal Rules of Civil Procedure, see FED. R. CIV. P. 12(b). For a list of comparable grounds on which a motion may be made in New York courts, see N.Y. C.P.L.R. 3211(a) (McKinney 2009). You must check the court rules for your particular state or federal court for a complete list of defenses.

[9] *See* FED. R. CIV. P. 12(b)(6); N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016).

[10] *See* FED. R. CIV. P. 56 (the federal rule for summary judgment); N.Y. C.P.L.R. 3212 (McKinney 2021) (the New York rule for summary judgment).

[11] *See* Chapter 16 of the *JLM* for a discussion of 42 U.S.C. § 1983.

[12] *See* Chapter 24 of the *JLM* for an explanation of 8th Amendment protections in assault cases.

are true. This means that the judge will give you the benefit of the doubt. If the judge believes that there is no way you can demonstrate that the single incident amounted to a violation of the Eighth Amendment, he will grant the guard's motion for summary judgment. If the judge thinks that the officer may have violated the Eighth Amendment, then he will deny summary judgment and your case will move forward to trial.

Summary judgment is different from a "motion to dismiss for failure to state a claim." In a motion to dismiss for failure to state a claim, the judge only relies on your pleadings (allegations submitted to the court) to make a decision. However, when the defendant files a motion for summary judgment, the judge decides the motion based on affidavits submitted by both sides. This means that, if the defendant submits an affidavit in support of a summary judgment motion, you have the right to introduce affidavits to support your claim and oppose the defendant's motion.[13] When you are opposing a motion for summary judgment, you should demonstrate in an affidavit that there are disputed facts that support your claim. You should also demonstrate that a reasonable person could believe your version of the story. For example, if you claim that a prison guard hit you, a reasonable person could not believe you if the prison guard proved that he was not at the prison when you claim that he hit you. If possible, you should seek to amend your complaint (or other introductory papers) to correct any possible errors.

(c) Motion for a More Definite Statement

In addition to attempting to have your case dismissed, the defendant may choose to file answering papers that require you to file more papers. These types of answers may include a "motion for a more definite statement" because your complaint was not specific enough.[14] This type of motion may be granted in order to give the defendant a chance to understand and answer your claims. It may also be a delaying device used by your opponent to buy more time. If the judge grants this motion, you will have to amend your complaint to explain your claims in more detail.

(d) Counterclaim

A defendant may also file a "counterclaim" against you.[15] This means that the defendant claims that you harmed him. For example, if you sue a prison guard for assaulting you, the prison guard may answer in turn with a claim that you injured him instead. If a defendant files a counterclaim, you must file a reply stating your version of the events.[16]

(e) Request for Extension

Finally, some issues may prevent the defendant from being able to respond to your charges within the time limits given to answer. If this happens, the defendant will probably request an extension from the court, which requires a showing of "good cause" (having a good reason).[17] Courts usually grant these requests.

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[13] If you would like to introduce any documents to support your opposition to the motion, these must be "authenticated" by an affidavit unless they are already in the court's record. *See* FED. R. CIV. P. 56(c); Martinez v. Am.'s Wholesale Lender, 446 F. App'x 940, 943–944 (9th Cir. 2011) (*unpublished*) (holding that photocopies of deeds were not "self-authenticating," and therefore could not be considered for summary judgment); Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987) (finding that unauthenticated documents in a report cannot be used when deciding a summary judgment motion). This means you should have someone who has knowledge of the documents swear that the documents are genuine and reliable. A person has the required knowledge to authenticate a document in an affidavit if he could authenticate a document during trial under the evidence rules. *See*, *e.g.*, FED. R. EVID. 901 (requiring that all evidence be authenticated). Also note that some documents, such as public records and newspapers, are "self-authenticating," which means that they are considered so trustworthy that they do not need to be sworn to in an affidavit. *See* FED. R. EVID. 902 (listing some documents that do not require additional evidence to be authenticated).

[14] *See* FED. R. CIV. P. 12(e); N.Y. C.P.L.R. 3024(a) (McKinney 2009).

[15] *See* FED. R. CIV. P. 13; N.Y. C.P.L.R. 3019(a) (McKinney 2009).

[16] *See* FED. R. CIV. P. 7(a); N.Y. C.P.L.R. 3011 (McKinney 2009).

[17] *See* FED. R. CIV. P. 6(b); N.Y. C.P.L.R. 2004 (McKinney 2009).

If the defendant does not file (1) an answer to your charges, (2) a motion attacking the validity of your charges, or (3) a motion for an extension of time, you have the right to request that the judge enter a "default judgment," which is a judgment in your favor.[18] A default judgment assumes that your charges are true because the defendant did not respond to them. To get a default judgment, you must file a request that a default judgment be entered with the clerk of the court. You will later request the same court to order the relief (the help) you requested in your starting papers.

5. Your Reply to the Defendant's Answer

Once you receive the defendant's answer, you should read it closely. Carefully reading the defendant's answering papers will help you determine the arguments he will make as the case progresses. For example, a defendant might raise affirmative defenses in his answer, in which he agrees that an injury occurred, but claims that he has no legal responsibility. One example of an affirmative defense is a claim of contributory negligence. This is when the defendant claims that your carelessness somehow helped cause the injury and that he is, therefore, not fully responsible for it.[19] Importantly, an affirmative defense can only be used at trial if the defendant raised it in the answer to the complaint. By carefully reviewing the answer and understanding the defendant's facts and arguments, you will be able to counter them effectively.

In some instances, such as when the defendant files a counterclaim in his answer, you may be required to respond to the charges. If the court requires a reply to the counterclaim and you do not file one, everything in the answer will be accepted as true by the judge and you will lose your lawsuit. Even if you are not required to reply to the defendant's answer, but the court allows you to do so, you should go ahead and prepare a well-thought-out reply to the defendant's statements. It is in your best interest to file and serve a written reply whenever it is possible to do so, because the clearer you make your argument to the court, the better chance you have of winning your lawsuit.

Chapters 9–13, 15–17, and 20–22 of the *JLM* explain in detail the types of claims you can bring and the kinds of documents you will need to maintain such actions. In each Chapter, there are examples of the papers you need to file. The table in Appendix A will help you become familiar with the names of the papers each suit requires.

C. Conclusion

If you are thinking about taking legal action, you should take the following steps:

(1) Identify the law that has been broken;
(2) Determine the type of lawsuit you need to file; and
(3) Prepare the necessary documents.

Appendix A of this Chapter lists types of lawsuits and forms the court requires for each type of suit. If you file a lawsuit, you will need:

(1) Papers to start a lawsuit;
(2) Papers supporting your lawsuit; and
(3) Other important papers that are required by the court.

After you have filed your lawsuit, the defendant should respond to your claim. If the defendant responds, you should reply. If the defendant does not respond, you should file papers with the court requesting a default judgment in your favor.

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[18] *See* FED. R. CIV. P. 55; N.Y. C.P.L.R. 3215 (McKinney 2009).

[19] *See* FED. R. CIV. P. 8(c); N.Y. C.P.L.R. 3018(b) (McKinney 2009) (providing a partial list of affirmative defenses).

APPENDIX A

LEGAL DOCUMENTS TABLE

Type of Suit	Papers to Start Suit	Supporting Papers	Miscellaneous Papers	Answers	Replies
Criminal Appeal[20]	• Notice of Appeal[21]	• Papers to Perfect Appeal[22]	• *In forma pauperis* Papers[23] • Bail Request Papers • Papers for Requesting Extension of Time	• Opposing Brief	• Reply Brief
Article 440[24]	• Notice of Motion to Vacate Judgment[25] • Notice of Motion to Set Aside Sentence[26]	• Affidavits	• *In forma pauperis* Papers	• Answer	

[20] *See* FED. R. APP. P. 3(a). This type of suit is brought by a criminal defendant who was found guilty in the lower court. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

[21] *See* FED. R. APP. P. 3(a). The notice of appeal must be filed with the court within the time allowed by statute. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

[22] *See* FED. R. APP. P. 10(a). In order to perfect the appeal, the court must have all the relevant documents that might play a role in the final determination, including the original papers and exhibits filed in the trial, a transcript of the proceedings, and a certified copy of the docket entries. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

[23] *See* 28 U.S.C. § 1915. Upon filing these papers, the court may authorize a suit or appeal to be brought without prepayment of fees. See Chapter 9 of the *JLM*, "Appealing Your Conviction or Sentence," for information about criminal appeals.

[24] *See* N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2023). This type of suit is brought as a motion by the losing party after the court has ruled. See Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedural Law to Attack Your Unfair Conviction or Illegal Sentence," for information on using Article 440.

[25] *See* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2023). This motion can be filed to ask the court to vacate (or remove) the judgment (decision) just entered at trial. See Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," for information on using Article 440.

[26] *See* N.Y. CRIM. PROC. LAW § 440.20 (McKinney 2023). This motion does not set aside the entire judgment, but asks the court to begin a new sentencing proceeding. See Chapter 20 of the *JLM*, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," for information on using Article 440.

Federal Habeas Corpus[27]	• Petition	• Affidavits	• Motion for Appointment of Counsel	• Answer	• Traverse[28]
State Habeas Corpus[29]	• Petition	• Check requirements of your state	• Notice of Time and Place of Hearing • *In forma pauperis* Papers	• Return	• Reply
42 U.S.C. § 1983[30]	• Summons • Complaint • Order to Show Cause and Temporary Restraining Order	• Affidavit	• *In forma pauperis* Papers	• Answer • Motion to Dismiss	• Reply

[27] *See* 28 U.S.C. § 2255. A person incarcerated in federal custody can file a federal habeas corpus petition in order to get a court to review the validity of his imprisonment. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information on federal habeas corpus.

[28] *See* 28 U.S.C. § 2243. A traverse can be filed if the incarcerated person wants to deny any of the facts claimed in the opposing party's answer. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information on federal habeas corpus.

[29] *See* 28 U.S.C. § 2254. This petition provides the same type of remedy for state incarcerated people as the federal petition for federal incarcerated people, but the state habeas process must be exhausted before an incarcerated person can appeal to the federal courts. See Chapter 21 of the *JLM*, "State Habeas Corpus: Florida, New York, and Michigan," for information on state habeas corpus.

[30] *See* 42 U.S.C. § 1983. This type of action provides federal relief from state action that deprives a person of their civil rights. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," for information on using ¶ 1983 to obtain relief from violations of federal law.

Tort Action[31]	• Notice of Intention to File Claim[32] • Notice for Permission to File Late Claim[33] • Verified Tort Claim[34]	• Affidavits	• Affidavit to Request Reduction of Filing Fees[35] • Notice of Appeal	• Demand for Bill of Particulars[36]	• Bill of Particulars[37]
Article 78[38]	• Order to Show Cause[39] • Notice of Petition • Verified Petition • Request for Judicial Intervention • Application for an Index Number	• Affidavits	• Affidavit to Request Reduction or Waiver of Filing Fees	• Answer	• Reply

[31] *See* N.Y. C.P.L.R. § 103 (McKinney 2003). A tort action is a civil action where a plaintiff brings suit against a defendant for damages. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[32] *See* N.Y. CT. CL. ACT § 10 (McKinney 2009). A Notice of Intention to File a Claim may be necessary depending on state law. You should carefully read the relevant sections in the applicable state code. In New York, this notice is necessary if a claim is brought against the state or state actors. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[33] *See* N.Y. CT. CL. ACT § 10 (McKinney 2009). A Court has the jurisdiction to accept late claims if the claimant files this motion with the court and presents strong arguments concerning why the claim was not filed on time. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[34] *See* N.Y. C.P.L.R. § 3020 (McKinney 2010). This is a statement under oath that the pleading is true to your best knowledge. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[35] *See* N.Y. C.P.L.R. § 1101(d) (McKinney 2012). An affidavit showing that the filing fees cannot be paid must be prepared for the court if you wish to avoid significant court costs. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[36] *See* N.Y. C.P.L.R. Rule 3042 (McKinney 2010). A demand for a bill of particulars may be made and must be complied with within thirty days. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[37] *See* N.Y. C.P.L.R. Rule 3043 (McKinney 2010). A bill of particulars is a list of questions that must be answered in a personal injury action, such as the time of the incident and its location. See Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions," for information on tort actions.

[38] *See* N.Y. C.P.L.R. § 7801 (McKinney 2008). This type of suit is used to challenge the action or inaction of state and local government officers and agencies, and it goes by different names in different states. See Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for information on how to challenge administrative decisions using Article 78.

[39] See N.Y. C.P.L.R. § 7804 (McKinney 2008) for more specifics regarding these forms. See Chapter 22 of the *JLM*, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules," for information on how to challenge administrative decisions using Article 78.

APPENDIX B

SAMPLE MEMORANDUM OF LAW[40]

This Appendix contains an example of a memorandum of law, or a brief. This particular memorandum was submitted to a federal district court in response to the defendants' motion for summary judgment. The plaintiff had filed a Section 1983 claim for excessive force in violation of the Eighth Amendment.[41] We are including this in the *JLM* so that you may study the form and style of a brief. The names of all parties, witnesses, and facts have been changed. The footnotes have been added to clarify and explain things to you but should not go in your memorandum. In addition, you should not use the cases cited in this sample without verifying that they are still good law.[42]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Robert K. Simms, Petitioner,[43] - against - Corrections Officer William D. Bennett, New York State Penitentiary, and Sergeant Paul J. Wright, Respondents.[44]	:	97 Civ No._____

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Robert K. Simms ("Simms") respectfully submits this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.[45]

PRELIMINARY STATEMENT

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[40] This memorandum of law is based on a submission drafted by Daniel M. Abuhoff and Nicole A. Ortsman-Dauer at Debevoise & Plimpton LLP.

[41] For more information on how to bring a claim under 42 U.S.C. § 1983, see Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law." Chapter 24 of the *JLM*, "Your Right To Be Free from Assault by Prison Guards and Other Incarcerated People," discusses the law that applies to your right to be free from assault in prison.

[42] See *JLM*, Chapter 2, "Introduction to Legal Research," for information on legal research.

[43] A "petitioner" is a party who presents a petition to a court. Here, that person is Robert K. Simms.

[44] A "respondent" is the party against whom an appeal is taken. Here, those persons are William D. Bennett and Paul J. Wright.

[45] "Summary Judgment" is granted on a claim or defense about which there is no genuine issue of material fact and upon which the party asking for summary judgment is entitled to win as a matter of law. Here, Simms is arguing against Bennett and Wright's Motion for Summary Judgment. See FED. R. CIV. P. 56 for more information.

On January 17, 1990, defendant William D. Bennett ("Bennett"), a corrections officer at the New York State Penitentiary ("Penitentiary"), physically assaulted and threatened to beat and kill Robert Simms, an incarcerated person awaiting processing. Defendant Paul J. Wright ("Wright"), Bennett's supervisor, knew of the attack and death threats, yet did nothing to intervene and protect Simms. Simms brings this lawsuit under 42 U.S.C. § 1983 against Officer Bennett for his malicious and sadistic use of excessive force, and against Sergeant Wright for his deliberate indifference to the attack and threats of beating and death.

Defendants have moved for summary judgment, arguing (i) Simms suffered *de minimis* physical injuries and unactionable psychological pain; (ii) the force used by Bennett, if any, was reasonable and necessary; and (iii) Wright did not act with deliberate indifference because he did not witness the physical attack and threats of beating and death. Defendants are wrong on both the law and the facts.

First, the use of force here was more than *de minimis*.[46] Bennett shoved Simms, pushed him into a wall, swung him around the search room, and punched him in the arms, legs, and face, while simultaneously screaming that he should shoot, stab, and beat him. As a result of the attack, Simms suffered more than *de minimis* physical and mental pain, sustaining not only bruises to his arms, legs, and face, but also serious and extensive mental pain lasting to the present. The Eighth Amendment's prohibition on unnecessary and wanton infliction of pain encompasses both physical and mental pain.

Second, the evidence demonstrates that there was no need for force. Simms provoked no attack. He was not violent. He did not refuse to follow Officer Bennett's instructions. As indicated by the content of Bennett's threats, the attack—fueled by Bennett's personal feelings of hatred and disgust—was malicious, sadistic, and for the very purpose of causing Simms harm.

Finally, the supervising officer, Sergeant Wright, was deliberately indifferent to Simms' plight.[47] Wright admits to hearing noise from the search room. Indeed, Wright was told by Simms what was going on. Yet, Wright chose to do nothing to stop the attack.

Defendants' motion for summary judgment should be denied.

1. STATEMENT OF FACTS

(a) Robert Simms' Child Pornography Convictions

Plaintiff Robert Simms, a black male in his late forties, is a convicted child pornographer. The last conviction took place on January 10, 1990. As a result of that conviction, Simms was sentenced to five years of imprisonment, which he served at the New York State Penitentiary from January 17, 1990, to January 16, 1995. (Simms Aff. ¶ 3).[48]

(b) Officer Bennett Attacks Robert Simms and Sergeant Wright Does Nothing

Simms arrived at the Penitentiary at approximately 9:30 a.m. on January 17, 1990. He was led into the bullpen holding cell and sat on a bench as he waited to be processed. In addition to Simms, there was only one other person in the bullpen. (Simms Aff. ¶ 5; Simms Dep. 20:12–13).

On the morning of January 17, 1990, defendant Officer Bennett and Officer Howard Lewis ("Lewis") worked the 8:00 a.m. to 2:00 p.m. shift in the search area of the Penitentiary. (Bennett Dep. 35:25–27; Lewis Dep. 24:8–10). Sergeant Wright, working the same shift, was the supervisor on duty. (Wright Dep. 22:36–24:5).

Corrections officers at the Penitentiary all have the opportunity to learn incoming incarcerated people's charges. Not only do corrections officers discuss, on occasion, incarcerated people's charges,

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[46] *De minimis* means so insignificant that a court may overlook it in deciding an issue. Here, Simms is arguing that the use of force used on him was not *de minimis*, or in other words, that it was significant.

[47] "Deliberate indifference" means awareness and disregard for the risk of harm. Here, Simms is claiming that one of the defendants knew of the mistreatment and did nothing to stop it.

[48] Citations to "Simms Aff. ¶ __" refer to the Affidavit of Robert K. Simms, dated August 15, 1998. Citations to "___ Dep." refer to the transcript of the deposition for the individual specified. Citations to "Compl." refer to Simms' Complaint. Citations to "Def. Mem." refer to the Defendants' Memorandum of Law. The symbol "¶" refers to a particular paragraph in that document. A citation that reads 20:12-13 indicates that the cited information can be found on page 20, lines 12 through 13 of the referenced document.

but officers working in the booking and search areas also have access to that information. (Bennett Dep. 43:15–19, 52:9–55:12, 62:24–64:14; Lewis Dep. 27:7–15, 36:24–37:5). Simms sat on the bullpen bench for approximately one hour when he heard Officer Bennett shouting from inside the search room, located a few yards from the bullpen: "He's pond scum. That low-life piece of trash kiddie porn lover deserves to be killed. Someone should kill him." (Simms Aff. ¶ 12; Simms Dep. 21:15–24:7; Compl. Pt. II at 1).

In order to determine the source of and reason for the threats, Simms stood up from the bullpen bench and approached the bullpen bars. Bennett approached the bullpen, stood very close to Simms, and screamed: "You revolting cradle robber. Get the hell out of my face, you pedophile. You nauseate me! Get the hell away from the bars before I beat you senseless." Simms was terrified and did not know how to respond. He had done nothing to provoke the threats. (Simms Aff. ¶ 12; Compl. Pt. II at 1).

Officer Bennett, becoming even more aggressive, continued his verbal attack for the next half hour. He screamed: "If I had a knife, I'd stab you in your chest right now. Get away from the bars you disgusting pond scum pervert!" Simms became very anxious. He thought he was going to be killed by Officer Bennett or by other incarcerated people to whom Bennett would reveal his charges. (Simms Aff. ¶ 13; Simms Dep. 24:7–13; Compl. Pt. II at 1–2).

A few minutes later, Simms was retrieved from the bullpen and escorted to the search room where Officer Bennett stood, glaring at him. (Simms Aff. ¶ 14; Simms Dep. 26:14–25; Compl. Pt. II at 6). Officer Lewis and approximately four to six other corrections officers—including Officer Felding, who booked Simms that morning and prepared his booking sheet containing his child pornography charges—also stood in the room, all staring at Simms and Bennett with expressions of expectation. (Simms Aff. ¶ 15; Compl. Pt. II at 4).

Officer Bennett slammed shut the search room door and pushed Simms from behind with two hands, towards the wall where the other officers stood. He pushed Simms approximately ten times and swung him around the room. Bennett slapped Simms' face and body and again began to scream threats of beating and death at Simms. Bennett next shoved Simms into the wall next to the corrections officers while screaming: "You vile scumbag. I should kill you. If I had my knife, I'd carve you up. If I had my revolver, I'd blow you to shreds. You are a sick maggot." Simms was terrified and kept still. (Simms Aff. ¶ 16; Simms Dep. 28:12–30:25; Compl. Pt. II at 3–4).

Officer Bennett continued to push Simms into the wall while yelling that he could not stand the sight of Simms. Simms finally asked Bennett what he had done to deserve this attack and reminded Bennett he did not know the details of Simms' case. Bennett responded by yelling that he did not give "two hoots" about the circumstances of Simms' case; he was going to carve him up anyway. Bennett pushed Simms. Simms ricocheted off the wall, and Bennett continued to scream obscenities and threats of beating and death. Officer Lewis and the others in the search room looked on with amusement. (Simms Aff. ¶ 17; Simms Dep. 29:15–30:10; Compl. Pt. II at 6–7).

At some point, Officer Bennett demanded that Simms stand in a particular spot in the search room. Each time Simms moved to the requested spot, Bennett taunted him and screamed, "No, this way!," pointing to a different spot. He then swung Simms around the room, grabbing his arm and launching him into the wall. Bennett repeated this several times. (Simms Aff. ¶ 18; Simms Dep. 28:7–29:6).

Eventually, Bennett screamed that Simms should strip. Simms complied and removed his shirt. He never refused or questioned Bennett's order. When Simms put his shirt on an empty chair in the room, however, Bennett flew into a rage. He whipped Simms' shirt around in the air above his head, screaming that Simms was a repulsive child pornographer. Bennett prepared to punch Simms again. Simms turned his body to avoid being hit and called out for the sergeant. (Simms Aff. ¶ 16; Simms Dep. 28:9–30:12, 33:14–20, 35:8–29).

Sergeant Wright heard "loud screaming" coming from the search room and went to investigate. (Wright Dep. 28:7–9, 30:22–25, 50:7–25). As Wright appeared at the door, Bennett acted as if nothing was wrong. Simms told Wright that he was glad Wright had arrived and that he needed Wright's help. Wright cut Simms off and told him to "shut the hell up and take off your clothes," to which Simms replied, "You're in this too? This is unbelievable!" Simms did not question Wright's order to strip.

Rather, he took off his pants. Bennett strip-searched him. (Simms Aff. ¶ 20; Simms Dep. 30:21–32:12, 39:8–40:2; Compl. Pt. II at 8; Wright Dep. 32:20–23, 52:19–21; Bennett Dep. 49:4–20).

Once the strip search was completed, Simms told Wright that Bennett had physically assaulted him and threatened to beat, stab, and kill him. Wright responded, "Well, this is jail!" and walked out of the search room, leaving Simms alone with Bennett and the other officers. (Simms Aff. ¶ 4; Davis Dep. 28:7–29:15; Wright Dep. 15:02–16:20 (testifying that Davis had a complaint about the officers)).

Once Sergeant Wright left the search room, Simms dressed and Bennett resumed threatening him. Bennett again shoved Simms, sending him flying across the search room. Bennett screamed, "You are a piece of crap! You are a disgusting kiddie porn loving animal who deserves to die. I am going to make sure someone's going to kill you. Your days are numbered." (Simms Aff. ¶ 18; Simms Dep. 40:15–42:30; Compl. Pt. II at 8). Bennett then led Simms out of the search room and screamed, "Send him to protective custody and get him out of my face. He gets off on little girls!" (Simms Aff. ¶ 20; Simms Dep. 41:18–22; Compl. Pt. II at 9). After spending approximately forty-five minutes in the search room, Simms was taken to a cell in protective custody where incarcerated people are kept alone in separate cells that are kept locked for most of the day. Simms did not want to be housed in protective custody after the assault. He feared he would be more vulnerable to attack by defendants or others because there would be no witnesses. (Simms Aff. ¶ 22; Simms Dep. 35:3–23, 40:21–42:3, 56:15–58:4; Compl. Pt. II at 10).

(c) Robert Simms' Physical and Mental Pain Resulting from the Attack

As a result of the attack, Simms sustained bruises on his arms, legs, and face. He requested medical attention the day after the incident. By the time Simms saw a doctor—a week later—these injuries were no longer visible. (Simms Aff. ¶ 24; Simms Dep. 44:12–18, 48:23–50:2; Compl. Pt. II at 5).

In addition to the physical injuries, Simms suffered extreme and extensive mental pain. Not only was he humiliated and shocked by the search, but for the entire time he was housed at the Penitentiary, he was anxious and terrified that Bennett, Lewis, and Wright were going to beat or kill him—either by themselves or by encouraging other incarcerated people—and cover it up. Simms felt hopeless. He became depressed and contemplated suicide. To this day, Simms suffers from nightmares about the attack. (Simms Aff. ¶ 29; Simms Dep. 49:15–51:12, 52:14–15; Compl. Pt. II at 5).

On January 18 and 19, Simms made several visits to the Mental Health Clinic. He was depressed, aggravated, and in despair. He did not want to be housed in protective custody where no one could witness any possible further attack. (Mental Health Evaluation Sheet, dated January 18, 1990). One nurse specifically noted that the "problem" was that Simms was harassed by corrections officers because of his charge. (Mental Health Evaluation Sheet, dated January 18, 1990). Simms also received help for his psychological pain from Mark Denby, a Muslim mullah (religious leader) in Simms' community, and Dr. Margaret Phillips, Simms' therapist. These individuals visited Simms on numerous occasions while he was at the Penitentiary. After Simms finished serving his sentence in 1995, he continued to meet with Dr. Phillips, with whom he often spoke about the assault. (Simms Aff. ¶ 26; Simms Dep. 44:16–17, 53:18–19, 57:14–28; Compl. Pt II at 5–7).

(d) Robert Simms' Complaint and the "Investigation"

On January 19, two days after the attack, Simms wrote a letter to Warden Frank Boston detailing the physical abuse and death threats prompted by his child pornography charges. He also noted Sergeant Wright's unconcerned reaction. (Simms Aff. ¶ 28). Captain Sharon Grant conducted an investigation, then wrote a report to Warden Boston on January 26. Of course, Grant concluded that there was no merit to Simms' Claim. (Grant Report).

2. ARGUMENT

The standards for summary judgment[49] are well settled. The moving party[50] bears the burden of establishing that there are no genuine issues of material fact in dispute.[51] *See, e.g.*, *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993). This standard stops the court from resolving disputed issues of fact. If there are material[52] factual issues, the court must deny summary judgment. *See, e.g.*, *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). In evaluating whether there are factual issues, the court is to view the evidence in the light most favorable to the non-moving party[53] and draw all permissible inferences[54] in the non-moving party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). However, assessments of credibility, conflicting versions of events, and the weight to be assigned to evidence are for the jury, not the court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. Officer Bennett's Attack On Robert Simms Violated The Eighth Amendment

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain"[55] and is the source of claims for excessive force under Section 1983. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Analysis of an excessive force claim contains both objective and subjective inquiries.[56] An official's conduct violates the Eighth Amendment when (i) the conduct is "objectively, sufficiently serious," and (ii) the prison official acts with a "sufficiently culpable [guilty] state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted).

(a) Officer Bennett's Conduct Was Sufficiently Serious

Defendants argue that summary judgment should be granted because (i) Simms' physical injuries, if any, were *de minimis,*[57] and (ii) Simms' psychological injuries are not serious enough to justify continuing this Section 1983 case. As demonstrated below, however, the physical injuries and psychological pain suffered by Robert Simms were sufficiently serious to satisfy the Eight Amendment standard.

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[49] "Summary judgment" is a legal term that means that a judge can decide the case in one party's favor without the case ever going to a jury because the facts are not in dispute and the judge can make a ruling on the law.

[50] The "moving party" is the person who made the motion to the court asking the court to do something. In this case, the moving party is Officer Bennett, who is asking the court to decide the case in his favor at the summary judgment stage instead of going forward to a trial.

[51] When a party claims that there are "no genuine issues of material fact in dispute," that means that all the parties agree about the facts, or that the facts are so clearly in one party's favor that a neutral third party would have to say that the facts seem to heavily favor one party's story over the other's as the real version of events.

[52] In the summary judgment context, a "material fact" is a fact that is relevant to the legal issue(s) being decided. Facts are considered material if they are likely to have a significant effect on the outcome of the case.

[53] The "non-moving party" is the person who did not make the motion to the court. Here, the non-moving party is Simms, who is opposing Officer Bennett's motion for summary judgment. Simms wants the case to go forward to a trial, instead of being decided in Officer Bennett's favor by a judge.

[54] To "draw all permissible inferences" means that the court should take the facts and make any and all assumptions that the facts can support in a way that would favor the non-moving party, Simms. Essentially, because a judge ruling on summary judgment is ending the case before it goes to trial, the judge must give "the benefit of the doubt" to the party opposing summary judgment.

[55] "Wanton infliction of pain" means excessive, cruel, or immoral infliction of pain.

[56] "Objective" means as viewed by an independent outsider, sometimes referred to as the ordinary "reasonable person." "Subjective" means how a specific person felt, believed, or viewed the incident.

[57] *De minimis* is a legal term that means something has occurred in such a small quantity that it is not significant, and there is therefore no legal remedy. Here, Officer Bennett is arguing that Simms' physical injuries were *de minimis*. This means Officer Bennett is trying to claim that Simms was not hurt badly enough for the law to take notice of his injuries.

(i) The Use of Force Was More Than *De Minimis*

The objective component of a claim for excessive force under the Eighth Amendment is satisfied if the injury suffered results from something more than a *de minimis* use of force. *See Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994). Significant injury, that is, "injury that requires medical attention or leaves permanent marks," is not required. *Hudson v. McMillian*, 503 U.S. 1, 7–8, 13 (1992) ("The absence of serious injury is . . . relevant to the Eighth Amendment inquiry but does not end it.").

As an initial matter, defendants contend that Officer Bennett never used force against Robert Simms or even had any physical contact with him. (Def. Mem. 7). This argument, however, is hotly disputed and thus summary judgment must be denied. *See, e.g.*, *Allah v. Cox*, No. 96-CV-1225, 1998 WL 725939, at *2 n.2 (N.D.N.Y. Oct. 9, 1998) (summary judgment denied where corrections officer's version of events is expressly contradicted by incarcerated person).

Alternatively, defendants contend that the force used by Bennett—which defendants dismiss as mere grabbing and pulling—was *de minimis*. (Def. Mem. 5–7). But the evidence shows that Simms was shoved, pushed into a wall, swung around the search room, and punched—all while being threatened with further beatings and death for approximately forty-five minutes in the search room. (Simms Aff. ¶ 12–13; Simms Dep. 25:24–26:16, 32:2–3; Simms Stmt., dated January 19, 1990).

Defendants cite a number of cases to support their argument that the use of force against Simms was *de minimis* as a matter of law. None of these cases is on point. They are either decided on grounds other than the use of force or involve momentary uses of force dramatically different from the repeated and continuous physical assault and death threats inflicted on Robert Simms. *See Reyes v. Koehler*, 815 F. Supp. 109, 114 (S.D.N.Y. 1993) (summary judgment granted for defendant where incarcerated person did not allege malice or intent to cause harm and where defendant's pushing plaintiff against wall was "a momentary act, of such limited duration as to belie any inference of malicious or sadistic intent to cause harm") (internal quotation marks omitted); *Harris v. Keane*, 962 F. Supp. 397, 408 n.12 (S.D.N.Y. 1997) (squeezing incarcerated person's finger once is *de minimis*) (emphasis added); *Candelaria v. Coughlin*, 787 F. Supp. 368, 374–75 (S.D.N.Y. 1992) (use of force was *de minimis* where incarcerated person did not allege any "repeated or continuous grabbing" or any physical injury), *aff'd*, 979 F.2d 845 (2d Cir. 1992).

Simms suffered bruises to his arms, legs, and face. (Simms Aff. ¶ 20; Simms Dep. 54:10–24). Such visible injuries are more than sufficient to sustain an Eighth Amendment action. *See, e.g.*, *Griffin v. Crippen*, 193 F.3d 89, 91–92 (2d Cir. 1999) (reversing district court's determination that incarcerated person's bruised shin and swelling over left knee were *de minimis* as a matter of law); *Smith v. Marcellus*, 917 F. Supp. 168, 171–73 (W.D.N.Y. 1995) (abrasion under left eye, small laceration near right ear, four superficial skin tears on upper calf, and slightly swollen wrist, resulting from attack by corrections officers, constitutes sufficient injury).

Defendants make much of the fact that plaintiff was not given medical treatment for his bruises. (Def. Mem. 7–8). However, Simms asked for treatment. (Simms Aff. ¶ 1). Defendants cannot be relieved of responsibility for the physical abuse of Robert Simms because they refused him medical treatment for at least a week after abusing him. The provision of medical treatment, in any event, is merely one factor to be weighed by the jury in assessing whether the physical force was more than *de minimis*. *See Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987) (plaintiff's failure to seek medical treatment for injuries not fatal to Section 1983 claim).

(ii) Simms Can Recover for His Psychological Pain

Were there any question as to Bennett's use of more than *de minimis* physical force on Simms—and there should be none—Simms' psychological pain provides a separate basis for recovery. The intentional infliction of psychological pain can form the basis of a Section 1983 claim where the pain suffered is more than *de minimis*. The Supreme Court has stated:

"[T]he Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' 'Pain' in its ordinary meaning surely includes a notion of psychological harm. I am unaware

of any precedent of this Court to the effect that psychological pain is not cognizable[58] for constitutional purposes." *See Hudson v.* McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (internal citation omitted); *see also St. Germain v. Goord*, No. 96-CV-1560 (RSP/DRH), 1997 WL 627552, at *3–4 (N.D.N.Y. Oct. 8, 1997) (incarcerated person's misery, anguish, psychological pain, and fear found actionable).

Defendants argue that verbal threats alone are not enough to bring a claim under Section 1983. But this is not a case about a verbal argument. Simms was threatened while he was being assaulted. Verbal threats, accompanied by some physical force or injury, can violate the Eighth Amendment. As the case law makes clear, when threats are accompanied by conduct that increases the credibility of the threats, an incarcerated person's constitutional rights are violated. *See Northington v. Jackson*, 973 F.2d 1518, 1522–24 (10th Cir. 1992) (alleged psychological injury resulting from sheriff's placement of revolver to incarcerated person's head, accompanied by threats to shoot, held to be more than *de minimis*); *Burton v. Livingston*, 791 F.2d 97, 100–01 (8th Cir. 1986) (guard drawing weapon and threatening to shoot while using racially offensive language held to be more than *de minimis* use of force); *Douglas v. Marino*, 684 F. Supp. 395, 397–98 (D.N.J. 1988) (allegation that prison employee brandished knife while threatening to stab incarcerated person stated Section 1983 claim).

It is clear even from the cases on which defendants rely that threats accompanied by physical conduct violate the Eighth Amendment. In *Jermosen v. Coughlin*, for example, the court held that verbal threats do not amount to a constitutional violation "*unless* accompanied by physical force or the present ability to effectuate the threat." 878 F. Supp. 444, 449 (N.D.N.Y. 1995) (emphasis added). Similarly, in *McFadden v. Lucas*, the court stated, "*mere* threatening language" is not a constitutional violation where the "plaintiff has nowhere alleged that he was physically assaulted [or that] any touching of his person occurred at all." 713 F.2d 143, 146 (5th Cir. 1983), *cert. denied*, 464 U.S. 998 (1983) (emphasis added); *see also Harris v. Keane*, 962 F. Supp. 397, 406 (S.D.N.Y. 1997) ("Allegations of threats, verbal harassment or profanity, *without any injury or damage*, do not state a claim under Section 1983.") (emphasis added).

Unlike the cases cited by defendants—where the threats were unaccompanied by other conduct or the plaintiff was not physically abused—Robert Simms was threatened with beatings and death as he was physically attacked. (Simms Aff. ¶ 12–13). The lack of any justification for these threats indicates that their purpose was to inflict psychological harm. *See infra* Part B.[59] Simms' placement in protective custody, where he might be assaulted without witnesses, only bolstered the threats' credibility. *See Hudspeth v. Figgins*, 584 F.2d 1345, 1347–48 (4th Cir. 1978) (guard's threat that incarcerated person would be shot supported by subsequent transfer to work detail supervised by armed guards).

Simms' psychological pain was not *de minimis*. During the search process, he experienced humiliation, anxiety, and the terror of death or severe injury. Afterwards, fearing that Bennett, Lewis, and Wright were going to beat or kill him, Simms sank into a deep depression and contemplated suicide. Defendants' argument that Simms' suicidal thoughts should be disregarded because he could not actually kill himself misses the point that he suffered psychological pain. (Def. Mem. 6 n.1). He received psychological treatment from the Mental Health Clinic, which specifically noted that Simms had been harassed by corrections officers and that he was "depressed." (Mental Health Evaluation Sheets). Simms also received counseling from Mullah Mark Denby and Dr. Margaret Phillips. To date, he suffers from nightmares of the incident. (Simms Aff. ¶ 22; Simms Dep. 43:15–44:2, 49:18–51:18; Simms letter, dated January 24, 1990). Thus, Simms' mental pain is actionable.

Defendants characterize Simms' psychological pain as not"rational" because (i) the threats were conditional; (ii) an investigation was conducted; and (iii) the threats of beatings and killing were never effectuated. (Def. Mem. 11–13). None of these arguments withstands close examination. First, defendants' suggestion that Simms' fear of beating and death would only be justifiable had Bennett

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[58] "Cognizable" means that a court can recognize or identify something. Here, the Court declares that psychological pain is cognizable for constitutional purposes, meaning that psychological pain is something that the Court can take into account when considering a case alleging that a constitutional violation has taken place.

[59] "*Infra*" is sometimes used in legal citations to indicate that what is being cited to is later in the document. So this citation means "*See* Part B of this document below."

phrased his threats in the present tense—"I'm going to kill you now"—and that Simms should have taken comfort from the use of the conditional perfect in Bennett's actual statement—"I should kill you"—assumes that Simms has a high-level understanding of grammar and an ability to identify different verb tenses under those circumstances.

Defendants' second point, that Simms' fear and terror during the assault on January 17, 1990, should have been made better by defendants' investigation taking place on January 26, 1990, is similarly far-fetched. Even after the attack, Simms could have derived little comfort from an internal investigation, given his previous experience with Penitentiary personnel. As to the merits of the investigation, the quality of internal reports rests on credibility—a jury issue. *See Payne v. Coughlin*, No. 82 Civ. 2284 (CSH), 1987 WL 10739, at *3 (S.D.N.Y. May 6, 1987).

Finally, as discussed above, verbal threats are indeed actionable when accompanied by physical force. It is not necessary for Simms to have actually been beaten, shot, stabbed, or killed to maintain this lawsuit. *See St. Germain v. Goord*, No. 96-CV-1560 (RSP/DRH), 1997 WL 627552, at *3–4 (N.D.N.Y. Oct. 8, 1997) (holding actionable incarcerated person's mental pain and fear resulting from corrections officers' threats to "beat the hell out of plaintiff" which never materialized). Defendants rely on *Doe v. Welborn*, 110 F.3d 520 (7th Cir. 1997), in arguing that Simms' fear of beating and death are not compensable since the threats never materialized. That reliance is inappropriate. *Doe* is a conditions-of-confinement case; this is a case about excessive use of force. As *Doe* itself states: "What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends on the claim at issue." *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997). Thus, while the psychological harm of the plaintiff in *Doe* did not rise to "the extreme deprivations" required to make out a conditions-of-confinement claim, Simms' psychological injury is actionable because "a plaintiff in an excessive force case need not allege significant injury in order to survive dismissal." *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (internal citations and quotation marks omitted). Under the circumstances, the fear and other mental pain, which Simms suffered due to Bennett's threats of beating and death, accompanied by Bennett's aggressive physical actions, were clearly rational.

(a) Officer Bennett Acted Maliciously and Sadistically to Cause Harm

For claims of excessive force, the state of mind requirement turns on whether the prison official applied the force "'maliciously and sadistically to cause harm.'" *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)). In making that determination, the trier of fact is to consider the following factors: (i) "the extent of the plaintiff's injuries;" (ii) "the need for the application of force;" (iii) "the correlation [relationship] between that need and amount of force used;" (iv) "the threat reasonably perceived by the defendants;" and (v) "any efforts made by the defendants to temper [decrease] the severity of a forceful response." *Romano v. Howarth*, 998 F.2d 101, 105 (2d Cir. 1993) (citing *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

(i) Plaintiff Simms Suffered Physical and Mental Harm

As a result of Bennett's use of excessive force and threats of beating and death, Simms suffered physical and mental injury. *See supra* Sections 1(b) and (c).[60]

(ii) There Was No Need for Force or Death Threats

Where, as here, there is evidence that an attack by a corrections officer is unprovoked or without sufficient justification, courts generally will deny summary judgment. *See, e.g.*, *Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (reversing summary judgment where jury could find defendant initiated argument and struck incarcerated person without justification); *Moore v. Agosto*, No. 93 Civ. 4835, 1996 WL 125660, at *2 (S.D.N.Y. Mar. 20, 1996) (summary judgment denied where plaintiff maintained defendants initiated the confrontation), *aff'd*, 164 F.3d 618 (2d Cir. 1998).

[60] "*Supra*" is sometimes used in legal citations to indicate that what is being cited to is earlier in the document. So this citation means "*See* Sections 1(b) and (c) of this document above."

Defendants claim Bennett was justified in using force because of Simms' "admitted" refusal to follow defendants' instructions to submit to a strip search, stand away from the bullpen bars, stand where directed in the search room, and place his clothing in the designated place. (Def. Mem. 6–8).

Defendants' arguments are undermined by the simple fact that Bennett attacked Simms *prior* to the issuance of any of these instructions. The threats of violence began as Simms sat in the bullpen, and the physical attack began as soon as Simms entered the search room. (Simms Aff. ¶¶ 8, 11; Simms Dep. 19:20–20:3, 24:25–25:9, 25:14). Moreover, when Simms was ordered to strip, he complied. (Simms Aff. ¶¶ 15, 18; Simms Dep. 32:15–21; Simms letter dated January 24, 1990).

The other so-called "instructions" illustrate the malice and sadism motivating Bennett's attack. For example, Bennett's alleged "instruction" to stand away from the bullpen bars was in fact stated as follows:

> You revolting cradle robber. Get the hell out of my face, you pedophile. You nauseate me! Get the hell away from the bars before I beat you senseless.

(Simms Aff. ¶ 9; Simms Dep. 21:2–15). In addition, the purported "instruction" to stand in a particular spot was nothing but a malicious taunt. Bennett indeed told Simms to stand in a particular spot. However, each time Simms moved to the place indicated, Bennett screamed, pointed to a different spot, grabbed Simms' arm, and swung him to the new location. (Simms Aff. ¶ 14; Simms Dep. 27:22–27:2).

The expressions of disgust and hatred, which continued throughout the beating and accompanied the death threats, were a product of Bennett's personal feelings, not a good faith effort to maintain discipline. The evidence is clear that Bennett knew Simms' charges prior to the attack:

(1) Felding, the booking officer who prepared the booking sheet stating Simms' charges, stood in the search room while Simms was assaulted and searched (Booking Sheet; Bennett Dep. 31:10–25, 41:20–42:3, 49:3–7, 52:8–53:8; Def. Interrog. Resp. No. 7);
(2) Bennett, Lewis, and Wright admitted to talking about incarcerated people's charges (Bennett Dep. 56:17–25; Lewis Dep. 26:2–18; Wright Dep. 41:16–19);
(3) Bennett admitted that he had access to incarcerated people's charges (Bennett Dep. 53:2–54:8; see also Lewis Dep. 26:2–18); and
(4) The threats are replete with references of Simms being a child pornographer (Simms Aff. ¶¶ 7, 8, 9, 11, 14, 18; Simms Dep. 19:14–25, 25:6–7).

The fact that malice motivated Bennett's acts against Simms are explained, in part, by Bennett's testimony that he finds sex offenses committed against minors more disgusting than other crimes committed by incarcerated people. (Bennett Dep. 58:3–10). Moreover, Bennett was emboldened by his "amused" audience of corrections officers in the search room. (Simms Aff. ¶ 12; Simms Dep. 27:23–28:2; Def. Interrog. Resp. No. 7).

Defendants contend that the force used was necessary to avoid the "potential" security risks associated with a backlog of detainees waiting to be processed. (Def. Mem. 8). However, the "potential" risk could never have been a reality here. The morning of January 17, 1990, only Simms and one other detainee were waiting to be processed. (Simms Aff. ¶ 6).

(iii) The Amount and Type of Force Used Were Disproportionate to the Need

There is no correlation here between the need for force and the amount of force used. Given that Simms offered no physical or verbal resistance nor refused any orders, Bennett's pushing, shoving, swinging, punching, and simultaneous threatening with death and severe injury were clearly excessive.

Even assuming *arguendo* (for the sake of argument) that Simms did refuse to strip, the circumstances would not require the amount of physical force that Bennett used. Bennett himself admitted that Simms was not violent during the strip search. (Bennett Dep. 48:14). *See Martinez v. Rosado*, 614 F.2d 829, 831–32 (2d Cir. 1980) (violation of prison rule and refusal to obey direct order do not alone justify physical assault without evidence of physical resistance by incarcerated person or other indication that amount of force was proper); *see also Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (even where there is evidence that incarcerated person may have failed to follow an order,

officer can still be found to have used excessive or gratuitous force). Moreover, it is hard to see how threatening to shoot, beat, and stab Simms would get Simms to perform the desired action of stripping. At a minimum, this is a question for the jury. *See, e.g.*, *Trice v. Strack*, No. 94 Civ. 4470 (BSJ), 1998 WL 633807, at *3 (S.D.N.Y. Sept. 14, 1998) (whether force was applied maliciously and sadistically is left for jury to decide where defendants struck, tackled, and kicked plaintiff who may have precipitated conduct by waving underwear in one defendant's face).

(iv) Bennett Could Not Reasonably Have Perceived Simms as a Threat

It is clear that Bennett could not reasonably have seen Simms as a threat. On January 17, 1990, Simms was 5'4" and approximately 135 pounds, as compared to the taller, more muscular defendant Bennett. (Simms Aff. ¶ 8; Simms Dep. 19:6–9; Booking Sheet). In addition, while Bennett was accompanied by Lewis and four to six other corrections officers in the search room, Simms was the only incarcerated person present. (Bennett Dep. 39:9–14, 48:3–11; Def. Interrog. Resp. Nos. 2, 7).

(v) Bennett Has Demonstrated No Effort to Temper His Response

Finally, defendants have suggested no efforts by Bennett to temper the severity of the response. As noted above, Bennett assaulted and threatened Robert Simms *prior* to any peaceful request that Simms strip, and he continued to do so for another 45 minutes.

B. Defendant Wright Evinced Deliberate Indifference When He Failed to Protect Robert Simms from Bennett's Physical Assault and Accompanying Death Threats

Defendants argue summary judgment should be granted for Sergeant Wright because (i) Wright did not participate in or witness the physical attack and death threats directed toward Simms, and (ii) Wright took adequate steps to ensure that Simms' constitutional rights were not violated. (Def. Mem. 5–6). However, summary judgment is not appropriate because Wright acted with deliberate indifference when he failed to protect Simms from Bennett's physical assault and death threats.

The legal standard is that a supervisor may be liable under Section 1983 for the actions of his supervisees where, as here, the supervisor exhibits "deliberate indifference" to an incarcerated person's safety. There is no requirement of direct participation in the constitutional violation. *See, e.g.*, *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). Deliberate indifference exists where (1) there is a substantial risk of serious harm to an incarcerated person, and (2) the prison official knows of the risk and disregards it by failing to take steps to prevent harm to the incarcerated person. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also Hayes v. New York City Dept. of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996).

(a) Robert Simms Was at a Substantial Risk of Serious Harm

Here, the first requirement for a finding of deliberate indifference, "substantial risk of serious harm," is clearly met. A violent assault perpetrated without justification and solely for the purpose of causing harm creates a substantial risk of serious harm. *See supra* I.B.

(b) Wright Knew of and Disregarded the Harm to Simms by Not Acting to Prevent It

The second requirement of deliberate indifference, culpable intent, is also met. The evidence establishes that Wright had knowledge that Robert Simms faced a substantial risk of serious harm on the morning of January 17, 1990, regardless of whether Wright actually witnessed the physical abuse and death threats. Specifically:

(1) Wright admitted in his deposition that he proceeded into the search room after hearing "loud screaming" coming from that room. (Wright Dep. 26:23–28:23, 48:23–25, 54:4–6). Wright's Incident Report, stating that Wright "heard noise" coming from the search room, confirms this. (Incident Report of Sgt. Wright).
(2) Once the strip search was completed, Simms told Wright that Bennett physically assaulted him and threatened him with his life. (Simms Aff. ¶ 16; Simms Dep. 37:13–22).
(3) Wright admitted in his deposition that Simms had filed a complaint about Officer Bennett. (Wright Dep. 13:02–16:20).

The evidence further establishes that Wright disregarded the substantial risk of serious harm that he knew Simms faced. Even after hearing suspicious noises coming from the search room and being told that Bennett had attacked Simms, Wright did not immediately investigate the situation, reprimand (warn or punish) Bennett, or even stay in the search room until the booking and search process was complete. After Simms told Wright he needed Wright's help, Wright told Simms to "shut the hell up and take off your clothes." (Simms Dep. 38:18–20). Then, after specifically being informed of the abuse, Sergeant Wright merely told Simms, "Well, this is jail!" and walked out of the search room. (Simms Aff. ¶ 17; Simms Dep. 39:12–14; Simms letter, dated January 24, 1990). Given the evidence indicating that Wright had knowledge of the risk Simms faced, this indifferent response cannot be held reasonable as a matter of law.

That Wright failed to prevent any further harm to Simms is proven by the fact that Wright left Simms in the room with Bennett to suffer further abuse. Simms was indeed subjected to more abuse when Wright left the search room. Once Wright exited, Bennett shoved Simms, sending him reeling across the search room. Bennett screamed, "You are a piece of crap! You are a disgusting kiddie porn loving animal who deserves to die. I am going to make sure someone's going to kill you. Your days are numbered." (Simms Aff. ¶ 19; Simms Dep. 34:9–15; Compl. Pt. III at 6).

The failure to intervene to prevent harm to an incarcerated person constitutes deliberate indifference, subjecting the supervisor to liability. *See, e.g.*, *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (summary judgment denied where defendants were present but failed to intervene to prevent another prison official from firing a shotgun at incarcerated person); *Buckner v. Hollins*, 983 F.2d 119, 122–23 (8th Cir. 1993) (where defendant failed to prevent prison official from beating plaintiff, jury could find deliberate indifference for defendant's failure to intervene); *see also Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 621 (2d Cir. 1996) (reversing summary judgment for corrections officers where plaintiff advised officer he was in danger prior to attack, and record revealed no protective measures taken); *Livingston v. Rivera*, No. 94-CV-5319, 1999 WL 26902, at *3 (E.D.N.Y. Jan. 20, 1999) (officer's statement and other circumstances, suggesting defendant had knowledge that incarcerated person was exposed to imminent serious harm, precluded summary judgment). Here, there is substantial evidence that Wright disregarded a clear and obvious risk of harm to Simms. As a result, Simms suffered further physical assault and threats of beating and death. Wright's failure to take any steps—much less any reasonable ones—to prevent this abuse makes him liable, and at minimum, precludes summary judgment in his favor.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

Dated: _____
<<date submitted>> <<City, State>>

Respectfully submitted,
<<Attorney Firm Name>>[61]
By:_____
Rachel A. Felder (RF-XXXX)[62]
<<Attorney's Address>>
<<City, State>>
<<Phone number>>
Attorney for Plaintiff
Robert K. Simms

[61] If you are submitting your memorandum of law *pro se*, you should put your name here.

[62] If you are submitting your memorandum of law *pro se*, you should put your name, address, and contact information (including your "inmate number," if applicable) here.