UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHNNY MORGAN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 14 Civ. 7921 (DCF)

UNITED STATES' PRE-TRIAL MEMORANDUM OF LAW

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10007
Tel. (212) 637-2822/2528
Fax (212) 637-2786

Attorney for Defendant United States of America

TALIA KRAEMER
NATASHA W. TELEANU
Assistant United States Attorneys
Of Counsel

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

Defendant United States of America ("Defendant" or the "United States") respectfully submits the following pretrial memorandum of law in accordance with Part III.B.4 of the Court's Individual Rules & Practices in Civil Cases, to set forth certain law and anticipated evidence that Defendant believes will assist the Court. Defendant incorporates by reference Sections III (Subject Matter Jurisdiction), IV.A (The Parties' Claims and Defenses), VII (Stipulation/Agreed Statements of Facts and Law), VIII (Witness Lists), and X (Exhibit Lists) of the proposed Joint Pretrial Order ("JPTO"). *See* Dkt. No. 326.

I. OFFICER GRAHAM DID NOT COMMIT AN ASSAULT OR BATTERY OF PLAINTIFF ON FEBRUARY 10, 2014

A. Legal Standards

Plaintiff's claims against the United States are governed by the Federal Tort Claims Act ("FTCA"), which authorizes recovery for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *see also id.* §§ 2671-80. Because the search at issue occurred in Manhattan, Plaintiff's FTCA claims are governed by the substantive law of New York. *See* 28 U.S.C. § 1346(b)(1); JPTO § VII.B.2.3.

Generally, under New York law, "an 'assault' is an intentional placing of another person in fear of imminent harmful or offensive contact. A 'battery' is an intentional wrongful physical contact with another person without consent." *Girden v. Sandals Int'l*, 262 F.3d 195, 203 (2d Cir. 2001) (internal alterations omitted). However, to prevail on an assault or battery claim against a law enforcement officer, the plaintiff must also prove that the officer's conduct "was not reasonable within the meaning of the New York statute concerning justification of law

enforcement's use of force in the course of their duties." *Nimely v. City of N.Y.*, 414 F.3d 381, 391 (2d Cir. 2005); *see also Torres-Cuesta v. Berberich*, 511 F. App'x 89, 91 (2d Cir. 2013) (applying *Nimely* to an FTCA assault and battery claim).

The New York statute on justification provides that correctional officers "may, in order to maintain order and discipline, use such physical force as is authorized by the correction law." N.Y. Penal Law § 35.10(2). In turn, the New York Corrections Law authorizes correctional officers to use "all suitable means" to defend themselves and to maintain order and security:

> When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the officers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.

N.Y. Corrections Law § 137(5).

Though few courts have issued decisions addressing the application of Section 137(5) of the New York Corrections Law, the Second Circuit has explained that a New York assault and battery claim against a law enforcement officer is "substantially identical" to a claim for use of excessive force in violation of the Fourth Amendment. *Posr v. Doherty*, 944 F.2d 91, 94-95 (2d Cir. 1991); *see Lloyd v. City of N.Y.*, 246 F. Supp. 3d 704, 729 (S.D.N.Y. 2017). That is, "under federal or state law, a plaintiff must show that the amount of force used was objectively unreasonable based upon a consideration of the perspective of the officer at the time." *See Alvarez v. City of N.Y.*, 2015 WL 1499161, at *10 (S.D.N.Y. Mar. 30, 2015) (internal quotation marks omitted). Because Plaintiff was a pretrial detainee on February 10, 2014, his constitutional right to be free from excessive force arises under the Fifth Amendment's Due Process Clause, rather than the Fourth Amendment. *See Edrei v. Maguire*, 892 F.3d 525, 533 (2d Cir. 2018). The relevant inquiry, however, remains one of "objective reasonableness." *See Kingsley v. Hendrickson*, 135

S. Ct. 2466, 2473 (2015) (discussing the standards governing pretrial detainee excessive force claims under the Fourteenth Amendment's Due Process Clause, where plaintiff was detained in a county, rather than a federal, facility).

"[O]bjective reasonableness turns on the facts and circumstances of each particular case." *Id.* (internal quotation marks omitted). The assessment of whether an officer's conduct was reasonable must be made "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* In the context of pretrial detention, courts must "account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained," including the need "to preserve internal order and discipline and to maintain institutional security." *Id.* The Supreme Court has identified the following as relevant, but not exclusive, considerations to inform the analysis of whether force used against a pretrial detainee was objectively reasonable:

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id. The analysis must further account for the fact that "[o]fficers facing disturbances are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 2474.

In sum, to prevail on his FTCA claims for assault and/or battery against Officer Graham, Plaintiff must first prove that Officer Graham intentionally placed Plaintiff in fear of imminent harmful or offensive contact, and/or intentionally made wrongful physical contact with Plaintiff without his consent. *See Pizarro v. Ponte*, 2019 WL 568875, at *9 n.13 (S.D.N.Y. Feb. 11, 2019) (granting summary judgment on state claims for assault and battery even though defendant

might be liable under the Fourth Amendment for failure to intervene, because the state law claims required intentional conduct by the defendant satisfying the New York state law elements of assault and battery). Plaintiff must further prove that any use of force by Officer Graham was unjustified, in that it was not a "suitable means" for Officer Graham "to defend [himself], to maintain order, to enforce observation of discipline, [or] to secure [Morgan's] person[]." *See* N.Y. Corrections Law § 137(5). To meet that burden, drawing on constitutional principles, Plaintiff must show that any force used was objectively unreasonable, as measured by the perspective of an officer in Officer Graham's position at the time any such force was used and accounting for the government's legitimate interests in managing the correctional facility, including the need to preserve order and to maintain institutional security.

In the context of an excessive force claim, expert witnesses may assist the court by testifying to generally accepted law enforcement practices and explaining alternate courses of action that law enforcement officials might take in lieu of using force. *See Stern v. Shammas*, 2015 WL 4530473, at *5 (E.D.N.Y. July 27, 2015) (expert could testify on "generally accepted police standards and whether Defendants deviated from such standards"); *Bryans v. Cossette*, 2013 WL 4737310, at *15 (D. Conn. Sept. 3, 2013) (expert could opine that "the defendant could have most likely handled [the incident] verbally, not physically," where the opinion was based on sufficient facts or data). However, experts may not testify as to whether a particular use of force was "reasonable" or "justified under the circumstances" (or equivalent formulations), because such testimony would go directly to the ultimate legal question of whether excessive force was used and would "merely t[ell] the [fact finder] what result to reach." *Hygh v. Jacobs*, 961 F.2d 359, 64 (2d Cir. 1992); *see also id.* at 364 ("This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion."); *Stern*, 2015 WL 4530473, at *3

(expert could not testify that force used was "unreasonable"); *Bryans*, 2013 WL 4737310, at *14-15 (precluding testimony that "any force that was used that day was improper").

Finally, while a correctional facility's policies and practices may help inform the excessive force analysis, *see Kingsley*, 135 S. Ct. at 2474 (part of the reasonableness analysis includes "deference to policies and practices needed to maintain order and institutional security"), Plaintiff cannot prevail in his FTCA claim based solely on a violation of BOP policy or regulations, because no private analogue exists for such a claim, *see* Memorandum Opinion and Order at 19-20, Dkt. No. 245 (Jan. 29, 2018) (granting summary judgment to the extent Plaintiff asserts an FTCA claim on the basis of the BOP officers' alleged violation of BOP regulations).

B. Plaintiff Cannot Establish that Officer Graham Committed an Assault or Battery of Plaintiff on February 10, 2014

Plaintiff will not be able to meet his burden of proving that Officer Rashee Graham committed an assault or battery by using excessive force during the search on February 10, 2014. The evidence will show that, contrary to Plaintiff's claim, the BOP officers obtained possession of the contraband when Plaintiff finally complied with the officers' verbal orders and the contraband was released from between Plaintiff's buttocks—not by Officer Graham inserting his fingers into Plaintiff's anal cavity.

The contraband Plaintiff obtained during a social contact visit on February 10, 2014, was sizeable—approximately three inches long and approximately two inches in diameter. *See* JPTO § VII.A.8. When Plaintiff received the contraband, he attempted to insert the contraband into his anal cavity, but he did not use any lubricant while doing so. *Id.* § VII.A.9. The evidence will also show that Plaintiff attempted to insert the contraband into his anal cavity while in a position that made such efforts mechanically difficult: he was seated, and he attempted to insert the

contraband by reaching down the front of his pants. (Anticipated Johnny Morgan testimony; anticipated Dr. Stephen Gorfine testimony; anticipated Dr. Andrew Wollowitz testimony.)

After Plaintiff's social contact visit was over, Plaintiff entered a designated search room to undergo a visual search conducted by Officer Graham. *Id.* § VII.A.10, 13-14. The evidence will show that during the visual search, once Plaintiff undressed, Officer Graham was able to see the contraband clearly protruding from Plaintiff's buttocks. (Anticipated Officer Rashee Graham testimony.) Officer Graham gave Plaintiff verbal direction to hand over the contraband, as well as verbal orders to conduct physical maneuvers to facilitate release of the contraband, such as bending and spreading his buttocks, but Plaintiff refused. (Anticipated Graham testimony.) Officer Graham then radioed for assistance, and additional BOP officers arrived at the search room to assist. JPTO § VII.A.15-17. The United States expects Plaintiff to testify that after Officer Graham observed the contraband, Plaintiff made multiple attempts to push the contraband further out of sight into his anal cavity. (Anticipated Morgan testimony.) However, the BOP officers' testimony will show that the contraband was still visibly protruding. (Anticipated Graham testimony; anticipated Lieutenant Keith Hardy testimony.)

The evidence will further show that once additional BOP officers arrived on the scene, the officers continued to give Plaintiff verbal orders to undertake physical maneuvers like squatting or bending and spreading his buttocks to facilitate release of the contraband. (Anticipated Graham testimony; anticipated Hardy testimony.) Once Plaintiff complied, the contraband was released naturally and confiscated by Officer Graham. (Anticipated Graham testimony; anticipated Hardy testimony.)

The United States' colorectal expert, Dr. Stephen Gorfine, will testify that a foreign object, such as the contraband at issue in this case, can be expelled from the anal cavity through

the body's natural processes without the use of outside force, and that expulsion can be facilitated by physical maneuvers like squatting and bending. Dr. Gorfine will also testify that it is highly unlikely that Officer Graham would have been able to successfully recover the contraband by inserting his finger (or fingers) into Plaintiff's anal cavity and extracting the contraband forcefully, as Plaintiff alleges. Based on Dr. Gorfine's experience extracting foreign bodies from the anal cavity and rectum, Dr. Gorfine will explain that an effort to extract a foreign body from the anal cavity of a person who is not cooperating with the extraction, while the person is standing, with poor visibility of the anal area, and by a person without expertise in extracting foreign bodies from the anus is highly unlikely to be successful. (Anticipated Gorfine testimony.)

Because the evidence will show that Officer Graham did not use any force at all to recover the contraband, Plaintiff will not be able to prove that Officer Graham obtained possession of the contraband through use of force that was objectively unreasonable. Indeed, both parties' correctional experts are expected to testify that if the BOP officers recovered the contraband through use of verbal orders directing Plaintiff to engage in physical maneuvers such as bending or squatting, then the recovery of the contraband was consistent with good and accepted correctional practice. (Anticipated Arthur Wallenstein testimony; anticipated Martin Horn testimony.)[1] To the extent the Court finds that a minor amount of force was used during

[1] The United States is not asserting that, if the Court concludes that Officer Graham did forcibly insert his fingers into Plaintiff's anal cavity to recover the contraband, then such force was objectively reasonable. The parties' correctional experts agree on this point, as well. In fact, the parties' correctional experts agree on how good correctional practice applies to the only two scenarios before the Court—*i.e.*, that Plaintiff's allegation that the contraband was extracted by Officer Graham forcibly inserting fingers into his anal cavity is inconsistent with good correctional practice, and that the United States' position that the contraband was recovered through use of verbal orders is consistent with good correctional practice.

the search on February 10, 2014, for example through a BOP officer restraining Plaintiff's hand, the evidence will show that any such force would have been objectively reasonable. The officers had legitimate security and disciplinary interests in preventing Plaintiff from obtaining possession of the contraband he was concealing in his buttocks—which could have been a weapon, from the perspective of the officers present at the time—or concealing such contraband further, which could have made it more challenging to recover the contraband. The objective reasonableness of a minor amount of force is also supported by the fact that Plaintiff repeatedly refused to comply with the officers' orders, and the fact that Plaintiff cannot establish that he suffered any physical injury from any such force. Accordingly, Plaintiff will not be able to prove that Officer Graham used excessive force in recovering the contraband from Plaintiff, and cannot establish that the United States is liable for assault and battery under the FTCA.

II. PLAINTIFF CANNOT RECOVER DAMAGES BECAUSE HE CANNOT ESTABLISH THAT THE ALLEGED FEBRUARY 10, 2014 INCIDENT CAUSED HIM ANY PHYSICAL INJURY, AND EVEN IF HE COULD, ANY PHYSICAL INJURY WAS *DE MINIMIS*

The FTCA provides that the United States "shall be liable … in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. "Damages in FTCA actions are determined by the law of the state in which the tort occurred." *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1081-82 (2d Cir. 1988). "Under New York law, a plaintiff need not demonstrate that he was damaged by the defendant's conduct to establish liability for claims of assault and battery; however, he must show actual injuries to recover anything beyond nominal damages." *Poulos v. City of N.Y.*, 2018 WL 3750508, at *9 (S.D.N.Y. July 13, 2018). To do so, the plaintiff must "present competent evidence of injuries proximately caused by each tortious incident in order to recover compensatory damages for that incident." *Id.* If a plaintiff

establishes an assault or battery, but is unable to "adduce any evidence of actual loss, the fact finder must award nominal damages." *Id.* (internal quotation marks omitted).

As an initial matter, Plaintiff will not be able to establish that he suffered a physical injury upon the contraband exiting his anal cavity. Plaintiff is expected to testify that he experienced pain upon attempting to insert the contraband into his anal cavity, and both Plaintiff's expert and the United States' expert will testify that insertion of or attempts to insert a non-lubricated foreign object into the anal cavity can cause pain, friction, and superficial bleeding or lacerations. (Anticipated Morgan testimony; anticipated Wollowitz testimony; anticipated Gorfine testimony.) This testimony is consistent with the photographs of the retrieved contraband, which show a small amount of blood on only one end of the contraband. (JX-14, contraband photos.) Moreover, Plaintiff's expert will not offer any opinion on whether Plaintiff's alleged bleeding was from insertion of the contraband versus the contraband exiting his anal cavity. (Anticipated Wollowitz testimony.) Accordingly, Plaintiff cannot establish that the alleged forcible removal of the contraband—as opposed to the insertion of or attempts to insert the contraband—caused him to bleed.

Even assuming Plaintiff could establish that the contraband was forcibly removed from his anal cavity by Officer Graham's fingers, as he alleges, he cannot demonstrate that he suffered more than *de minimis* physical injury. When Plaintiff was examined by BOP's Health Services the day after the search, the mid-level practitioner did not observe any "rectal/anal tears," bleeding, redness, or swelling upon a visual examination. (PX-8, Feb. 11, 2014 BOP Health Services Injury Assessment.) In addition, Plaintiff is expected to testify that while he initially observed blood on the contraband and his underwear, he woke up later that night and observed that the bleeding had "slowed down." (Anticipated Morgan testimony.) Thus, any injury is *de*

minimis in nature, amounting to nothing more than a nominal damages award. *See Warren v. Westchester Cnty. Jail*, 106 F. Supp. 2d 559, 570 (S.D.N.Y. 2000) (abrasions to face and neck were only *de minimis* injury); *Gilmore v. Rivera*, 2014 WL 1998227, at *7 (S.D.N.Y. May 14, 2014) (burning and stinging in eyes only *de minimis* injury); *see also Parker v. Dubose*, 2013 WL 4735173, at *2 (N.D. Fla. Sept. 3, 2013) ("Plaintiff's alleged black eye, bloody lip, scrapes, abrasion and 'back pains' do not amount to more than *de minimis* physical injury and are not sufficient to meet the physical injury requirement of § 1997e(e).").

III. PLAINTIFF CANNOT ESTABLISH THAT THE FEBRUARY 10, 2014 INCIDENT CAUSED HIM COMPENSABLE EMOTIONAL OR MENTAL DISTRESS

To recover an award for emotional damages, Plaintiff must prove that he suffered an actual emotional injury caused by the United States' conduct. *See Augustin v. Jablonsky*, 819 F. Supp. 2d 153, 168 (E.D.N.Y. 2011) (requiring a "causal link between defendants' conduct and the alleged personal emotional distress injury"); *Sulkowska v. City of N.Y.*, 129 F. Supp. 2d 274, 304 (S.D.N.Y. 2001) ("The Court first notes that in the determination of the monetary damages to be awarded to the plaintiff for the emotional distress sustained as a result of her arrest, it must be careful not to compensate the plaintiff for any distress unrelated to her arrest."). The causal connection must be clear—mental distress damages "generally are not recoverable where the connection between the [mental anguish] and the existing injury is either too remote or tenuous." *United States v. Vulcan Soc'y, Inc.*, 2015 WL 11348177, at *4 (E.D.N.Y. Dec. 21, 2015) (alteration in original).

Here, Plaintiff will not be able to establish that the February 10, 2014 incident caused him to suffer from serious enduring emotional trauma or post-traumatic stress disorder ("PTSD"). The evidence will show that Plaintiff did not suffer significant enduring psychological damage from the February 10, 2014 incident, even assuming Plaintiff's allegation

that the contraband was forcibly removed from his anal cavity by Officer Graham is correct. Preceding the February 10, 2014 incident, Plaintiff had a long history of serious psychiatric problems, but he nevertheless frequently reported having no psychiatric symptoms after the February 10, 2014 incident. (Anticipated Dr. Roy Lubit testimony; anticipated Dr. Daniel Selling testimony.) And when Plaintiff did report symptoms, they were either episodic in nature or tied to other stressors in his life. (Anticipated Lubit testimony.) Collectively, an understanding of how emotional and behavioral problems evolve over time, the timing and fluctuation of Plaintiff's reported symptoms, and Plaintiff's psychological records, including testing of Plaintiff and statements by Plaintiff, demonstrate that Plaintiff does not meet the pattern of psychological trauma or fulfill the diagnostic criteria for PTSD, and certainly did not do so in any way caused by the incident at issue here. (Anticipated Lubit testimony.)

Plaintiff's expert is expected to opine that although Plaintiff does not meet the full American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders criteria for PTSD, Plaintiff suffers from many PTSD symptoms and suffered significant and enduring psychological damages. (Anticipated Selling testimony.) However, Plaintiff's expert concedes that many of Plaintiff's symptoms are linked to earlier traumas that pre-date the February 10, 2014 incident—including what Plaintiff has described as a near-death incident when Plaintiff was beaten by multiple police officers at age 16, and a beating by his mother with an ironing cord at age 11 or 12. (Anticipated Selling testimony.) And while Plaintiff's expert is anticipated to testify that as a result of Plaintiff's traumas and ensuing psychological distress he will have occupational and social impairments, Plaintiff's expert is unable to opine with any psychological certainty that Plaintiff would not have such impairments even if the February 10, 2014 incident had not occurred. (Anticipated Selling testimony.) The failure of Plaintiff's expert to rule out

Plaintiff's other traumatic experiences as the source of his current alleged injuries precludes basing an emotional or mental distress damages remedy on the expert's testimony, and renders his analysis unreliable. *See Tardif v. City of N.Y.*, 344 F. Supp. 3d 579, 601-02 (S.D.N.Y. 2018) ("Regardless of the original cause of Tardif's mental disorders (or predisposition to such illnesses), to conclude that Defendants' conduct exacerbated Tardif's PTSD requires a finding that Defendants *caused* that exacerbation. Accordingly, under circumstances of this case, the failure to engage in some form of a differential diagnosis is fatal to Dr. Goldman's opinion on causation or 'exacerbation.'").

IV. PLAINTIFF'S RECOVERY, IF ANY, IS CAPPED AT THE AMOUNT DEMANDED IN HIS ADMINISTRATIVE CLAIM

The FTCA limits Plaintiff's recovery in this suit to the amount of his demand in his administrative claim. 28 U.S.C. § 2675(b). Here, Plaintiff's administrative demand was for $312,000. (JX-11, Plaintiff's SF-95 Administrative Claim.) Thus, recovery at trial—if any—must be limited accordingly.

Dated: New York, New York
March 26, 2019

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: *s/ Natasha W. Teleanu*

TALIA KRAEMER
NATASHA W. TELEANU
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: 212-637-2822/2528
talia.kraemer@usdoj.gov
natasha.teleanu@usdoj.gov