UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHNNY MORGAN Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 1:14-cv-7921-DCF

PLAINTIFF JOHNNY MORGAN'S PRETRIAL MEMORANDUM OF LAW

Maximilian A. Grant
Counsel of Record
Marguerite M. Sullivan (*pro hac vice* pending)
George C. Chipev (admitted *pro hac vice*)
Ian C. Thresher (*pro hac vice* pending)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
Email: max.grant@lw.com
Email: marguerite.sullivan@lw.com
Email: george.chipev@lw.com
Email: ian.thresher@lw.com

Brett M. Sandford (admitted *pro hac vice*)
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025
Telephone: (650) 328-4600
Facsimile: (650) 463-2600
Email: brett.sandford@lw.com

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Pursuant to Section III.B.4 of the Court's Individual Practice Rules, Plaintiff Johnny Morgan respectfully submits the following Pretrial Memorandum of Law.

I. INTRODUCTION

This case is about the assault and battery that occurred on February 10, 2014, at the Metropolitan Correctional Center ("MCC"), a facility managed by the Federal Bureau of Prisons ("BOP") in Manhattan, New York, when a MCC correctional officer forcibly removed an item of contraband from Plaintiff Johnny Morgan's anal cavity (without his consent) by forcibly and repeatedly inserting his fingers into Mr. Morgan's anal cavity. Mr. Morgan's claim in this action against the United States of America ("Defendant") arises under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. The evidence presented at trial will show that the officers' conduct was excessive and unreasonable, and went beyond the pale—including beyond what is allowed by "good and accepted correctional practices" and the BOP's own policy. Because the officers have refused to acknowledge their conduct, Mr. Morgan respectfully requests that the Court find in his favor on his assault and battery claims under the FTCA, compensate Mr. Morgan for the physical and emotional damage their unreasonable and effective conduct caused (and continues to cause).

II. FACTUAL BACKGROUND

A. Plaintiff Johnny Morgan

Mr. Morgan has lived a difficult life. He grew up in the Bronx with an abusive, drug-addicted mother and rarely saw his father. Feb. 2017 Lubit Psych. Eval. of Mr. Morgan at 4:8-22; 16:24-17:5. Mr. Morgan's childhood was engulfed by drugs, crime, and poverty. Op. Expert Rpt. of Dr. Daniel Selling ("Selling Op. Rpt.") at ¶¶ 14-16. His mother was beaten in front of him. *Id.* at ¶ 15. He struggled in school and drifted into criminal behavior at the age of 15. *Id.* This early introduction to crime forced Mr. Morgan to develop a sophisticated moral code. *Id*. at ¶ 20.

Mr. Morgan's moral code was premised on the fundamental notion that, in his words: "In order to be involved in this game you have to know when you are right and equally know when you are wrong. You have to take it like a man." *Id.* at ¶ 21. Because Mr. Morgan "operates with a sense of accountability," despite his criminal entanglements, he "has taken responsibility when he was wrong, but has stood up for himself when he knew" he was in the right or felt "that his rights were being violated." *Id.*

B. Mr. Morgan's Experience at MCC Before the February 10, 2014 Assault

On February 20, 2012, Mr. Morgan was arrested by New York Police Department officers. Soon after his arrest, Mr. Morgan was transferred to BOP's MCC facility in Manhattan. During his time at the MCC, Mr. Morgan made progress towards rehabilitation, including receiving awards for completing programs such as "Narcotics and Alcohol Anonymous" and "Putting the Bars Behind You." PX-22 at BOP 0837-38. Despite this progress, Mr. Morgan has struggled for the past five years (and continues to struggle today) due to a painful, humiliating, and traumatizing assault and battery committed by BOP correctional officers during (what should have been) a routine search for contraband on February 10, 2014.

C. The Basic Requirements of BOP Policy and Good and Accepted Correctional Practice

As Plaintiff's expert Martin Horn—a Distinguished Lecturer in Corrections at the John Jay College of Criminal Justice and current Executive Director of the New York State Sentencing Commission—will explain at trial, the correctional profession has established "good and accepted correctional practice," which places strict safeguards and limitations against intrusions into the bodily privacy of inmates. For example, "[i]n order to further the safe, secure, and orderly running of its institutions," BOP Program Statement § 5521.05 requires inmates to undergo a strip search

following a social contact visit.[1] JX-4 at BOP 0084. The BOP Program Statement, however, only contemplates three types of body searches: (1) a pat search; (2) a visual search; and (3) a digital or simple instrument search. *Id.* at BOP 0085-87. Because the latter two searches require the inmate to be naked, they implicate fundamental concerns regarding an inmate's privacy and dignity. And because they implicate fundamental concerns regarding an inmate's privacy and dignity, the BOP Program Statement requires staff to (i) "employ the least intrusive method of search practicable," (ii) "avoid unnecessary force," and (iii) "strive to preserve the dignity of the individual being searched." *Id.* at BOP 0084; *see also id.* at BOP 0086. (providing that only "designated qualified health personnel" may perform a digital or simple instrument search "upon approval of the Warden"). The correctional officers' "search" of Mr. Morgan on February 10, 2014 violated these basic policy requirements and his fundamental rights to privacy and dignity. They were contrary to good and accepted correctional practice and violated the law.

D. The February 10, 2014 Assault and Battery

On February 10, 2014, Mr. Morgan had a social contact visit with his father at the MCC.[2] At some point during this visit, Mr. Morgan obtained contraband,[3] which was subsequently discovered to be tobacco and K2 spice wrapped tightly in a condom. JX-14 at BOP 1344-46. The contraband was round and approximately three inches long and two inches wide. *Id.* at BOP 1345. During his social contact visit, Mr. Morgan inserted the contraband "halfway" up his anal cavity by reaching his arm down the front of his pants while in a seated position. Morgan Dep. at 66:1-

[1] BOP Program Statement § 5521.05, titled "Searches of Housing Units, Inmates, and Inmate Work Areas," was the relevant BOP policy in effect as of February 10, 2014.

[2] A social contact visit is when an inmate meets with someone from outside the prison facility.

[3] Contraband is "material prohibited by law, regulation, or policy that can reasonably be expected to cause physical injury or adversely affect the safety, security, or good order of the facility or protection of the public." 28 CFR § 500.1(h).

20. There is no evidence that the contraband moved out of his anal cavity. Instead, it is likely that it remained in place, or was pushed further into his anal cavity, during the remainder of his social contact visit.

Following his social contact visit, Mr. Morgan entered the 11 South Visiting search room ("Search Room") at the MCC to be searched for contraband before being admitted back to the general population.[4] Morgan Dep. at 78:10-21. There is no evidence that the contraband moved or was pushed out of Mr. Morgan's anus during the time he walked from the social contact visit room to the Search Room. Correctional Officer ("Officer") Rashee Graham was in the Search Room at the time Mr. Morgan entered. *Id.* at 72:8-25. Once Mr. Morgan entered the Search Room, Officer Graham ordered Mr. Morgan to remove his clothes. *Id.* at 78:10-21. Mr. Morgan complied. *Id*. Officer Graham searched Mr. Morgan's clothes (a "pat search"), and then proceeded to conduct a "visual search" of Mr. Morgan's body, which includes "[a] visual inspection of all body surfaces and cavities." *Id.* at 80:8-19.

During the visual search, Officer Graham noticed a portion of contraband protruding from Mr. Morgan's anus. *Id.* at 84:24-86:1. Officer Graham gave Mr. Morgan several verbal orders to relinquish the contraband. *Id.* at 86:11-87:1. Mr. Morgan refused, claiming he "didn't have nothing." *Id.* at 92:20-24. Presumably growing angry at Mr. Morgan's refusal to relinquish the contraband, and because BOP policy expressly prohibits non-medical personnel such as Officer Graham from manually extracting contraband from an inmate's person or body cavities (*see* JX-4 at BOP 0086-87), Officer Graham ordered Mr. Morgan to place his hands against the wall while he radioed for help. Morgan Dep. at 93:8-18.

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[4] BOP policy requires all inmates to be searched after a social contact visit. Joint Pretrial Order Stip. Facts at #14 ("Stip. Fact").

Mr. Morgan initially complied with Officer Graham's order but, while Officer Graham was radioing for assistance, Mr. Morgan twice pushed the contraband further up into his anal cavity—each time successfully. Morgan Dep. at 94:3-4. On the first attempt, Mr. Morgan pushed the contraband further up his anal cavity, but stopped when Officer Graham turned to look at him. *Id.* at 95:17-25. On the second attempt, Mr. Morgan pushed the contraband "basically through the passageway," such that it was only "sticking out a little bit." *Id.* at 96:7-15.

Several correctional officers responded to Officer Graham's radio call or otherwise entered the Search Room, where Mr. Morgan was now standing naked with his hands on the wall. These correctional officers included: (1) Recreation Officer Greene, (2) Corrections Officer Durant, (3) Senior Officer Merrick, and (4) Special Housing Unit Officer Feliciano. Morgan Dep. at 111:9-22. Lieutenant Kimberly Shivers responded to the call but, because BOP policy prohibits officers of a different gender than the inmate from being present during a visual search (*see* JX-003 at BOP 0086), she never entered the Search Room and was not present for any event at issue in this case. She called the male lieutenant on duty, Activities Lieutenant Keith Hardy, to respond to the situation.[5] Lt. Kimberly Shivers' Obj, and Resp. to Plaintiff's Interr., Resp. No. 15; Stip. Facts at #17-18. Lieutenant Shivers remained outside of the Search Room during all relevant times. Stip. Fact. at #18.

After entering the Search Room, Officer Greene helped Officer Graham restrain Mr. Morgan, and held Mr. Morgan's wrist against the wall for a period of time. *See* Dkt. 321-8 at Resp. No. 34. After arriving, Lieutenant Hardy also restrained Mr. Morgan by holding his left

[5] Defendant intends to call Lieutenant Shivers as a trial witness, even though it admits she has no personal knowledge of the relevant events that occurred in the Search Room on February 10, 2014.

wrist high against the wall, while Officer Merrick held Mr. Morgan's back. Morgan Dep. at 116:1-118:13.

Officer Graham then directed Mr. Morgan to bend over and spread his buttocks with his hands. Mr. Morgan refused because he "was not going to do that with all of these officers being present." *Id.* at 109:11-15. Lieutenant Hardy then instructed Mr. Morgan to "just bend over and touch your toes," which Mr. Morgan did. *Id.* at 122:21-123:7. There is no evidence that the contraband in Mr. Morgan's anal cavity moved during these, or any other, movements, after which Mr. Morgan was retrained again. Instead, the evidence at trial will show that the contraband remained almost entirely inside Mr. Morgan's anal cavity until retrieval. *Id*. at 96:5-19; *see* Wollowitz Rpt. at ¶ 22(a) (opining that briefly bending over and coughing is insufficient to force the spontaneous evacuation of such an object from an individual seeking to maintain the object within the anal-rectal canal); Gorfine Dep. at 36:17-21 (testifying that "[t]hings don't fall out of the anus until they have moved beyond the anus. I mean, the most common use of a person's anus is during the act of defecation, which we've all done, I would imagine, hopefully.") But, as Mr. Morgan stood back up, Officer Graham proclaimed: "Look at it right there." *Id.* at 123:21. When Mr. Morgan again refused to give the contraband to the officers, he felt the officers grip him "real, real tight so [he] couldn't move." *Id.* at 125:1-9.

At that point, Mr. Morgan turned his head and saw Officer Graham walking towards him. *Id.* at 126:11-17. Officer Graham bent down behind Mr. Morgan's anus and—without asking for, much less obtaining, Mr. Morgan's consent—"retrieved" the contraband from Mr. Morgan's anus by forcibly and repeatedly (at least two to three times) inserting his fingers into Mr. Morgan's

anus. *Id.* at 127:9-128:16. The contraband, after being retrieved from Mr. Morgan's anus, had streaks of Mr. Morgan's blood on it.[6] *See, e.g.*, JX-14 at BOP 1344-46.

Still naked, but now in pain and humiliated, Mr. Morgan promptly asked to see a medical professional. *See* PX-5 at BOP 0051. Instead of taking him to see a medical professional, the officers took him to a "dry cell" in the Special Housing Unit ("SHU").[7] Mr. Morgan spent the night in the dry cell, where he attempted to treat himself without the assistance of a medical professional by wiping the blood from his anus with tissue paper. Morgan Dep. at 150:4-9. It was not until the next day, February 11, 2014, that Mr. Morgan obtained access to medical and psychological care.[8] *Id*. at 151:4-10. While being escorted to see a medical professional, Lieutenant Hardy (who was present for the February 10, 2014 assault) apologetically told Mr. Morgan that Officer Graham "messed up, he wasn't supposed to do that." *Id.* at 140:3-6. Lieutenant Hardy's contemporaneous admission was correct.

E. Contemporaneous Written Statements by Multiple BOP Correctional Officers Present for the February 10, 2014 Search Corroborate Mr. Morgan's Allegations

Lieutenant Hardy's verbal admission against interest is not the only contemporaneous statement that corroborates Mr. Morgan's description of events. On February 10, 2014, about ***six***

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[6] The evidence will show that this was not Mr. Morgan's first attempt to bring contraband into a correctional facility. It was, however, the first time such contraband was forcibly retrieved from his anus by a correctional officer. Mr. Morgan will testify that he never expected a corrections officer would act contrary to the proscribed procedures.

[7] A dry cell is a normal cell "where the water is simply left off to avoid the inmate washing contraband down the drain and the inmate is under direct staff observation from outside the cell for continuous supervision." Wallenstein Rpt. ¶ 21.

[8] Defendant contends that Mr. Morgan did not suffer any anal tears or injury because the exam conducted by Mid-Level Practitioner Erwin Ramos on February 11, 2014 was negative. But the evidence at trial will show that Mr. Ramos never performed an internal exam of Mr. Morgan's anus, which would be necessary to determine if anal tears or other internal injuries had occurred a result of the February 10, 2014 assault.

hours after Officer Graham assaulted Mr. Morgan in the Search Room, two correctional facility employees present for the assault submitted written statements to Lieutenant Shivers describing ***how*** Officer Graham conducted the "search" of Mr. Morgan's anus earlier that day.

First, Lieutenant Hardy submitted a written memorandum to Lieutenant Shivers less than six hours after the incident stating: "At that time Officer Graham ***retrieved*** a plastic bag from inmate anus." JX-1 at BOP 1331. Second, Officer Merrick separately submitted a written memorandum to Lieutenant Shivers mere hours after the incident admitting that "Officer Graham ***retrieved*** the bag from Inmate Morgan's anus." JX-23 at 1333. The evidence will show that both of these contemporaneous written statements—submitted as part of their official duties and to their superior officer—were made ***before*** Mr. Morgan's allegations of misconduct were made and/or known to either Lieutenant Hardy or Officer Merrick. They independently corroborate Lieutenant Hardy's verbal admission and Mr. Morgan's allegations in this case.[9]

F. Mr. Morgan's Post-Assault Medical, Psychological, and Psychiatric Treatment

Mr. Morgan began to suffer emotional health issues shortly after the February 10, 2014 assault. On February 11, 2014, Mr. Morgan learned from the incident report that Officer Graham claimed that "the sack fell out of [his] anal area." JX-10 at BOP 0599; Gorfine Dep. at 36:17-21. Prior to the February 10, 2014 assault, Mr. Morgan had been "stable on his medication and was doing well." *Id*. Mr. Morgan's emotional well-being deteriorated following the assault. For example, in May 2014 Mr. Morgan said that he "thinks of the incident where his anal cavity was

[9] Defendant may proffer self-serving affidavits crafted by counsel that Lieutenant Hardy and Officer Merrick submitted seven months after the February 10, 2014 incident, in conjunction with MCC's internal investigation into Mr. Morgan's allegations. These seven month stale affidavits are inadmissible hearsay, should be given little weight, and cannot rebut the contemporaneous written admissions that confirm Mr. Morgan's allegations.

searched by an officer and it bothers him." JX-9 at BOP 0593. He explained that, while he is "coping with it the best he can," he still experiences nightmares, re-living the trauma of the experience, sometimes even waking up "fe[eling] as if [he] was raped." *Id.* at BOP 0587, 0593.

Over the past five years, Mr. Morgan has reported and sought treatment for the following issues: (1) nightmares, flashbacks, and other intrusive thoughts that result in him re-experiencing the search; (2) frequent crying; (3) anxiety, headaches, and panic attacks when he thinks about what happened, even spontaneously and involuntarily; (4) paruresis ("shy bladder syndrome") when he is in public situations and does not feel like he has privacy; (5) feelings of humiliation, self-disgust, and powerlessness about what happened; (6) discomfort around other people, including those in positions of authority; (7) recollections of prior traumas, including when he was beaten by police officers. *See, e.g.*, Morgan Dep. at 199:11-202:11; 203:22-204:19; 205:9-206:11; 208:17-209:1; JX-10-13, JX-15-21; PX-24; *see also* JX-22; Selling Opt. Report at ¶¶ 9-10, 12-13, 26-29, 35-43; March 1, 2019 Expert Rpt. of Daniel Selling ("Selling Suppl. Rpt.") at 1-5; Lubit Psych. Eval. At 92:21-93:5; Lubit Psych. Rpt. at 4.

Since the February 10, 2014 assault, including after his release from BOP custody in November 2018, Mr. Morgan has required continuous mental health checkups. *See generally* JX-6 to JX-10, JX-12, JX-13, JX-15 to JX-21; PX-24, PX-25. While some of Mr. Morgan's symptoms of psychological damage are constantly present, other symptoms are episodic.[10] Selling Op. Rpt. at ¶ 38. However, regardless of whether the symptom is constant or episodic, Mr. Morgan's medical records uniformly show that the cause of his emotional and physical trauma was the

[10] As Dr. Selling will testify, it is common for assault victims to have episodic symptoms, as such victims commonly attempt to cope with, and move on from, a traumatic event by subconsciously developing sophisticated defense strategies. *See* Selling Op. Rpt. at ¶ 38.

assault Officer Graham committed on February 10, 2014 by forcibly and repeatedly inserting his fingers into Mr. Morgan's anal cavity.[11]

G. Administrative Remedies

Ashamed of being subjected to the invasive search on February 10, 2014, and frustrated that the officers were not being held accountable for their actions, Mr. Morgan took the first step towards exhausting his administrative remedies. Specifically, he filed a BP-8 form—an informal attempt at resolution of the inmate's grievance—with the prison on April 7, 2014. Morgan Dep. at 185:13-186:4 Mr. Morgan received no response. Mr. Morgan then filed a BP-9—a formal written request to the warden to review the inmate's grievance. *Id.* at BP 0002-03. The Warden did not resolve Mr. Morgan's grievance. Instead, the Warden responded: "You make no specific request for relief…Since you make allegation[s] of sexual misconduct, you will be informed at the conclusion of the investigation whether the allegation was substantiated, unsubstantiated, or unfounded. As you make no specific request for relief, this response is for informational purposes only." PX-1 at BP 0001. Confused by the Warden's form over substance response, Mr. Morgan proceeded on the mistaken assumption that he was required to file a BP-10—an appeal to the regional BOP office—at the close of the ongoing investigation into his original grievance, as opposed to within 20 days of the response. Morgan Dep. at 220:14-15. As a result, when he filed his BP-10, the prison rejected it as untimely. *Id*. at 229:20-25 Mr. Morgan then proceeded to file a BP-11—a direct appeal to the General Counsel of the Bureau of Prisons. *Id*. at 228:2-17. The

[11] Examples of these medical records are: (1) JX-9 at BOP 0594 (April 30, 2014), BOP 0593 (May 15, 2014), BOP 0592 (June 11, 2014), BOP 0489 (June 24, 2014), BOP 0587 (Oct. 10, 2014), BOP 0477, BOP 1022 (Jan. 16, 2015), BOP 1021 (Jan. 28, 2015), BOP 1020 (March 18, 2015), BOP 0924 (June 24, 2015), BOP 1261 (Sept. 24, 2015), BOP 1256 (Nov. 16, 2015), BOP 1254 (Nov. 30, 2015), BOP 1251 (March 11, 2016), BOP 1249 (March 29, 2016), BOP 1246 (April 19, 2016), BOP 1245 (May 16, 2016), BOP 1555 (Oct. 12, 2016), BOP 1553 (Oct. 25, 2016) and BOP 1551 (No. 21, 2016).

prison, again, dismissed Mr. Morgan's BP-11 as untimely. *Id*. at 231:1-15. Having exhausted his administrative remedies without any of the officers being held accountable for their conduct during the February 10, 2014 assault, Mr. Morgan sought relief in federal court on September 29, 2014 by filing a Complaint in the U.S. District Court for the Southern District of New York.[12]

While the litigation was pending, Morgan submitted the FTCA's requisite administrative SF-95 claim for damage, injury, or death to the BOP on June 26, 2015, and listed an "Amount of Claim" for "Personal Injury" of $312,000. Stip. Fact at #25; JX-11. The SF-95 claim form states that the basis for the claim is that Correctional Officer Graham "illegally and in defiance of B.O.P. policy … repeatedly forced his fingers into [Morgan's] rectum, while other officers restrained [Morgan], in an effort to retrieve the suspected contraband." JX-11 at 1. It also states that Mr. Morgan suffered physical damages, including "bruising and lacerations to [his] rectum," and psychological and emotional damages from the "brutal physical and sexual assault." *Id.*

III. DEFENDANT IS LIABLE FOR ASSAULT AND BATTERY UNDER THE FEDERAL TORT CLAIMS ACT

The evidence will show that Defendant, through the improper conduct of the officers present for the February 10, 2014 search, is liable for assault and battery under the FTCA.

The FTCA 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). "Employee of the government" is defined broadly, to include all "officers

[12] Mr. Morgan proceeded pro se for over three and a half years, including through the completion of discovery. Latham & Watkins LLP was appointed as his pro bono counsel on February 2, 2018, and appeared on February 28, 2018. Dkt. 248 at 1-4; Dkt. 254 at 1.

or members of any federal agency."[13] 28 U.S.C. § 2671. Claims involving allegations of assault and battery by federal prison guards are actionable under the FTCA. *See, e.g.*, *Charlton v. United States*, 08-cv-1405, 2011 WL 6097756, at *3 (N.D. Ga. Dec. 5, 2011) (citing cases).

A. Defendant is Liable to Mr. Morgan for Assault

The evidence will show that Defendant is liable for assault under the FTCA because Officer Graham forcibly and repeatedly inserted his fingers into Mr. Morgan's anus during the contraband search on February 10, 2014.

"Under New York law, '[a]n assault is an intentional placing of another person in fear of imminent harmful or offensive conduct.'" *Garcia v. Comprehensive Ctr., LLC*, No. 17-cv-08970, 2018 WL 3918180, at *6 (S.D.N.Y. Aug. 16, 2018). "The plaintiff must show that the defendant intended 'either to inflict personal injury or to arouse apprehension of harmful or offensive bodily contact.'" *Wright v. Musanti*, No. 14-cv-8976, 2017 WL 253486, at *5 (S.D.N.Y. Jan. 20, 2017), *aff'd*, 887 F.3d 577 (2d Cir. 2018); *Girden v. Sandals Int'l*, 262 F.3d 195, 203 (2d Cir. 2001) ("In the civil context . . . the common meanings of 'assault' and 'battery' subsume all forms of tortious menacing and unwanted touching."). "Although a plaintiff 'need not prove actual contact, [he] must allege some physical menace against [his] body.'" *Wright*, 2017 WL 253486, at *5. "That is, 'there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful conduct.'" *Id.*

For example, the trial court in *Wright* held that a "classic assault" occurred when defendant threatened to kick plaintiff, and then followed through by "rais[ing] her leg and 'kick[ing] out'

[13] Government liability is determined by the law of "the State where the act or omission occurred," here, New York. 28 U.S.C. § 1346(b); *Richards v. United States*, 369 U.S. 1, 11 (1962). Under New York law, the government's liability is "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

towards plaintiff," and subsequently "hit, kick and scratched plaintiff and trapped him against the building's façade." 2017 WL 253486, at *6. The court found that "[t]hrough these threatening gestures and words, defendant obviously intended to make plaintiff fear that she would imminently kick him," and "plaintiff's apprehension of imminent contact was more than reasonable." *Id.*; *see also Garcia*, 2018 WL 3918180, at *6 (holding that plaintiff's "allegations of intentional punching and dragging her by her collar satisfy the elements of assault"). Similarly, in *Yan Zhao v. United States*, the trial court held that an officer committed assault under the FTCA when he "pepper-sprayed Plaintiff, threw her against a wall, kneed her in the head, grabbed her hair, and slammed her head against the wall," as these actions were not "in any way reasonable or warranted under the circumstances. *Yan Zhao v. United States*, 273 F. Supp. 3d 372, 399 (W.D.N.Y. 2017).The Court should reach the same conclusion here. The evidence at trial will show that Officer Graham assaulted Mr. Morgan on February 10, 2014 while retrieving the contraband from Mr. Morgan's anal cavity. First, Officer Graham placed Mr. Morgan "in fear of imminent harmful or offensive conduct" when he approached him from behind to retrieve the contraband from Mr. Morgan's anal cavity. *Garcia*, 2018 WL 3918180, at *6. Second, while Mr. Morgan "need not prove actual contact" occurred, the fear of "imminent harmful or offensive conduct" manifested into actual contact when Officer Graham retrieved the contraband from Mr. Morgan's anal cavity by forcibly and repeatedly (and without Mr. Morgan's consent) inserting his fingers into Mr. Morgan's anal cavity.[14] *Id.* Third, Officer Graham's conduct was "intentional" because he intended to either inflict personal injury or, at a minimum, intended to arouse apprehension of harmful or offensive bodily contact. *Wright*, 2017 WL 253486, at *5. Fourth, there can be credible dispute that

[14] The evidence will also show that officers also restrained Mr. Morgan's arms during the February 10, 2014 search. Dkt. 321-8 at Resp. No. #34.

retrieving contraband by forcibly and repeatedly inserting fingers into an inmate's anal cavity without consent is "harmful or offensive bodily contact," and constitutes a "physical menace against [Mr. Morgan's] body." *Id.* at *5. And as Plaintiff's expert Mr. Horn will testify, such contact violates BOP policy and is inconsistent with "good and accepted correctional practice." Expert Rpt. of Martin Horn ("Horn Rpt.") at 9.

By forcibly and repeatedly inserting his fingers into Mr. Morgan's anus without his consent, Officer Graham, aided by the other correctional officers, committed an unlawful assault against Mr. Morgan during the February 10, 2014 contraband search.

B. Defendant is Liable to Mr. Morgan for Battery

The evidence will show that Defendant is liable for battery under the FTCA.

"'A 'battery' is an intentional wrongful physical contact with another person without consent.'" *Garcia*, 2018 WL 3918180, at *6. "To establish a battery, a plaintiff must prove that (1) the defendant made bodily contact, (2) the contact was harmful or offensive, (3) the defendant intended the contact, and (4) the plaintiff did not consent to the contact." *Id.* (citations omitted). "The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive." *Wright*, 2017 WL 253486, at *6 (citation omitted). "Any alleged injury to plaintiff 'may be unintended, accidental or unforeseen.'" *Id.*

In *Garcia*, the trial court found that "defendant repeatedly battered plaintiff during the course of the altercation" because "[t]here is no doubt that the defendant made physical contact (defendant's kick contacted plaintiff's calves), and that this contact was objectively harmful and offensive, and not consented to by plaintiff." 2018 WL 3918180, at *6. In *Crews v. County of Nassau*, the trial court held that officers who used severe force to handcuff a person could be liable for battery because "a rational jury could find that the pain plaintiff claims to have experienced

was sufficiently severe to warrant liability for assault and battery, even though plaintiff did not seek medical care." 996 F. Supp. 2d 186, 212 (E.D.N.Y. 2014).

The evidence will show that Officer Graham battered Mr. Morgan during the February 10, 2014 search for contraband. First, as described above, the evidence will show that Officer Graham "made bodily contact" with Mr. Morgan when he forcibly and repeatedly inserted his fingers into Mr. Morgan's anal cavity. *See supra* at _. Second, there can be no credible dispute that such intrusive contact is, at a minimum, "harmful or offensive." *Supra* at _. Third, the evidence will show that, by knowingly inserted his fingers (two to three times) into Mr. Morgan's anal cavity, Officer Graham formed the requisite "intent to cause a bodily contact that a reasonable person would find offensive." *Wright*, 2017 WL 253486, at *6. Fourth, it is undisputed that Mr. Morgan did not consent to Officer Graham's insertion of his fingers into Mr. Morgan's anus. *See, e.g.*, Morgan Dep. at 125:15-24 (testifying that, after Officer Graham inserted his fingers into his anus, that he said "what are you doing, what are you doing?"); Wallenstein Dep. at 53:22-54:3 (testifying that "in virtually any situation [he[can think of," forcibly removing contraband from an inmate's anus without the inmate's consent "would not be correct."). Indeed, the evidence will show that Officer Graham never even sought Mr. Morgan's consent, despite the BOP Program Statement requiring "staff [to] solicit the inmate's written consent prior to conducting a digital or simple instrument search." JX-4 at BOP 0087; Wallenstein Dep. at 147:11-15.

By intentionally forcing his fingers into Mr. Morgan's anal cavity without his consent, Officer Graham committed a battery against Mr. Morgan under New York law.

C. Defendant is Liable to Mr. Morgan for Both Assault and Battery, Even Within the Law Enforcement Context

The evidence will show that the additional elements required under New York law are present where, as here, an alleged assault or battery occurs in the law enforcement context.

In addition to the standard elements for assault and battery described above, "[t]o succeed on an assault or battery claim in the law enforcement context, a plaintiff must demonstrate that defendants' conduct 'was not reasonable within the meaning of the New York statute concerning justification for law enforcement's use of force in the course of performing their duties." *Cuellar v. Love*, No. 11-cv-03632, 2014 WL 1486458, at *13 (S.D.N.Y. Apr. 11, 2014); *see also Torres-Cuesta v. Berberich*, 511 F. App'x 89, 91 (2d Cir. 2013) (same). The relevant "New York statute concerning justification for law enforcement's use of force," *id.*, is New York Corrections Law 137(5), which provides in relevant part:

> 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.

"[W]ith the exception of the state actor requirement, the elements of a Section 1983 excessive force claim and state law assault and battery claims are substantially identical." *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 398 (S.D.N.Y. 2013). Thus, in effect, "the test for whether a plaintiff can maintain [state law assault and battery] cause[s] of action against law enforcement officials is the exact same test as the one used to analyze a Fourth Amendment excessive force claim." *Id.*; *see also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015) (holding that the appropriate standard for a pretrial detainee's excessive force claim is objective and to prevail on this due process claim under 42 U.S.C. § 1983 "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable");[15] *Edrei v. Maguire*, 892 F.3d 525, 533-37 (2d Cir. 2018) (discussing *Kingsley*

[15] Because Mr. Morgan was a pretrial detainee at the time of the assault and battery, his right to be free from excessive force amounting to punishment is protected by the Due Process Clause.

standard); *Yan Zhao* 273 F. Supp. 3d at 398-99 (describing standards for assault and battery claims under New York law).

The Supreme Court in *Kingsley* held that

> objective reasonableness turns on the facts and circumstances of each particular case. A court must make this determination 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. A court must also account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained, appropriately deferring to policies and practices that in the judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security.

135 S. Ct. at 2473; *see also Rogoz v. City of Hartford*, 796 F.3d 236, 246-47 (2d Cir. 2015) (explaining in a Fourth Amendment analysis that "[t]he 'reasonableness' of the amount of force used thus 'must be judged from the perspective of a reasonable officer on the scene . . . at the moment' the force is used."). Factors courts may consider include (1) "the relationship between the need for the use of force and the amount of force used"; (2) the extent of the plaintiff's injury; (3) the severity of the security problem at issue; (4) the threat reasonably perceived by the officer and (5) whether the plaintiff was actively resisting. *Kingsley*, 135 S. Ct. at 2473. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Rogoz*, 796 F.3d at 246. But "law enforcement officers violate the Fourth Amendment if the amount of force they use is 'objectively [un]reasonable' in light of the facts and circumstances confronting them." *Id.* "This is particularly true where the circumstances of the encounter suggest that the officer 'gratuitously inflict[s] pain in a manner that [is] not a reasonable response to the circumstances." *Yan Zhao*, 273 F. Supp. 3d

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E.g., *Kingsley*, 135 S. Ct. at 2473. The objective reasonableness inquiry discussed in *Kingsley* is substantially identical to the one used for a Fourth Amendment excessive force analysis.

at 399. For example, in *Yan Zhao*, the court concluded that the officers' actions were unreasonable and not warranted under the circumstances because (i) the plaintiff did not flee when approached by the officer; (ii) the plaintiff did not attack the officer, resist arrest, or otherwise act in a combative manner; (iii) the officer nevertheless pepper-sprayed the plaintiff, threw her head against a wall, kneed her in the head, grabbed her hair, and slammed her head against the ground. 273 F. Supp. 3d at 399.

As in the cases described above, the evidence will show that Officer Graham's conduct was objectively unreasonable under the circumstances, even when considering the latitude afforded to officers' use of force in the course of performing their duties. Under the first *Kingsley* factor, there was no need for ***any*** force under the circumstances; regardless, the amount of force used was grossly disproportionate to any purported need. No "reasonable officer on the scene" would have attempted to retrieve the contraband as Officer Graham did—by forcibly inserting his fingers into Mr. Morgan's anal cavity. *Rogoz*, 796 F.3d at 246-47. Indeed, Defendant's use of force expert, Mr. Arthur Wallenstein, repeatedly admits that such conduct is "an inappropriate use of force," "beyond [Officer Graham's scope and not within the guidelines of the policy," and inconsistent with good and accepted correctional practice. Wallenstein Dep. at 108:27-24 ("If the inmate's allegations are correct that he put his hands inside the anus of the inmate, that would be an inappropriate use of force . . ."); *id.* at 132:3-8 ("Officer Graham would have been acting beyond his scope and not within the guidelines of the policy."); *id.* at 141:4-9 ("Q. If Officer Graham had performed a digital or simple instrument search on Mr. Morgan on February 10th, 2014, that would also have been a violation of BOP Program Statement 5521.05, correct? A. As you stated it, if proven it happened, yes."); *see also id.* at 132:25-135:5, 234:7-13. Plaintiff's expert, Mr. Horn,

agrees. He will testify that Officer Graham's conduct violates BOP policy[16], and is inconsistent with good and accepted correctional practice. Horn Rpt. at 8.

Under the second *Kingsley* factor, the emotional and psychological trauma Mr. Morgan has suffered, *see infra* § 4, has been significant, in addition to the immediate pain and burning that Mr. Morgan felt in the hours after the retrieval of the contraband.

Under the other three *Kingsley* factors described above, the unreasonableness of Officer Graham's conduct is confirmed by the circumstances at the time he "retrieved" the contraband from Mr. Morgan's anus. JX-1 at 1; JX-23 at 1. First, although he refused to relinquish the contraband, Mr. Morgan was complying with Officer Graham's orders at the time the contraband was retrieved. *See* Wallenstein Dep. at 198:2-7 ("Q. So at the time that the contraband was separated from Mr. Morgan's anus on February 10th, 2014, he was complying with the verbal orders given by the lieutenants and officers, correct? A. He was doing what he was ordered to do."). Second, Mr. Morgan was restrained by at least one, and more likely two, BOP officers. *See* Dkt. 321-8 at Resp. No. 34. Third, Mr. Morgan posed no legitimate risk to BOP officer safety. Wallenstein Dep. at 203:3-8 ("Q And there are no statements from officers or lieutenants in -- that were present for the February 10th, 2014 incident that Mr. Morgan was violent in any way, correct? A. Correct."). Fourth, Mr. Morgan made no attempt to ingest or otherwise destroy the contraband.[17] *See, e.g.*, *id.* at 200:21-24 ("Q. Are you aware of any evidence in the record that Mr. Morgan told officers he was going to ingest the contraband? A. No."); *id.* at 202:9-13 ("Q Will

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[16] A violation of BOP policy occurred because Officer Graham is not designated health personnel, is not authorized to perform a simple or digital instrument search, and never obtained the Warden's authorization or Mr. Morgan's consent. Horn Rpt. at 6; Wallenstein Rpt. at ¶ 19; Wallenstein Dep. 115:6-116:12; JX-4.

[17] Although Mr. Morgan refused to relinquish the contraband, it is undisputed that he was fully complying with orders at the time the contraband was retrieved. *See* Dkt. 308-3 at Resp. No. 36; Rashee Graham's Obj. and Resp. to Plaintiff's Inter., Resp. Nos. 10, 12.

you agree with me, sir, that there's no statement from an officer or a lieutenant who was present on February 10th, 2014 that Mr. Morgan was attempting to ingest the contraband? A. Yes.").[18]

Because Officer Graham's conduct was objectively unreasonable under the circumstances, Defendant is liable to Mr. Morgan for both assault and battery.

IV. DAMAGES

The evidence at trial will show that Mr. Morgan is entitled to (1) past and/or future pain and suffering damages; and (2) past and/or future emotional distress damages, in amount up to and including $312,000.[19] *See* JX-11.

Under New York law, a plaintiff who prevails on either an assault or battery claim "may recover compensatory damages, and '[b]oth pecuniary and nonpecuniary losses—such as emotional pain and suffering and loss of liberty.'"[20] *Zhao*, 273 F. Supp. 3d at 401; *see also Offei v. Omar*, No. 11-cv-4283, 2012 WL 2086294, at *5 (S.D.N.Y. May 18, 2012), *report and recommendation adopted*, 2012 WL 2086356 (S.D.N.Y. June 8, 2012) (detailing compensatory

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[18] That Officer Graham had numerous alternatives to engaging in the expressly prohibited anal cavity retrieval issue, confirms the unreasonableness of his conduct. The officers could have handcuffed Mr. Morgan and continued giving him verbal orders, or they could have taken him to a dry cell. Horn Rpt. at 6; Wallenstein Rpt. at ¶ 18; Wallenstein Dep. 160: 18-24. They chose otherwise.

[19] Plaintiff is not seeking a specific dollar amount or range of damages at trial for any of these categories, in part because "[a]wards for mental and emotional distress damages are inherently speculative. There is no objective way to assign any particular dollar value to distress." *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 162 (2d Cir. 2014). The Second Circuit has held that "[t]here is no precise rule for fixing the value of non-economic damages. Instead, the trier of the facts must determine the value from all of the evidence in the particular case." *Zhao*, 273 F. Supp. 3d at 401; *see also Sulkowska v. City of New York*, 129 F. Supp. 2d 274, 308 (S.D.N.Y. 2001). To determine this value, courts have looked to "[d]amage awards in analogous cases provide an objective frame of reference, but they do not control [the Court's] assessment of individual circumstances." 273 F. Supp. 3d at 401-02.

[20] Damages available under the FTCA are determined by state law, here New York. *See* 28 U.S.C. § 2674.

damages available for assault and battery claims). Compensatory damages include (1) "non-economic losses sustained as a result of the injury," (2) "conscious pain and suffering including mental and emotional anxiety which can be based on the plaintiff's subjective testimony," and (3) "loss of enjoyment of life." *Zhao*, 273 F. Supp. 3d at 401; *Offei*, 2012 WL 2086294, at *5. Emotional distress damages include three different types of damages (1) "garden variety"; (2) "significant; and (3) "egregious." *Duarte v. St. Barnabas Hospital*, 341 F. Supp. 3d 306, 319-20 (S.D.N.Y. 2018) (detailing different categories of emotional distress awards).[21]

The evidence, including testimony from Plaintiff's forensic psychologist expert, Dr. Daniel Selling, will show that Mr. Morgan is entitled to four types of damages as a result of the assault and battery that occurred on February 10, 2014. First, Mr. Morgan is entitled to damages for past and/or future pain and suffering, including his symptoms related to urinating in public areas because of the mental anguish and anxiety caused by the improper search. Second, Mr. Morgan is entitled to past and/or future emotional distress, including as a result of mental anguish and humiliation caused by the assault and battery that occurred on February 10, 2014. Third, Mr. Morgan is entitled to damages for past emotional distress, including (1) nightmares, flashbacks, and other intrusive thoughts that result in him re-experiencing the search; (2) frequent crying; (3) anxiety, headaches, and panic attacks when he thinks about what happened, even spontaneously and involuntarily; (4) issues urinating (paruresis, or shy bladder syndrome); (5) feelings of humiliation and self-disgust, and powerlessness about what happened; (6) discomfort and distrust

[21] For "garden variety" claims, the evidence of mental suffering generally is limited to the testimony of the plaintiff, and can involve damages from shock, nightmares, sleeplessness, humiliation, and other subjective distress. *Duarte*, 341 F. Supp. 3d at 319-20. "Significant" emotional distress claims merit larger awards and sometimes are supported by medical testimony and evidence. *Id.* at 320. "Egregious" emotional distress claims generally involve outrageous or shocking discriminatory conduct or a significant impact on the plaintiff's physical health. *Id.*

of authority, including corrections officers; (7) hypervigilance; (8) reminders of prior traumatic events, including Mr. Morgan's beating at the hands of police officers when he was younger, and beatings by his mother; and (9) feelings of being violated. *See, e.g.*, Morgan Dep. at 199:11-202:11; 203:22-204:19; 205:9-206:11; 208:17-209:1; JX-10-13, JX-15-21; PX-24; *see also* JX-22; Selling Opt. Rpt. at ¶¶ 9-10, 12-13, 26-29, 35-43; Selling Suppl. Rpt at 1-5; Lubit Pysch. Eval. at 92:21-93:5. Fourth, Mr. Morgan is entitled to damages for future emotional distress, including any continued symptoms. *See, e.g.*, PX-24. Mr. Morgan's testimony at trial will explain that his suffering and symptoms have not gone away simply because he no longer is in BOP custody.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter a verdict finding Defendant liable for assault and battery under the FTCA, and award Plaintiff damages in the amount of $312,000.

Dated: March 26, 2019

Respectfully submitted,

By: /s/ Maximilian A. Grant
Maximilian A. Grant
Counsel of Record

Marguerite M. Sullivan (*pro hac vice* pending)
George C. Chipev (admitted *pro hac vice*)
Ian C. Thresher (*pro hac vice* pending)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
Email: max.grant@lw.com
Email: marguerite.sullivan@lw.com
Email: george.chipev@lw.com
Email: ian.thresher@lw.com

Brett M. Sandford (admitted *pro hac vice*)
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025
Telephone: (650) 328-4600
Facsimile: (650) 463-2600
Email: brett.sandford@lw.com

Attorneys for Plaintiff Johnny Morgan