

# **TRIAL ADVOCACY TRAINING FOR PRO BONO LAWYERS**

Training Case File



**JANUARY 11, 2013**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
500 PEARL STREET  
NEW YORK, NEW YORK 10007**

## Introduction

These materials are a fictitious case file that will be used throughout the day during the training. The panelists will assume your familiarity with these materials and will be relying on the testimony and documents included in the materials during each session. It is highly recommended that you read these materials in advance of the training.

In addition, the Opening Statements panel would like you to respond to the following:

We would like you to visualize and construct the first few minutes of the deliberations in this case. As plaintiff's counsel, in a sentence or two, what do you hope to be the first persuasive statements offered by a plaintiff's juror?

Now think about what you anticipate to be the strength/core of the defense case – what is it (in a sentence or two) and is it responsive to the plaintiff's persuasive statement?

Now, if it is responsive, what do you hope the plaintiff's juror is able to say in response (in a sentence or two) AND, if the defense juror was not responsive, how would you hope the plaintiff's juror would respond (in a sentence or two) to the defense statement.

By the end, you should have written the first three pieces of dialogue for the first scene in the deliberations.

**Please send your anticipated dialogue no later than Tuesday, January 8, 2013, to [dcooper@litstrat.com](mailto:dcooper@litstrat.com)** and consider, as you think about how you would open and try your case, how you prepare jurors to engage in your 'ideal' deliberations.

The training will be held at the Southern District of New York, 500 Pearl Street, in Room 850. Please arrive no later than 8:30 and remember that you must go through security to enter the Courthouse and that the security line can cause significant delay. You may not bring a laptop into the Courthouse, and only lawyers with an S.D.N.Y. Attorney Service Pass are permitted to bring a cell phone or other PDA. See [Standing Order M10-468](#) (Feb. 18, 2010). The training will conclude at 4:30.

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subordinate employees, including the practice of organized prisoner-on-prisoner fighting at ABC Facility. The Department is also responsible for the training and supervision of all DOC personnel, including Defendants.

4. Defendant Correction Officer Nateon was a correction officer of the DOC, acting as an agent of the Defendant City, within the scope of his employment and acting under color of state law. On information and belief, Defendant Nateon worked at ABC Facility at the time of the incident alleged herein. Defendant Nateon is sued in his individual capacity.

5. Defendant Correction Officer Cruz was a correction officer of the DOC, acting as an agent of the Defendant City, within the scope of his employment and acting under color of state law. On information and belief, Defendant Cruz worked at ABC Facility at the time of the incident alleged herein. Defendant Cruz is sued in his individual capacity.

6. Defendant Captain Belling was a captain of the DOC, acting as an agent of the Defendant City, within the scope of his employment and acting under color of state law. On information and belief, Defendant Belling worked at ABC Facility at the time of the incident alleged herein. Defendant Belling is sued in his individual capacity.

#### JURISDICTION and VENUE

7. This action arises under the First, Fourth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983 and 1988, and under the New York Constitution and New York State common law.

8. The jurisdiction of this Court is predicated upon 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1367(a).

9. The acts complained of occurred in the Southern District of New York and venue is lodged in this Court pursuant to 28 U.S.C. § 1391(b).

JURY DEMAND

10. Plaintiff demands a trial by jury in this action.

FACTUAL ALLEGATIONS

11. DOC personnel organizes fights between prisoners housed in the punitive segregation unit at ABC Facility. These fights are entertainment for the staff – who bet on the winner – and fighters are given certain privileges if they win, such as extra recreational time or alcohol.

12. On or around September 21, 2009, Plaintiff was released from his cell at ABC Facility for the sole purpose of fighting another prisoner.

13. Plaintiff, however, refused to fight this prisoner because he was his friend, Victor.

14. For refusing to fight each other, Plaintiff and Victor were yelled at and called names.

15. The following week, Plaintiff spoke to an investigator from the Board of Correction, a City oversight agency that had been investigating allegations of organized prisoner fights at ABC Facility.

16. The day after the Board of Correction investigator spoke to Jonathan, he was assaulted by Defendants Nateon, Cruz and Belling. Plaintiff was assaulted in retaliation for refusing to fight Victor and for reporting the practice of organized fighting to the Board of Correction.

17. These Defendants assaulted Plaintiff by punching him, hitting him with police sticks and kicking him.

18. Plaintiff suffered serious physical injuries, including two broken ribs, an orbital fracture and multiple contusions to his upper and lower torso.

FIRST CAUSE OF ACTION  
(Against Individual Defendants)

19. Plaintiff's first cause of action is for the violation of his rights, secured by 42 U.S.C § 1983, including the rights guaranteed under the First, Fourth and Fourteenth Amendments to the United States Constitution to be free from gratuitous and excessive force and free from retaliation for reporting incidents of misconduct to a City agency.

20. As a direct and proximate result of this abuse, Plaintiff sustained damages in an amount to be determined at trial.

SECOND CAUSE OF ACTION  
(Against All Defendants)

21. Plaintiff's second cause of action is for intentional assault and battery in violation of the laws of the State of New York.

22. By assaulting, battering and threatening Plaintiff, while acting in their capacities as DOC personnel and within the scope of their employment, the individual Defendants committed a willful and unlawful assault and battery upon Plaintiff. Defendant City, as employer of each of the individual Defendants, is responsible for their wrongdoing under the doctrine of *respondeat superior*.

23. As a direct and proximate result of this abuse, Plaintiff sustained damages in an amount to be determined at trial.

THIRD CAUSE OF ACTION  
(Against Defendant City)

24. Plaintiff's third cause of action is against Defendant City, through DOC, for permitting and tolerating a practice of coerced fighting between prisoners and for permitting and tolerating a practice of excessive use of force by DOC personnel.

25. Such practices violate Plaintiff's rights, secured by 42 U.S.C § 1983, including the rights guaranteed under the First, Fourth and Fourteenth Amendments to the United States Constitution to be free from gratuitous and excessive force and free from retaliation for reporting incidents of misconduct to a City agency.

26. As a direct and proximate result of this abuse, Plaintiff sustained damages in an amount to be determined at trial.

FOURTH CAUSE OF ACTION  
(Against Defendant City)

27. Plaintiff's fourth cause of action is against Defendant City, through DOC, for failing to properly train and discipline staff in connection with the use of injurious force.

28. Such failures violate Plaintiff's rights secured by 42 U.S.C § 1983, including the rights guaranteed under the Fourth and Fourteenth Amendments to the United States Constitution to be free from excessive force.

29. As a direct and proximate result of this abuse, Plaintiff sustained damages in an amount to be determined at trial.

Dated: January 1, 2010

s/  
Plaintiff Jonathan  
Pro Se

Use of Force Report (Nateon)

OFFICER: Nateon PRISONER: Jonathan

DATE OF INCIDENT: September 29, 2009

LOCATION: ABC Facility – Housing Area B

REPORT:

On September 29, 2009, I, Officer Nateon, was the escort officer for the ABC Facility in Housing Area B. While on break, sitting in the command room, I noticed Prisoner Jonathan refusing to obey orders of an officer by dragging his feet and not entering his cell. I decided to assist the escort officer and left the command room. When I arrived, Prisoner Jonathan lunged at me and tried to hit me with his left hand. To defend myself, I grabbed his left arm. He tackled me with his right hand causing us both to fall to the floor. At that time, the emergency team arrived and its officers were able to control Prisoner Jonathan. He was escorted out of the housing area for medical attention at the medical clinic.

OTHER OFFICERS INVOLVED: Escort Officer, Emergency Unit

INJURIES SUSTAINED BY OFFICER: None.

INJURIES SUSTAINED BY PRISONER: Bloody face.

Dated: September 30, 2009

/s  
Officer Nateon

Use of Force Report (Cruz)

OFFICER: Cruz PRISONER: Jonathan

DATE OF INCIDENT: September 29, 2009

LOCATION: ABC Facility – Housing Area B

REPORT:

On September 29, 2009, I, Officer Cruz, was the security officer for ABC Facility. While patrolling the facility, I heard noise coming from Housing Area B. When I arrived, I witnessed Officer Nateon and Prisoner Jonathan struggling on the floor. I tried to separate them. Prisoner Jonathan attempted to kick me, and I defended myself by striking him in the upper torso area. Eventually, the emergency team arrived, and Prisoner Jonathan was removed from the housing area.

OTHER OFFICERS INVOLVED: Officer Nateon, Emergency Unit

INJURIES SUSTAINED BY OFFICER: Right hand.

INJURIES SUSTAINED BY PRISONER: Upper Torso.

Dated: October 15, 2009

/s  
Officer Cruz

Amended Use of Force Report

I, Officer Cruz, was unable to file timely my Use of Force Report involving the September 29, 2009 incident with Prisoner Jonathan because I was relieved from duty for one day for an injury to my hand that occurred during that incident. When I returned to duty on October 1, 2009, I forgot to prepare my Use of Force Report.

Dated: October 21, 2009

/s  
Officer Cruz

Use of Force Report (Belling)

CAPTAIN: Belling PRISONER: Jonathan

DATE OF INCIDENT: September 29, 2009

LOCATION: ABC Facility – Housing Area B

REPORT:

On September 29, 2009, I, Captain Belling, was the captain and commanding officer for ABC Facility. While patrolling the facility, I heard Prisoner Jonathan exchange words with Officer Nateon. When I arrived at Housing Area B, I witnessed Prisoner Jonathan attempt to strike Officer Nateon. Officer Nateon tried to control him, causing them both to fall to the floor. At that time, Officer Cruz arrived to assist Officer Nateon. Prisoner Jonathan attempted to strike Officer Cruz, and Officer Cruz defended himself with one blow to the upper torso.

At that time, I noticed that another incident was occurring on the upper tier of the housing unit involving Prisoner Victor. I ran upstairs and attempted to control Prisoner Victor, who was threatening an officer. Prisoner Victor tried to assault me, but I was able to control him without incident until the emergency team arrived. The emergency team dispensed one shot of chemical agent, which took effect immediately. At this time, Prisoner Victor ceased his resistance and complied without further incident. He was escorted to the medical clinic for decontamination.

OTHER OFFICERS INVOLVED: Officer Cruz, Officer Nateon, Emergency Unit

INJURIES SUSTAINED BY OFFICER: None.

INJURIES SUSTAINED BY PRISONER: Chemical agent, upper torso.

Dated: September 30, 2009

/s  
Captain Belling

Tour Commander Report

COMMANDER: Deputy Salley PRISONER: Jonathan

DATE OF INCIDENT: September 29, 2009

LOCATION: ABC Facility – Housing Area B

REPORT:

I, Deputy Warden Salley, am the Tour Commander for ABC Facility. I have reviewed the Use of Force Reports of Officers Cruz and Nateon and Captain Belling and make the following findings and recommendations:

While being escorted back from the recreation area, Prisoner Jonathan refused to comply with the escort officer's order to return to his cell. He became agitated and aggressive. At that time, Officer Nateon, who was on scheduled break, entered the housing unit to assist the escort officer. Jonathan swung at Officer Nateon, and Officer Nateon defended himself by grabbing Jonathan's arm causing Officer Nateon to fall on top of Jonathan. Officer Cruz then arrived to assist Officer Nateon. Jonathan attacked Officer Cruz, and he defended himself properly by striking the prisoner one time. Captain Belling arrived at this time and attempted to assist the officers. At that same time, Prisoner Victor became agitated and Captain Belling left his position and went to the upper tier to assist other officers who were trying to control Victor. Any use of force as applied to prisoners Victor and Jonathan was appropriate and within the Department Directive on the Use of Force.

Eventually the emergency unit arrived, and they were able to control Jonathan. He was escorted from the housing unit to the medical clinic for care. It was determined by DOC medical personnel that Jonathan should be sent to Bellevue Emergency Center to rule out any fractures or head injuries. He was discharged from Bellevue two days later with two broken ribs, an orbital fracture and bruising on his upper torso. The injuries are consistent with Jonathan's fall and having Officer Nateon land on top of him.

I conclude that Jonathan should be disciplined for failing to comply with an order to enter his cell and for assaulting Officers Nateon and Cruz. He should be given 105 days in punitive segregation.

I further conclude that Officer Nateon should be disciplined for failing to include in his Use of Force Report that Officer Cruz was involved in this incident and that he used appropriate force to defend himself and control Jonathan. He should be given 2 days of unpaid leave.

DOC Directive on the Use of Force

DIRECTIVE:           #7930, Use of Force

DATE:                 January 1, 2000

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Pursuant to Department policy, DOC personnel are authorized to use appropriate force when necessary. Appropriate force is defined as the least injurious force necessary to control a prisoner or protect DOC personnel from injury. The least injurious force shall be proportionate to the force or threat of force used by a prisoner. Except upon threat of death or serious bodily injury, under no circumstances may DOC personnel strike a prisoner in the head or facial area.

Board of Correction Memo

TO: Executive Director  
FROM: Investigator Jones  
DATE: September 28, 2009  
RE: Arranged Fighting at ABC Facility

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As you know, the Board of Correction is organized under the City Charter. The Board monitors conditions in the City's jails, investigates serious incidents, evaluates the performance of the Department of Correction (DOC), reviews prisoner and employee grievances, and makes recommendations in critical areas of correctional planning. Our constituency includes both prisoners and DOC employees.

I recently interviewed several prisoners held at the ABC Facility concerning the allegations that Department of Correction employees are arranging fights among prisoners and betting on the outcomes. I interviewed Jonathan, a prisoner housed in Housing Area B. He confessed that he has been involved in several staff-organized fights. He said he does this because if he wins he gets extra time in the gym, more phone privileges and, sometimes, he's been given alcohol. He says there are usually 10 officers who watch these fights. He doesn't recognize all of them but knows that Officers Nateon and Cruz and Captain Belling are usually involved. He's seen the officers exchange money after a fight and he assumes they are betting on the outcome. Jonathan has been in three or four fights. He's also seen other prisoners fight, including Victor, Steven, Horatio and Eric. A week ago, he was supposed to fight Victor but he refused because they are friends.

I interviewed Victor. He had been in two fights. In one of them, he broke his wrist but he didn't seek medical attention. He said it was healing on his own. He also told me that he had refused to fight with his friend Jonathan. He's seen Jonathan fight with other inmates; Jonathan usually wins those fights.

I also interviewed Eric. At the time, he had a black-eye. He refused to tell me how he got it and said he had never heard of organized fighting between prisoners. He says that prisoners in the ABC Facility are not allowed out of their cells when another prisoner is out of his and so it would be impossible for two prisoners to fight each other

/s  
Investigator Jones

Jonathan Medical Records

Patient presents from Rikers Island and complains that he was assaulted by correction officers.

He is diagnosed with two broken ribs, an orbital fracture and contusions to the upper torso.

Medical records further indicate that patient had at least one prior broken rib that had not healed correctly.

Dated: September 30, 2009.

/s  
Sarah Netburn, M.D.

## Jonathan Deposition Transcript

I spent much of my youth in and out of the criminal justice system. By the time I was 13, I had already been arrested for a drug offense. I spent 16 months upstate in a juvenile center. That's where I met Victor. Victor and I both came from East New York; although we didn't know each other from home, we had many friends in common.

When I was released from the juvenile center, I went back to New York City and hung out with my old friends. I didn't see Victor back home but I kept up with him through friends. You never really want to see someone you know from "inside" when you're "outside."

It didn't take long for me to get picked up by the police for minor offenses: turnstile jumping, shoplifting, falsifying a \$100 check and possession of marijuana. I was in and out of Rikers Island for much of my late teens but never spent more than a few months in jail for any one offense. I hated being at Rikers and got into a lot of trouble with the correction officers (COs). I had more than 20 administrative infractions for failing to obey orders, breaking prison property and fighting with other inmates. For these infractions, I was given days in segregation. I was never rearrested for a new criminal offense.

Then, when I was 19, I was arrested, charged with burglary and sent back to Rikers Island. Because of my history with the Department, I was sent to ABC Facility – a facility where they housed people who had long infraction records like mine. This facility was different from the ones where I had been housed before. I didn't know any of the officers from my prior bids in jail, but these officers seemed harsher and more aggressive than others. I was housed in Housing Area B. The cells were single unit cells: 8 on the bottom tier and 8 on the top tier. There was a large open space in front of the 8 cells on the bottom tier, and a small balcony on the top tier. In ABC Facility, we were not allowed out of our cell except for an hour of recreation each day, which we spent alone. You were never permitted out of your cell if another prisoner was out of his. One cell had to be locked before another was opened. I was housed in cell 2, on the bottom tier.

My first day there, I heard an officer call for Victor and heard his voice respond. He was housed in cell 14, on the top tier. I could not see him but knew it was my friend from the upstate juvenile center.

In the punitive segregation unit, the officers organized fights among those of us who were locked up. Even though we were never supposed to be out of cells at the same time, the officers would crack open two cells in our unit and the guys would fight each other in the space in front of the bottom 8 cells. Guys would fight seriously and people got pretty injured. But if you won, the officers would give you extra rec time, alcohol or other privileges. I often saw officers exchanging money after a fight; it was understood that they were betting on the outcomes and that it was in the prisoner's interest to win.

I was in a couple of these fights. It was something to do, and I was a good fighter so I usually won. The guys I fought with got beat-up pretty badly but the rule was you couldn't seek medical treatment for your injuries – otherwise the medical staff would ask how you ended up out of your cell at the same time as another prisoner and were able to get into such a fight.

On September 21, my cell door cracked and I was called out for one of these fights. I jumped out of my cell ready to go but then I saw that Victor was my intended challenger. I wasn't going to get into a fight with him, and he didn't want to fight me either. We said no and went back into our cells. The three officers who were always involved in these fights started yelling at us and calling us names. These were Officer Nateon, Officer Cruz and Captain Belling. They told us that they were going to beat us up for refusing to fight each other. Later that day, I was issued an infraction for failing to obey an order – it said I refused to come out of my cell for a scheduled medical visit. That wasn't true.

About a week later, I was interviewed by Ms. Jones, an investigator with the New York City Board of Correction. She asked me a lot of questions about the organized fighting that is going on at ABC Facility. I told her that I had done it a couple of times because I got privileges for it and told her about other prisoners who had also fought. I also told her that they tried to make me fight my old friend Victor but we had refused.

The day after my interview with Ms. Jones, I was being escorted by Officer Smith after my rec hour. As I was being returned to my cell, I saw that Victor was being escorted out of his cell on his way to the gym. We were both out of our cells at the same time, which was unusual. Before I was locked into my cell, and while Victor was on his way to the stairs, Officers Nateon and Cruz and Captain Belling appeared. They were wearing leather gloves and had police batons in their hands. They started yelling at me and Victor and accusing us of disobeying orders. Officer Nateon and Cruz grabbed me and I saw Captain Belling run up the stairs toward Victor. The officers threw me to the floor and started kicking and hitting me. My hands were still cuffed behind my back from the escort back from the gym and all I could do to defend myself was to curl up in a ball. I heard other officers arrive and it felt like I was being beaten by 5 or 6 guys. I don't really know what was happening. I could also hear Victor yelling and officers screaming at him, but I couldn't see him.

At some point, the beating stopped. I was lifted up by two officers who I didn't recognize. Then, Officer Nateon sprayed me with pepper spray directly into my eyes. I was then escorted to the medical clinic and eventually taken to Bellevue Hospital where I was diagnosed with two broken ribs, an orbital fracture and bruises all over my body.

When I returned to Rikers Island I was housed in the segregation unit within the Infirmary. While there, I was served with a Notice of Disposition, which said I refused to attend an administrative hearing concerning an administrative charge against me. I had never been provided with notice of such a charge or the hearing. The notice said that I

had been found guilty of assaulting Officer Nateon. I was to serve 105 days in punitive segregation. I was, however, never criminally charged with assaulting him.

A few months later, I entered a plea on the pending burglary charges against me and was sent upstate to serve my sentence. I still haven't seen Victor.

## Correction Officer Nateon Deposition Transcript

I was graduated from George Washington High School in Washington Heights, NY. I have 18 credits in criminal justice studies from John Jay College. I was a New York City Police Officer for five years, working in a precinct in Queens. I had no disciplinary problems when I was with the NYPD. Officer Cruz entered the NYPD with me, and we both joined the New York City Department of Correction (DOC) at the same time. I've known him for more than 15 years. We socialize on occasion – retirement parties, Mets games – but not regularly.

I became a Correction Officer with DOC in 2002. Training at the Academy lasts three months. After that, you're pretty much expected to know how to handle the prisoners. Since the Academy, I have been trained on how to use a firearm, computer systems and the use of pepper spray. I have not been re-trained on the use of force, and I have not reviewed the Department Directive on the Use of Force in many years.

After the Academy, I was assigned to the women's facility at Rikers Island. I was there for three years without incident. In 2005, I was transferred to the ABC Facility. I am the escort officer for this unit, which means I escort prisoners from their cell to the law library, medical clinic or the gym. Prisoners are required to be handcuffed whenever they are escorted anywhere.

The ABC Facility houses some of the worst and most dangerous offenders. These guys don't understand how to listen to and follow commands. I've never hit a prisoner – and I've never seen any officer hit a prisoner – but I have used my pepper spray a lot of times. I've been involved in four or five use of force incidents. Most of them involved using pepper spray and the prisoner wasn't physically injured in any serious way.

In one incident, I was escorting a prisoner back from the law library. As we were walking down the hallway, he saw a friend and shouted hello. I told him not to speak to or look at other prisoners. He got angry at me and cursed at me. When I told him that that was not appropriate behavior, he swung at me. I grabbed his arm and carefully brought him to the floor. He resisted and, as a result, he hit his head on the floor. He had to get 6 stitches for a cut along his eyebrow. I was not disciplined for this incident. My conduct was determined to be appropriate and consistent with the Department's policy.

On another occasion, I was moving a prisoner from one cell to another. When I opened his cell gate, he looked at me in a menacing way and refused to come out. I ordered him to do so but he wouldn't listen. Eventually, I called for an emergency team to remove him. When I walked into the cell, I grabbed the prisoner's arm in order to cuff him. After he was cuffed, I left and the emergency team took him out. I later learned that the prisoner's arm had been broken. I wasn't with him for the escort so I don't know how that happened. I never hit him in the arm. I was investigated for this use of force because I was the person who cuffed him and the emergency team said they didn't use any force with him. In the end, the investigator agreed with me, and I wasn't disciplined.

I was, however, sued by this prisoner for allegedly breaking his arm by striking him with a stick. I think the case settled. I was never deposed.

On September 29, 2009, I was the escort officer for Housing Area B at the ABC Facility. I was on break and sitting in the command room where I could see prisoners returning from the gym to the housing area and could watch the housing cells. I saw Jonathan being returned from the gym that day and noticed that he was more agitated than normal. Jonathan is known to be an aggressive prisoner and so we watch him closely. I noticed that he was dragging his feet and causing the other escort officer to push him along. I decided to come down to the housing area to see if I could assist. As soon as I arrived, Jonathan swung at me with his left hand. I caught his hand before he made contact but he tackled me with his right hand causing us both to fall to the floor. I think I fell on top of him. The escort officer – who had left the housing unit and was now in the command station – pulled the alarm and the emergency team arrived and subdued Jonathan. I didn't see any officer hit Jonathan. When he was picked up, his face was pretty bloody and he was complaining that his chest hurt. I left to clean myself up and he was taken to the medical clinic. I don't know if he was taken the hospital or not.

Two weeks later, I was interviewed by someone from the Investigations Division. I told them the same story I'm telling you. I didn't hit Jonathan, but he attacked me. I don't know how he got his injuries; I guess it was from when he tackled me and I fell on top of him. The investigator also asked me whether prisoners were being permitted to fight each other for sport and whether officers were betting on this. He asked about three different incidents where prisoners appeared to have suffered injuries that were unexplained. I told him that I didn't know anything about this.

## Correction Officer Cruz Deposition Transcript

I grew up in a rough neighborhood in the Bronx. A lot of my friends – and my brother – got in trouble with the law and did time upstate. When I was a teenager, I got into a lot of fights with other kids. A few times, I was picked up by the police and held in the precinct but no charges were ever filed against me.

As a kid, I was really interested in boxing and trained pretty seriously. But after a while, I realized that I couldn't make a living doing that, and so I got my GED. I had a few odd jobs but nothing permanent. I applied to be a police officer with the NYPD three times before passing the exam. I joined the force in 2002 and immediately became friends with Officer Nateon. We both met our wives around the same time and used to go on double dates a lot. Our wives are still really good friends, and our kids go to the same school and play in the same baseball league. I see Office Nateon a lot outside of work.

As a young police officer, you're assigned to foot patrol for the first few years. I hated walking around these neighborhoods. It was exhausting and I never trusted the kids hanging out on the street. I knew what they were up to from my own experiences in the Bronx. I had a bunch of Civilian Complaint Review Board (CCRB) complaints filed against me. All of them were unsubstantiated, except one, where the CCRB found that I had used profanity against a woman. I don't recall that incident.

In 2005, I decided to apply to the New York City Department of Correction. There's no foot patrol at Rikers Island. I convinced Officer Nateon to come over with me. I was first assigned to the unit that housed the youth offenders. These prisoners are very difficult to control. I was involved in several use of force incidents at that facility but never disciplined for any of them.

Once, I was escorting a prisoner and, out of the blue, he head-butted me. I tried to place him on the wall but he kept resisting. He tried to hit me and, to defend myself, I struck him in the face, causing a tooth to fall out. The inmate fell to the floor and was handcuffed and escorted away without further incident. My supervisor, who reviewed this incident, concluded that the use of force was necessary to defend myself and within the Department's protocol.

When I was transferred to ABC Facility, I found that these prisoners were even more difficult than the youth prisoners. I had several incidents with prisoners attacking me where I had to defend myself. One time, I was escorting a prisoner back to his cell from the law library. He was angry because he had just lost his criminal appeal and didn't want to leave the library yet. On the return to the housing unit, he was using inappropriate language and talking about how the NYPD officers were all corrupt. I told him to stop talking, and he turned around and spit in my face. The prisoner then tripped and, while falling, hit his head on the wall. He had to be transferred to Bellevue Hospital for stitches to his lip. Following an investigation of the incident, I was disciplined for not using the proper escort hold, which allowed this prisoner to trip.

I don't know much about how the incident with Jonathan got started. I was patrolling the facility when I heard a scuffle coming from the housing unit. When I arrived, I found Jonathan and Officer Nateon on the floor fighting. I tried to separate them. Jonathan then tried to kick me, and I defended myself by striking him in the upper torso area. Eventually the emergency unit appeared and took Jonathan away. That same day, there was another incident involving a prisoner named Victor where he attacked Captain Belling. It may have happened at the same time; I don't recall.

I ended up taking one day of medical leave because I hurt my right hand during this incident.

## Captain Belling Deposition Transcript

I have been employed by the New York City Department of Correction for 15 years. Over those years, I have had many use of force incidents involving prisoners who do not follow orders. I can't remember any of them with any detail. I have been twice disciplined for a violation of the Department's Directive on appropriate use of force: one time I lost 3 days of pay; another time I lost 5 days. I don't remember what happened in these incidents. I have also been disciplined for allegedly preparing false reports.

On September 29, I heard Jonathan exchanging words with an officer. When I arrived in Housing Area B, I saw Jonathan swing at Officer Nateon. Officer Nateon tried to control him and they both fell to the floor. Officer Cruz arrived on the scene and tried to separate Jonathan and Officer Nateon. Jonathan tried to hit Officer Cruz, and Officer Cruz defended himself by striking Jonathan in the upper torso.

While all this was happening, I heard more screaming coming from the top tier of the housing unit. I saw a prisoner named Victor threaten the escort officer. I ran upstairs and tried to restrain Victor but he resisted. He tried to punch me, but I managed to grab his right hand before he made contact with me. We struggled and fell to the floor. Eventually the emergency team arrived. They sprayed Victor with pepper spray, causing him to release his hold on me. He was then detained and handcuffed and taken to the medical clinic to be decontaminated. I do not recall what he looked like when he left the housing area. I didn't see Jonathan being escorted out and haven't seen him since.

I was interviewed by the Investigations Division. I explained to them that Jonathan and Victor are known violent offenders, and that Officers Cruz and Nateon and I did what was appropriate to restrain and control them. The investigators also asked me whether I had ever heard that officers were arranging fights between prisoners and betting on the outcome. I told them that that was not possible because prisoners in the ABC Facility are not permitted out of their cells at the same time.

### JURY CHARGE

I will now instruct you on the substantive law to be applied to this case.

The plaintiff in this case is Jonathan, who was, at the relevant time, incarcerated at ABC Facility, a New York City jail. He contends that Defendants, Correction Officers Nateon and Cruz, and Captain Belling, used excessive force against him on September 29, 2009, in retaliation for refusing to fight another prisoner and for reporting to the Board of Correction the practice by DOC personnel of organized prisoner-on-prisoner fights. The Plaintiff claims that the Defendants' actions and omissions violated his rights under the First, Fourth and Fourteenth Amendments to the United States Constitution to be free from excessive and injurious force and free from retaliation for reporting incidents of misconduct. The Defendants contend that the force they used was applied in a good-faith effort to maintain or restore discipline.

### JURY CHARGE ON IMPEACHMENT BY FELONY CONVICTION:

You have heard the testimony of a witness – the Plaintiff – who was previously convicted of a crime punishable by more than one year in jail. This prior conviction was put into evidence only for you to consider in evaluating the witness's credibility. You may consider the fact that the witness who testified is a convicted felon in deciding how much of his testimony to accept and what weight, if any, it should be given.

### JURY CHARGE ON CORRECTION OFFICERS' AND PRISONERS' TESTIMONY:

You have heard testimony of correction officers and prisoners. The fact that a witness is employed by the City or incarcerated does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of any other witness. It is your decision, after reviewing all the evidence, whether to accept

or reject the testimony of the witness and to give to that testimony whatever weight you find it deserves.

JURY CHARGE ON EXCESSIVE FORCE CLAIM:

We now turn to instructions describing one of the claims the Plaintiff here is bringing, which is a claim of excessive force. Specifically, the Plaintiff in this case, Jonathan, claims that on September 29, 2009, while he was incarcerated at ABC Facility, he was subjected to excessive force by one or more of the Defendants here, Nateon, Cruz and Belling.

In the context of this case, the Plaintiff, in order to prevail on his claim against a given Defendant, must prove by a preponderance of the credible evidence each of three elements:

first, that on September 29, 2009, the Defendant you are considering used or caused another person to use excessive force against the Plaintiff;

second, that the Defendant did so intentionally or recklessly;

and third, that the excessive force proximately caused injury to the Plaintiff.

As to the first element, bear in mind that a corrections officer has the right and duty to use such reasonable force as is necessary under the circumstances to maintain order and assure compliance with prison regulations. Accordingly, in this context, excessive force is force that exceeds what would be reasonable for a corrections officer to use for such purposes under all the facts and circumstances presented by the situation.

As to the second element, a Defendant who uses or causes another to use excessive force is liable only if he does so either with an actual intent to use excessive

force or does so “recklessly,” that is, with conscious disregard of the high probability that excessive force would be used.

As to the third element, an act is a proximate cause of an injury if it was a substantial factor in bringing about that injury and if the injury was a reasonably foreseeable consequence of the Defendant’s act.

If, as to a given Defendant, Plaintiff proves all three of these elements by a preponderance of the credible evidence, you should record on your verdict form that you find that Defendant “Liable.” If, as to a given Defendant, Plaintiff fails to prove any or all of these elements, you should record on your verdict form that you find that Defendant “Not Liable.”

JURY CHARGE ON FIRST AMENDMENT RETALIATION CLAIM:

The First Amendment protects prisoners from retaliation for engaging in constitutionally protected speech. It protects the right of prisoners to submit complaints about and grievances regarding prison conditions.

In addition to the excessive force claim I just discussed, Plaintiff claims that Defendants violated his First Amendment rights by retaliating against him for reporting incidents of misconduct. Specifically, Plaintiff claims that Defendants assaulted him in retaliation for speaking to the Board of Correction investigator about forced fighting between prisoners. He claims that the Individual Defendants assaulted him for his reporting.

To establish that the Defendants acted to deprive Plaintiff of his right to free speech, Plaintiff must prove that he complained about DOC personnel misconduct and that Defendants took adverse action against him in retaliation because he had done so. In

other words, it would not be sufficient for Plaintiff to establish that Defendants took adverse action against him. In order to prevail on his retaliation claims, he must show by a preponderance of the evidence both that one or all of the Defendants took the adverse action that he claims took place – namely, the assault – and that they did so, at least in part, because he had exercised his constitutional right to complain about prison conditions.

JURY CHARGE ON OFFICIAL POLICY OR CUSTOM (MONELL) CLAIM:

You are also asked to determine whether the City of New York is liable under federal law for the acts of the individual Defendants in this case. You will recall that the federal law here is 42 U.S.C. § 1983, which I explained to you a little earlier. To prove the City liable under § 1983, Plaintiff must establish, by a preponderance of the evidence, that the action of the employee or employees that deprived Plaintiff of his federal right was the result of either an “official policy” of the municipality or a governmental custom, even though such a custom has not received formal approval through the body’s official decision-making channels.

Whether an official practice or custom exists is a question of fact for you to determine. A practice or custom is a persistent, widespread course of conduct by municipal employees that has become a traditional way of carrying out policy, and has acquired the force of law, even though the municipality has not formally adopted or announced the custom.

Moreover, an “official policy” may be inferred from informal acts or omissions of supervisory municipal officials. Thus, if you find: (1) that supervisory officials in the New York City Department of Correction by their actions or omissions impliedly or

tacitly authorized, approved, or encouraged the type of conduct that Plaintiff was subjected to; and (2) that those actions or omissions caused the injury that occurred in this case, you must find the City liable.

In making your determination, you must consider whether supervisors had knowledge of a *pattern* of constitutionally offensive acts by their subordinates and acted or failed to act in response to that pattern so as to cause the harm to Plaintiff. While a single incident of illegality is not enough to constitute a pattern, you may find that the nature of the incidents that occurred, and the extent to which they occurred, were enough to constitute a pattern such that failure to take remedial steps warrants a finding of liability.

To determine whether a pattern existed, you may look both to whether a pattern of unlawful conduct occurred with respect to the Plaintiff in this case, as well as to whether a pattern of unlawful conduct occurred with respect to other corrections officers not parties to this case. However, to find the City liable, you must find that the supervisor's failure to take remedial measures in the face of an unconstitutional pattern of conduct proximately caused the alleged harm. Proximate cause here should be determined by the same standards on which I instructed you earlier.