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INTRODUCTION

Avion Lawson was confined at Martin Correction Institution when he was chased and brutally stabbed by two other inmates with homemade knives.[1] Lawson immediately approached two officers to seek medical attention.[2] The officers told Lawson: "You're okay, you're not bleeding enough, they only look like little gashes. Maybe next time you'll think about disrespecting our staff and filing your grievances, then we'll help. Other than that, throw some dirt on it and go to the house."[3] The horrific incident occurred just over two weeks after Lawson had twice met with various prison officials for his progress interviews and after the officers threatened Lawson for filing grievances and complaints.[4] For instance, during the second progress interview, one officer told Lawson that he

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1. Lawson v. McGee, No. 19-81526-CV-RUIZ, 2020 WL 5822266, at *2 (S.D. Fla. Aug. 28, 2020).
2. *Id.*
3. *Id.*
4. *Id.*

would have other inmates "beat and stab him to death."[5] These threats put Lawson in a continuous state of fear of the correctional officers and his fellow inmates.[6]

The threats did not end there.[7] Following the tragic incident that left Lawson fearing for his life, threats by officials began to resurface almost immediately.[8] Prison officials told Lawson that if he continued to file grievances against the correctional officers, "[it] won't be pretty," which indicated future harm would occur if Lawson failed to adhere to what the officers wanted.[9] The ferocious attack on Lawson, and the threats that followed, caused Lawson to suffer from "aching, panic attacks, sleep deprivation, uncontrollable shaking, nightmares, [and] headaches."[10]

Lawson filed a complaint under 42 U.S.C. § 1983, arguing that the officers' treatment was unconstitutional under the Eighth Amendment.[11] Unfortunately, the Martin Correction Institute is in a jurisdiction that has yet to recognize any verbal threat, regardless of the seriousness of the threat, as an Eighth Amendment violation.[12] Like many prisoners who are continuously threatened by correctional officers, Lawson's complaint will likely be dismissed, and he will not have the opportunity to challenge the treatment he faced from the prison officials in court.[13]

Although the Constitution "does not mandate comfortable prisons,"[14] it also does not permit inhumane ones.[15] This Comment will discuss a current circuit split on whether verbal threats of physical harm made by prison officials can form a basis for an Eighth Amendment claim. Specifically, this Comment will focus on why some courts believe such threats can rise to the level of a

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5. *Id.* at *5.
6. *See generally id.* at *2.
7. *See id.*
8. *Id.*
9. *Id.*
10. *Id.* at *3.
11. *Id.* at *1.
12. *See id* at *1, *9; *see also* Hernandez v. Fla. Dep't of Corr., 281 F. App'x 862, 866 (11th Cir. 2008) (holding "verbal abuse alone is insufficient to state a constitutional claim").
13. *See generally Lawson*, 2020 WL 5822266, at *13.
14. Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
15. *See* Helling v. McKinney, 509 U.S. 25, 30 (1993).

constitutional violation while others do not.[16] This Comment will argue that prison officials who make threats of physical violence towards prisoners can violate a prisoner's Eighth Amendment rights, because some threats can form the basis of an injury sufficiently serious to constitute cruel and unusual punishment.

To address these Eighth Amendment claims, courts should enact a four-factor analysis for determining whether a threat amounts to a constitutional violation: (1) repetitiveness of the threat; (2) credibility of the threat; (3) subject matter of the threat; and (4) context surrounding the threat. The foregoing factors will help courts determine which threats made by a prison official constitute cruel and unusual punishment and which threats fail to meet the stringent requirements needed to prevail on an Eighth Amendment claim.

Part I of this Comment will paint a general background of the Eighth Amendment in the context of prisoners' rights and will explain how the Supreme Court has recognized and analyzed various Eighth Amendment claims made by prisoners. In Part II, this Comment will examine the current circuit split and explain why some courts believe threats can cause a serious risk to a prisoner, while others believe that no threat—regardless of how serious—can ever rise to a constitutional violation. Part III will argue that the courts that recognize a constitutional violation are correct because prison officials act with the deliberate indifference to a substantial risk of serious harm needed for cruel and unusual punishment when making threats of physical violence. This Part will further analyze the various psychological and physical harms an inmate may experience due to threats of physical violence, such as: emotional distress, gastrointestinal problems, cardiovascular damage, headaches, and chronic pain. Lastly, Part IV will propose a four-factor analysis for courts to adopt to carefully determine which threats meet the

16. In addition to the Eighth and D.C. Circuits, the Fourth Circuit has recognized that verbal threats of physical violence may rise to an Eighth Amendment violation. *See, e.g.*, Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir. 1978) ("A threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts."). Alternatively, some circuits, such as the Fifth Circuit, join the Ninth and Eleventh Circuits by finding "mere words" or "idle threats" will never rise to a Constitutional violation. *See, e.g.*, Lamar v. Steele, 693 F.2d 559 (5th Cir. 1982).

threshold for a constitutional violation. This Comment will conclude that it is critical for the Supreme Court to find that threats of physical violence are Eighth Amendment violations, because doing so would not only permit inmates to bring suits challenging mistreatment but will also create clearly established law to prevent qualified immunity from barring recovery.

I. BACKGROUND OF THE EIGHTH AMENDMENT AS APPLIED TO PRISONER CLAIMS

The Eighth Amendment of the United States Constitution prohibits, in relevant part, "cruel and unusual punishments."[17] Courts are aware that "[r]outine discomfort is a part of the penalty that criminal offenders must pay, so only extreme conditions that deprive inmates of a 'civilized measure of life's necessitates' violate the Eighth Amendment."[18] Claims of cruel and unusual punishment generally relate either to excessive force or conditions of confinement.[19] Courts have unanimously considered the issue of threats as implicating conditions of confinement rather than excessive force.[20] Therefore, this Comment will likewise adopt that approach and employ its analytical framework.

In the twentieth century, the Supreme Court decided three cases regarding prison conditions that developed the current

17. U.S. CONST. amend. VIII.

18. Hudson v. McMillian, 503 U.S. 1, 9 (1992).

19. *See generally* Irving v. Dormire, 519 F.3d 441, 446 (8th Cir. 1992); *see also Hudson,* 503 U.S. at 9. (citing Whitley v. Albers, 457 U.S. 320, 327 (1986). In *Hudson*, a prisoner alleged his Eighth Amendment rights were violated after he received a physical beating from a state correctional officer. *Hudson*, 503 U.S. at 4. Hudson suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate. *Id.* The Court held that use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. *See id.* at 9. Excessive force claims require a showing of "unnecessary and wanton infliction of pain." *Id.* at 5 (quoting *Whitley*. 457 U.S. at 319). Courts recognize that force is sometimes required in prison, so prison officials will only be liable if they are unjustified in using force or they are using it maliciously and sadistically. *Id.* at 12 (Stevens, J., concurring (citing *Whitley*, 457 U.S. at 320–21)). In other words, prison officials must be justified to use the force and cannot use "force greater than de minimis, or any use of force that is 'repugnant to the conscience of mankind.'" *Id.* at 9–10 (quoting *Whitley*, 457 U.S. at 327).

20. *See id.* at 1; *see also Irving*, 519 F.3d 441.

standard necessary to prevail on an Eighth Amendment claim.[21] Starting with *Wilson v. Seiter* in 1991, the Supreme Court held that, in order to prevail on an Eighth Amendment claim, a prisoner must prove that a prison official acted with both a subjective and objective element of culpability.[22] The Court held that an inmate is required to show that a prison official acted with "deliberate indifference" in order to meet the subjective element of an Eighth Amendment claim.[23]

In *Helling v. McKinney*, the Supreme Court recognized that a plaintiff need not have a current injury, and just a showing of a potential future injury may be deemed sufficiently substantial to satisfy the objective element.[24] Objectively speaking, an inmate must demonstrate the deprivation of rights was or will be a "sufficiently serious" injury to a reasonable person.[25] So long as the plaintiff can demonstrate that an injury was or will be sufficiently substantial to a reasonable person, the plaintiff will satisfy the objective element.[26]

Lastly, in *Farmer v. Brennan* in 1994, the Supreme Court held that a prison official is not liable "unless the official knows of and disregards an excessive risk to inmate health or safety."[27] *Farmer* officially set out the deliberate indifference standard used today which requires a showing that the defendant was aware of a

21. *See generally* Wilson v. Seiter, 501 U.S. 294 (1991); Helling v. McKinney, 509 U.S. 25 (1993); Farmer v. Brennan, 511 U.S. 825 (1994).

22. *Wilson*, 501 U.S. at 298.

23. *Id.* at 303. Justice Powell concluded: "Whether one characterizes the treatment received by [the prisoner] as inhuman conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *Id.*

24. *See Helling*, 509 U.S. at 35. In *Helling*, the inmate sued prison officials alleging that his exposure to environmental tobacco smoke posted an unreasonable risk to his heath which arose to the level of cruel and unusual punishment. *Id.* at 28. The Court held "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* at 33.

25. *See id.* at 34.

26. *See id.*

27. Farmer v. Brennan, 511 U.S. 825, 837 (1994); *see also* Brenna Helppie-Schmieder, Note, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Health Hazards?* 110 NW. L. REV. 647, 657–58 (2016).

substantial risk of a serious harm and that such defendant drew from the inference by acting upon it.[28]

Although the Supreme Court has not yet ruled on whether threats of physical violence rise to an Eighth Amendment violation, the circuits that have ruled on the issue are split.[29] Six have held that verbal threats alone are insufficient to state a claim for cruel and unusual punishment because they believe no threat—regardless how serious—can cause a substantial risk of harm to an inmate which is required to meet the objective element of an Eighth Amendment claim.[30] On the other hand, three circuits—the Eighth, Fourth and D.C.—have recognized that some verbal threats can rise to a constitutional violation.[31]

Courts are divided on the issue, and until the Supreme Court explicitly takes a stance on the issue, prisoners will struggle to overcome qualified immunity and as a result, will face greater obstacles in recovering from their injuries.[32] In order for inmates to be able to bring suit, the Supreme Court must first take the issue up and find threats of physical violence may constitute an Eighth Amendment claim.[33] Without the Supreme Court ruling in favor of recognizing a constitutional violation, many prisoners in the United

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28. *See Farmer,* 511 U.S. at 837.

29. The First and Tenth Circuit have yet to take a stance on the issue.

30. The Second, Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have all held that mere verbal threats are never enough to constitute an Eighth Amendment violation. *See* Salahuddin v. Harris No. 82 Civ. 8527 1986 WL 9791, at *2 (S.D.N.Y 1986) (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1973)); Maclean v. Secor, 876 F.Supp. 695, 697 (E.D. Pa. 1995); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987); Evans v Wilson, 12 F.3d 1100 (7th Cir. 1993); Morgan v. Stansberry, 2019 No.:1:18-CV-256 2019 WL 6742915, at *9 (E.D. Tenn. 2019) (citing Ivey v. Wilson, 832 F.2d 950 (6th Cir. 1987)); Bender v. Brumley, 1 F.3d 271, 274 n. 4 (5th Cir. 1993).

31. *See* Irving v. Dormire, 519 F.3d 441, 448–49; *see also* Chandler v. D.C. Dept. of Corr., 145 F.3d 1355, 1360–61 (D.C. Cir. 1998).

32. Qualified immunity grants government officials performing governmental functions immunity from civil suits. In order to prevent a governmental official from being shielded by qualified immunity, a plaintiff must show the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In this context, a reasonable person in a prison officials' situation may not be aware of a clearly established law prohibiting the use of verbal threats of physical violence because the Supreme Court has yet to take a stance on the issue. *Id.*

33. *See generally id.*

States will be barred from recovery.[34] Moreover, until the Supreme Court holds the threat of physical violence is a constitutional violation, prisoners will face greater obstacles in recovering from their injuries because the lack of clearly established law will permit officers to claim qualified immunity.

II. THE CURRENT CIRCUIT SPLIT

A. *Circuits That Have Recognized Threats of Physical Harm as Eighth Amendment Violations*

There are currently three circuits that have recognized constitutional violations regarding the use of threats of physical violence.[35] First, the Eighth Circuit recognizes that some threats of physical harm made by prison officials can form the basis of an Eighth Amendment violation.[36] In *Irving v. Dormire*, the defendant prison officials offered other inmates cigarettes and fifty dollars to assault Irving over a period of several months.[37] In addition, the prison officials directly threatened to kill Irving or "have him killed," telling Irving they would "get him sooner or later," and that they wanted him dead.[38] In this case, the defendants relied on a prior Eighth Circuit case, *Hopson v. Fredrickson*, arguing that verbal threats are insufficient to violate the Constitution.[39] The prison

34. *Id.*

35. *Id.*

36. *Irving*, 519 F.3d at 449.

37. *Id.* at 445. The prison officials also opened Irving's cell door allowing other inmates to attack Irving. *Id.* The attack resulted in an injured jaw and nose causing breathing problems for nearly two months after. *Id.* The Court held that "Hyer and Neff not only failed to take reasonable measures to guarantee Irving's safety as required by the Eighth Amendment, but they also intentionally brought danger to him." *Id.* at 447 (citation omitted).

38. *Id.* at 445. Irving alleged various instances or threats made by prison officials. For example, the officer's alleged conduct in threatening Irving with a can of pepper spray failed to rise to the level of being objectively credible. *Id.* at 444.

39. *Id.* at 448. In *Hopson*, the Eighth Circuit found no Constitutional violation when prison offices seated in the front seat threatened to knock out the prisoner in the back seat if he did not start talking. *Id.* (citing Hopson v. Fredrickson, 961 F.2d 1374, 1378 (8th Cir. 1992)). The Court explained "[t]he officers did not threaten Hopson's life, nor did they raise any fist or weapon to Hopson or otherwise take any action to make the threat seem credible." *Id.* at 449 (quoting *Hopson*, 961 F.2d at 1378–79).

officials failed to recognize that the Eighth Circuit has made an exception to this general rule when a state official has acted in a "brutal and wanton act of cruelty" even without any physical harm done.[40]

The Court explained that Irving's allegations clearly satisfied the subjective element because "no legitimate penological purpose could have been served by defendants' conduct, and their actions toward Irving demonstrated a state of mind that was not merely deliberately indifferent, but also sadistic and malicious."[41] The Court focused on the fact that the threats here were ongoing in nature and were coupled with affirmative attempts to follow through with the alleged threats.[42] The number of threats made "stronger confirmations of the threats' credibility."[43] Irving was left confined in prison with a constant fear of violence and a risk of serious harm to his future health.[44] Thus, the actions made by the prison officials were sufficiently serious to implicate the Eighth Amendment given their ongoing nature and the concrete affirmative efforts to persuade other inmates to assault Irving.[45]

In addition, the Fourth Circuit has joined the Eighth Circuit in recognizing that a verbal threat may be sufficient for an Eighth Amendment violation.[46] In *Hudspeth v. Figgins*, prison officials threatened an inmate, Hudspeth, by telling him that "they [would] pay five thousand dollars to an officer to shoot [him] and make it

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40. *Id.* at 448 (citing Hopson, 861 F.2d 1378). In *Burton v. Livingston*, a prison official pointed a gun at the prisoner's head and told him to run as an excuse to shoot Burton. *Id.* (citing Burton v. Livingston, 791 F.2d 97, 99 (8th Cir. 1986)). The *Hopson* Court recognized this as an Eighth Amendment violation noting that "a prisoner retains at least the right to be free from the terror of instant and unexpected death at the whim of his . . . custodians." *Id.* (quoting *Burton*, 791 F.2d at 100).

41. *Id.* at 446. Moreover, the defendants here had previously made three unsuccessful offers of payments to have other inmates assault Irving, armed an inmate to assault Irving, and even labeled Irving a "snitch" to encourage others to assault him. *Id.* at 449.

42. *Id.*

43. *Id.*

44. *Id.* at 449–50.

45. *Id.*

46. *See, e.g.,* Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir.1978) (holding that "[a] threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts.").

look like an accident."[47] When Hudspeth sought legal recourse, the officials retaliated by moving him to a different work assignment, which subjected him to greater risk of physical harm due to his hearing impairment.[48] The Court noted that, insofar as Hudspeth was indeed fearful for his life, the officials' threat implicated the Eighth Amendment.[49]

Lastly, in addition to the Eighth and Fourth Circuit, the D.C. Circuit has held that even a single threat of physical harm, if sufficiently serious, can be enough to give rise to an Eighth Amendment violation.[50] In *Chandler v. D.C. Department of Corrections*, the Court held that an allegation of a single death threat made by a guard to an inmate without any further physical harm, can rise to an Eighth Amendment violation.[51] The inmate, Chandler, alleged that the prison official "made a threat against [his] life."[52] The complaint alleged that the prison official's threat had caused Chandler "psychological damage," which led to nightmares accompanied by waking up in a "frantic sweat."[53]

The Court in *Chandler* looked to *Hudson v. McMillian* and noted that "verbal threats, without more, may be sufficient to state a cause of action under the Eighth Amendment."[54] In *Hudson*, Justice Blackmun observed:

> It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment . . . [T]he Eighth Amendment prohibits the unnecessary and wanton infliction of "pain," rather than "injury." . . . "Pain" in its ordinary meaning surely includes a notion of psychological harm.[55]

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47. *Id.* at 1347.
48. *See id.*
49. *Id.* at 1348.
50. *See* Chandler v. D.C. Dept. of Corr., 145 F.3d 1355, 1361 (D.C. Cir. 1998).
51. *Id.*
52. *Id.* at 1359.
53. *Id.*
54. *Id.* at 1360.
55. *Id.* (citing Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring)).

In *Chandler*, the prison official's threats led Chandler to believe his life was at risk because the prison official had the capability of carrying out the threat.[56] Thus, the D.C. Circuit recognized that a verbal threat "accompanied by conduct supporting the credibility of the threat" could also rise to the level of an Eighth Amendment violation.[57]

B. *Circuits That Have Failed to Recognize Threats of Physical Harm as Eighth Amendment Violations*

On the other hand, the Ninth Circuit has held that no threat rises to an Eighth Amendment violation. For example, in *Gaut v. Sunn*, a prisoner alleged that prison guards denied him access to medical care, severely beat him, and threatened to physically harm him if he sought legal redress for the beating.[58] The Court held the beatings constituted a § 1983 claim, but the threat did not, and concluded that "we find no case that squarely holds a threat to do an act prohibited by the Constitution is equivalent to doing the act itself."[59] Thus, the Ninth Circuit held that verbal threats alone can never rise to an Eighth Amendment violation.[60]

Further, in *Ferguson v. Pagati*, a district court within the Ninth Circuit found that a correctional officer's threat to have an inmate physically harmed failed to rise to the level of a viable Eighth Amendment violation.[61] The inmate alleged that the correctional officer verbally threatened him with physical violence while he was seeking medical care.[62] After receiving medical care due to "severe chest pains and congestive heart failure," the defendant "began to shout threats of physical violence and threats to physically harm [the inmate]."[63] The prisoner contended that the threat

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56. *Id.* at 1361.

57. *Id.*

58. Gaut v. Sunn, 810 F.2d 923, 924–25 (9th Cir. 1987). The Court looked to Hawaiian state law in guiding their holding. The Court explained that under Hawaiian law, mere threats may not state a cause of action of an Eighth Amendment violation. *Id.* at 925.

59. *Id.*

60. *See* Furguson v. Pagati, No. CV 12-00653, 2013 WL 3989426, at *4 (C.D. Cal. Aug. 1, 2013). *See generally Gaut*, 810 F.2d. 923.

61. *Ferguson*, 2013 WL 3989426 at *2.

62. *Id.*

63. *Id.* at *4.

caused him "severe emotional distress and aggravt[ed] his vulnerable medical condition."[64] The Court reasoned that the prisoner did not establish an Eighth Amendment violation because he only alleged a single verbal threat with no indications that the threat would be acted upon by the prison officials.[65] Moreover, the court noted that nowhere in the complaint did the prisoner allege that the threats made were unusually harsh for a prison setting.[66] The court further reasoned that "it trivialized the [E]ighth [A]mendment to believe a threat constitutes a constitutional wrong."[67]

Like the Ninth Circuit, the Eleventh Circuit has also found that threats alone are insufficient to state a constitutional claim.[68] In *Hernandez v. Florida Department of Corrections*, the inmate, Hernandez, alleged that correctional officers verbally threatened him with physical violence.[69] The court held that Hernandez's allegations of threats made by prison officials failed to state a claim because the prison officials never actually carried out those threats.[70] Therefore, the Eleventh Circuit affirmed the lower court's dismissal of the claim reasoning that because the prison officials never acted upon the threats, no harm had been done.[71]

Lastly, in a district court case within the Eleventh Circuit, *Majors v. Clemmons*, a prisoner brought suit against the warden of Santa Rosa Correctional Institution, alleging a violation of his Eighth Amendment rights, the prisoner purportedly received homophobic threats of physical violence from other prisoners and prison

64. *Id.* at *2.

65. *Id.* at *5.

66. *Id.*

67. *Id.* at *4 (citing Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (finding a prisoner's claim against prison officials who threatened physical violence not a sufficient deprivation warranting protection by the Eighth Amendment); *see also* Corales v. Bennett, 567 F.3d 554, 564–65 (9th Cir. 2009) (upholding Gaut's holding that threats cannot demonstrate constitutional deprivation).

68. *See* Hernandez v. Fla. Dep't. of Corr., 281 F. App'x 862, 866 (11th Cir. 2008); *see also* Edwards v. Gilbert, 867 F.2d 1271, 1273–74 n.1 (11th Cir. 1989).

69. *Hernandez*, 281 F. App'x at 866.

70. *Id.* (citing *Edwards*, 867 F.2d at 1274 n.1 (rejecting a claim that prison officials "violated their duty of protection or deprived the petitioner of his constitutional rights" based on threats from adult inmates, even if the threats were distressing)).

71. *Id.*

officials.[72] The court held that claims of threats of physical violence made by prison officials were insufficient because "derogatory, demeaning, profane, threatening, or abusive comments made by an officer to an inmate, no matter how repugnant or unprofessional, do not rise to the level of a constitutional violation," and that threats alone do not cause actual, recognizable harm.[73] Thus, the Eleventh Circuit has consistently held that a threat alone—without physical harm—does not provide a basis for a cognizable Eighth Amendment claim.

In contrast to the Ninth and Eleventh Circuits, this Comment argues that verbal threats of physical harm can result in a substantial risk of not only physical harm, but psychological harm as well. Courts should recognize verbal threats of physical harm to help prevent a substantial risk of serious harm from being disregarded.

III. A VERBAL THREAT OF PHYSICAL HARM CAN RISE TO AN EIGHTH AMENDMENT VIOLATION

A. *Threats From Prison Officials May Create a Substantial Risk of Harm*

A prison official acts with deliberate indifference when he knows that his action will create a *substantial risk of serious harm* and he disregards that risk.[74] Not only can threats lead to physical harm, but such threats can also lead to psychological harm.[75] There is no dispute that being incarcerated does not take away an inmate's physical and psychological needs and protections.[76]

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72. Majors v. Clemmons, No. 3:19-cv-05051, 2020 WL 5775817, at *1 (N.D. Fla. Aug. 20, 2020). Although the defendant failed to address the threats he made against the plaintiff in the motion to dismiss, the court granted the defendant's motion to dismiss for failure to state a claim. The court noted that even if the plaintiff tried to bring suit for the prison officials' threats again, that claim would again be dismissed. *Id.* at *5.

73. *Id.*

74. Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st. Cir. 2002) (citing Farmer v. Brennan, 511 U.S.825, 835–40 (1994)).

75. Jens Modvig, *Violence, Sexual Abuse and Torture in Prisons*, *in* PRISONS AND HEALTH, WORLD HEALTH ORG. 19, 19 (Stefan Enggist, Lars Møller, Gauden Galea & Caroline Udesen eds., 2014).

76. *See id.*

1. Physical Injury

The use of verbal threats of physical harm can lead an inmate to experience a variety of physical injuries. The anticipation of physical harm in the face of a threat can trigger physical reactions.[77] For example, when an individual is faced with fear, one may experience an increased heartrate.[78] An individual may also face chronic pain.[79] Chronic pain can be defined as "prolonged physical pain that lasts for longer than the natural healing process should allow."[80] The use of verbal threats of physical violence may lead to an inmate experiencing trauma derived from living in a constant fear of the prison official carrying out the threats of physical violence.

Furthermore, emotional distress can cause irritable bowel syndrome, headaches, cardiovascular damage, gastrointestinal problems, accelerated ageing and can even lead to premature death.[81] When an individual experiences a traumatic event, "the nervous system goes into survival mode and sometimes has difficultly reverting back to its normal, relaxed mode again."[82] When an inmate is threatened with his life, there is no doubt that this could constitute a traumatic event. When stuck in survival mode, "stress hormones such as cortisone, are constantly released."[83] This can lead to an increase of blood pressure and blood sugar.[84] Many inmates

77. John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. L. REV. 1, 87 n.371 (2019).

78. *Id.*

79. Susanne Babbel, *The Connections Between Emotional Stress, Trauma and Physical Pain*, PSYCHOLOGY TODAY, (Apr. 8, 2010), https://www.psychologytoday.com/us/blog/somatic-psychology/201004/the-connections-between-emotional-stress-trauma-and-physical-pain [https://perma.cc/8UWW-HKPB].

80. *Id.*

81. *Id.* Recent studies have found that "the more anxious and stressed people are, the more tense and constricted their muscles are, causing the muscles to become fatigues and inefficient over time." *Id.* While incarcerated and experiencing threats of physical violence, it is not unreasonable for an inmate to develop anxiety and stress. *See also* Louise Delagran, *Impact of Fear and Anxiety*, UNIV. MINN. (Sep. 10, 2021, 1:27 PM), https://www.takingcharge.csh.umn.edu/impact-fear-and-anxiety [https://perma.cc/AA7S-3QRW].

82. Babbel, *supra* note 79.

83. *Id.*

84. *Id.*

may perceive threats as a traumatic event and in turn trigger not only an emotional response, but also a physical reaction to the threat. These physical injuries and manifestations often derive from the psychological injuries.

2. Psychological Injury

Although the Supreme Court has yet to answer the question of whether psychological trauma alone is sufficient to prevail for an Eighth Amendment violation, various cases show that courts are more likely to recognize psychological harm when coupled with physical harm.[85] There is no dispute that psychological harm is not treated as seriously as physical harm within the prison system.[86] Studies have shown that instances of verbal threats of physical violence can affect an individual's psychological state by causing extreme emotional distress.[87] The human body reacts to threats of violence as "an essential part of keeping us safe."[88] When an individual faces prolonged fear, their psychological state may begin to deteriorate.[89] Once fear is detected, our body releases hormones which may "slow or shut down functions not needed for survival."[90] Long-term fear can lead to fatigue, clinical depression, and PTSD.[91] The use of threats of violence can lead to a physical and

85. *See generally* Michael B. Mushlin, 1 Rights of Prisoners § 3:1 (5th ed., Sept. 2020 update) (tracing the history of aspects of prison life that have been found unconstitutionally punitive); Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1251, 1262 (2015). For example, Courts have historically failed to recognize the psychological harm alone caused by solitary confinement sufficient for a Constitutional violation. Most recently, courts have started to recognize that mental harm alone may rise to a violation. Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) (stating "mental health, just as much as physical health, is a mainstay of life.").

86. Bessler, *supra* note 77, at 70 n. 304.

87. *See id* at 69–70; *see also* Todd P. Gordon, *Verbal and Physical Threats,* U.S. ARMY (May 1, 2019), https://www.army.mil/article/221106/verbal_and_physical_threats [https://perma.cc/C4MG-KA5B] ("The most serious verbal threats are those that are genuine, credible and directed specifically at someone…").

88. Delagran, *supra* note 81.

89. *Id.*

90. *Id.*

91. *Id.*

psychological impact on inmates and can meet the "sufficiently serious" threshold.[92]

Many cases have discussed the use of verbal threats of physical harm, including cases of death threats.[93] In regard to death threats, it has been recognized (outside the prison system) that such threats have profound consequences.[94] Credible death threats or verbal threats of physical harm may lead to the production of psychological terror to an individual who is already susceptible to mental health challenges.[95] Not only do threats of physical harm inflict psychosocial terror, but they also inflict trauma and severe pain and suffering.[96] Moreover, it has long been held that death threats can qualify as acts of torture.[97] If death threats have previously been classified as "torture" as a matter of law, then threats of death or physical injury in the prison system should be classified as "cruel and unusual punishment."

Though the Supreme Court has not held that psychological harm is a sufficient injury needed to show a constitutional violation, we as a society have recognized that certain threats of physical

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92. *See generally Substantive Rights Retained by Prisoners*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 995 (2010).

93. *See, e.g.,* Irving v. Dormire, 519 F.3d 441 (8th Cir. 2008); Chandler v. D.C. Dep't. of Corr., 145 F.3d 1355 (D.C. Cir. 1998).

94. Bessler, *supra* note 77, at 4–5 (citing 1 ENCYCLOPEDIA OF DEATH AND THE HUMAN EXPERIENCE 553 (Clifton D. Bryant & Dennis L. Peck eds., 2009) ("in general, a death threat is not protected speech if there is intent to follow through with the threat.").

95. *See id.* at 9; *see also The Supreme Court and Time on Death Row*, DEATH PENALTY INFO. CTR., (Sept. 10, 2021, 9:42 PM), https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row/the-supreme-court-and-time-on-death-row [https://perma.cc/F3XW-JVW6]. Other examples of credible death threats can be seen using the death penalty in the United States. *See id.* Although the Supreme Court has not yet held the length of a prisoner's tenure on death row is constitutional, Justice Stephen Breyer and former Justice John Paul Stevens have questioned it for many years. *See id.* For example, when the Supreme Court declined review in Thompson v. McNeil, Justice Steven wrote "[o]ur experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforced my opinion that contemporary decisions 'to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process.'" *Id.*

96. Bessler, *supra* note 77, at 12.

97. *Id.* at 9–10.

violence can lead to severe psychological harm to the point that society has limited the offender's free speech. If the Supreme Court views the harm as so severe that they must restrict one's First Amendment rights to free speech, then courts should recognize the same threats of physical violence as cruel and unusual punishment.

The Supreme Court has explained that "'true threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[98] When a victim's fear is reasonable or grounded in reality, the threatening speech will lose its First Amendment protection.[99] A prohibition on true threats "protects individuals from the fear of violence" and "from the possibility that the threatened violence will occur."[100] Victims of true threats can experience psychological effects for long periods of time that can range from mild to severe.[101] "The victim's stress levels can increase due to his constant state of apprehension about his personal safety."[102] An inmate often lacks the tools of obtaining safety because their perpetrator is the prison official responsible for overseeing the inmate.

A prison official should not be precluded from these crucial restrictions just because they hold a position of power. Many prison officials' threats may rise to the level of a "true threat." Likewise, the threats that constitute a "true threat" are not threats that are merely "offensive words" or "unpleasantries," rather, they are threats to end someone's life or inflict physical harm.[103] Two purposes of making these types of threats are to cause fear and apprehension and "to operate on a particular individual through coercion or intimidation."[104] When receiving a "true threat," a prisoner may

98. Virginia v. Black, 538 U.S. 343, 359–60 (2003).

99. Bessler, *supra* note 77 at 18 (citing Joshua Azriel, *First Amendment Implications for E-Mail Threats: Are There Any Free Speech Protections?* 23 J. MARSHALL J. COMPUT. & INFO. L. 845, 846 (2005)).

100. *Black*, 538 U.S. at 344; *see also* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 547 (2004).

101. Elrod, *supra* note 100, at 548–49.

102. *Id.* at 549.

103. *Id.* at 551.

104. *Id.* at 552. When an individual makes a true threat to another, the recipient of the threat is coerced into taking or not taking action in which he or she normally would or would not take. *Id.* An individual is fearful of the ultimate consequence of not acting in a way consistent with their request. *Id.*

experience the same psychological harm as any other free citizen may experience.[105] Threats of physical violence have been deemed serious enough to cause a detrimental impact on a targeted individual and, therefore, should also be prohibited in the prison settings because the victims are not free from such injury just because they are incarcerated.[106] Thus, threats of physical violence can rise to the serious harm that is required to prevail on an Eighth Amendment violation claim.

Historically, courts prefer validating a claim for cruel and unusual punishment where the complainant has suffered a physical injury.[107] A physical injury might not be present immediately when a prison official makes a verbal threat of physical violence. Because there may very well be circumstances where an inmate's physical pain does not appear right away, courts should recognize the importance of an inmate's psychological pain absent physical harm. Threats of physical violence can lead to psychological and physical harm[108] and therefore should be considered part of the serious harm required to prevail on an Eighth Amendment claim.

B. *Threats of Physical Violence Hold Minimal Penological Purpose*

In addition to the physical and psychological harm caused by verbal threats of physical violence, there is very little penological purpose to making such threats. The Eighth Amendment bars punishments that are "totally without penological justification."[109] When imprisoned, inmates retain the rights consistent with legitimate penological objectives of the corrections system.[110] The Eighth Circuit has stated that "[s]ubjecting prisoners to . . . constant fear of such violence shocks modern sensibilities and serves no legitimate penological purpose."[111]

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105. *See id* at 101.

106. *Id.* at 547.

107. *See* Bessler, *supra* note 77, at 33.

108. *Id.*

109. Kelsey D. Russell, *Cruel and Unusual Construction: The Eighth Amendment as a Limit on Building Prisons on Toxic Waste Sites*, 165 UNIV. PA. L. REV. 741, 750 (2017).

110. *Id.* at 753.

111. Irving v. Dormire, 519 F.3d 441, 449 (2008) (quoting Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984)).

There are limited circumstances where the use of verbal threats of physical violence holds any penological purpose. One example of such circumstance is when the threats are made in order to prevent a riot or "other major prison disturbance[s]."[112] The use of threats in this circumstance is necessary in order to keep the prison staff and other inmates safe and free from potential harm.[113]

This Comment is not addressing these limited scenarios. Instead, this Comment addresses situations where a prison official makes a threat to an individual inmate for reasons not relating to retaining a safe prison environment. For instance, telling an inmate that he will be killed if he does not stop filing grievances, or if he does not follow prison officials' orders, does not serve any penological purpose.[114] Thus, when making threats of verbal violence, no legitimate purpose can be served by the prison official's actions because threats of physical violence do not further implement the goals of the criminal justice system.

Courts should adopt the view that verbal threats of physical harm rise to an Eighth Amendment violation. It is generally recognized that trauma can arise from psychological harm just the same as physical harm.[115] Moreover, the Supreme Court should find that verbal threats of physical harm hold no legitimate, penological purpose. Until the Supreme Court takes up this issue, Circuit Courts will be faced with the challenging task of continuing to make these determinations independently.

C. *Not All Threats of Physical Violence Violate the Eighth Amendment*

Some may argue that by recognizing threats made by prison officials as a constitutional violation, the courts are creating a situation where any threat made by a prison official —regardless of how serious they may be— can become an Eighth amendment violation. As stated in *Rhodes*, the Constitution "does not mandate

112. Anya Emerson, *Your Right to be Free from Assault by Prison Guards and Other Prisoners, in* COLUM. L. REV., A JAILHOUSE LAW.'S MANUAL, 736, 744 (12th ed. 2020).

113. *Id.*

114. *See, e.g., Irving*, 519 F.3d at 449.

115. *See* Babbel, *supra* note 79.

comfortable prison."[116] Sometimes threats are needed to keep prisoners in line and keep prison officials and inmates safe. If prison officials are unable to make any threats, prison officials will be limited in their tactics of controlling the prisoners within the prison, potentially leading to dangerous prison conditions, such as riots. However, adopting the four-factored analysis proposed below would recognize that some threats fail to rise to an Eighth Amendment violation and limit which claims are successful.

Courts often struggle with the objective element of an Eighth Amendment claim; that is to say, Courts struggle with finding whether a prison official was deliberately indifferent towards a substantial risk of harm to an inmate. Prison officials often show deliberate indifference by consciously disregarding the previous discussed physical and psychological harm that might result when they make verbal threats of physical harm. Deliberate indifference can be broken down into four elements: (1) the defendant knew of; (2) a substantial risk; (3) of a serious harm; and (4) disregarded that risk.[117] The next part will propose a four-factor analysis for courts to use in determining whether a prison official acted with deliberate indifference.

IV. A PROPOSED FOUR-FACTOR ANALYSIS TO HELP GUIDE COURTS IN DETERMINING WHICH THREATS RISE TO A CONSTITUTIONAL VIOLATION.

Currently, courts have not adopted a test to analyze what verbal threats of physical violence creates the substantial risk of serious harm required to prevail on an Eighth Amendment claim. To demonstrate a prison official acted deliberately indifferent, the inmate must show that the prison official was aware of a substantial risk of serious harm and that the official "disregarded that risk by failing to take reasonable measures to abate it."[118] Such analysis is broad and gives very little guidance. A four-factor analysis will help guide courts in their determination of whether a prison official's threat of physical violence rises to the level of a substantial risk of serious harm. The analysis also limits the possibility of

116. Rhodes v. Chapman, 452 U.S. 337, 349 (1981).
117. Calderón-Ortíz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002).
118. *Substantive Rights Retained by Prisoners*, *supra* note 92, at 1014.

unfounded threats that do not cause psychological or physical harm from being actionable.

A. *The Four Factors*

There are four factors courts should look to when deciding whether a threat of physical violence rises to an Eighth Amendment violation: (1) the repetitiveness of the threat; (2) the credibility of the threat; (3) the subject matter of the threat; and (4) the context of the threat. Courts should balance each factor against each other to make an individualized determination as to whether there is a constitutional violation. These factors are not determinative in ones' ability to prevail, and each factor should be balanced together. A strong showing of one element balanced with a weak showing of another may still be sufficient.

1. Repetitiveness of the Threat

The first factor a court should look at is the repetitiveness of the threat. While a single threat of physical violence could qualify as a substantial risk of serious harm, courts have been hesitant to recognize a verbal threat as cruel and unusual when the threat has only occurred once.[119] Very few courts have (perhaps cautiously) concluded that a single occurrence, coupled with other oppressive circumstances, can be sufficient to show a constitutional violation.[120] However, repetitiveness of the threat is relevant because repetitive threats can lead to long lasting psychological effects. By continuously making conscious threats of physical violence, prison officials are knowingly and willfully disregarding a substantial risk of physical and psychological harm to the inmate which can lead to more serious psychological harm as an inmate is faced with constant fear of danger.[121]

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119. *See, e.g.*, Williams v. Cassell, No. 3:17-cv-03039, 2017 WL 3396605, at *2, (W.D. Ark. Aug 8, 2017). *But see* Irving v. Dormire, 519 F.3d 441, 449–50 (2008) ("The repeated. . . threats against Irving, if proved to be true, constituted brutal and wanton acts of cruelty that served no legitimate penological purpose and poses a substantial risk of harm to Irving's future health.").

120. Farmer v. Brennan, 511 U.S. 825, 843 (1994).

121. Delagran, *supra* note 81.

The Court in *Williams v. Cassell* analyzed repetitiveness in its decision.[122] In *Williams*, the allegations stated a prison official threatened the inmate by saying, "[i]f you don't get a job, I will shoot you in the face! If I have to work for a living, then you do too!"[123] This was a single incident, and at no other point did the prison official make subsequent threats to the inmate.[124] The Court held this was not the type of conduct that is sufficient to state a constitutional claim because the threat only occurred once.[125]

In a scenario where the prison official makes one, although serious, singular threat, such threat may fail to meet the high standard of a "sufficiently serious" deprivation of a "substantial risk of harm."[126] However, when prison officials make threats on multiple occasions, courts should find the prison official acted with deliberate indifference to a substantial risk of a serious harm because they consciously made verbal threats on more than one occasion, and, therefore, were aware of a substantial risk of an inmates physical and mental health.[127] Accordingly, consciously choosing to make verbal threats on more than one occasion, knowing the damages it can cause to an inmates health, should rise to acting with deliberate indifference.

2. Credibility of the Threat

In *Northington v. Jackson*, the court held that threats accompanied by conduct reinforcing the credibility of the threat may be sufficient to support an Eighth Amendment claim.[128] In *Northington*, a parole officer held a gun to a prisoner's head while threatening to kill the prisoner.[129] Because the verbal threat was coupled with the actual means of carrying out the threat, the threat was

122. *See generally Cassell*, 2017 WL 3396605.
123. *Id.* at *1.
124. *Id.* at *2.
125. *Id.*
126. Helling v. McKinney, 509 U.S. 25, 34 (1993).
127. One factor courts must consider is whether repetitive unfounded threats lead to a lack of credibility. For example, if a prison official threatened a prisoner daily that he will "beat him" yet not once has the prison official acted upon that threat, one may argue that it is unreasonable to believe he will act this time because he never acted upon previous threats.
128. *See* Northington v. Jackson, 973 F.2d 1518, 1522 (10th Cir. 1992).
129. *Id.*

deemed credible and, therefore, could rise to the level of an Eighth Amendment violation.[130] Moreover, in *Hudspeth v. Figgins*, the court found that "the combination of the guard's threat and the prisoner's subsequent transfer from unsupervised work to a work detail supervised by armed guards sufficed to state a cause of action."[131]

To assess credibility, courts should look to whether the prison official has the actual means of carrying out their threat. For example, if a prison official threatens to shoot a prisoner yet the prison official is unarmed, it would be unreasonable for the prisoner to believe the threat was credible. On the other hand, when a prison official is armed or brandishes their weapon, the official has clear means to carry out the threat.[132] The more credible the threat is, the more likely the inmate is to perceive harm from the threat, damaging their physical and mental health. Thus, the more credible a threat appears to be, the more likely it is an Eighth Amendment violation.

3. Subject Matter of the Threat

Next, courts should look at the subject matter of the threat. The more heinous the threat, the more likely it is a court will find that it constitutes cruel and unusual punishment. Threats of death are the cruelest type of threats that prison officials can make. For example, in *Burton v. Livingston,* a prison official pointed a gun at the prisoner's head and told him to run so the official had an excuse to shoot him.[133] The court held that "a prisoner retains at least the right to be free from the terror of instant an unexpected death at the whim of his. . . custodians."[134] Accordingly, prison officials cannot threaten inmates with death without violating the Eighth Amendment.

On the other hand, in cases where the prison officials are threatening an inmate with physical harm that is less than the threat of death, the court should take that into consideration when

130. *Id.*

131. Chandler v. D.C. Dep't of Corrections, 145 F.3d 1355, 1361 (D.C. Cir. 1998) (citing Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir. 1978)).

132. *See* Burton v. Livingston, 791 F.2d 97, 100 (noting the prison official "pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death.").

133. *Id.* at 99.

134. *Id.* at 100.

determining whether the threat rises to an Eighth Amendment violation. In *Irving*, the court failed to find that the inmate's Eighth Amendment rights were violated when one prison official threatened to pepper spray him.[135] Threatening to spray an inmate with pepper spray is not as serious as threatening to kill or seriously injure an inmate.[136] The end result if the prison official carried out the threat would differ greatly because in one scenario the inmate will be suffering temporary physical pain, while in the other scenario, the inmate would be killed. Therefore, in situations where a prison official is threatening an inmate with serious physical harm or death, the court should weigh the threat more heavily than an instance of simple physical violence.

4. Context of Threat

Finally, courts should look at the overall context surrounding the threats. Specifically, whether the threat was made in front of other inmates or alone and whether the threat was made to all inmates or whether the threat was made directed towards just one inmate. Context is essential in a court's determination as to whether the verbal threat of physical violence can constitute an Eighth Amendment violation.

Courts should look at whether other people were present at the time the threat was made.[137] For example, in *Williams*, the Court noted that four witnesses were present at the time the threat was made.[138] These four individuals witnessed the prison officials threaten the inmate and were present throughout such acts.[139] Because there were other people around when the threat was made,

135. Irving v. Dormire, 519 F.3d 441, 448 (8th Cir. 2008). Irving brought various claims against multiple different defendants. Although the court found an Eighth Amendment violation for other claims against other defendants, the court failed to recognized Irving's claim against one of the prison officials because it was objectively unreasonable.

136. *See* Emma Frankham, *Use of Pepper Spray to "Fog" Inmates in Jail: A National Trend?* RACE, POL., JUST. (Aug. 2, 2017), https://www.ssc.wisc.edu/soc/racepoliticsjustice/2017/08/02/use-of-pepper-spray-to-fog-inmates-in-jail-a-national-trend/ [https://perma.cc/KM8P-XBUF].

137. *See generally* Williams v. Cassell, No. 3:17-cv-03039, 2017 WL 3396605 (W.D. Ark. Aug 8, 2017).

138. *Id.* at *1.

139. *See id.*

the chances of the defendant acting upon the threat were slim to none.[140]

Another circumstance worthy of consideration is whether the threat was individualized to a specific inmate or whether it was made to multiple individuals. In cases where a prison official threatens an individual and that individual alone, one could argue that it is objectively reasonable for that inmate to experience more psychological harm. On the other hand, if multiple inmates receive the same threat, then the chances of the threat being carried out is very unlikely.

Lastly, a court should look to what led to the threat. A very common reason why prison officials make threats of physical violence is to discourage inmates from seeking judicial relief.[141] Because a prisoner has a right of access to courts, when threats are made after an inmate attempts to seek judicial relief, the court should not take this lightly.[142] If courts ignore this, then a prisoner's right to access the courts is being infringed upon as an inmate may be hesitant to seek redress which is a right guaranteed under the First Amendment.[143]

B. *An Application of the Four-Factored Analysis*

Various courts have already used some of the above factors in their reasoning. For example, the Eighth Circuit in *Hopson v. Frederickson*, determined no Eighth Amendment violation occurred after looking at some of the various factors explained above.[144] First, the court looked to the subject matter of the verbal threat and stated the subject matter of the threat here did not rise to a violation because the officer just threatened to "knock [Hopson's]

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140. *Id.* at *2.

141. *See* Irving v. Dormire, 519 F.3d 441, 445 (8th Cir. 2008).

142. U.S. CONST. amend. I. The First Amendment of the Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to *petition the Government for a redress of grievances*." *Id.* (emphasis added). In the prison context, a prisoner still retains his right to access the courts. Likewise, inmates have a right to be free from retaliation if he chooses to seek judicial redress. *See id.*

143. *Id.*

144. Hopson v. Fredrickson, 961 F.2d 1374, 1379 (8th Cir. 1992).

remaining teeth out" if he failed to speak.[145] Such violence, while reprehensible, is undeniably a far cry from the threat made in *Burton*, where prison officials threatened to kill the prisoner.[146]

Next, the court considered the credibility of the threat.[147] Here, Hopson was located in the back seat of a police car and the defendants were in the front seat.[148] It was unlikely that the defendants would have the ability to knock the prisoners' teeth out when the officers were driving, and Hopson was in the backseat.[149] Then the Court looked to the repetitiveness prong. This was a single occasion and the plaintiff failed to point to any other instances of "brutal" and "wanton act[s] of cruelty."[150] Finally, the Court looked to the context of the verbal threat noting that not once did Hopson allege that he was physically assaulted by the officer or that the officer "raised his fists or made any type of physical gesture to him."[151]

The court adequately took into consideration the various factors proposed in order to determine whether Hopson's claim raised an Eighth Amendment violation and ultimately found it did not.[152] Thus, if other courts followed this approach, only claims that truly rise to an Eighth Amendment violation will be provided relief. Moreover, the Supreme Court should find there is a constitutional violation here because doing so will create clearly established law required to preclude a governmental official from being shielded from liability under qualified immunity.

145. *Id.* at 1378.

146. *Id.* at 1378–79.

147. *See generally id.*

148. *Id.* It is unknown as to whether there was any form of safety protection barrier commonly seen in police vehicles between the front and back seats. If there was a physical barrier, it would surely strengthen the Court's holding that the threat lacked credibility.

149. *See generally id.*

150. *Id.* at 1379.

151. *Id.*

152. *Id.* (holding that "Officer Thomure's alleged conduct failed to rise to the level of a 'brutal' and 'wanton' act of cruelty.").

C. *The Adoption of the Four-Factored Analysis Will Help Guide Courts and Would Allow the Supreme Court to Recognize Threats of Physical Violence as an Eighth Amendment Violation, Which is Essential for Inmates to Bring Suit and Overcome Qualified Immunity.*

Qualified immunity "shield[s] [government officials] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[153] Often, prison officials are not liable for their actions due to qualified immunity.[154] When a right is clearly established and a governmental official violates that right, the official risks being held personally liable for the actions they take.[155] Qualified immunity often precludes an individual from prevailing on a claim. In respect to verbal threats of physical harm, circuits have been split on the issue for more than two decades. Currently, because the majority of courts have yet to recognize a claim, many inmates go without remedy simply because they fail to have the opportunity to bring suit. Thus, it is essential that the Supreme Court finds threats of physical violence as a constitutional violation to permit inmates to bring suit.

The recognition of a legal claim is crucial, but is only the first step to overcoming qualified immunity. In this situation, having no clear and established law, prison officials can and are regularly getting away with threatening inmates without any repercussions. There is no doubt that the right to be free from cruel and unusual punishment is clearly established, but the extent of what constitutes "cruel and unusual" has long been debated. Such right to be free from verbal threats of physical violence from prison officials will not be clearly established until the Supreme Court takes up the question or until there is a consensus amongst all circuits. By holding that verbal threats of physical harm are a violation of one's Eighth Amendment right to be free from cruel and unusual punishment, qualified immunity will no longer shield prison officials of their true threats and these prison officials will face the

153. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

154. *See* Crow v. Montgomery, 403 F.3d 598, 601 (8th Cir. 2005); *see also* Baker v. McCollan, 443 U.S. 137, 139 (1979).

155. *Crow,* 403 F.3d at 602.

consequences of their conscious acts of making verbal threats of physical violence to inmates.

CONCLUSION

If courts recognize verbal threats of physical violence and use the above factors, individuals such as Avion Lawson, who was threatened with physical violence for filing grievances and complaints, may be able to prevail on a claim of cruel and unusual punishment.[156] The prison officials made a verbal threat of physical violence just two weeks before Lawson was brutally attacked by other inmates.[157] A court may find that making a threat of physical violence constituted an Eighth Amendment violation.

Verbal threats of physical violence should constitute an Eighth Amendment violation because prison officials act deliberately indifferent when making threats and by doing so, they disregard a serious risk of physical or psychological harm to the prisoner. In order to prevent threats from being labeled "cruel and unusual," courts should look to factors such as repetitiveness of the threats, credibility of the threat, subject matter of the threat, and the context surrounding when the threat was made. By doing so, this will limit the number of threats prevailing while protecting the rights of the incarcerated and will solve the circuit split creating the clearly established law needed to prevent prison officials from being shielded from liability under qualified immunity.

156. *See* Lawson v. McGee, No. 19-81526-CV-RUIZ, 2020 WL 5822266, at *1 (S.D. Fla. Aug. 28, 2020).

157. *Id.* at *5.