

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

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4 August Term, 2007

5 (Argued: January 16, 2008 Decided: July 18, 2008)

6 Final brief submitted: February 15, 2008

7  
8 Docket No. 06-0644-op

9  
10 IN RE: NATHANIEL SIMS

11 - - - - -

12 NATHANIEL SIMS,

13 Petitioner,

14 - v. -

15 MIKE J. BLOT, Correctional Officer, FRANCISCO  
16 CARABALLO, Correctional Officer,

17 Respondents.  
18

19 Before: KEARSE, LEVAL, and CABRANES, Circuit Judges.

20 Petition for a writ of mandamus to reverse an order of the  
21 United States District Court for the Southern District of New York,  
22 Loretta A. Preska, Judge, requiring petitioner, who has asserted  
23 claims pursuant to 42 U.S.C. § 1983 for use of excessive force but  
24 is not seeking damages for mental or unusual emotional injury, to  
25 disclose his mental health records to respondents.

26 Petition granted; order reversed.

27 ANTONY L. RYAN, New York, New York (Jeffrey B.  
28 Korn, Josef M. Klazen, Cravath, Swaine & Moore,  
29 New York, New York, on the brief), for  
30 Petitioner.

1 ROBERT C. WEISZ, Assistant Solicitor General,  
2 New York, New York (Eliot Spitzer, Attorney  
3 General of the State of New York, Michael S.  
4 Belohlavek, Senior Counsel, New York, New York,  
5 on the brief), for Respondents.

6 KEARSE, Circuit Judge:

7 Petitioner Nathaniel Sims, a New York State ("State")  
8 prisoner who is pursuing an action pursuant to 42 U.S.C. § 1983  
9 against State corrections officers for the alleged use of excessive  
10 force against him on December 20, 1999, seeks a writ of mandamus to  
11 set aside a discovery order of the United States District Court for  
12 the Southern District of New York, Loretta A. Preska, Judge,  
13 requiring disclosure of Sims's privileged psychiatric treatment  
14 records for the period December 20, 1997, through January 20, 2000.  
15 The district court ruled that Sims's deposition testimony as to  
16 communications with mental health professionals waived his privilege  
17 of confidentiality with respect to psychotherapist-patient  
18 communications, and that fairness required that Sims disclose his  
19 psychiatric records to respondents notwithstanding his withdrawal of  
20 any claims for emotional injury damages beyond those ordinarily  
21 associated with a conventional claim for pain and suffering  
22 resulting from an assault and physical injury, and his renunciation  
23 of any reliance on evidence as to, inter alia, his fears of  
24 corrections officers. In his petition for mandamus, Sims argues  
25 principally that the district court erred as a matter of law in  
26 finding (a) that he had waived the privilege, and (b) that there  
27 would be unfairness in denying respondents' access to his mental

1 health records. For the reasons that follow, we grant the writ of  
2 mandamus and reverse the order for disclosure.

3 I. BACKGROUND

4 The present petition arises out of an altercation that  
5 occurred on December 20, 1999 (the "December 20 incident") during a  
6 routine strip frisk of Sims, who was then an inmate at New York's  
7 Sing Sing Correctional Facility ("Sing Sing"). Sims contends that  
8 respondents Mike Blot and Francisco Caraballo, Sing Sing corrections  
9 officers, physically assaulted him without provocation or  
10 justification. Respondents contend instead that Sims started the  
11 altercation. The history of the proceedings leading to this  
12 petition--spanning two actions--is not in dispute.

13 A. The Proceedings in the Original Action

14 Sims initially filed a § 1983 complaint pro se in the  
15 Southern District of New York ("SDNY") in February 2000 ("Pro Se  
16 Complaint" or "original complaint"), using the SDNY complaint form  
17 for pro se prisoners, against respondents and seven others  
18 (collectively "defendants"), requesting money damages, injunctive  
19 relief, and termination of the defendants' employment. With respect  
20 to Blot and Caraballo, the complaint described the December 20  
21 incident as follows:

22 I was told to stay facing the wall[,] hand back my  
23 shirt. This done I was told to hand back my shoes.  
24 This done I was told to remove my pants and hand  
25 them back. When I reached down to take my pants

1 off, C.O. M. Blot punched me in the back of my head  
2 and then grabbed me around my chest pinning my arms  
3 at my side and slammed me to the floor. At this  
4 time C.O.s Carabello [sic], White, and McDonough  
5 commensed [sic] to kick, stomp and punch me about my  
6 head, neck, shoulders and back. I yelled out for  
7 Sgt. Hasse to come and intervene to no avail. While  
8 I was struggling to cover up from being either  
9 kicked or punched in a vital area, my feet was  
10 grabbed and held by someone while C.O. M. Blot  
11 placed his knee in my side and kept punching me in  
12 my head. C.O. F. Carabello, [sic] shouted, "You hit  
13 a f---ing officer, you piece of s---, we'll kill  
14 you." At this time, C.O. F. Carabello, [sic] pulled  
15 his pocket knife and swung down in a stabbing  
16 motion. I twisted away as best I could but was cut  
17 by his knife anyway. . . .

18 (Pro Se Complaint Item IV.) In response to the SDNY complaint  
19 form's instruction to describe any injuries sustained, Sims stated,  
20 "I received a laceration over eye that required five [5] steri-  
21 strips to close; I also had swelling to right shoulder, pain  
22 medication given." (Id. Item V-A.)

23 In August 2003, after the claims against all of the  
24 defendants other than Blot and Caraballo had been dismissed, either  
25 on summary judgment or by stipulation, Sims's complaint was  
26 dismissed on the ground that he had failed to exhaust his  
27 administrative remedies. In the meantime, there were discovery  
28 proceedings in 2000-2002 leading to the order at issue here.

29 Defendants scheduled Sims's deposition for December 2000.  
30 Sims asked the district court either to relieve him of the  
31 obligation to give pretrial testimony in the form of a deposition or  
32 to appoint counsel to represent him. The court denied both requests  
33 in an order filed on November 28, 2000, and denied a renewed request  
34 for the appointment of counsel in an order filed on December 11,

1 2000. The court stated that Sims would be allowed to renew his  
2 request for assignment of counsel after submitting a copy of the  
3 transcript of his deposition.

4 1. Sims's Deposition

5 Defendants proceeded to depose Sims. Assistant Attorney  
6 General ("AAG") Nicola N. Grey, representing the defendants,  
7 questioned Sims, representing himself.

8 Q. Can you please describe for me what  
9 happened to you on December 20th, 1999?

10 A. Yes. I was coming back into the special  
11 housing unit at Sing Sing from the hospital, and  
12 Officers Blot, Carabello [sic], White, and McDonough  
13 were standing around the strip frisk area waiting  
14 for me to come in. When I got in I had a few words  
15 with Officer Blot which basically stem from prior  
16 confrontation I had with him a week earlier. While  
17 I was standing there waiting to get processed back  
18 in the guy from [the Inspector General's office]  
19 came in and I tried to stop him to speak to him, let  
20 him know that I had a feeling that this was about  
21 ready to get a little bit out of hand, and I wanted  
22 him to stick around. He said that he couldn't stop  
23 at that particular moment, but he would come see me  
24 a little later on.

25 (Deposition of Nathaniel Sims, December 28, 2000 ("Sims Dep."),  
26 at 15.) Sims stated that he began removing items of clothing as  
27 instructed by Blot, and

28 while I was taking my pants off he hit me.

29 Q. Then what happened after that?

30 A. Rushed me, grabbed me, bear hug, threw me  
31 to the floor, and the rest of the officers commenced  
32 to helping [sic] him out here. In the process of  
33 that--

34 Q. What do you mean by helping him out?

35 A. Helping him to physically assault me. In

1 the process of that, Officer Carabello [sic] yelled  
2 out to me: You hit an officer! I'll kill your  
3 effen' behind. Okay. So while they was punching on  
4 me and everything I seen him swing down, I moved my  
5 head and he cut me [with a knife]. . . . Eventually  
6 they put handcuffs and shackles on me and rushed me  
7 down to the ER.

8 (Id. at 16.)

9 Sims testified that he was returned to the special housing  
10 unit ("SHU") on the night of the incident; but on the next day, he  
11 was moved back to the hospital and placed in the psychiatric  
12 satellite unit ("PSU"). (See id. at 18.) Sims stated that he was  
13 not on PSU status at that time but was kept in the PSU for several  
14 weeks thereafter "for security reasons." (Id.) The AAG questioned  
15 Sims about his PSU status:

16 Q. Okay. I want to direct you to your  
17 complaint. It states in your complaint that you  
18 were being returned from PSU, mental health unit,  
19 prior to the incident?

20 A. Yes.

21 Q. Did you have PSU status at that time?

22 A. At that time I did, yes.

23 Q. So on 12/20/99 prior to--

24 A. Prior to that.

25 Q. --prior to returning to the SHU you had--

26 A. I was admitted on the PSU.

27 Q. How long were you in PSU?

28 A. From the 13th, 12/13 to--no, 12/13/99.  
29 Pardon me.

30 Q. And why were you admitted to the PSU?

31 A. They thought I was kind [of] bugging. What  
32 happened was I punched the plexiglas and broke it,

1 and cut my hand. This is basically what started all  
2 this. Officer Blot and Officer Carabello [sic] had  
3 just beaten up on a crazy inmate and I spoke up.  
4 That's basically what happened. And because of that  
5 it escalated to--first they was talking about coming  
6 to my cell, and I was like: All right! Fine! We  
7 can do that. And I had a pen, and I had a cup of  
8 liquid detergent and they was saying that I was  
9 threatening to throw it on them, this crazy  
10 nonsense. But that's what started all this. That's  
11 where the week earlier came from where we had the  
12 words.

13 . . . .

14 . . . What they end up doing was moving me and  
15 putting me behind glass. And I felt that there was  
16 no need to be placed behind glass because I hadn't  
17 thrown anything, hadn't threatened to throw  
18 anything, so I broke the glass.

19 . . . .

20 Q. And after you broke the glass what  
21 happened?

22 A. Well, because I end up cutting myself with  
23 the glass they felt that I was really, really out of  
24 it. They sent me upstairs to PSU to calm down,  
25 basically. And I ended up staying up there for  
26 about a week. I came back that Monday which was  
27 [December] 20th. I believe that was the Monday.

28 Q. Okay. So, prior to getting escorted to SHU  
29 they took you off of PSU status.

30 A. Right.

31 (Sims Dep. 24-28.)

32 One of those sued by Sims in his original complaint was  
33 Lorraine Del Santo, a psychiatric nurse. Asked why he had made her  
34 a defendant, Sims responded that although Del Santo was not present  
35 at the December 20 incident, she had been included because Sims had  
36 told her prior to the incident that he "had been threatened by two  
37 of these officers on a regular basis." (Id. at 30.) The AAG

1 questioned Sims about that conversation:

2 Q. How did you make your complaint to Del  
3 Santo, the nurse?

4 A. She got to be the mental health therapist  
5 that made rounds at SHU. And being that I see  
6 inmates from MHU [Mental Health Unit], I see them on  
7 a regular basis from a lot of stress and things of  
8 that nature, I explained to her during her rounds  
9 and a few times when I've gone upstairs to PHU [sic]  
10 I explained to her I had to get away from down there  
11 because I stand by ready to lose it. They keep  
12 constantly threatening me, and I'm not going to sit  
13 back and let them do it to me first, so before it  
14 happens I think I have--need a break. Put me up  
15 here from downstairs, let things calm down. On one  
16 occasion I told her that these guys was threatening  
17 me. Her response was: Well, you must have done  
18 something to them. Okay.

19 Q. How many times did you complain to her?

20 A. I complained to her more than five times.  
21 How many exactly, I can't recall. But I know it was  
22 definitely more than five times.

23 (Sims Dep. 32-33.)

24 Sims stated that he complained to Del Santo that the  
25 threatened assaults were "stressing [him] out" (id. at 62), but that  
26 nothing was ever done about those complaints. The AAG asked:

27 Q. Well, what did you expect Del Santo to do?

28 A. Like I said, that's my therapist, and being  
29 that I constantly complain to her she could go to  
30 the Superintendent and explain to them: Listen, you  
31 know, the guy's one of our patients. You know, he's  
32 down there in your area. Do something about this  
33 before it gets out of hand. You know, she has my  
34 whole folder right there. She knows how I can get.  
35 Why allow it to escalate to that?

36 Q. Did you ask her to talk to the  
37 superintendent?

38 A. I asked her to speak to a few people. I  
39 said: Talk to whoever you've got to talk to to get  
40 them to stop bothering me, or get me out of here.



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. . . .

Q. How could she get you out of there?

A. Like I said, put me--you know, they doing the same thing here now, mental health may go to the deputy of security, or go to the Superintendent. Listen, it would be beneficial to get Sims out of here. He's wearing his welcome out, or something. Anything! She could sit there, you know, like for his state of mind it would be beneficial to get him out of here.

Q. So she would have had to put you on PSU status?

A. No, she wouldn't have to put me on PSU status, but being my therapist she could make-- basically speak for me.

(Sims Dep. 62-64.)

As to the injuries claimed by Sims, the AAG questioned him as follows:

Q. Did you receive any injuries?

A. Yeah.

Q. And what injuries did you receive?

A. That laceration for one, swelling of my back, had to get five sutures to--steri-strips to close that up.

(Id. at 52.) After Sims described having the blood washed out of his eye, from the laceration above it, and stated that he had been given pain medication for his back, the AAG inquired as to any further injuries and received a negative response:

Q. And besides these injuries did you receive any other injuries?

A. No.

(Id. at 53.)

After exploring Sims's filing of a grievance and an

1 administrative complaint about the December 20 incident, the AAG  
2 returned to the subject of injury:

3 Q. Besides the physical injuries did you  
4 suffer any mental injuries as a result of this  
5 incident?

6 A. I wouldn't say I suffered mental injuries  
7 as a result of this, but I do think about it  
8 continuously.

9 Q. Any emotional effects?

10 A. In fact, I dream about it.

11 Q. Any emotional or psychological injuries as  
12 a result of this?

13 A. Emotionally, yes.

14 Q. What are those injuries?

15 A. I have to sit here, and every time I see a  
16 knife in one of the officer's hands I have to  
17 actually restrain myself from reacting because I  
18 don't know if they'll be allowed to do this again.  
19 And it has an emotional toll on me. As I say, I had  
20 dreams about this. I'm just not used to being on  
21 the receiving end of it. I mean, I've spent almost  
22 twenty years of my life in prison and never been cut  
23 by a prisoner or anyone, and I've got to be cut by  
24 an officer. That doesn't sit too well with me.

25 Q. Are you receiving any treatment for your  
26 emotional injuries?

27 A. Not pertaining to this particular incident,  
28 no.

29 (Sims Dep. 55-56.)

30 In September 2001, the court granted summary judgment  
31 dismissing the complaint against Del Santo and two other defendants  
32 to whom, Sims testified, he had complained but who were not present  
33 at the December 20 incident.

1           2.   The Motion for Production of Sims's Psychiatric Records

2           In October 2001, the court granted a renewed request by  
3   Sims for the assignment of counsel; it appointed Jeffrey B. Korn,  
4   Esq., et al. Shortly thereafter, the remaining defendants served on  
5   Sims a demand for production of, inter alia, "[a]ll psychiatric  
6   records of [Sims] since [Sims's] incarceration in 1993."  
7   (Defendants' Request for Documents, dated October 23, 2001, at 2.)  
8   The demand attached a document for Sims's signature to authorize the  
9   State's Office of Mental Health ("OMH") to release

10           any and all records or documents of any kind in  
11           [OMH's] possession pertaining to Nathaniel Sims,  
12           including but not limited to all medical,  
13           psychological and psychiatric reports and records,  
14           hospitalization records, doctors' notes, nurses'  
15           notes, correspondence, x-rays, charts and diagrams,  
16           laboratory and pathological reports and tests, and  
17           documents of any kind concerning examination and  
18           analyses, surgical and non-surgical procedures,  
19           diagnosis and prognosis, history and statements,  
20           bills and charges.

21   (Id., Attachment.)

22           Sims, through his new attorneys, objected to the document  
23   request on the ground that the records requested were protected by  
24   the psychotherapist-patient privilege. The magistrate judge to whom  
25   the case was assigned for supervision of pretrial proceedings  
26   initially granted defendants' request, ruling as follows:

27           The Defendants are entitled to production of the  
28           Plaintiff's psychiatric treatment records. Although  
29           courts differ as to whether the assertion of a  
30           "garden variety" emotional distress claim requires a  
31           waiver of the psychiatrist-patient privilege, the  
32           Plaintiff's claim that he has become frightened of  
33           all knives as a result of the Defendants' alleged  
34           misconduct is not, in my judgment, such a "garden  
35           variety" claim.

1 Magistrate Judge's Order dated January 2, 2002 ("First M.J. Order").

2 Sims's attorneys promptly moved for reconsideration of the  
3 magistrate judge's order, stating that Sims had not intended to  
4 place his mental or emotional state in issue, and stating, "we  
5 hereby withdraw any claim Mr. Sims may have asserted to recover for  
6 'non-garden variety' emotional distress injuries, including  
7 'Plaintiff's claim that he has become frightened of all knives as a  
8 result of the Defendants' alleged misconduct.'" (Letter from  
9 Jeffrey B. Korn to Magistrate Judge Frank Maas dated January 7, 2002  
10 ("Korn Letter"), at 1 (quoting First M.J. Order).) The letter  
11 elaborated:

12 In Jaffee v. Redmond, the Supreme Court held  
13 that "confidential communications between a licensed  
14 psychotherapist and her patients in the course of  
15 diagnosis or treatment are protected from compelled  
16 disclosure under Rule 501 of the Federal Rules of  
17 Evidence". 518 U.S. 1 (1996). This privilege may  
18 be waived only where a party places his mental or  
19 emotional condition "at issue" by relying upon "the  
20 condition as an element of his claim or defense". 3  
21 Jack B. Weinstein & Margaret A. Berger, Weinstein's  
22 Federal Evidence § 504.01 (2d ed. 1997). Here,  
23 however, Mr. Sims never intended to place his mental  
24 or emotional state "at issue", and that condition is  
25 not an element of his Section 1983 claim. Indeed,  
26 Defendants' sole basis for asserting otherwise is  
27 Mr. Sims's undefended deposition testimony, elicited  
28 by defense counsel when Mr. Sims was a pro se  
29 litigant. At his deposition, Mr. Sims testified  
30 truthfully--and unguardedly--as to the emotional  
31 ramifications of the incident that is the subject of  
32 this action. (See Sims Dep. at 55-56 (attached  
33 hereto as Exhibit 1).) But Mr. Sims did not plead  
34 in his complaint, or testify at his deposition, that  
35 he was seeking to recover for those emotional  
36 injuries--i.e., he did not put them at issue for  
37 purposes of this litigation. (See Complaint, filed  
38 Feb. 15, 2000 (attached hereto as Exhibit 2); Sims  
39 Dep. at 55-56.)

40 In order to clarify the issue, we hereby

1 withdraw any claim Mr. Sims may have asserted  
2 regarding "non-garden variety" emotional distress  
3 injuries. Mr. Sims will not offer any evidence or  
4 make any argument at trial about those injuries, and  
5 will not seek any recovery for them. In light of  
6 this representation, there is no longer any basis  
7 for a finding of waiver.

8 (Korn Letter at 1 (emphasis in original).)

9 After reviewing this request and the response from defense  
10 counsel, the magistrate judge reversed his previous ruling, stating:

11 To the extent that Mr. Sims intends to testify  
12 generally that he was upset as a result of an  
13 assault, I consider his claim "garden variety" and  
14 not one which would warrant the broad disclosure  
15 sought by the defendants. If, on the other hand, he  
16 will seek to recover damages for some generalized  
17 fear that he had prior to the assault, the  
18 psychiatric records must be disclosed. Finally, the  
19 defendants do not need the psychiatric records to  
20 establish whether Mr. Sims was sent to the PSU for  
21 "security reasons." If that were the case, some  
22 evidence of it surely would exist outside his  
23 psychiatric file.

24 Magistrate Judge's Order dated January 10, 2002 ("Revised M.J.  
25 Order") (emphasis in original).

26 3. The Order That Sims's Psychiatric Records Be Disclosed

27 On February 4, 2002, all of the remaining defendants  
28 except Blot and Caraballo were dismissed from the action by  
29 stipulation. Blot and Caraballo appealed the Revised M.J. Order to  
30 the district judge, who requested further submissions as to the  
31 effect of Sims's attorneys' claim-withdrawal representations on the  
32 issue of waiver. In response, Sims's attorneys wrote:

33 [W]e do not intend to offer:

- 34 • fact or expert testimony about a psychological  
35 disorder;

- 1 • evidence concerning conversations between Mr.  
2 Sims and psychiatric personnel;
- 3 • evidence concerning Mr. Sims's housing in the  
4 psychiatric satellite unit;
- 5 • evidence that Mr. Sims made a fear of the  
6 Defendants known to mental health officials;
- 7 • evidence that Mr. Sims was placed behind  
8 plexiglass, punched the plexiglass and as a  
9 result was admitted to the psychiatric  
10 satellite unit;
- 11 • evidence that Mr. Sims was transferred to the  
12 psychiatric satellite unit after the incident  
13 or that he was transferred there for security  
14 rather than psychiatric reasons; or
- 15 • evidence that Mr. Sims's mental health status  
16 affects his behavior.

17 In light of those clarifications, it is clear  
18 that Mr. Sims does not seek to make his mental  
19 condition an issue at trial. Stated simply, Mr.  
20 Sims does not assert any claim or defense involving  
21 his mental condition, nor does he intend to offer  
22 any evidence concerning that condition. Rather, it  
23 is Defendants that seek to make Mr. Sims's mental  
24 health status an issue in this litigation in an  
25 attempt to obtain evidence to impeach his  
26 credibility at trial. However, as demonstrated in  
27 our letters dated January 22 and 25, 2002, that is  
28 insufficient to pierce Mr. Sims's psychiatrist-  
29 patient privilege. See Jaffee v. Redmond, 518 U.S.  
30 1, 17 (1996).

31 (Letter from Jeffrey B. Korn and Antony L. Ryan to District Judge  
32 Loretta A. Preska dated February 11, 2002 ("Korn/Ryan Letter"),  
33 at 1.)

34 In an order dated February 15, 2002, the district judge  
35 reversed the magistrate judge's January 10 denial of defendants'  
36 request for production of Sims's psychiatric records. As set forth  
37 more fully in Part II.B.2. below, the district judge ruled that  
38 Sims's deposition testimony constituted a waiver of his

1 psychotherapist-patient privilege, and that

2 [Sims] may not unring the bell. "Once he waives his  
3 privilege . . . , a witness may not withdraw his  
4 waiver to prevent matters which he has already gone  
5 into from being explored in greater detail."

6 District Court Order dated February 15, 2002 ("2002 Disclosure  
7 Order"), at 1 (quoting United States ex rel. Carthan v. Sheriff, 330  
8 F.2d 100, 102 (2d Cir.), cert. denied, 379 U.S. 929 (1964)). The  
9 district judge found that Sims had "testified freely as to  
10 communications with mental health professionals and as to the  
11 supposed circumstances of his placement in the PSU"; that he did so  
12 "in an effort to support his claim and otherwise gain advantage in  
13 this litigation"; and that "fairness requires that" Blot and  
14 Caraballo "have access to plaintiff's mental health records for the  
15 period from two years before the incident at issue through the  
16 present" because otherwise Blot and Caraballo would be  
17 "disadvantaged both specifically in their inability to, for example,  
18 prove . . . that [Sims] was not [sic] placed in the PSU for  
19 psychiatric reasons and generally in not being able to test [Sims's]  
20 credibility." 2002 Disclosure Order at 2.

21 4. The Dismissal for Lack of Exhaustion

22 Sims filed a petition in this Court for a writ of  
23 mandamus, seeking reversal of the 2002 Disclosure Order. Before  
24 that petition could be heard, Blot and Caraballo moved in the  
25 district court for summary judgment dismissing Sims's action on the

1 ground that he had failed to exhaust his administrative remedies as  
2 required by 42 U.S.C. § 1997e(a). We held Sims's mandamus petition  
3 in abeyance pending resolution of the motion to dismiss his action,  
4 and that petition eventually became moot.

5 In August 2003, the district court dismissed the action,  
6 without prejudice to renewal after proper exhaustion of all  
7 available administrative remedies.

8 B. The Present Action

9 In 2004, Sims filed the present § 1983 action, represented  
10 by his appointed counsel, against Blot and Caraballo based on the  
11 same allegations as in the original action. Sims's complaint, as  
12 amended in May 2005 following complete exhaustion of his  
13 administrative remedies ("Amended Complaint"), alleges that Blot and  
14 Caraballo used excessive force against Sims in violation of his  
15 rights under the Eighth Amendment, by assaulting him "without  
16 provocation" (Amended Complaint ¶ 14), "intentionally and without  
17 justification" (*id.* ¶ 57). The Amended Complaint alleges that, as  
18 a result of respondents' cruel and unusual punishment, Sims  
19 "suffered serious and painful physical injuries, which required  
20 emergency medical attention." (*Id.* ¶ 58.)

21 Blot and Caraballo asked the district court to renew the  
22 2002 Disclosure Order, entered in the original action, requiring  
23 Sims to disclose his mental health records. Blot and Caraballo  
24 maintained that Sims's complaint and deposition testimony waived his  
25 psychotherapist-patient privilege. They contended that



1 the application of the privilege will deny  
2 defendants information vital to their defense.  
3 Specifically, defendants contend that [Sims], who  
4 has been under the care of the Office of Mental  
5 Health for years, did not ever express any fear of  
6 the defendants, but rather suffers from a mental  
7 illness which may affect his perception.  
8 Significantly, [Sims's] medical records reveal that  
9 in the past he has been suicidal and threatening,  
10 and has engaged in self-harm.

11 (Letter from AAG Rebecca Ann Durden to District Judge Loretta A.  
12 Preska dated June 23, 2005, at 2 (emphases added).) Blot and  
13 Caraballo also argued that disclosure should be ordered on the  
14 grounds that "the mental health records" were needed to allow  
15 defendants to rebut Sims's testimony that he was returned to the PSU  
16 "because he was told that officers could not keep him safe from the  
17 defendants" (id. at 3), and that "[t]o the extent that [Sims]  
18 intends to argue at trial that he was not the aggressor, defendants  
19 should be permitted to provide the jury with evidence as to his  
20 state of mind at the time of, before and after the incident" (id. at  
21 5). In response, Sims reiterated his prior representation that he  
22 would not offer any evidence at trial with respect to his mental  
23 state.

24 Respondents' motion for renewal of the 2002 Disclosure  
25 Order was argued at an unrecorded conference with the district judge  
26 on October 28, 2005. Both sides' briefs on appeal provide (without  
27 contradiction from the other side) some insight into what transpired  
28 at that conference. By the time of the conference, respondents had  
29 taken the deposition of an expert forensic pathologist who had been  
30 retained by Sims--apparently the only expert he retained--to give an  
31 opinion as to Sims's physical condition before and immediately after

1 the altercation.

2 [A]t the October 28, 2005 oral argument, Respondents  
3 argued for a waiver based on Sims's pleadings and  
4 testimony, as well as the testimony of his expert  
5 that Sims's "memory of pain" and emotional state at  
6 the time affect the expert's opinion that Sims was  
7 unlikely (but not unable) to have started the  
8 altercation.

9 (Respondents' brief on appeal at 4 (emphasis in original).) The  
10 district judge indicated that she would grant respondents' motion,  
11 stating that Sims "had placed his psychiatric history at issue by  
12 relying on evidence that he suffered from a pre-existing physical  
13 condition to support his claim that he was attacked by Officer  
14 Blot." (Sims brief on appeal at 15 (emphasis in original).) The  
15 court explained that Sims had forfeited his psychotherapist-patient  
16 privilege by claiming that the attack on him was unprovoked, since  
17 Sims's "psychiatric records might show that he had masochistic or  
18 suicidal tendencies undermining his claim." (Id.)

19 In a brief order dated February 2006, without issuing a  
20 new written explanation, the district court granted respondents'  
21 motion for renewal of the 2002 Disclosure Order, stating as follows:

22 IT IS HEREBY ORDERED that the New York State  
23 Office of Mental Health release to Rebecca Ann  
24 Durden, Assistant Attorney General, or her  
25 designated representative, . . . the complete mental  
26 health record for Nathaniel Sims . . . for the  
27 period December 20, 1997 to and including January  
28 20, 2000.

29 District Court Order dated February 1, 2006 ("February 2006  
30 Disclosure Order"). The present petition for mandamus followed.

31 II. DISCUSSION

1           In his petition for mandamus, Sims contends that the  
2 district court erred in ruling that he has waived his  
3 psychotherapist-patient privilege; he argues that he has not put his  
4 mental health in issue by alleging that corrections officers  
5 attacked him physically or by responding to questions in a  
6 deposition at which he was unable to be represented by counsel.  
7 Respondents contend (1) that the petition should be dismissed  
8 because the February 2006 Disclosure Order is an ordinary discovery  
9 order that does not involve "any recurring issue" (respondents'  
10 brief on appeal at 6) and hence is not reviewable by mandamus, and  
11 (2) that, in any event, the ruling that Sims has waived his  
12 privilege is correct because Sims put his mental state in issue by  
13 (a) alleging in his complaint that respondents assaulted him without  
14 provocation, (b) testifying at his deposition in a manner that,  
15 explicitly or implicitly, implicated his mental state at the time of  
16 the altercation and claimed emotional damage, and (c) retaining an  
17 expert to testify that it is unlikely that Sims would have been the  
18 aggressor in the altercation. Respondents also argue that any  
19 person seeking damages for injuries that include, or might include,  
20 pain and suffering waives the psychotherapist-patient privilege.  
21 For the reasons that follow, we conclude that mandamus is  
22 appropriate and that the disclosure order should be reversed.

23   A. Availability of Mandamus Review

24           The principles governing the availability of mandamus as  
25 an avenue for review of orders relating to pretrial discovery are

1 well established.

2           Although mandamus is generally unavailable as a  
3 means of reviewing district court discovery orders,  
4 the writ is appropriate to review discovery orders  
5 that involve privilege where (i) the petition raises  
6 an issue of importance and of first impression; (ii)  
7 the petitioner's privilege will be lost if review  
8 must await final judgment; and (iii) immediate  
9 resolution will avoid the development of discovery  
10 practices or doctrine undermining the privilege.

11 In re Long Island Lighting Co., 129 F.3d 268, 270 (2d Cir. 1997)  
12 ("LILCO"); see, e.g., In re County of Erie, 473 F.3d 413, 416-17 (2d  
13 Cir. 2007). The first of these factors, although usually absent  
14 where the contention is merely that there was an "incorrect  
15 application of a well-developed principle," LILCO, 129 F.3d at 271  
16 (discussing In re W.R. Grace & Co., 984 F.2d 587, 589 (2d Cir.  
17 1993)), is present when the case instead involves "the extension of  
18 an established principle to an entirely new context," LILCO, 129  
19 F.3d at 271 (discussing In re von Bulow, 828 F.2d 94, 97 (2d Cir.  
20 1987)).

21           The second factor--loss of the petitioner's privilege if  
22 review must await final judgment--is normally present when the  
23 privilege is meant to protect the confidentiality of a communication  
24 (as contrasted, for example, with the privilege against self-  
25 incrimination), for "a remedy after final judgment cannot unsay the  
26 confidential information that has been revealed . . . ." In re von  
27 Bulow, 828 F.2d at 99; see, e.g., LILCO, 129 F.3d at 271. The third  
28 factor--the need to prevent the development of discovery practices  
29 that will undermine the privilege--is present where there is  
30 "potentially broad applicability and influence of the privilege

1 ruling under attack," LILCO, 129 F.3d at 271, thereby creating  
2 uncertainty as to whether a privileged communication will be  
3 protected. "An uncertain privilege--or one which purports to be  
4 certain, but results in widely varying applications by the courts--  
5 is little better than no privilege." In re von Bulow, 828 F.2d at  
6 100.

7 Sims's petition presents all of these factors. First,  
8 this Court has yet to address the issue of waiver or forfeiture in  
9 the context of the psychotherapist-patient privilege; nor have we  
10 addressed the degree to which a court should hold a pro se litigant,  
11 who is reluctantly proceeding without counsel, to have irretrievably  
12 waived that privilege in responding to questions at a deposition.  
13 Second, respondents do not dispute, and there is no question, that  
14 Sims's privilege of confidentiality will have been lost if review  
15 must await a final judgment, prior to which his communications to  
16 his psychotherapists are disclosed.

17 Finally, Sims's petition raises the novel and far-reaching  
18 question of whether a plaintiff's claim for injuries that include  
19 only the garden-variety emotional injury that would ordinarily  
20 result from a physical assault, constitutes a forfeiture of his  
21 psychotherapist-patient privilege. See Koch v. Cox, 489 F.3d 384,  
22 390 (D.C. Cir. 2007) (distinguishing "garden variety" emotional  
23 distress from "any specific psychiatric injury or disorder, or  
24 unusually severe distress" (internal quotation marks omitted)). As  
25 discussed in Part II.B. below, the Supreme Court in Jaffee v.  
26 Redmond, 518 U.S. 1 (1996), made clear that "if the purpose of the

1 [psychotherapist-patient] privilege is to be served, the  
2 participants in the confidential conversation must be able to  
3 predict with some degree of certainty whether particular discussions  
4 will be protected," id. at 18 (internal quotation marks omitted).  
5 The rationales advanced by respondents in support of the district  
6 court's February 2006 Disclosure Order, if accepted, demonstrate  
7 that the confidentiality of psychotherapist-patient communications  
8 would be uncertain--if not extinguished--in a great number of cases.

9 For example, respondents contend that a plaintiff's  
10 allegation that an assault on him was unprovoked--or apparently even  
11 a nonspecific statement by the plaintiff or a witness "to the  
12 effect" that the assault was unprovoked--places the plaintiff's  
13 mental state in issue and forfeits his privilege. (Respondents'  
14 brief on appeal at 6 (emphasis added); see also id. at 20-22.) This  
15 rationale for disclosure could affect virtually every case in which  
16 an assault, or the use of excessive force, is alleged. Respondents  
17 also ask us to uphold the disclosure order on the theory that  
18 "anybody who asks for [damages for] pain and suffering has waived  
19 the psychiatric privilege[.]" (Transcript of oral argument of this  
20 appeal ("Oral Arg. Tr.") at 19-20.) They take the position that "if  
21 anybody asks for pain and suffering damages, [the defendants] are  
22 entitled to the[ plaintiff's] psychiatric records because the  
23 psychiatric records might conceivably disprove the experiencing of  
24 the pain and suffering[.]" (Id. at 19 (emphases added).) They  
25 further contend that a plaintiff places his mental health in issue  
26 by asserting a claim of "unspecified damages [that may] include[]

1 some sort of mental injury" (respondents' brief on appeal at 21  
2 (emphasis added)), and that this Court "should find that even a  
3 claim of 'garden variety' injury waives the psychotherapist-patient  
4 privilege" (id. at 42; see also id. at 43 ("Whether the alleged  
5 injury is specific or general, unusual, or 'garden variety,'  
6 privilege is waived and the defendant is entitled to discovery about  
7 whether and to what extent the injury exists and about what, if  
8 anything, caused it.")). The breadth of respondents' proposed  
9 rationales is obvious.

10 Moreover, respondents argue that disclosure of Sims's  
11 mental health records is necessary so that the jury may have  
12 evidence as to "Sims's state of mind" in order to "evaluate whether  
13 [Sing Sing] staff members acted reasonably and in good faith"  
14 (respondents' brief on appeal at 21) (brackets in original)  
15 (internal quotation marks omitted) (emphases added). Leaving aside  
16 the mental gymnastics needed to justify the leap from the mental  
17 state of Sims to the mental state of respondents, it would appear  
18 that this proposed justification for the forfeiture of a plaintiff's  
19 psychotherapist-patient privilege could be asserted whenever a  
20 defendant wished to interpose a defense of good faith.

21 In sum, despite respondents' suggestion that the present  
22 petition "will not resolve any recurring issue" (respondents' brief  
23 on appeal at 6), their own contentions are of such breadth as to  
24 make it clear that immediate review is needed in order to prevent a  
25 proliferation of discovery rulings that could eviscerate the  
26 effectiveness of the psychotherapist-patient privilege. We conclude

1 that mandamus review is appropriate.

2 B. The Psychotherapist-Patient Privilege

3 In 1996, the Supreme Court made clear that the federal  
4 courts are required to recognize that confidential communications  
5 between a licensed psychotherapist--including a licensed social  
6 worker engaged in psychotherapy--and his or her patients in the  
7 course of diagnosis or treatment are protected from compelled  
8 disclosure under Rule 501 of the Federal Rules of Evidence, see  
9 Jaffee, 518 U.S. at 15. The Court noted that "[t]he psychotherapist  
10 privilege serves the public interest by facilitating the provision  
11 of appropriate treatment for individuals suffering the effects of a  
12 mental or emotional problem. The mental health of our citizenry, no  
13 less than its physical health, is a public good of transcendent  
14 importance." Id. at 11. The Court concluded that the privilege  
15 thus "promotes sufficiently important interests to outweigh the need  
16 for probative evidence," id. at 9-10 (internal quotation marks  
17 omitted), i.e., that it "serve[s] a public good transcending the  
18 normally predominant principle of utilizing all rational means for  
19 ascertaining truth," id. at 15 (internal quotation marks omitted).

20 The Court reasoned that strict confidentiality is required  
21 because

22 [l]ike the spousal and attorney-client  
23 privileges, the psychotherapist-patient privilege is  
24 rooted in the imperative need for confidence and  
25 trust. . . . Effective psychotherapy . . . depends  
26 upon an atmosphere of confidence and trust in which  
27 the patient is willing to make a frank and complete  
28 disclosure of facts, emotions, memories, and fears.  
29 Because of the sensitive nature of the problems for



1           which individuals consult psychotherapists,  
2           disclosure of confidential communications made  
3           during counseling sessions may cause embarrassment  
4           or disgrace. For this reason, the mere possibility  
5           of disclosure may impede development of the  
6           confidential relationship necessary for successful  
7           treatment.

8           Id. at 10 (internal quotation marks omitted) (emphases added). The  
9           Court observed that psychiatrists' ability to help their patients  
10           is completely dependent upon [the patients']  
11           willingness and ability to talk freely. This makes  
12           it difficult if not impossible for [a psychiatrist]  
13           to function without being able to assure . . .  
14           patients of confidentiality and, indeed, privileged  
15           communication. Where there may be exceptions to  
16           this general rule . . . , there is wide agreement  
17           that confidentiality is a sine qua non for  
18           successful psychiatric treatment.

19           Id. (internal quotation marks omitted).

20           Further, as confidentiality is a sine qua non, the Jaffee  
21           Court refused to endorse the proposition that a court could subject  
22           a claim of psychotherapist-patient privilege to a balancing test,  
23           see id. at 17, and deny protection if it found "in the interests of  
24           justice, [that] the evidentiary need for the disclosure of the  
25           contents of a patient's counseling sessions outweighs that patient's  
26           privacy interests," id. at 7 (internal quotation marks omitted).  
27           Rejecting such a "balancing component of the privilege," the Supreme  
28           Court stated that

29           [m]aking the promise of confidentiality contingent  
30           upon a trial judge's later evaluation of the  
31           relative importance of the patient's interest in  
32           privacy and the evidentiary need for disclosure  
33           would eviscerate the effectiveness of the  
34           privilege. . . . [I]f the purpose of the privilege  
35           is to be served, the participants in the  
36           confidential conversation "must be able to predict  
37           with some degree of certainty whether particular  
38           discussions will be protected. An uncertain

1 privilege, or one which purports to be certain but  
2 results in widely varying applications by the  
3 courts, is little better than no privilege at all."

4 Id. at 17-18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393  
5 (1981)) (emphasis added).

6 1. Waiver and Forfeiture Principles

7 Despite ruling that the psychotherapist-patient privilege  
8 should be accorded strict protection, the Jaffee Court noted that  
9 "[l]ike other testimonial privileges, the patient may of course  
10 waive the protection." 518 U.S. at 15 n.14. Waiver of a privilege  
11 may be either express or implied, see, e.g., John Doe Co. v. United  
12 States, 350 F.3d 299, 302 (2d Cir. 2003) ("Doe Co."), and a district  
13 court's finding that a party has waived a privilege is reviewed  
14 under the abuse-of-discretion standard, see, e.g., In re von Bulow,  
15 828 F.2d at 101. A district court has "abuse[d] its discretion if  
16 it based its ruling on an erroneous view of the law or on a clearly  
17 erroneous assessment of the evidence," Cooter & Gell v. Hartmarx  
18 Corp., 496 U.S. 384, 405 (1990), or rendered a decision that "cannot  
19 be located within the range of permissible decisions," Zervos v.  
20 Verizon N.Y., Inc., 252 F.3d 163, 169 (2d Cir. 2001).

21 In dealing with testimonial privileges other than the  
22 psychotherapist-patient privilege, we have held that a waiver may be  
23 implied in circumstances where it is called for in the interests of  
24 fairness. "[F]airness considerations arise when the party attempts  
25 to use the privilege both as 'a shield and a sword.'" In re Grand  
26 Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) ("In re Grand

1 Jury") (quoting United States v. Bilzerian, 926 F.2d 1285, 1292 (2d  
2 Cir.) ("Bilzerian"), cert. denied, 502 U.S. 813 (1991), and In re  
3 von Bulow, 828 F.2d at 103). "The quintessential example is the  
4 defendant who asserts an advice-of-counsel defense and is thereby  
5 deemed to have waived his [attorney-client] privilege with respect  
6 to the advice that he received." In re Grand Jury, 219 F.3d at  
7 182-83 (internal quotation marks omitted). Or the holder of the  
8 privilege may "assert[] a claim that in fairness requires  
9 examination of protected communications." Bilzerian, 926 F.2d at  
10 1292; see also United States v. Nobles, 422 U.S. 225, 239-40 (1975)  
11 (litigant may not both present the trial testimony of an  
12 investigator as to statements he obtained from witnesses and refuse,  
13 on the ground of work-product privilege, to produce relevant  
14 portions of the investigator's report for use in cross-examining  
15 him). "In other words, a party cannot partially disclose privileged  
16 communications or affirmatively rely on privileged communications to  
17 support its claim or defense and then shield the underlying  
18 communications from scrutiny by the opposing party." In re Grand  
19 Jury, 219 F.3d at 182 (emphasis added).

20 "[W]hether fairness requires disclosure . . . is best  
21 decided on a case by case basis, and depends primarily on the  
22 specific context in which the privilege is asserted.'" Doe Co., 350  
23 F.3d at 302 (quoting In re Grand Jury, 219 F.3d at 183). For  
24 example, we look to see whether the privilege holder took  
25 "affirmative steps to inject privileged materials into the  
26 litigation." Id. at 187. In addition, the venue of the privilege

1 holder's statements may be material, for the fairness inquiry  
2 focuses on whether there is a "risk that some independent  
3 decisionmaker will accept [the privilege-holder's] representations  
4 without the [adversary's] having adequate opportunity to rebut  
5 them." Doe Co., 350 F.3d at 305. Thus, a defendant may forfeit his  
6 attorney-client privilege with respect to certain materials "if [he  
7 gives] certain testimony at trial before the jury," id. at 304 n.3  
8 (emphasis in original) (discussing Nobles and Bilzerian); but he  
9 does not forfeit it merely by asserting to his adversary that he  
10 believes he has done nothing wrong, see, e.g., id. at 304; see also  
11 id. at 302 (noting that where the holder made no representation,  
12 express or implied, that he intended to surrender his privilege, the  
13 applicable principle is perhaps more aptly termed "one of  
14 forfeiture, rather than waiver"). The Supreme Court has noted that  
15 "[p]arties may forfeit a privilege by exposing privileged evidence,  
16 but do not forfeit one merely by taking a position that the evidence  
17 might contradict." United States v. Salerno, 505 U.S. 317, 323  
18 (1992).

19 A further consideration in the fairness analysis is  
20 whether the witness's testimony was given in the absence of counsel.  
21 Thus, in In re Grand Jury, 219 F.3d at 186-87, we held that a  
22 corporation's privilege was not necessarily lost by reason of the  
23 grand jury testimony of a witness--the corporation's founder, chief  
24 executive officer, and controlling shareholder--who was uncounseled  
25 in the grand jury room and had no legal training.

26 We also note that in other contexts, a "party appearing

1 without counsel is afforded extra leeway in meeting the procedural  
2 rules governing litigation," and that district judges should "make  
3 some effort to protect a party so appearing from waiving a right  
4 . . . because of his or her lack of legal knowledge." Enron Oil  
5 Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). To give such  
6 "extra leeway," courts are, for example, to construe a pro se  
7 litigant's pleadings and motions liberally, see Haines v. Kerner,  
8 404 U.S. 519, 520 (1972), and to allow amendments to a pro se  
9 litigant's pleadings more freely, see Holmes v. Goldin, 615 F.2d 83,  
10 85 (2d Cir. 1980); courts should not allow a pro se litigant's  
11 rights to "be impaired by harsh application of technical rules,"  
12 Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983).

13 This Court has not previously addressed questions as to  
14 whether a plaintiff asserting a civil rights claim forfeits his  
15 psychotherapist-patient privilege by reason of allegations in his  
16 pleading or his answers to questions in discovery. We note that the  
17 District of Columbia Circuit, presented with precisely these  
18 questions in Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007) ("Koch"),  
19 has rejected broad claims of waiver.

20 In Koch, the plaintiff sued his employer, the Securities  
21 and Exchange Commission ("SEC"), for discrimination, retaliation,  
22 and failure to accommodate his medical conditions; the SEC sought to  
23 subpoena records and testimony from Koch's psychotherapist. A  
24 magistrate judge ordered production, ruling that Koch had forfeited  
25 his psychotherapist-privilege because (1) he had made a claim for  
26 emotional distress damages, and (2) he had stated in answers to

1 interrogatories that he suffered from depression and took medication  
2 for that condition. Koch moved in the district court to withdraw  
3 any claim for emotional distress damages, and he argued to the court  
4 of appeals that in fact his "complaint d[id] not even contain a  
5 claim of emotional distress." 489 F.3d at 388. The court of  
6 appeals, on reviewing the complaint, found that Koch indeed had made  
7 no such claim in his complaint. And it found that his interrogatory  
8 answers as to depression "d[id] not clearly make an allegation of,  
9 much less a claim to recovery for, emotional distress." Id. In  
10 addition, the Koch Court found it "clear" that Koch had "abandoned  
11 any claim the district court may have thought he made for damages  
12 due to emotional stress." Id. Accordingly, the only question  
13 before the court of appeals was whether a plaintiff--who had in fact  
14 made no claim for emotional distress and had expressly abandoned any  
15 such claim--had nevertheless irrevocably "put[] his mental state in  
16 issue in such a way as to waive the psychotherapist-patient  
17 privilege by acknowledging he suffer[ed] from depression." Id.

18 Analogizing to other testimonial privileges, "consistent  
19 with the Supreme Court's analogy in Jaffee," the Koch Court stated  
20 that although a plaintiff waives his psychotherapist-patient  
21 privilege if he "does the sort of thing that would waive the  
22 attorney-client privilege, such as basing his claim upon the  
23 psychotherapist's communications with him," id. at 391, or  
24 "selectively disclos[ing] part of a privileged communication in  
25 order to gain an advantage in litigation," id. (internal quotation  
26 marks omitted), or "su[ing] the therapist for malpractice," id. at

1 389, he "does not put his mental state in issue merely by  
2 acknowledging he suffers from depression, for which he is not  
3 seeking recompense," id. at 391 (emphasis added). The Koch Court  
4 also ruled that the privilege is not overcome when the plaintiff's  
5 mental state is put in issue only by the defendant. See id.; see  
6 also id. at 390-91 (plaintiff's waiver of the privilege as to a  
7 different doctor with respect to physical ailments did not put his  
8 mental condition in issue or waive his psychotherapist-patient  
9 privilege). The Koch Court rejected the SEC's contention that "any  
10 time it is possible, as a matter of medical science, that a  
11 plaintiff's mental condition--depression, anxiety, remorse, etc.--  
12 may be a cause of his alleged physical condition, or even just  
13 aggravate that condition, the plaintiff necessarily has put his  
14 mental state in issue and thereby waived the psychotherapist-patient  
15 privilege," stating that such a rule would "eviscerate the  
16 privilege." Id. 389-90.

17 The Koch decision is consistent with the considerations  
18 leading to our own decisions discussed above. In light of the  
19 transcendent importance of the psychotherapist-patient privilege as  
20 discussed in Jaffee, we agree with the Koch Court that a plaintiff  
21 does not forfeit his psychotherapist-patient privilege merely by  
22 asserting a claim for injuries that do not include emotional damage;  
23 that a plaintiff does not forfeit that privilege by merely stating  
24 that he suffers from a condition such as depression or anxiety for  
25 which he does not seek damages; that a plaintiff may withdraw or  
26 formally abandon all claims for emotional distress in order to avoid

1 forfeiting his psychotherapist-patient privilege; and that a party's  
2 psychotherapist-patient privilege is not overcome when his mental  
3 state is put in issue only by another party.

4 2. Application of Forfeiture Principles to Sims's Claim

5 The running themes in respondents' request for Sims's  
6 psychiatric records are their contentions (1) that "Sims's  
7 complaint, his deposition testimony, and the deposition testimony of  
8 his hired expert, [are] all to the effect that . . . he had suffered  
9 serious emotional damages as a result of the assault" (respondents'  
10 brief on appeal at 6 (emphasis added); see, e.g., id. at 3, 28-29);  
11 (2) that even a request for only garden-variety damages waives the  
12 psychotherapist-patient privilege "because the psychiatric records  
13 might conceivably disprove the experiencing of the pain and  
14 suffering" (Oral Arg. Tr. 19 (emphasis added); see also respondents'  
15 brief on appeal at 42-43); and (3) that Sims's psychiatric records  
16 may be used to show that Sims, rather than Blot, started the  
17 December 20 altercation, i.e., that "Sims's mental state is and  
18 always has been at the heart of this case" (respondents' brief on  
19 appeal at 11) in which "[t]he principal issue at trial will be  
20 whether Sims first physically attacked officer Blot or vice-versa"  
21 (respondents' letter brief on appeal, dated February 15, 2008,  
22 at 1).

23 The district court appears to have accepted these  
24 arguments. The February 2006 Disclosure Order that granted  
25 respondents' motion for a renewal of the 2002 Disclosure Order was



1 not accompanied by a new written explanation, and we assume that the  
2 district judge's reasons for granting disclosure were those she  
3 expressed in the 2002 Disclosure Order, as well as those she is  
4 described by the parties as having stated at the unrecorded October  
5 28, 2005 oral argument of the renewal motion. In ordering  
6 disclosure in 2002, the district judge stated, in pertinent part, as  
7 follows:

8 [P]laintiff argues that his withdrawal of his non-  
9 garden variety claims for emotional damages and his  
10 undertaking not to testify to his fear of defendants  
11 or that he was placed in the PSU for security  
12 reasons makes contrary material in his mental health  
13 records inadmissible. That information may be  
14 inadmissible at trial, however, does not preclude  
15 its discovery. Fed. R. Civ. P. 26(b)(1). More  
16 importantly, however, plaintiff may not unring the  
17 bell. "Once he waives his privilege . . . , a  
18 witness may not withdraw his waiver to prevent  
19 matters which he has already gone into from being  
20 explored in greater detail." United States [ex rel.  
21 Carthan] v. Sheriff, 330 F.2d 100, 102 (2d Cir.  
22 1964) (citing Brown v. United States, 356 U.S. 148  
23 (1958)). . . .

24 Here, plaintiff testified freely as to  
25 communications with mental health professionals and  
26 as to the supposed circumstances of his placement in  
27 the PSU in an effort to support his claim and  
28 otherwise gain advantage in this litigation.  
29 Defendants, on the other hand, are disadvantaged  
30 both specifically in their inability to, for  
31 example, prove the negative that plaintiff was not  
32 [sic] placed in the PSU for psychiatric reasons and  
33 generally in not being able to test plaintiff's  
34 credibility based on what is apparently not an  
35 insubstantial mental health issue. See Chnapkova v.  
36 Koh, 985 F.2d 79, 82 (2d Cir. 1993). Accordingly,  
37 fairness requires that defendants have access to  
38 plaintiff's mental health records for the period  
39 from two years before the incident at issue through  
40 the present.

41 2002 Disclosure Order at 1-2 (emphases added). And at the October  
42 2005 oral argument of the renewal motion, the district judge

1        apparently indicated that Sims had forfeited his psychotherapist-  
2        patient privilege for the additional reasons (a) that he "had placed  
3        his psychiatric history at issue by relying on evidence that he  
4        suffered from a pre-existing physical condition to support his claim  
5        that he was attacked by Officer Blot," and (b) that Sims claimed  
6        that Blot's attack on him was unprovoked, which might be undermined  
7        because Sims's "psychiatric records might show that he had  
8        masochistic or suicidal tendencies." (Sims brief on appeal at 15  
9        (emphasis in original).)

10                We note first that the record in no way justifies  
11        acceptance of respondents' contentions that Sims's complaint, his  
12        deposition testimony, and the deposition testimony of his expert  
13        witness assert that Sims "suffered serious emotional damages as a  
14        result of the assault" (respondents' brief on appeal at 6). The  
15        original complaint filed by Sims, described in Part I.A. above,  
16        describes as his injuries only shoulder pain and a laceration over  
17        his eye; Sims's current complaint alleges that Sims "suffered  
18        serious and painful physical injuries, which required emergency  
19        medical attention" (Amended Complaint ¶ 58 (emphasis added)); but  
20        neither complaint so much as mentions emotional injury. Nor do we  
21        see that Sims suggested that he was asserting a claim for emotional  
22        injury, serious or otherwise, in his deposition testimony. As  
23        quoted in Part I.A.1. above, Sims testified that he thinks and  
24        dreams about the assault and that he becomes anxious at the sight of  
25        a corrections officer holding a knife. But he testified, "I  
26        wouldn't say I suffered mental injuries as a result of this" (Sims

1 Dep. 55); he testified that he was not receiving any treatment for  
2 emotional injury related to the events underlying this litigation  
3 (see id. at 55-56); and nowhere did he state that he was seeking  
4 damages for mental or emotional injuries. Finally, as to Sims's  
5 expert's deposition, respondents have provided us with no page  
6 citation to support their contention that his testimony includes the  
7 opinion that Sims suffered serious emotional damages as a result of  
8 the assault; and in our own review of that deposition, we have seen  
9 no testimony as to any emotional consequences at all, much less as  
10 to any "serious" emotional injury.

11 In addition, for the reasons that follow, we conclude that  
12 the district court's 2002 Disclosure Order and the rationales stated  
13 at the 2005 oral argument of the renewal motion were based on  
14 erroneous views of the law and did not properly apply the privilege-  
15 forfeiture principles discussed in Part II.B.1. above.

16 a. The Legal Framework of the District Court's Ruling

17 In reaching its conclusion that Sims's mental health  
18 records should be disclosed because Sims "may not unring the bell,"  
19 2002 Disclosure Order at 1, the court quoted United States ex rel.  
20 Carthan v. Sheriff ("Carthan") for the proposition that "[o]nce he  
21 waives his privilege . . . , a witness may not withdraw his waiver  
22 to prevent matters which he has already gone into from being  
23 explored in greater detail," 330 F.2d at 102 (emphasis ours). The  
24 context in which the Carthan statement was made, however, was  
25 materially different from the circumstances here.

1           To begin with, Carthan was not a plaintiff in a civil case  
2 in which he could withdraw a claim; he was a witness in a grand jury  
3 investigation over which he had no control. Further, he was a New  
4 York City employee who was required, by the City Charter, "to waive  
5 his privilege against self-incrimination with respect to city  
6 affairs" if he wished to retain his position and his eligibility for  
7 any other city employment; and he in fact "executed a Limited Waiver  
8 of Immunity." 330 F.2d at 101. In addition, Carthan had proceeded  
9 to disclose financial information for certain years by answering  
10 grand jury questionnaires. When he thereafter, invoking the  
11 privilege against self-incrimination, resisted compliance with a  
12 grand jury subpoena for his income tax returns for those years and  
13 was held in contempt, we refused to disturb the contempt ruling  
14 because he had knowingly waived his privilege. This was the context  
15 of the statement that Carthan could not "withdraw his waiver," id.  
16 at 102.

17           The circumstances of the present case are far different.  
18 For example, nothing in the record here suggests that Sims made a  
19 knowing election to waive his psychotherapist-patient privilege.  
20 Sims requested and was denied assignment of counsel, and nothing has  
21 been called to our attention to indicate that he was even aware that  
22 he had such a privilege and was entitled to maintain the  
23 confidentiality of his psychiatric communications.

24           Further, unlike a grand jury witness who has no say over  
25 the issues in the proceeding, Sims, as a plaintiff in a civil case,  
26 was entitled not to pursue a claim he had asserted. Indeed, Sims's

1 attorneys stated that "Sims never intended to place his mental or  
2 emotional state 'at issue', and that condition is not an element of  
3 his Section 1983 claim." (Korn Letter at 1.) And as discussed  
4 above, there is in fact no mention in either Sims's original  
5 complaint or his Amended Complaint of emotional distress. But in  
6 any event, especially given that Sims commenced the action pro se,  
7 his subsequent counseled express disavowal of any claim for unusual  
8 emotional distress--whether such a claim was actually asserted or  
9 was merely imputed to him by respondents--should have been given  
10 effect.

11 Finally as to Carthan, as discussed in Part II.B.2.c.  
12 below, a disclosure made to the grand jury is materially different  
13 in impact from a disclosure made to a party opponent in a  
14 deposition. A grand jury uses the information it receives in order  
15 to decide whether or not a criminal proceeding will be commenced.  
16 Deposition testimony in a civil action, on the other hand, might  
17 never come to the attention of any decisionmaker. For all of these  
18 reasons, Carthan's ruling that the grand jury witness could not  
19 withdraw his waiver of the privilege against self-incrimination  
20 bears little relationship to this civil-action plaintiff's  
21 withdrawal of a claim.

22 In addition, the district court in the present case cited  
23 Chnapkova v. Koh, 985 F.2d 79, 82 (2d Cir. 1993), in support of its  
24 view that Sims's psychiatric records should be disclosed in order to  
25 avoid respondents' being "disadvantaged . . . specifically in their  
26 inability to, for example, prove" the reason for Sims's return to

1 the PSU, and "disadvantaged . . . generally" if they are unable to  
2 use those records "to test [his] credibility," 2002 Disclosure Order  
3 at 2. Chnapkova, however, which concerned admissibility of a  
4 plaintiff's psychiatric records at trial, did not analyze--or even  
5 mention--privilege and did not involve an issue of privilege waiver  
6 or forfeiture. Rather, its focus was solely on the probative value  
7 of the records. The trial in Chnapkova took place prior to this  
8 Court's first recognition of the psychotherapist-patient privilege,  
9 see In re Doe (Diamond), 964 F.2d 1325, 1328 (2d Cir. 1992), and the  
10 Chnapkova trial judge excluded the plaintiff's psychiatric records  
11 from evidence pursuant to Fed. R. Evid. 403 on the ground that any  
12 probative value they might have was outweighed by the danger of  
13 unfair prejudice. This Court reversed, holding that the records  
14 could be used because they would be sufficiently "probative of . . .  
15 credibility," id. at 81, and "certainly probative" of one of the  
16 facts in issue, see id. at 82. Our conclusion in Chnapkova, which  
17 was decided in 1993, that the prejudice resulting from disclosure of  
18 psychiatric records could be outweighed by the probative value of  
19 those records, was overtaken by the Supreme Court's 1996 decision in  
20 Jaffee that the psychotherapist-patient privilege is not subject to  
21 such a balancing test. As discussed above, Jaffee held that the  
22 psychotherapist-patient privilege "promotes sufficiently important  
23 interests to outweigh the need for probative evidence," 518 U.S. at  
24 9-10 (internal quotation marks omitted), and "transcend[s] the  
25 normally predominant principle of utilizing all rational means for  
26 ascertaining truth," id. at 15 (internal quotation marks omitted).

1 In sum, the district court's reliance on Chnapkova in the 2002  
2 Disclosure Order for the proposition that Sims's psychiatric records  
3 should be disclosed in order to allow respondents to prove certain  
4 facts and to test Sims's credibility was misplaced, as that case did  
5 not involve a claimed privilege forfeiture or entail the type of  
6 fairness analysis that a determination as to forfeiture requires,  
7 and instead utilized a balancing analysis that is now foreclosed by  
8 Jaffee.

9 Nor does the district court's decision comport with Jaffee  
10 based on the rationale stated in October 2005 that Sims's  
11 psychiatric records should be disclosed, on account of his assertion  
12 that the assault on him was unprovoked, because those records might  
13 undermine that assertion by showing that he had masochistic or  
14 suicidal tendencies. The possibility that a patient has such  
15 tendencies is a far better reason to deny disclosure than to grant  
16 it. "If the privilege were rejected, confidential conversations  
17 between psychotherapists and their patients would surely be  
18 chilled," Jaffee, 518 U.S. at 11-12, and the public interest in  
19 securing psychiatric help for a patient who has suicidal tendencies  
20 surely transcends the interest of an accused assailant who wishes to  
21 suggest that the existence of such tendencies indicates that the  
22 patient started the fight. The "suicidal tendencies" rationale  
23 exceeded appropriate bounds of discretion.

24 Finally, while the district court recognized the  
25 importance of fairness to the other side in considering whether  
26 there should be a forfeiture of the privilege, we do not see that

1 the court gave consideration to several components of fairness in  
2 this context, which are discussed in Part II.B.1. Sims, who had  
3 expressly withdrawn any claim of emotional distress injury (beyond  
4 "garden variety" pain and suffering from physical injury) had not  
5 attempted to "use the privilege both as 'a shield and a sword.'" In  
6 re Grand Jury, 219 F.3d at 182. This case had nothing in common  
7 with that of a "defendant who asserts an advice-of-counsel defense"  
8 but then invokes the privilege in an effort to prevent the adversary  
9 from discovering his communications with his counsel. Id. at 182-83  
10 (internal quotation marks omitted). Nor was Sims "assert[ing] a  
11 claim that in fairness requires examination of protected  
12 communications." Bilzerian, 926 F.2d at 1292. Sims was not  
13 "partially disclos[ing] privileged communications or affirmatively  
14 rely[ing] on privileged communications to support [his] claim . . .  
15 and then shield[ing] the underlying communications from scrutiny by  
16 the opposing party." In re Grand Jury, 219 F.3d at 182. He did not  
17 take "affirmative steps to inject privileged materials into the  
18 litigation" while simultaneously trying to shield the privileged  
19 communications from scrutiny by the adversary. Id. at 187. "The  
20 unfairness courts have found which justified imposing involuntary  
21 forfeiture [of a privilege] generally resulted from a party's  
22 advancing a claim to a court or jury (or perhaps another type of  
23 decision maker) while relying on its privilege to withhold from a  
24 litigation adversary materials that the adversary might need to  
25 effectively contest or impeach the claim." Doe Co., 350 F.3d at  
26 303. This case exhibited none of these characteristics.



1 Further, in basing its waiver finding on the proposition  
2 that at his deposition Sims "testified freely," 2002 Disclosure  
3 Order at 2, about his communications with Del Santo, the district  
4 court apparently gave no consideration to the fact that at that  
5 deposition Sims was not represented by counsel, the court having  
6 denied his request either for permission to provide discovery in  
7 some other manner or for the appointment of counsel to represent  
8 him. While a party to a civil action of course has no  
9 constitutional right to the assignment of counsel, see, e.g., United  
10 States v. Coven, 662 F.2d 162, 176 (2d Cir. 1981), cert. denied, 456  
11 U.S. 916 (1982), and we intend no criticism of the district court  
12 for not having appointed counsel for Sims sooner, it is nonetheless  
13 relevant to the fairness analysis that the record does not indicate  
14 that Sims was learned in the law and does indicate that when Sims  
15 represented himself at his deposition it was not by his choice.

16 b. The View that Sims Used His Privilege as a Sword

17 Further, we cannot accept the district court's finding  
18 that fairness required the disclosure of Sims's psychiatric records  
19 on the basis that his testimony (a) as to his "communications with  
20 mental health professionals and [b] as to the supposed circumstances  
21 of his placement in the PSU" constituted "an effort to support his  
22 claim and otherwise gain advantage in this litigation," 2002  
23 Disclosure Order at 2. The finding with respect to Sims's  
24 communications with mental health professionals would have been an  
25 appropriate rationale for disclosure to Del Santo, the psychiatric

1 nurse, if she were still a defendant in this action. Sims testified  
2 that the reason he had sued Del Santo, who was not present at the  
3 December 20 incident, was that he had told her he was repeatedly  
4 threatened by two of the corrections officers and had asked her to  
5 intercede with prison officials on his behalf (see Sims Dep. 62-64),  
6 but that nothing had been done about his complaints. If the lack of  
7 any curative response to those complaints were the basis of an  
8 existing claim by Sims against Del Santo, Sims could properly have  
9 been found to be using his confidential communications as a sword  
10 and be prohibited from using his privilege as a shield.

11 But Del Santo was dismissed from this action in September  
12 2001, prior to the defense request for Sims's psychiatric records,  
13 and there were--and are--no assertions of this type with respect to  
14 Blot and Caraballo. Further, Sims has represented that he will  
15 offer no evidence at trial that he fears corrections officers or  
16 that he ever communicated any fear of Blot and Caraballo to mental  
17 health officials.

18 As to the finding that Sims sought to support his claim  
19 and gain a litigation advantage by testifying "as to the supposed  
20 circumstances of his placement in the PSU," it is not clear whether  
21 the district court was referring to his placement in the PSU before  
22 or after the December 20 incident, but it is difficult to see how  
23 either placement supports--or refutes--Sims's claim so as to provide  
24 a permissible rationale for disclosure of his mental health records.  
25 The pre-altercation theory advanced by respondents, i.e., the  
26 contention that Sims forfeited his psychotherapist-patient privilege

1 by alleging in his original complaint that the altercation occurred  
2 while he was on his way to SHU from the PSU, is baseless. There is  
3 no dispute as to where the altercation occurred; there is no dispute  
4 as to where Sims was coming from when the altercation occurred; and  
5 the place from which Sims was coming sheds no light on any factual  
6 issue to be tried in this case.

7 Similarly, to the extent that the district court instead  
8 meant that respondents would be disadvantaged if they could not use  
9 Sims's mental health records to show that Sims was returned to the  
10 PSU for mental health reasons, rather than for security reasons, on  
11 the day after the altercation, the court did not explain how the  
12 reason for his return to the PSU would shed any light on who had  
13 started the fight; and we see no connection. In any event, the  
14 circumstances of Sims's return to the PSU after the altercation had  
15 been withdrawn from the case by Sims's attorneys' representations in  
16 2002 (see Korn/Ryan Letter at 1 ("we do not intend to offer . . .  
17 evidence that Mr. Sims was transferred to the psychiatric satellite  
18 unit after the incident or that he was transferred there for  
19 security rather than psychiatric reasons"))).

20 Nor does the deposition testimony of Sims's forensic  
21 pathologist, Isidore Mihalakis, M.D., to which the court apparently  
22 referred at the October 2005 oral argument of respondents' motion to  
23 renew the 2002 Disclosure Order, provide a proper basis for finding  
24 that Sims forfeited his psychotherapist-patient privilege. At that  
25 deposition, Mihalakis gave his opinion that it was unlikely that  
26 Sims was the aggressor in the December 20 incident (by moving in a

1 sudden and violent manner as apparently described in a deposition  
2 given by Blot) because Sims had a "memory of pain," associated with  
3 such a movement, from a preexisting physical condition. (Deposition  
4 of Isidore Mihalakis, M.D., October 4, 2005, at 40.) This testimony  
5 does not justify a forfeiture of Sims's psychotherapist-patient  
6 privilege for several reasons. First, Mihalakis's opinion concerned  
7 the effects of a chronic condition that was not psychological but  
8 physical. Second, Mihalakis is not a psychiatrist or a  
9 psychologist; he would not be qualified to testify at trial as to  
10 Sims's mental state. And third, Sims's attorneys had represented  
11 that they would not offer at trial evidence that Sims's mental  
12 health status affects his behavior. (See Korn/Ryan Letter at 1.)  
13 In addition, clarifying that representation in response to this  
14 Court's request at oral argument, Sims's attorneys have stated that  
15 Mihalakis did not review any of Sims's mental health records, and  
16 that Sims "will not offer any testimony from Dr. Mihalakis  
17 concerning the effect of Mr. Sims' emotional state or 'memories of  
18 pain' on his actions" (Sims letter brief on appeal, dated February  
19 8, 2008, at 1). Given this record, the prospective testimony of the  
20 pathologist provides no basis for finding that fairness demands  
21 disclosure of Sims's psychiatric records to respondents.

22 In sum, we conclude that with respect to Sims's claims  
23 against Blot and Caraballo, who are the only remaining defendants,  
24 the district court erred in indicating that Sims essentially used  
25 his privilege as a sword.

1 c. The Disregard of Both the Procedural Context of Sims's  
2 Statements and His Evidentiary and Claim Renunciations

3 Finally, in finding that fairness required that  
4 respondents be given access to Sims's mental health records, the  
5 district court noted, but plainly gave no effect to, Sims's  
6 attorneys' representations that Sims's mental or emotional state "is  
7 not an element of his Section 1983 claim" (Korn Letter at 1) or  
8 their representations, described in Parts I.A.2. and I.A.3. above,  
9 that they would not offer evidence relating to his mental or  
10 emotional state. While the court initially adverted to the claim  
11 withdrawal and evidentiary renunciations, it did so only to state  
12 that although they might make the information inadmissible at trial,  
13 admissibility was not the test. See 2002 Disclosure Order at 1.  
14 The court thereafter proceeded to assess the fairness issue,  
15 however, as if the renounced evidence would in fact be admitted,  
16 concluding, for example, as discussed above, that respondents would  
17 be at a disadvantage because they would be unable to prove that Sims  
18 was returned to the PSU after the December 20 incident for reasons  
19 other than security. See id. at 2. But with no evidence to be  
20 presented by Sims at trial as to this matter, the view that  
21 respondents would be unfairly prejudiced by lacking access to the  
22 privileged information that might "prove the negative," id., is  
23 inexplicable.

24 These findings that respondents would be disadvantaged by  
25 Sims's references to his privileged communications and his return to  
26 the PSU--and the ruling that Sims cannot "unring the bell"--ignored  
27 the procedural venue in which his statements were made. As

1 discussed in Part II.B.1. above, the fairness inquiry focuses on  
2 whether there is a risk that a "decisionmaker" will accept the  
3 privilege-holder's statements without his opponent's having an  
4 adequate opportunity to present rebutting evidence. See, e.g., Doe  
5 Co., 350 F.3d at 305. In Carthan, for example, statements were made  
6 to the grand jury, which was to decide whether, and against whom, to  
7 return an indictment; the witness was not allowed to waive his  
8 privilege against self-incrimination in order to make certain  
9 statements, but then invoke the privilege to deny the grand jury  
10 access to materials that would allow it to evaluate those  
11 statements.

12 In the present case, in contrast, Sims's statements were  
13 made only in a deposition, not before a decisionmaker or factfinder.  
14 Given that Sims cannot introduce any of his own deposition testimony  
15 at trial (unless, of course, respondents were to introduce some  
16 portion of the deposition that Sims should be allowed to supplement  
17 in the interest of completeness, see Fed. R. Civ. P. 32(a)(6)),  
18 Sims's deposition testimony does not place respondents in a  
19 disadvantageous position at trial. And since Sims made it clear  
20 that he will not offer any evidence as to his mental health, or any  
21 psychological disorder, or his fears, or any non-garden-variety  
22 emotional distress resulting from the alleged assault, etc., we  
23 conclude that it was not within the permissible limits of discretion  
24 for the district court to conclude that respondents would be  
25 prejudiced if Sims were not required to disclose his mental health  
26 records.

1 d. Respondents' Alternative Arguments

2 The suggestions advanced by respondents as alternative  
3 bases for upholding the order for disclosure of Sims's mental health  
4 records fare no better. Their contention that "Sims's allegation of  
5 the improper use of force raises the question of whether Sims, due  
6 to uncontrolled aggression, a persecution complex, or some other  
7 psychological problem, started the fight by attacking the correction  
8 officers, in which case the Respondents would not be liable"  
9 (respondents' brief on appeal at 21-22 (emphases added)), provides  
10 no basis for disclosure of Sims's psychiatric records. If Sims  
11 started the fight by attacking respondents, respondents presumably  
12 would not be liable for the injuries alleged here regardless of  
13 whether or not Sims was motivated by such a mental condition.

14 Further, a privilege may be forfeited with respect to a  
15 "claim or defense," In re Grand Jury, 219 F.3d at 182 (emphasis  
16 added). Thus, respondents' notion that a party forfeits his  
17 psychotherapist-patient privilege simply because he alleges--or even  
18 implies--that the attack on him was unprovoked is farther-reaching  
19 than perhaps respondents envision. If that principle were adopted,  
20 it would also be applicable to Blot and Caraballo, who contend that  
21 it was Sims who started the fight without provocation from them. On  
22 respondents' theory, in any assault or excessive-force case both the  
23 plaintiffs and the defendants could be required to disclose their  
24 respective mental health records. Disclosure, rather than  
25 protection of confidentiality, would become the norm.

26 Finally, we reject respondents' contentions that "anybody"

1 who requests damages for "pain and suffering has waived the  
2 psychiatric privilege" "because the psychiatric records might  
3 conceivably disprove the experiencing of the pain and suffering"  
4 (Oral Arg. Tr. 19), that any claim of "even . . . 'garden variety'  
5 injury waives the psychotherapist-patient privilege" (respondents'  
6 brief on appeal at 42), and that a plaintiff's mental health is  
7 placed in issue whenever the plaintiff's claim for "unspecified  
8 damages" may "include[] some sort of mental injury" (respondents'  
9 brief on appeal at 21). In reality respondents simply seek to have  
10 the privilege breached whenever there is a possibility that the  
11 psychiatric records may be useful in testing the plaintiff's  
12 credibility or may have some other probative value. To accept these  
13 contentions would inject the balancing component that Jaffee  
14 foreclosed, and would disregard the principle that "[p]arties  
15 . . . do not forfeit [a privilege] merely by taking a position that  
16 the evidence might contradict," Salerno, 505 U.S. at 323. If this  
17 principle were not the rule, then in virtually every case a  
18 forfeiture might be found, as in virtually every case the party  
19 opposing the privilege could argue that the psychological record  
20 might reveal evidence that the party asserting the privilege is  
21 testifying falsely.

## 22 CONCLUSION

23 We have considered all of respondents' arguments on this



1 appeal and have found them to be without merit. Given the  
2 considerations discussed above, including

3 - the importance of the psychotherapist-patient  
4 privilege, and the Supreme Court's ruling in Jaffee that,  
5 if not waived, that privilege is to be upheld without  
6 being subjected to a balancing analysis in which the  
7 privilege may be deemed outweighed by the need for  
8 probative or impeaching evidence,

9 - the district court's erroneous views that the cases it  
10 cited supported a determination that Sims's  
11 psychotherapist-patient privilege was forfeited, and

12 - the district court's failure to consider such fairness  
13 factors as

14  
15 - the absence of any allegation of emotional  
16 injury in Sims's pleadings,

17 - the fact that the only statements by Sims that  
18 he suffered any emotional distress were made in his  
19 deposition, at which he reluctantly appeared pro se,

20 - the fact that even after respondents brought up  
21 the subject of emotional injury and Sims testified  
22 that he suffered recurring dreams and anxiety, he  
23 did not assert any claim for recovery on that basis,

24 - the fact that no part of Sims's deposition  
25 testimony would be admitted in evidence at trial  
26 unless respondents' own submissions require it, and

27 - Sims's evidentiary renunciations and his  
28 withdrawal of any claim to damages for mental injury  
29 or any non-garden-variety emotional injury,

30 we conclude that the order requiring disclosure of Sims's mental  
31 health records to respondents was beyond the permissible limits of  
32 discretion.

33 The writ of mandamus is granted. The February 2006  
34 Disclosure Order is reversed. We of course express no view as to  
35 the merits of the case.