# 9.28 Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim of Failure to Protect

As previously explained, the plaintiff has the burden of proving that the [act[s]] [failure to act] of the defendant deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] [other pronoun] of [his] [her] [other pronoun] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff’s claim*].

 Under the Eighth Amendment, a convicted prisoner has the right to be free from “cruel and unusual punishments.” To prove the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must prove the following elements by a preponderance of the evidence:

 First, the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;

 Second, those conditions put the plaintiff at substantial risk of suffering serious harm;

 Third, the defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and

 Fourth, by not taking such measures, the defendant caused the plaintiff’s injuries.

 With respect to the third element, the defendant’s conduct must be both objectively unreasonable and done with a subjective awareness of the risk of harm. In other words, the defendant must have known facts from which an inference could be drawn that there was a substantial risk of serious harm, and the defendant must have actually drawn that inference.

**Comment**

 The Eighth Amendment imposes on prison officials a duty to “take reasonable measures to guarantee the safety of the inmates.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). This includes a duty to protect prisoners from violence at the hands of other prisoners. *Id*. at 833. *See also Cortez v. Skol*, 776 F.3d 1046, 1050-53 (9th Cir. 2015) (holding that the mother of prisoner who suffered severe brain damage following an attack by two other inmates raised genuine issues on Eighth Amendment claim in light of evidence that one guard escorted three hostile, half-restrained, high-security prisoners through isolated prison passage in contravention of prison policy and practice). “A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Farmer*, 511 U.S. at 828 (citing *Wilson v. Seiter*, 501 U.S. 294 (1991); and *Estelle v. Gamble*, 429 U.S. 97 (1976)). “While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Id*. at 835.

 In *Farmer*, the Supreme Court held that an Eighth Amendment claim based on deliberate indifference must satisfy both an objective and a subjective component test. *Farmer*, 511 U.S. at 834. “The Eighth Amendment imposes a duty on prison officials to protect inmates from violence at the hands of other inmates. A prison official violates this duty when two requirements are met. First, objectively viewed, the prison official’s act or omission must cause a substantial risk of serious harm. Second, the official must be subjectively aware of that risk and act with deliberate indifference to inmate health or safety. In other words, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Cortez*, 776 F.3d at 1050 (9th Cir. 2015) (holding that an officer leading three inmates through a prison was deliberately indifferent to the risk that the inmates would be violent with one another, citing evidence that the officer knew about (1) the hostility between the inmates, (2) the inmate victim’s protective custody status, and (3) a prison policy requiring leg restraints when moving detention unit inmates) (internal quotations and citations omitted). *See also Castro v. County of Los Angeles*, 833 F.3d. 1060, 1068, 1070-71 (9th Cir. 2016) (en banc) (distinguishing a convicted prisoner’s claim of failure to protect under the Eighth Amendment from pretrial detainee’s claim under Fourteenth Amendment, and noting that in the prison context, “the official must demonstrate a *subjective awareness* of the risk of harm”); *but see Kingsley v. Hendrickson*, 576 U.S. 389, 402 (2015) (“We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.”).

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts “must defer to the judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security.” *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). “It is well established that judges and juries must defer to prison officials’ expert judgments.” *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

 The Ninth Circuit has held that failing to give a jury deference instruction based on the general principles outlined in *Bell* was an error. *Norwood*, 591 F.3d at 1066-67 (“Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement.”). In subsequent cases, the Ninth Circuit explained that a deference instruction should be given only where both of the conditions in *Bell* were present: first, the prison officials adopted and executed “policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security,” *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Bell*, 441 U.S. at 547), and second, the record did not contain “substantial evidence showing [that the prison’s] policies are an unnecessary or unjustified response to problems of jail security.” *Id.* (quoting *Florence*, 566 U.S. at 323); *see also Fierro v. Smith*, 39 F.4th 640, 648 (9th Cir. 2022) (restating the rule that “two conditions” inform whether the deference instruction should be given when prisoners assert Eighth Amendment claims challenging their treatment in prison, namely “whether the treatment the prisoner challenges (1) was provided pursuant to a security-based policy or practice, and, if so, (2) was a necessary, justified, and non-exaggerated response to security needs”).

 In light of the two *Bell* conditions, the Ninth Circuit has explained the contours of giving a deference instruction in different scenarios. The plaintiff bears the burden of producing “substantial evidence” in the record that the two conditions are not met. *Shorter*, 895 F.3d at 1183 (“In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations courts should ordinarily defer to their expert judgment in such matters” (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). If the plaintiff has failed to carry this burden, or if the parties do not dispute that both *Bell* conditions are met, the trial court must give a jury the deference instruction. *Fierro*, 39 F.4th at 648; *Norwood*, 591 F.3d at 1067. Where the parties agree that one condition is met and one is absent, or that both conditions are absent, then the trial court may not give the jury deference instruction. *Fierro*, 39 F.4th at 648.

In cases involving the denial of medical care to prisoners, which highlight *Bell*’s first condition (whether the policy or procedure addressed the need for prison security), the deference instruction should not be given “unless a party’s presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision.” *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also* *Shorter*, 895 F.3d at 1184 (holding that “the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy”); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants “did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant’s] morphine prescription without tapering”).

 In a case highlighting *Bell*’s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate when the record contained substantial evidence that the jail’s search practice “was an unnecessary, unjustified, and exaggerated response to jail officials’ need for prison security.” *Shorter,* 895 F.3d at 1184 (stating that “jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time”).

 Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston,* 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official’s action “was not provided pursuant to a security-based policy or practice,” and the policy at issue was “an unnecessary, unjustified, or exaggerated response,” but in response the prison adduced substantial evidence that the prison official’s “actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated,” *Coston*, 13 F.4th at 735, then “it might be appropriate to instruct the jury that ‘whether to give deference to prison officials [is] left to the jury to decide.’” *Fierro*, 39 F.4that 648-49 (citing *Coston*, 13 F.4th at 735).

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