# 9.31 Particular Rights—Fourteenth Amendment—Pretrial Detainee’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 Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff’s claim*]. Under the Fourteenth Amendment, a pretrial detainee has the right to be protected while in custody.

To prove the defendant deprived the plaintiff of this right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

First, the defendant made an intentional decision regarding 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 or reduce 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 objectively unreasonable.

**Comment**

After the Supreme Court decided *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the Ninth Circuit decided *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc). In *Castro*, the Ninth Circuit held that Castro, a pretrial detainee who was injured by an inmate while detained in a sobering cell, “had a due process right to be free from violence from other inmates.” *Id.* at 1067. The Ninth Circuit focused its discussion on the Fourteenth Amendment, but “neither Castro nor the majority claim[ed] that any other constitutional right [was] at issue.” *Id*. at 1067-70, 1084 (Ikuta, J., dissenting). Analogizing to the Supreme Court’s excessive force analysis in *Kingsley*, the Ninth Circuit in *Castro* approved the following elements for a pretrial detainee’s failure-to-protect claim under the Fourteenth Amendment:

(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) 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 (4) By not taking such measures, the defendant caused the plaintiff’s injuries.

*Id.* at 1071.

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).

This framework also applies to pretrial detainees challenging use of force and other conditions of confinement. See *Fierro*, 39 F.4th 648. n. 6 (“This framework also applies to pretrial detainees challenging their conditions of confinement under the Fourteenth Amendment.”). A court must also account for the “legitimate interests that stem from [the government’s] need to manage the facility in which the individual is detained,” appropriately deferring to “policies and practices that in th[e] judgment” of jail officials “are needed to preserve internal order and discipline and to maintain institutional security.” *Kingsley*, 576 U.S. at 397 (quoting *Bell*, 441 U.S. at 540). *See also Bell v. Williams*, 108 F.4th 809,828 (9th Cir. 2024) (approving instructing the jury on deference owed to jail’s security interests for pretrial detainee’s claims under the ADA and Rehabilitation Act: “consider a detention facility's legitimate correctional interests, and whether there is a valid, rational connection between the action taken and the legitimate and neutral governmental interest put forward to justify it.”).

 The Fourth Amendment may also be applicable. In *Graham v. Connor*, 490 U.S. 386,

395 n.10 (1989), the Supreme Court observed that it was an open question “whether the Fourth

Amendment continues to provide individuals with protection against deliberate use of excessive

physical force beyond the point at which arrest ends and pretrial detention begins.” But with

regard to pre-arraignment custody, the Ninth Circuit held that the Fourth Amendment

provides protection against the use of excessive force. *Pierce v. Multnomah County*, 76 F.3d

1032, 1043 (9th Cir. 1996) (“We hold, therefore, that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest.”).

 In *Alexander v. Nguyen*, 78 F.4th 1140, 1144 (9th Cir. 2023), the Ninth Circuit noted that “the law governing pretrial detainees’ claims of inadequate medical care and other dangerous conditions of confinement is still developing in the wake of the Supreme Court’s decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).” *Alexander* involved alleged failure to prevent violence among pretrial detainees. After Alexander was injured by another pretrial detainee, the defendant doctor evaluated the circumstances, consulted with others, and opted not to move Alexander. Less than two weeks later, the same pretrial detainee struck Alexander again. The Ninth Circuit concluded under *Gordon* that “[t]hough Alexander was, regrettably, attacked a second time, the evidence shows that [the defendant doctor’s] responses to both incidents were thorough and careful.” *Alexander*, 78 F.4th at 1145 (“[T]he benefit of hindsight from the fact that Alexander was attacked a second time [by the same pretrial detainee] does not show that [the defendant doctor’s] original decision was unreasonable.”).

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