

9.29 Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim of Excessive Force

As previously explained, the plaintiff [name] has the burden of proving that the act[s] of the defendant [name] deprived the plaintiff [name] of particular rights under the United States Constitution. In this case, the plaintiff [name] alleges the defendant [name] 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 establish the defendant [name] deprived the plaintiff [name] of this Eighth Amendment right, the plaintiff [name] must prove the following elements by a preponderance of the evidence:

First, the defendant [name] used excessive and unnecessary force under all of the circumstances;

Second, the defendant [name] acted maliciously and sadistically for the purpose of causing harm, and not in a good faith effort to maintain or restore discipline; and

Third, the act[s] of the defendant [name] caused harm to the plaintiff [name].

In determining whether these three elements have been met in this case, consider the following factors:

- (1) the extent of the injury suffered;
- (2) the need to use force;
- (3) the relationship between the need to use force and the amount of force used;
- (4) any threat reasonably perceived by the defendant; and
- (5) any efforts made to temper the severity of a forceful response, such as, if feasible, providing a prior warning or giving an order to comply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and when the plaintiff is a convicted prisoner. For claims of sexual assault when the plaintiff is a convicted prisoner, use Instruction 9.30 (Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim of Sexual Assault). When the plaintiff is a pretrial detainee, see Instruction 9.33 (Particular Rights—Fourteenth Amendment—Pretrial Detainee’s Claim of Excessive Force). When the plaintiff is not in custody, use Instruction 9.27

(Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force). When the prisoner claims unconstitutional conditions of confinement, including inadequate medical care, use Instruction 9.31 (Particular Rights—Eighth Amendment—Convicted Prisoner’s Claim re Conditions of Confinement/Medical Care), which sets out the applicable deliberate indifference standard.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term “officers” or “defendants.” In *Chinaryan*, the Ninth Circuit explained that the jury instructions were “confusing” where the instructions stated that “to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officers”—plural—“used excessive force.” *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The “officers” jury instruction language was confusing because it “required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force.” *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Eighth Amendment prohibits cruel and unusual punishment in penal institutions. *Wood v. Beauclair*, 692 F.3d 1041, 1045 (9th Cir. 2012). “[U]nnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” *Bearchild v. Cobban*, 947 F.3d 1130, 1140 (9th Cir. 2020) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)). The focus of this inquiry is therefore not on officer intent, but on the lack of any penological justification for harming the inmate. *Hoard v. Hartman*, 904 F.3d 780, 787 (9th Cir. 2018). “Whether a particular event or condition in fact constitutes ‘cruel and unusual punishment’ is gauged against ‘the evolving standards of decency that mark the progress of a maturing society.’” *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (quoting *Hudson*, 503 U.S. at 8).

In excessive force cases, the relevant inquiry is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hughes v. Rodriguez*, 31 F.4th 1211, 1221 (9th Cir. 2022) (quoting *Hudson*, 503 U.S. at 7). The Ninth Circuit applies a five factor test as set forth in *Hudson* “to determine whether the use of force was malicious and sadistic:” “(1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response.” *Hughes*, 31 F.4th at 1221; *see also Furnace v. Sullivan*, 705 F.3d 1021, 1029 (9th Cir. 2013) (“Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply.”).

The “malicious and sadistic” standard applies when prison guards “use force to keep order . . . [w]hether the prison disturbance is a riot or a lesser disruption[.]” *Hudson*, 503 U.S. at 6 (citing *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)); *see also LeMaire v. Maass*, 12

F.3d 1444, 1452-53 (9th Cir. 1993) (holding malicious and sadistic “heightened state of mind” controlling when applied to any “measured practices and sanctions either used in exigent circumstances or imposed with considerable due process and designed to alter [the] manifestly murderous, dangerous, uncivilized, and unsanitary conduct” of repeat offenders housed in disciplinary segregation); *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc) (noting that a “greater showing” than deliberate indifference is required “in the context of a prison-wide disturbance or an individual confrontation between an officer and prisoner,” when “corrections officers often must act immediately and emphatically to defuse a potentially explosive situation”). Although *de minimis* use of physical force is insufficient to prove an Eighth Amendment violation, *Hudson*, 503 U.S. at 9-10, a prison guard’s use of force violates the Eighth Amendment when the guard acts maliciously for the purpose of causing harm whether or not significant injury is evident. See *Wilkins v. Gaddy*, 559 U.S. 34, 36-38 (2010) (“An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.”).

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.4th at 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 v. Wolfish*, 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 Eighth Amendment applies equally to convicted prisoners who are inside the walls of a penal institution and convicted prisoners, such as escapees, who are outside the walls of a penal institution. *See Hughes v. Rodriguez*, 31 F.4th 1211, 1220-21 (9th Cir. 2022).

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