JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

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On 29 May 2013, the Judicial Council approved the Eleventh Circuit Pattern Jury Instructions, Civil Cases (2013 revision). On 19 July 2017, the Judicial Council approved the first set of revised and new instructions. On 2 January 2018, the Judicial Council approved the following revised and new instructions for the Pattern Jury Instructions, Civil Cases:

Civil Rights Constitutional Claims (42 U.S.C. § 1983)

NEW

5.1 Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Retaliation

5.2 Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Claim – Prisoner Alleging Retaliation or Denial of Access to Courts

5.3 Civil Rights – 42 U.S.C. § 1983 Claims – Fourth Amendment Claim – Private Person Alleging Unlawful Arrest, Unlawful Search, or Unlawful Terry Stop

NEW

5.4 Civil Rights – 42 U.S.C. § 1983 Claims – Fourth or Fourteenth Amendment Claim – Private Person or Pretrial Detainee Alleging Excessive Force

NEW

5.5 Civil Rights – 42 U.S.C. § 1983 Claims – Fourth Amendment Claim – Malicious Prosecution

5.6 Civil Rights – 42 U.S.C. § 1983 Claims – Eighth Amendment Claim – Convicted Prisoner Alleging Excessive Force

NEW

5.7 Civil Rights – 42 U.S.C. § 1983 Claims – Arrestee, Pretrial Detainee, or Convicted Prisoner Alleging Failure to Intervene

5.8 Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim – Convicted Prisoner or Pretrial Detainee Alleging Deliberate Indifference to Serious Medical Need

5.9 Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim – Failure to Protect

5.10 Civil Rights – 42 U.S.C. § 1983 Claims – Government Entity Liability

5.11 Civil Rights – 42 U.S.C. § 1983 Claims – Government Entity Liability for Failure to Train or Supervise

5.12 Civil Rights – 42 U.S.C. § 1983 Claims – Supervisor Liability

NEW

5.13 Civil Rights – 42 U.S.C. § 1983 Claims – Damages

All other instructions in the Pattern Jury Instructions, Civil Cases Eleventh Circuit (2013 revision) and the revisions to instructions 9.1, 9.3, 9.4, 9.5, 9.7, 9.8, 9.9, 9.10, 9.11, 9.12, 9.14, 9.15, 9.16, 9.18, 9.19, 9.20, 9.21, 9.22, 9.23, 9.24, 9.25, 9.26, 9.27, 9.28, 9.29, 9.30, 9.31, 9.32, 9.33, 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, 10.7, 10.8, 11.1, 11.2, 11.3, 11.4, and 11.5, approved by the Judicial Council on 19 July 2017 and announced in a memorandum on 28 August 2017, remain in effect. The May 2013 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2013 pattern jury instructions. Those limitations and conditions also apply to the instructions listed above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at http://pji.ca11.uscourts.gov has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

5.0
Civil Rights – 42 U.S.C. § 1983 Claims – Introductory Annotations

I. Applicability of Instructions in this Chapter

The instructions in this Chapter apply to constitutional claims asserted under 42 U.S.C. § 1983 for actions taken under color of state law and claims asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for actions taken under color of federal law. *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) ("[F]ederal courts incorporate § 1983 law into *Bivens* actions." (citation omitted)).

II. Qualified Immunity

In cases under § 1983 or *Bivens*, the named defendants will often assert on motion for summary judgment prior to trial a qualified immunity defense to be addressed by the court under the standards summarized in *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 733-34 (11th Cir. 2010). The instructions in this chapter presume that the court has previously determined that the defendants do not have a qualified immunity defense. If there is a genuine issue of material fact pertaining to the qualified immunity defense and that issue is not subsumed in the elements of the claim the plaintiff must prove, the model instructions should be revised accordingly. *See Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) ("A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury.").

III. Multiple Defendants and Government Liability

If the plaintiff claims that more than one defendant is liable for a § 1983 or *Bivens* claim, the model charges may be modified to accommodate multiple defendants. Further, if the plaintiff seeks to hold a government entity or individual supervisor liable, Pattern Instruction 5.10 *et seq.* may be incorporated into the instructions as appropriate. In doing so, the court should make clear that government entities are immune from punitive damages.

5.1

Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Retaliation

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, [describe defendant's alleged retaliation] in retaliation for [describe plaintiff's alleged protected speech or conduct] in violation of the First Amendment.

A person's right to [describe plaintiff's alleged protected speech or conduct] is protected by the Constitution.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [describe plaintiff's alleged protected speech or conduct];

Second: That [name of defendant] [describe defendant's alleged retaliation];

Third: That [name of plaintiff]'s [describe alleged protected speech or conduct] was a motivating factor in [name of defendant]'s decision to [describe alleged retaliation];

Fourth: That [name of defendant]'s [describe alleged retaliation] would likely deter a similarly situated reasonable person from engaging in similar [describe plaintiff's alleged protected speech or conduct]; and

Fifth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

[For the fifth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, then you must consider [name of defendant]'s contention that [he/she] would have [describe defendant's alleged retaliation] anyway. To succeed on this contention, [name of defendant] must prove by a preponderance of the evidence that [he/she] would have done the same thing if [name of plaintiff] had not [describe plaintiff's alleged protected speech or conduct].

If you find [name of plaintiff] has proved each of the facts [he/she] must prove and if you find that [name of defendant] has not proved [his/her] contention, you must then decide the issue of [name of plaintiff]'s damages.

However, if you find that [name of plaintiff] did not prove each of the facts [he/she] must prove, or if you find that [name of defendant] proved [his/her]

contention, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Scope of Instruction

This instruction applies to any claim in which a prisoner or private citizen who is not suing in his or her capacity as a public employee alleges that a public official retaliated against him or her for exercising a constitutional right. For public employees asserting a First Amendment retaliation claim, see Pattern Instruction 4.1.

II. Elements of the Claim

The elements of the claim are derived from *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008): (1) the speech was constitutionally protected; (2) the defendant's retaliatory conduct adversely affected the protected speech; and (3) there is a causal connection between the retaliatory actions and the adverse effect on speech. *See also Bennett v. Hendrix*, 423 F.3d 1247, 1250, 1254 (11th Cir. 2005).

a. Protected Conduct

Whether the conduct is constitutionally protected is a question of law for the court. If necessary, additional contextual information about the protected conduct may be added to the second paragraph of the instruction.

b. Adverse Effect on Protected Speech

To show the defendant's conduct adversely affected protected speech, a plaintiff must show the defendant's conduct would likely "deter a person of ordinary firmness"

from exercising his or her First Amendment rights. *See, e.g.*, *Bennett*, 423 F.3d at 1254 ("A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights."); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) ("The second element required [the plaintiff] to show that the discipline he received would likely deter a [prisoner] of ordinary firmness from complaining about the conditions of his confinement." (second alteration in original) (internal quotation marks and citation omitted)). The Committee has used the language "deter a similarly situated reasonable person" because it is easier to understand and conveys the same idea.

c. Causation

First Amendment retaliation claims have a unique causation element. "In order to establish a causal connection, the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011); *see also Smith*, 532 F.3d at 1278 ("The causal connection inquiry asks whether the defendants were subjectively motivated to discipline because [the plaintiff] complained of some of the conditions of confinement."). Courts decide the "subjective motivation issue" using the burden-shifting formula set forth by the Supreme Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Smith*, 532 F.3d at 1278.

"[O]nce the plaintiff shows that her protected conduct was a motivating factor, the burden shifts to the defendant to show that she would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable." *Castle*, 631 F.3d at 1197; *see also Smith*, 532 F.3d at 1278 n.22 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 n.4 (6th Cir. 1999) (alterations in original) ("Under the *Mt. Healthy* approach, if the government official 'can prove that [he] would have taken the adverse action in the absence of the plaintiff's protected conduct, [he] cannot be held liable.'")).

III. Damages

The Eleventh Circuit has noted that physical injury "rarely" results from a First Amendment violation. *Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011). In those rare cases where a prisoner suffers a physical injury resulting from a First Amendment violation, the jury should be instructed concerning recoverable damages. For the damages instruction, see Pattern Instruction 5.13.

5.2
Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Claim – Prisoner Alleging Retaliation or Denial of Access to Courts

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, violated [his/her] rights under the First Amendment to the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant] violated [his/her] constitutional right of access to the courts by [describe defendant's conduct, *e.g.*, by making a disciplinary report against [him/her]] because [he/she] [attempted to use the legal system] [communicated an intent to use the legal system] about [describe plaintiff's grievance, *e.g.*, concerning [his/her] continuation in a close-confinement status].

A convicted prisoner loses some constitutional rights, such as the right to liberty, after being convicted of a criminal offense. But the prisoner keeps other constitutional rights. One of those retained rights is the First Amendment right of access to the courts to challenge the lawfulness of [name of plaintiff]'s conviction and the constitutionality of [his/her] confinement conditions. If [name of plaintiff] had no right to go to court to address these claims, the Constitution's guarantees would have no meaning, because there would be no way to enforce the guarantees.

The Constitutional right of access to the courts means that a prisoner has the right to file claims and other papers with the court, and the exercise of that right, or plan to exercise that right, cannot be the basis for a penalty or further punishment.

This is true because, once again, if [name of plaintiff] could be punished for exercising a constitutional right or for giving a good-faith notice of intent to do so, the right itself would be meaningless.

But to maintain discipline and security, prison authorities do have the right to impose reasonable restrictions on the exercise of constitutional rights.

[The prohibition against prisoners making written threats is one reasonable restriction on the exercise of First Amendment rights. And, in this case, [name of defendant] claims that [name of plaintiff]'s communication to [him/her/it] about a lawsuit was nothing more than a written threat intended to harass prison officials—not a good-faith notice of intent to sue that was given in an effort to reach a settlement in a pending, legitimate dispute.]

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [attempted to use the legal system] [communicated [his/her] intent to use the legal system to [name of defendant]];

Second: That [name of plaintiff]'s [attempt to use the legal system] [communication to [name of defendant] of [his/her] intent to use the legal system] was made in good faith as an exercise of [his/her] First Amendment rights and was not a bad-faith threat intended as an act of harassment;

Third: That [name of defendant] intentionally retaliated against or punished [name of plaintiff] because of [his/her] [attempt to use the legal system] [communication of [his/her] intent to use the legal system to [name of defendant]]; and

Fourth: That [name of defendant] acted under color of law when [he/she] retaliated against or punished [name of plaintiff]. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the third element, [name of defendant] "retaliated against" [name of plaintiff] if [name of defendant]'s actions would likely deter a similarly situated reasonable person in [name of plaintiff]'s position from exercising First Amendment rights.

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, then you must consider [name of defendant]'s contention that [he/she] would have [describe defendant's alleged retaliation or punishment] anyway. To succeed

on this contention, [name of defendant] must prove by a preponderance of the evidence that [he/she] would have done the same thing if [name of plaintiff] had not [describe attempt to use the legal system or communication of [his/her] intent to use the legal system to [name of defendant]].

If you find [name of plaintiff] has proved each of the facts [he/she] must prove and if you find that [name of defendant] has not proved [his/her] contention, you must then decide the issue of [name of plaintiff]'s damages. However, if you find that [name of plaintiff] did not prove each of the facts [he/she] must prove, or if you find that [name of defendant] proved [his/her] contention, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Qualified Immunity

In cases under § 1983 or *Bivens*, the named defendants will usually assert on motion for summary judgment prior to trial a qualified immunity defense to be addressed by the court under the standards summarized in *Brown v. City of Huntsville, Ala.*, 608

F.3d 724, 733-34 (11th Cir. 2010). The instructions in this chapter presume that the court has previously determined that the defendants do not have a qualified immunity defense. If there is a genuine issue of material fact pertaining to the qualified immunity defense and that issue is not subsumed in the elements of the claim the plaintiff must prove, the model instructions should be revised accordingly.

II. Retaliation

The definition of retaliation provided in this instruction is derived from *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008).

III. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.1.

IV. Damages

The Eleventh Circuit has noted that physical injury "rarely" results from a First Amendment violation. *Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011). In the event a prisoner suffers a physical injury resulting from a First Amendment violation, the jury should be instructed concerning recoverable damages. For the damages instruction, see Pattern Instruction 5.13.

5.3
Civil Rights – 42 U.S.C. § 1983 Claims – Fourth Amendment Claim – Private Person Alleging Unlawful Arrest, Unlawful Search, or Unlawful Terry Stop

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law intentionally committed acts that violated [name of plaintiff]'s constitutional right[s] [not to be arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to an unreasonable investigatory stop].

Under the Fourth Amendment to the United States Constitution, every person has the right [not to be arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to an unreasonable investigatory stop].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s constitutional right [not to be arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to an unreasonable investigatory stop];

Second: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and.

Third: That [name of defendant] acted under color of law. [The parties

have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

(First element for unlawful arrest claims):

[For the first element, [name of plaintiff] claims that [name of defendant] arrested [name of plaintiff] without probable cause. [Name of defendant] may arrest a person without a warrant whenever the facts and circumstances within [name of defendant]'s knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that the person has committed, is committing, or is about to commit an offense. It is a criminal offense for any person to [describe criminal offense [name of plaintiff] was alleged to have committed].]

(First element for unlawful search claims):

[For the first element, [name of plaintiff] claims there was an unreasonable search of [his/her] home. The Constitution protects against unreasonable searches. The general rule is that a law enforcement official must get a search warrant from a judicial officer before conducting any search of a home. But there are certain exceptions to this general rule. One exception is [a search conducted by consent. If a person in lawful possession of a home freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct the search to the extent of the consent] [recognized in emergency situations in which a

law enforcement officer may enter and make a safety inspection for the purpose of ensuring or protecting the officer's and others' wellbeing. But the officer must have a reasonable and good faith belief that there is a serious threat to the officer's safety or the safety of someone else].]

(First element for unlawful Terry stop claims):

For the first element, [name of plaintiff] claims that [he/she] was subjected to an unreasonable investigatory stop. [Name of plaintiff] may succeed in showing that the investigatory stop was unreasonable if [he/she] proves *either* that [name of defendant] did not have a reasonable suspicion that [name of plaintiff] was involved in, or was about to be involved in, criminal activity; *or* that the stop was not reasonable in scope.

A reasonable suspicion is a particularized and objective basis for suspecting an individual of criminal activity. To determine whether the scope of the stop is reasonable, you should consider the law enforcement purposes served by the stop, the diligence with which the officer[s] pursued investigation, the intrusiveness of the stop, and the length of the stop. In making these determinations, you should consider the totality of the circumstances and focus on all of the information available to [name of defendant] at the time that the officer[s] executed the stop.

For the second element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without

[name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the third element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each fact that [he/she] must prove, you must decide the issue of [his/her] damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Elements of Unlawful Arrest Claim

A warrantless arrest without probable cause violates the Constitution and provides a basis for a § 1983 claim. *Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004). However, the existence of probable cause at the time of arrest constitutes an absolute bar to a § 1983 action for unlawful arrest. *Id*. "Probable cause to arrest exists when an arrest is objectively reasonable based on the totality of the circumstances." *Id*. (citing *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998)). "This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id*. (internal quotations omitted).

II. Elements of Unlawful Search Claim

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." In regard to unreasonable searches, the Fourth Amendment protects certain areas over which individuals manifest "a subjective expectation of privacy" and where "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 27-28 (2001). The home is one such area where it is readily accepted that an expectation of privacy exists. *Id*. at 34; *see also Kentucky v. King*, 563 U.S. 452, 474 (2011). Accordingly, the United States Supreme Court has held that "searches and seizures inside a home without a warrant are presumptively unreasonable." *King*, 563 U.S. at 459 (citation omitted). However, there are two principal exceptions to the search warrant requirement which are detailed in this instruction—searches conducted by consent or under exigent circumstances. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

"The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). Additionally, a "well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *King*, 563 U.S. at 460 (internal quotations omitted). The Supreme Court has identified several exigencies that may justify a warrantless search of a home. This instruction includes a description of the "emergency aid" exception, under which "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Other recognized exigent circumstances include where officers are "in hot pursuit of a fleeing suspect," *King*, 563 at 460 (citing *United States v. Santana*, 427 U.S. 38, 42-43 (1976)), and where there is a need to "prevent the imminent destruction of evidence." *Id*.

Additional exceptions not detailed in this instruction include the plain view exception, *see Kyllo*, 533 U.S. 27, 38-40, and the exception for search incident to a lawful arrest. *See Maryland v. Buie*, 494 U.S. 325, 334 (2009). This instruction may be altered if an exception other than consent or an exigent circumstance is at issue in a particular case.

III. Elements of Unlawful Terry Stop Claim

"[L]aw enforcement officers may seize a suspect for a brief, investigatory *Terry* stop where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity, and (2) the stop '[is] reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011) (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20, 30 (1968)). Determining the unreasonableness of a seizure within the meaning of the Fourth Amendment requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *Courson v. McMillian*, 939 F.2d 1479, 1490 (11th Cir. 1991) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). The reasonableness of an investigatory stop is examined under the totality of the circumstances. *United States v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012) (citing *Samson v. California*, 547 U.S. 843, 848 (2006); *Jordan*, 635 F.3d at 1186).

"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Courson*, 939 F.2d at 1490 (quoting *Adams v. Williams*, 407 U.S. 143, 145-46 (1972)). "While 'reasonable' suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Alternatively stated, "[r]easonable suspicion need not involve the observation of illegal conduct, but does require 'more than just a hunch.'" *Lewis*, 674 F.3d at 1303 (citation omitted). "The detaining officer 'must have a particularized and objective basis for suspecting the person of criminal activity.'" *United States v. Cruz*, 909 F.2d 422, 424 (11th Cir. 1989) (quoting *United States v. Aldridge*, 719 F.2d 368, 371 (11th Cir. 1983)).

Even if an officer has reasonable suspicion to make a valid *Terry* stop, the encounter may mature into a detention that amounts to an arrest for which probable cause is required. *United States v. Acosta*, 363 F.3d 1141, 1145-46 (11th Cir. 2004). The Eleventh Circuit has set forth four non-exclusive factors which may be considered in

"drawing the line between a *Terry* stop and an arrest in an individual case." *Id.* at 1146. These factors include: "the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention." *Id.* (citation omitted).

IV. Causation

"A § 1983 claim requires proof of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation." *Troupe v. Sarasota Cnty., Fla.*, 419 F.3d 1160, 1165 (11th Cir. 2005) (citing *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986)). The requisite causation includes proof of legal and proximate causation. *Jackson v. Sauls*, 206 F.3d 1156, 1168 n.16 (11th Cir. 2000). Thus, "a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." *Id*. at 1168. The model instruction makes clear that the plaintiff must prove both legal and proximate causation in accordance with Eleventh Circuit case law.

V. Damages

For the damages instruction, see Pattern Instruction 5.13

5.4

Civil Rights – 42 U.S.C. § 1983 Claims – Fourth or Fourteenth Amendment Claim – Private Person or Pretrial Detainee Alleging Excessive Force

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally committed acts that violated [name of plaintiff]'s constitutional right to be free from the use of excessive or unreasonable force [during an arrest] [while being held in custody as a pretrial detainee].

Under the [Fourth] [Fourteenth] Amendment to the United States Constitution, every person has the right not to be subjected to excessive or unreasonable force [while being arrested by a law enforcement officer—even though the arrest is otherwise made in accordance with the law] [while being held in custody as a pretrial detainee].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s constitutional right not to be subjected to excessive or unreasonable force [during an arrest] [while being held in custody as a pretrial detainee];

Second: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Third: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

(First Element for claims asserted by arrestees):

[For the first element, [name of plaintiff] claims that [name of defendant] used excessive force when arresting [him/her]. When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, whether the suspect resists or flees, the need for application of force, the relationship between the need for force and the amount of force used, and the extent of the injury inflicted.

You must decide whether the force [name of defendant] used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances. [Name of defendant]'s underlying intent or motivation is irrelevant.]

(First Element for claims asserted by pretrial detainees):

[For the first element, [name of plaintiff] claims that [name of defendant] used excessive force on [him/her] while [he/she] was being held in custody as a

pretrial detainee. But not every push or shove—even if it later seems unnecessary—is a constitutional violation. Also, an officer always has the right to use the reasonable force that is necessary under the circumstances to maintain order and ensure compliance with jail or prison regulations. Whether a specific use of force is excessive or unreasonable depends on factors such as the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or limit the amount of force used; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

You must decide whether the force [name of defendant] used in this case was excessive or unreasonable based on the degree of force a reasonable officer would have applied to maintain order and safety under the same circumstances. [Name of defendant]'s underlying intent or motivation is irrelevant.]

For the second element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the third element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when

[he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each fact that [he/she] must prove, you must decide the issue of [his/her] damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Excessive Force Claims by Arrestees and Pretrial Detainees

Claims of excessive force against law enforcement officials in the course of making an arrest of a private person are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388, 395 n.10 (1989). Claims of excessive force asserted by pretrial detainees, while governed by the Fourteenth Amendment's Due Process Clause, are likewise analyzed under an objective reasonableness standard. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (holding that excessive force claims asserted by pretrial detainees are governed under an objective reasonableness standard which should account for the government's need to maintain order). While this instruction applies to claims brought by both arrestees and pretrial detainees, Pattern Instruction 5.6 applies if the excessive force claim is brought by a convicted prisoner.

II. Elements of Excessive Force Claim

In *Graham v. Connor*, the Supreme Court held that claims of excessive force asserted by a private citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. 490 U.S. at 388. The Court also recognized that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," but that the proper application of the Fourth Amendment's objective reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Additional factors to consider may include "the need for the application of force, . . . the relationship between the need and amount of force used, and . . . the extent of the injury inflicted." *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002) (citing *Leslie v. Ingram*, 786 F.2d 1533, 1536 (11th Cir. 1986)). The "reasonableness" of a particular use of force is "judged [objectively] from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 397.

In *Kingsley v. Hendrickson*, the Supreme Court held that a pretrial detainee alleging a claim of excessive force "must show only that the force purposely or knowingly used against him was objectively unreasonable." 135 S. Ct. at 2473. In this regard, the Court also stated that the following factors may bear on the reasonableness of the force used against a pretrial detainee: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Id.*

III. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.5
Civil Rights – 42 U.S.C. § 1983 Claims – Fourth Amendment Claim – Malicious Prosecution

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, maliciously caused criminal proceedings to be commenced against or continued against [name of plaintiff] without probable cause and because of those proceedings, [name of plaintiff] was unlawfully seized in violation of [his/her] rights under the United States Constitution.

Under the Fourth Amendment to the United States Constitution, every person has the right not to be seized without probable cause.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] caused a criminal proceeding to be instituted or continued against [name of plaintiff];

Second: That [name of defendant] acted with malice and without probable cause;

Third: That the proceeding terminated in [name of plaintiff]'s favor. [The parties have agreed that the proceeding terminated in [name of plaintiff]'s favor, so you should accept that as a proven fact];

Fourth: That [name of plaintiff] was unlawfully seized as a result of the criminal proceeding;

Fifth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Sixth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the second element, you must decide whether [name of defendant]'s actions causing the criminal proceeding to be instituted or continued were taken with malice and without probable cause. To prove malice [name of plaintiff] must show that [name of defendant]'s actions were [insert applicable state law standard]. **(See annotation below)**. Probable cause exists whenever the facts and circumstances within [name of defendant]'s knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that the person has committed a criminal offense.

[For the third element, you must decide whether the proceeding terminated in [name of plaintiff]'s favor. The proceeding terminated in [name of plaintiff]'s favor if the termination suggests that [name of plaintiff] is innocent, but proof of actual innocence is not required. For example, the proceeding terminated in [name of plaintiff]'s favor if [name of plaintiff] was acquitted, the case was dismissed based on an affirmative decision not to prosecute, the case was dismissed due to the running of the statute of limitations, or a *nolle prosequi*

was entered. However, if the proceeding terminated as the result of a compromise or agreement reached between the government and [name of plaintiff], such as through a plea agreement, then the proceeding did not terminate in [name of plaintiff]'s favor.]

For the fourth element, you must decide whether [name of plaintiff] was unlawfully seized as a result of the criminal proceeding. A seizure under the Fourth Amendment occurs when there is an undue restraint placed on an individual's personal liberty. The seizure must have occurred after the beginning of [name of plaintiff]'s criminal proceeding. In the case of a warrantless arrest, a criminal proceeding begins after the individual is arraigned or indicted.

For the fifth element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she]

is an official.]

If you find [name of plaintiff] has proved each of the facts that [he/she] must prove, you must then decide the issue of [name of plaintiff]'s damages. If you find that [name of plaintiff] has not proved each of these facts, you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Malicious Prosecution, generally

"[L]abeling a section 1983 claim as one for a 'malicious prosecution' can be a shorthand way of describing a kind of legitimate section 1983 claim; the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead." *Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998) (quoting *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996)). "The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty." *Id.* (quoting *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). "If malicious prosecution or abuse of process is committed by state actors and results in the arrest or other seizure of

the defendant . . . we now know that the defendant's only constitutional remedy is under the Fourth Amendment . . . ." *Id.* (quoting *Smart v. Bd. of Trs. of the Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994)).

To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of her Fourth Amendment right to be free from unreasonable seizures. *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003); *Uboh*, 141 F.3d at 1004-05. "As to the constituent elements of the common law tort of malicious prosecution, [the Eleventh Circuit] has looked to both federal and state law and determined how those elements have historically developed." *Wood*, 323 F.3d at 881 (*citing Uboh*, 141 F.3d at 1002-04; *Whiting*, 85 F.3d at 584-86). While "both state law and federal law help inform the elements of the common law tort of malicious prosecution, a Fourth Amendment malicious prosecution claim under § 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law." *Id.* at 882.

II. Malice

The Eleventh Circuit has not, to date, enunciated a federal malice standard for § 1983 malicious prosecution claims. However, the Court has stated: "When malicious prosecution is brought as a federal constitutional tort, the outcome of the case does not hinge on state law, but federal law, and does not differ depending on the tort law of a particular state." *Wood*, 323 F.3d at 882 n.17. Even so, courts may need to refer to the applicable common law for any additional modification of the instruction that may be needed for the definition of malice, in the absence of controlling Eleventh Circuit precedent. *See, e.g., Blackshear v. City of Miami Beach*, 799 F. Supp. 2d 1338, 1348-49 (S.D. Fla. 2011); *Brown v. Benefield*, 757 F. Supp. 2d 1165, 1181 (M.D. Ala. 2010); *Buckner v. Shetterly*, 621 F. Supp. 2d 1300, 1302 n.2 (M.D. Ga. 2008).

III. Favorable Termination

The withdrawal of criminal charges pursuant to a compromise or agreement does not constitute favorable termination and, thus, cannot support a claim for malicious prosecution. *See Uboh*, 141 F.3d at 1006 ("It is worth noting that the charges involved in this action were not dismissed pursuant to any agreement among the parties."). Likewise, a favorable termination does not exist where the stated basis for the dismissal of criminal charges has been "in the interests of justice," or expressly remanded for retrial. *Id.* at 1005 (citing *Singer*, 63 F.3d at 118). By contrast, a favorable termination does exist by virtue of an

acquittal, an order of dismissal reflecting an affirmative decision not to prosecute, a dismissal based on the running of the statute of limitations, an entry of a *nolle prosequi*, and, in some cases, a granted writ of *habeas corpus*. *Id.* However, actual innocence is not required to satisfy the favorable termination requirement of a malicious prosecution claim. *Id.*

IV. Seizure

A seizure under the Fourth Amendment occurs when a state actor places a restraint on an individual's personal liberty. *Uboh*, 141 F.3d at 1003. A plaintiff bears the burden of proving that she was seized in relation to the prosecution, in violation of her constitutional rights. *Kingsland*, 382 F.3d at 1235. An arrest following the filing of an information suffices for a seizure after judicial proceedings have commenced. *Uboh*, 141 F.3d at 1004 (citation omitted); *Kingsland*, 382 F.3d at 1235. In the case of a warrantless arrest, the judicial proceeding does not begin until the party is arraigned or indicted. *Kingsland*, 382 F.3d at 1235; *see also, e.g.*, *Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (E.D.N.Y. 2000) ("[T]he existence, or lack, of probable cause is measured as of the time the judicial proceeding is commenced (e.g., the time of the arraignment), not the time of the preceding warrantless arrest."). Thus, the plaintiff's arrest cannot serve as the predicate deprivation of liberty because it occurred prior to the time of arraignment, and was not one that arose from malicious prosecution as opposed to an unlawful arrest. *Kingsland*, 382 F.3d at 1235.

V. Injury

The injury involved in a § 1983 claim for malicious prosecution may include both the injury which results from the unlawful seizure and injury associated with the prosecution of the criminal proceeding. *See Whiting*, 85 F.3d at 584-86.

VI. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

VII. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.6
Civil Rights – 42 U.S.C. § 1983 Claims – Eighth Amendment Claim – Convicted Prisoner Alleging Excessive Force

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally violated [name of plaintiff]'s Eighth Amendment right as a prisoner to be free from cruel and unusual punishment.

The Constitution guarantees that every person who is convicted of a crime or a criminal offense has the right not to be subjected to cruel and unusual punishment. This includes, of course, the right not to be assaulted or beaten without legal justification while incarcerated.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally [describe the alleged conduct];

Second: That the force used against [name of plaintiff] by [name of defendant] was excessive;

Third: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Fourth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

You must decide whether any force used in this case was excessive based on whether the force, if any, was applied in a good-faith effort to maintain or restore discipline, or instead whether it was applied maliciously or sadistically to cause harm. In making that decision you should consider the amount of force used in relationship to the need presented; the motive of [name of defendant]; the extent of the injury inflicted; and any effort made to temper the severity of the force used. Of course, officers may not maliciously or sadistically use force to cause harm regardless of the significance of the injury to the prisoner. But not every push or shove—even if it later seems unnecessary—is a constitutional violation. Also, an officer always has the right to use the reasonable force that is necessary under the circumstances to maintain order and ensure compliance with jail or prison regulations.

For the third element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are

outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, you must find for [name of plaintiff] and consider the issue of damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth Amendment Claims

"In the prison context, three distinct Eighth Amendment claims are available to plaintiff inmates alleging cruel and unusual punishment, each of which requires a different showing to establish a constitutional violation." *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010) (citation omitted). "The Eighth Amendment can give rise to claims challenging specific conditions of confinement, the excessive use of force, and the deliberate indifference to a prisoner's serious medical needs." *Id*. at 1303-04. "Each of these claims requires a two-prong showing: an objective showing of a deprivation or injury that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities' and a subjective showing that the official had a 'sufficiently culpable

state of mind.'" *Id*. at 1304 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Separate instructions are provided for each of these three types of claims brought by prisoners. *See* Pattern Instructions 5.6, 5.7, 5.8, 5.9.

II. Elements of Eighth Amendment Excessive Force Claim

With respect to the objective component of an Eighth Amendment excessive force claim, "not . . . every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id*. at 9-10 (internal quotations omitted). Applying that standard, the Supreme Court ruled that blows directed at a prisoner causing bruising, swelling, loosened teeth, and a cracked dental plate were not *de minimis* for Eighth Amendment purposes. *Id*. at 10.

With respect to the subjective element of an Eighth Amendment excessive force claim, prison officials must not act maliciously or sadistically for the purpose of causing harm. *Id*. at 6-7; *accord Thomas*, 614 F.3d at 1304; *see also Whitley v. Albers*, 475 U.S. 312, 319 (1986) (holding that "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment forbidden by Eighth Amendment).

The Eleventh Circuit has affirmed much of the language used in earlier versions of this instruction to define the elements of an Eighth Amendment excessive force claim, and that language was retained in the present instruction. *Johnson v. Breeden*, 280 F.3d 1308, 1314 (11th Cir. 2002), *overruled in part on other grounds, Wilkins v. Gaddy*, 130 S. Ct. 1175, 1177 (2010), *as recognized in Dixon v. Sutton, No. 2:08-cv-745-WC*, 2011 U.S. Dist. LEXIS 49945, at *46-47, n.4 (M.D. Ala. May 9, 2011). However, *Kingsley v. Hendrickson* "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners." 135 S. Ct. 2466, 2476 (2015).

III. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.7
Civil Rights – 42 U.S.C. § 1983 Claims – Arrestee, Pretrial Detainee, or Convicted Prisoner Alleging Failure to Intervene

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, failed to intervene when [name of officer] used excessive force against [name of plaintiff] in violation of the United States Constitution.

An officer who fails or refuses to intervene when a constitutional violation such as excessive force takes place in his presence may be held liable for his failure to intervene.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of officer] used excessive force on [name of plaintiff];

Second: That [name of defendant] [saw [name of officer] use excessive force] [knew [name of officer] was going to use excessive force];

Third: That [name of defendant] had a realistic opportunity to prevent harm from occurring;

Fourth: That [name of defendant] failed to take reasonable steps to prevent harm from occurring;

Fifth: That [name of defendant]'s failure to act caused [name of plaintiff]'s injuries and the injuries were a reasonably foreseeable consequence of [name of defendant]'s failure to act; and

Sixth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, you must then decide the issue of [name of plaintiff]'s damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

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ANNOTATIONS AND COMMENTS

I. Elements of Failure to Intervene Claim

The elements of this claim are derived from *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002), and *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998). In *Ensley*, the Eleventh Circuit emphasized that to be held liable, the defendant must have observed the excessive force and have been in a position to intervene. 142 F.3d at 1408.

However, even if the officer did not observe the excessive force but had "an indication of the prospective use of excessive force," he may still be held liable for his nonfeasance. *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996). Further, the opportunity to intervene must have been realistic. *Id.* (citing *O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988)); *cf. Priester v. City of Riviera Beach*, 208 F.3d 919, 925 (11th Cir. 2000) (concluding there was a genuine issue of fact whether the defendant had an opportunity to intervene where one defendant testified the incident lasted 5-10 seconds and another testified it may have lasted two minutes).

The committee notes that the Eleventh Circuit acknowledged the possibility of a failure to intervene claim in an unlawful arrest case if a non-arresting defendant "knew the arrest lacked any constitutional basis and yet participated in some way." *Wilkerson v. Seymour*, 736 F.3d 974, 980 (11th Cir. 2013) (citing *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999)).

II. Underlying Excessive Force Claim

As noted in the first element of the claim, the plaintiff must prove another officer used excessive force. However, if the officer who allegedly used excessive force has settled or is otherwise not involved in the case, the court will need to adjust the instructions to ensure that the jury has a sufficient understanding of the underlying excessive force allegations.

III. Causation

Failure to intervene and failure to protect claims potentially present unique causation and damages issues. Necessarily, a third party or perhaps a co-defendant will have committed the actual assault. In this situation, defendants may argue that district courts should apply state law regarding joint liability and apportionment of damages. According to the Supreme Court, in the Civil Rights Statutes "Congress has directed federal courts to follow a three-step process;" the district court should (1) "look to the laws of the United States so far as such laws are suitable to carry the civil and criminal civil rights statutes into effect;" (2) consider state common law; and then (3) "apply state law only if it is not inconsistent with the Constitution and the laws of the United States." *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (internal citations, quotation marks, and

alterations omitted). However, Eleventh Circuit case law suggests that district courts should apply federal law recognizing joint and several liability. *See Finch v. City of Vernon*, 877 F.2d 1497, 1502-03 (11th Cir. 1989) ("In this case, the district court, applying a federal rule of damages, correctly held the City jointly and severally liable for the damages Finch suffered from the wrongful discharge."); *see also Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1308-09 (11th Cir. 1988) (holding that the federal common law, not law of the forum state, governs the mitigation of damages in § 1983 cases and holding that in such cases, "[i]f a federal damages rule exists, it applies"). Other Circuits have more squarely found that federal common law requires applying joint and several liability in § 1983 cases regardless of the law of the forum state. *See Weeks v. Chaboudy*, 984 F.2d 185, 188 (6th Cir. 1993) (concluding that federal common law requires joint and several liability in § 1983 cases and reversing a district court's apportionment of damages); *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985) (applying federal common law in holding that defendants were jointly and severally liable in a § 1983 case). More generally, the Eleventh Circuit has held that the purpose of § 1983 "is to compensate for the actual injuries caused by the particular constitutional deprivation." *Gilmere v. City of Atlanta*, 864 F.2d 734, 739 (11th Cir. 1989) (citation omitted). Accordingly, while courts may "look to the common law of the states where this is 'necessary to furnish suitable remedies' under 1983," resort to state law is not necessary if federal law is sufficient to serve the policies of the Civil Rights Acts. *Id*. at 738 (quoting *Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978) (quoting 28 U.S.C. § 1988)).

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.8
Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim – Convicted Prisoner or Pretrial Detainee Alleging Deliberate Indifference to Serious Medical Need

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, was deliberately indifferent to [his/her] serious medical need and caused injury to [him/her] in violation of [his/her] [Eighth/Fourteenth] Amendment rights.

The United States Constitution provides that anyone who is imprisoned is entitled to necessary medical care, and a corrections officer violates that right by being deliberately indifferent to a [prisoner's/pretrial detainee's] known serious medical need.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] had a serious medical need;

Second: That [name of defendant] knew that [name of plaintiff] had a serious medical need that posed a risk of serious harm;

Third: That [name of defendant] failed to [provide/get] necessary medical care for [name of plaintiff]'s serious medical need in deliberate indifference to the risk of serious harm;

Fourth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Fifth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the first element, [name of plaintiff] must prove a serious medical need. A "serious medical need" is a medical condition that a physician has diagnosed as requiring treatment or a medical condition that is so obvious that even a lay person would easily recognize the need for medical care. In either case, the medical condition must have posed a substantial risk of serious harm to [name of plaintiff] if left unattended.

For the second element, you must determine whether [name of defendant] actually knew [name of plaintiff] had a serious medical need and required immediate attention. Put another way, it is not enough to show that [name of defendant] was careless or neglected [his/her] job duties and should have known about [name of plaintiff]'s need. And it is not enough to show that a reasonable person would have known of the serious medical need. However, you may find from circumstantial evidence that [name of defendant] knew about the risk of serious harm. Further, if the risk of serious harm was obvious, you may, based on that, find that [name of defendant] knew about that risk.

For the third element, to decide whether [name of defendant] was deliberately indifferent to [name of plaintiff]'s serious medical need, you may consider all the relevant circumstances including the seriousness of [name of plaintiff]'s injury,

the length of any delay in providing [name of plaintiff] medical care, and the reasons for any delay. But the law does not require that [name of plaintiff] receive the most advanced medical response to [his/her] serious medical need.

For the fourth element, you must determine whether [name of defendant]'s conduct caused [name of plaintiff]'s injuries. [Name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct or if [name of plaintiff]'s injuries were worsened by [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the fifth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form

for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth and/ Fourteenth Amendment

Claims involving the mistreatment of pretrial detainees while in custody are governed by the Fourteenth Amendment's Due Process Clause, and similar claims by convicted prisoners are governed by the Eighth Amendment's Cruel and Unusual Punishment Clause. *See, e.g.*, *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1196 (11th Cir. 2003). Regardless, with respect "to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1574 (11th Cir. 1985); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) ("[D]ecisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees."). Accordingly, this instruction applies to claims of deliberate indifference to serious medical need by both pretrial detainees and convicted prisoners.

II. Elements of Claim of Deliberate Indifference to Medical Need

The elements of this claim are derived from *Youmans v. Gagnon*, 626 F.3d 557, 563-64 (11th Cir. 2010), and *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306-07 (11th Cir. 2009). Specifically, a plaintiff must satisfy an objective component by showing that she had a serious medical need and a subjective component by showing that the prison official acted with deliberate indifference to that need. *See, e.g.*, *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007). To establish the subjective component, the plaintiff must prove (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than either mere or gross negligence. *Compare Youmans*, 626 F.3d at 564 (gross negligence), *with Mann*, 588 F.3d at 1307 (mere negligence); *see also Granda v. Schulman*, 372 F. App'x 79, 82 n.1 (11th Cir. 2010) (noting the intra-circuit split regarding the degree of negligence); *Townsend v. Jefferson Cty.*, 601 F.3d 1152, 1158 (11th Cir. 2010) (noting the split but concluding that *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. ~~1~~1996), ~~f~~first stated the more-than-gross-negligence standard and, as the earliest case, controls). The second and third elements of the instruction address the subjective component. To avoid the issue of whether more than mere or more than gross negligence is required, the instruction suggests factors the jury can consider in determining whether a defendant was deliberately indifferent. *See Goebert*, 510 F.3d at 1327. The second element in the instruction acknowledges that subjective knowledge can be demonstrated in "the usual ways," such as "inference from circumstantial evidence," and that a factfinder may infer subjective knowledge from "the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Goebert*, 510 F.3d at 1327.

III. Different Types of Claims for Deliberate Indifference to Medical Needs

The paragraph explaining the third element is well-suited for a claim based on a

delay in providing medical care. *See Goebert*, 510 F.3d at 1326-27; *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). However, there are other ways in which defendants may fail to provide adequate medical care. *McElligott*, 182 F.3d at 1255. For example, a defendant may simply deny medical care altogether, *Lancaster v. Monroe Cty.*, 116 F.3d 1419, 1425 (11th Cir. 1997), *overruled on other grounds by LeFrere v. Quezada*, 588 F.3d 1317, 1318 (11th Cir. 2009), or provide treatment "so cursory as to amount to no treatment at all," *Mandel v. Doe*, 888 F.2d 783, 789 (11th Cir. 1989). Thus, a court may wish to adjust the paragraph explaining the third element depending on the type of deliberate indifference claim at issue.

IV. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

V. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.9
Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim – Failure to Protect

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, unlawfully failed to protect [name of plaintiff] from harm in violation of the United States Constitution.

An officer who fails to protect a prisoner from a known threat of harm posed by another prisoner may be held liable for this failure to protect.

To succeed on this claim, [name of plaintiff] must prove each of the following by a preponderance of the evidence:

First: That there was a substantial risk to [name of plaintiff] that [he/she] could be harmed by another prisoner;

Second: That [name of defendant] actually knew of that risk;

Third: That [name of defendant] disregarded that risk or failed to take reasonable measures to protect [name of plaintiff] in response to that risk;

Fourth: That [name of plaintiff] was [describe harm, *e.g.*, attacked by another prisoner];

Fifth: That [name of defendant]'s failure to protect caused [name of plaintiff]'s injuries and the injuries were a reasonably foreseeable consequence of [name of defendant]'s failure to protect; and

Sixth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

[For the second element, it is not necessary that [name of defendant] knew precisely who would attack [name of plaintiff] if [name of defendant] knew there was a substantial risk to [name of plaintiff]'s safety. Also, if [name of plaintiff] shows that [name of defendant] had information [he/she] suspected (or believed) to be true, and if you find that such information indicated a substantial risk of serious harm to [name of plaintiff], [name of defendant] cannot escape liability for failing to confirm those facts. But it is not enough for [name of plaintiff] to show that [his/her] risk of substantial harm was obvious and that [name of defendant] should have known of the risk. [Name of plaintiff] must show that [name of defendant] actually knew of the risk.]

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, you must then decide the issue of [name of plaintiff]'s damages. If you

find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth and Fourteenth Amendment

This instruction applies to claims brought by both pretrial detainees and convicted prisoners for the reasons discussed in the annotations following Pattern Instruction 5.8, *supra*.

II. Elements of Claim

Any condition of confinement may serve as the basis for a claim under the Eighth or Fourteenth Amendment, and the instruction addresses the common claim that prison officials failed to protect the plaintiff from attack by another prisoner. *See, e.g.*, *Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 616-17 (11th Cir. 2007). A prison official's failure to protect a prisoner from attack violates the prisoner's constitutional rights "when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk." *Carter v. Galloway*, 352 F.3d 1346, 1349 (11th Cir. 2003) (quotation omitted). "A plaintiff must also show that the constitutional violation caused his injuries." *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1028 (11th Cir. 2001), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007)). For the third element, the factors the jury can consider in determining whether a defendant responded reasonably to a known risk will depend on the nature of the claim. *See, e.g.*, *Rodriguez*, 508 F.3d at 616 (in a failure to protect case, "[a]n official responds to a known risk in an objectively unreasonable manner if 'he knew of ways to reduce the harm but knowingly declined to act' or if 'he knew of ways to reduce the harm but recklessly declined to act.'"); *see also* Pattern Instruction 5.8.

Prison officials may avoid liability by showing: (1) "that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger"; (2) "that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent"; or

(3) that "they responded reasonably to the risk, even if the harm ultimately was not averted." *Rodriguez*, 508 F.3d at 617-18 (quotation omitted). At the time of publication, no authority designates these arguments as affirmative defenses; therefore, the instruction does not include separate affirmative defenses on these grounds.

III. Causation

Failure to intervene and failure to protect claims present unique causation and damages issues. Necessarily, a third party or a codefendant will have committed the actual assault. Although the Eleventh Circuit has not addressed the issue, there is authority suggesting district courts should apply state law regarding joint liability and apportionment of damages if there is a gap in federal law and the state law is not inconsistent with the purposes of § 1983 claims. *See Katka v. Mills*, 422 F. Supp. 2d 1304, 1310 (N.D. Ga. 2006) (concluding that prior Georgia law would not permit contribution for intentional torts; but compare the Georgia Apportionment statute, O.C.G.A. § 51-12-33, which does not distinguish between negligent and intentional torts); *Rosado v. New York City Hous. Auth.*, 827 F. Supp. 179, 183 (S.D.N.Y. 1989) (considering whether to apply New York contribution law); *Goad v. Macon Cty., Tenn.*, 730 F. Supp. 1425, 1431-1432 (M.D. Tenn. 1989) (considering whether to apply Tennessee law concerning set-offs); *Hoffman v. McNamara*, 688 F. Supp. 830, 833-834 (D. Conn. 1988) (applying Connecticut law regarding the rule of set-off); *Dobson v. Camden*, 705 F.2d 759, 763-69 (5th Cir. 1983), *on reh'g*, 725 F.2d 1003 (5th Cir. 1984) (considering whether Texas one satisfaction rule should apply to § 1983 claim). Thus, this instruction and the damages instruction, Pattern Instruction 5.13, may require modification.

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.10
Civil Rights – 42 U.S.C. § 1983 Claims – Government Entity Liability
(Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of government entity], which employed [name of officer], is liable for violating [name of plaintiff]'s constitutional rights. You should consider whether [name of government entity] is liable only if you find that [name of officer] violated [name of plaintiff]'s constitutional rights.

[Name of government entity] is not liable for violating [name of plaintiff]'s constitutional rights simply because it employed [name of officer]. Rather, [name of government entity] is liable if [name of plaintiff] proves that an official policy or custom of [name of government entity] directly caused [his/her] injuries. Put another way, [name of government entity] is liable if its official policy or custom was the moving force behind [name of plaintiff]'s injuries.

An "official policy or custom" means:

(a) A rule or regulation created, adopted, or ratified by [name of government entity]; or

(b) A policy statement or decision made by [name of government entity]'s policy-maker; or

(c) A practice or course of conduct that is so widespread that it has acquired the force of law—even if the practice has not been formally approved.

You may find that an "official policy or custom" existed if there was a

practice that was so persistent, widespread, or repetitious that the [name of government entity]'s policy-maker either knew of it or should have known of it.

[Name of policy-maker] is the [name of government entity]'s "policy-maker."

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into any applicable § 1983 instructions when there is a claim against an individual defendant or defendants. In such case, jury interrogatories applicable to the government entity should be added if a special verdict form is used.

II. Elements

This charge is derived from *AFL-CIO v. City of Miami, Fla.*, 637 F.3d 1178, 1187 (11th Cir. 2011). A government entity may not be held liable under § 1983 absent a finding that an individual, typically an individual named as a defendant in the case, violated the plaintiff's constitutional rights. *See, e.g., Garczynski v. Bradshaw*, 573 F.3d 1158, 1170-71 (11th Cir. 2009).

III. Punitive Damages

As discussed in the annotations following Pattern Instruction 5.13, *infra*, punitive damages may not be assessed against a government entity.

5.11
Civil Rights – 42 U.S.C. § 1983 Claims – Government Entity Liability for Failure to Train or Supervise (Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of government entity] is liable for failing to adequately [train/supervise] its officer[s] and that this failure caused [name of officer] to violate [name of plaintiff]'s [describe constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of officer] violated [name of plaintiff]'s [describe constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force];

Second: That [name of officer] was not adequately [trained, supervised] in [describe relevant area, *e.g.*, the use of deadly force];

Third: That [name of official policy-maker] knew based on at least one earlier instance of unconstitutional conduct materially similar to [name of officer]'s violation of [name of plaintiff]'s constitutional rights that [additional] [training/supervision] was needed to avoid [describe alleged constitutional violation] likely recurring in the future; and

Fourth: That [name of official policy-maker] made a deliberate choice not to provide [additional] [training/supervision] to [name of officer].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into applicable § 1983 instructions when there is a claim against an individual defendant or defendants. In such case, if a special verdict form is used, jury interrogatories applicable to the government entity should also be added.

II. Elements

This instruction is derived from *AFL-CIO v. City of Miami, Fla.*, 637 F.3d 1178, 1188-89 (11th Cir. 2011), and cases cited therein. A government entity may not be held liable under § 1983 absent a finding that an individual, typically an individual named as a defendant in the case, violated the plaintiff's constitutional rights. *See, e.g.*, *Garczynski v. Bradshaw*, 573 F.3d 1158, 1170-71 (11th Cir. 2009).

The model instruction presumes that the parties do not dispute the identity of the final policymaker through which the municipality acts.

The third element of plaintiff's case may be satisfied absent proof of at least one prior incident of materially similar unconstitutional conduct by proof that unconstitutional conduct would obviously result from failing to provide additional training or supervision. *AFL-CIO*, 637 F.3d at 1188-89. This is an extremely

difficult standard to meet and it is often resolved in favor of the defendant(s) before trial. *See, e.g.*, *Gold v. City of Miami*, 151 F.3d 1346, 1352 (11th Cir. 1998). Accordingly, the model instruction does not include a charge on obvious need for additional training or supervision. Of course, where this issue is not resolved in favor of the defendant(s) as a matter of law prior to trial, an appropriate instruction on this standard should be given.

III. Punitive Damages

As discussed in the annotations following Pattern Instruction 5.13, *infra*, punitive damages may not be assessed against a government entity.

5.12
Civil Rights – 42 U.S.C. § 1983 Claims – Supervisor Liability
(Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of supervisor], who supervised [name of subordinate], is liable in [his/her] supervisory capacity for violating [name of plaintiff]'s [specify constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force]. You should consider whether [name of supervisor] is liable only if you find that [name of subordinate] violated [name of plaintiff]'s [specify constitutional right].

[Name of supervisor] is not liable simply because [he/she] supervised [name of subordinate]. Rather, [name of plaintiff] must prove by a preponderance of the evidence that (1) [name of subordinate] violated [his/her] [specify constitutional right] and (2) one of the following circumstances was present at the time [name of plaintiff]'s constitutional rights were violated:

(a) [Name of supervisor] personally participated in the violation of [name of plaintiff]'s constitutional rights; or

(b) A history of widespread abuse, meaning abuse that was

obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences, put [name of supervisor] on notice of the need to take corrective action and [he/she] failed to do so; or

(c) [Name of supervisor] intentionally implemented an "official policy or custom" that resulted in [name of subordinate] acting with deliberate indifference, meaning reckless disregard, to [name of plaintiff]'s [specify constitutional right]; or

(d) [Name of supervisor] directed [name of subordinate] to take the action that resulted in the violation of [name of plaintiff]'s [specify constitutional right]; or

(e) [Name of supervisor] knew that [name of subordinate] would take action[s] in violation of [name of plaintiff]'s [specify constitutional right] and failed to stop [name of subordinate] from doing so.

An "official policy or custom" means a:

(a) A policy statement or decision that is made by [name of supervisor]; or

(b) A practice or course of conduct that is so widespread that it

has acquired the force of law, even if the practice has not been formally approved.

You may find that an "official policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [name of supervisor] either knew about it or should have known about it.

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into applicable § 1983 instructions against an individual defendant or defendants. To minimize confusion, it is suggested that the supervisor and subordinate be referenced by their actual names rather than by generic terms such as "Supervisor" and "Subordinate."

II. Elements

The instruction is derived from *Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007), and the definition of "official policy or custom" provided in Pattern Instruction 5.10, *supra*.

A supervisory liability claim fails absent a violation of plaintiff's constitutional rights by a subordinate. *See, e.g.*, *Beshers v. Harrison*, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007).

5.13
Civil Rights – 42 U.S.C. § 1983 Claims – Damages

[**For cases subject to the PLRA:** [Name of plaintiff] can recover compensatory [and punitive] damages only if you find that [name of plaintiff] has suffered more than a minimal physical injury. Thus, you must first determine whether [name of plaintiff] suffered more than a minimal physical injury. Minor cuts and bruises are examples of minimal physical injuries. If [name of plaintiff] has failed to prove that [he/she] suffered more than a minimal physical injury, then you must award nominal damages of $1.00. This is because a person whose constitutional rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. If you find that [name of plaintiff] has proved more than a minimal physical injury, then you must consider [name of plaintiff]'s claims for compensatory [and punitive] damages.]

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of name of plaintiff]'s damages—no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you

must not base these compensatory damages on speculation or guesswork. But compensatory damages are not restricted to actual loss of money—they also cover the physical aspects of the injury. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like physical pain. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others: [List recoverable damages, *e.g.*:

(a) The reasonable value of medical care and supplies that [name of plaintiff] reasonably needed and actually obtained, and the present value of medical care and supplies that [name of plaintiff] is reasonably certain to need in the future;

(b) [Name of plaintiff]'s physical injuries, including ill health, physical pain and suffering, disability, disfigurement, and discomfort, including such physical harm that [name of plaintiff] is reasonably certain to experience in the future;

(c) Wages, salary, profits, and the reasonable value of working time that [name of plaintiff] lost because of [his/her] inability or diminished ability to work, and the present value of such compensation that [name of plaintiff] is reasonably certain to lose in the future because of [his/her] inability or diminished ability to work;

(d) [Name of plaintiff]'s mental and emotional distress, impairment of reputation, and personal humiliation, including such mental or emotional harm that [name of plaintiff] is reasonably certain to experience in the future; and

(e) The reasonable value of [name of plaintiff]'s property that was lost or destroyed because of [name of defendant]'s conduct.]

[**Nominal Damages:** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty; or (c) [name of defendant] used both justifiable and unjustifiable force against [name of plaintiff] and it is entirely unclear whether [name of plaintiff]'s injuries

resulted from the use of justifiable or unjustifiable force.]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages—to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage. So, if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages:**

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of plaintiff] must prove by a preponderance of the evidence that

[he/she] is entitled to punitive damages.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

ANNOTATIONS AND COMMENTS

I. The Prison Litigation Reform Act of 1995 (PLRA)

Pursuant to the PLRA, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18)." 42 U.S.C. § 1997e(e). In the Eleventh Circuit, a prisoner or pretrial detainee who suffers a constitutional violation without more than a *de minimis* physical injury may recover nominal damages, but not compensatory or punitive damages. *See, e.g.*, *Brooks v. Warden*, 800 F.3d 1295, 1307-09 (11th Cir. 2015); *Al-Amin v. Smith*, 637 F.3d 1192, 1195-99 (11th Cir. 2011) (affirming district court's exclusion at trial of evidence concerning compensatory and punitive damages where there was no evidence plaintiff suffered a physical injury); *cf. Calhoun v. DeTella*, 319 F.3d

936, 940-41 (7th Cir. 2003) (noting the circuit split regarding the application of the PLRA's bar on damages). The "availability of declaratory or injunctive relief" as determined by the court is not affected by the PLRA. *Boxer X v. Harris*, 437 F.3d 1107, 1111 n.3 (11th Cir. 2006).

Although physical injury must be more than *de minimis* to recover compensatory and punitive damages under the PLRA, the physical injury need not be significant. *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999), *vacated*, 197 F.3d 1059 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970 (11th Cir. 2000) . The Eleventh Circuit has not precisely defined what constitutes *de minimis* physical injury. Case law indicates that a *de minimis* physical injury includes minor cuts and bruises. *Nolin v. Isbell*, 207 F.3d 1253, 1258 n.4 (11th Cir. 2000) (bruises received during an arrest were non-actionable *de minimis* injury); *Harris*, 190 F.3d at 1286 (holding that a forced "dry shave" was a *de minimis* injury); *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997) (finding that a sore, bruised ear persisting for three days was *de minimis*). The instruction uses more than minimal injury, rather than more than *de minimis* injury because it is easier for jurors to understand and conveys the same idea.

The damages limitations under the PLRA apply with equal force to claims by convicted prisoners and pretrial detainees. *Goebert v. Lee Cty.*, 510 F.3d 1312, 1322-25 (11th Cir. 2007) (applying PLRA to § 1983 claim by a pretrial detainee). However, the PLRA does not apply to lawsuits brought by individuals who are no longer in custody. *Napier v. Preslicka*, 314 F.3d 528, 531-34 (11th Cir. 2002).

II. Compensatory Damages

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *accord Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). Damages may include monetary losses, such as lost wages, damaged property, and future medical expenses. *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000)). Damages also may be awarded based on "physical pain and suffering" and " demonstrated . . . impairment of reputation[] and "personal humiliation." *Slicker*, 215 F.3d at 1231. The general rule requiring plaintiffs to mitigate damages applies in actions under 42 U.S.C. § 1983. *See, e.g.*, *Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1309-10 (11th Cir. 1988). Accordingly, the instruction

provides an optional bracketed charge regarding mitigation of damages.

"[C]ompensatory damages under § 1983 may be awarded only based on actual injuries caused by the defendant and cannot be presumed or based on the abstract value of the constitutional rights that the defendant violated." *Slicker*, 215 F.3d at 1229 (emphasis omitted). Consequently, when a plaintiff does not provide any "proof of a specific, actual injury caused by" the defendant's conduct, the plaintiff is not entitled to compensatory damages. *Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994).

III. Nominal Damages

The instruction reflects the three situations identified in *Slicker*, a non-PLRA case, where an award of nominal damages is appropriate. *Slicker*, 215 F.3d at 1232.

In cases that are not subject to the PLRA, an award of nominal damages may be sufficient to justify an award of punitive damages in a § 1983 action. *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177-78 & n.3 (11th Cir. 2009) (noting that if plaintiff organization is successful on its claim of a First Amendment violation permitting nominal damages, then "punitive damages may be available" as well); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991) (affirming award of punitive damages even though jury awarded plaintiff nominal damages but not compensatory damages).

IV. Punitive Damages

In order to receive punitive damages in § 1983 actions, a plaintiff must show that the defendant's conduct was "motivated by evil motive or intent" or involved "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Punitive damages in § 1983 claims are not recoverable against government entities. *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008). In a case brought against both individuals and government entities, the instructions should expressly state that punitive damages may be assessed only against the individual defendants for their respective conduct.

APPENDIX A

CIVIL RIGHTS – SPECIAL INTERROGATORIES – 42 U.S.C. § 1983 CLAIMS

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] has proved [insert plaintiff's claim]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2.That [name of plaintiff] should be awarded compensatory damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

[3. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

APPENDIX B

CIVIL RIGHTS – SPECIAL INTERROGATORIES – 42 U.S.C. § 1983 CLAIMS – FOR CASES BROUGHT BY NON-PRISONERS (PRISON-LITIGATION REFORM DOES NOT APPLY)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s right to [describe protected right]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[2. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of defendant]'s conduct caused [name of plaintiff]'s injuries?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4.a. That [name of plaintiff] should be awarded compensatory damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

– OR –

4.b. That [name of plaintiff] should be awarded nominal damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

[5. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

APPENDIX C

CIVIL RIGHTS – SPECIAL INTERROGATORIES – 42 U.S.C. § 1983 CLAIMS – FOR CASES BROUGHT BY PRISONERS (PRISON LITIGATION REFORM APPLIES)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s right to [describe protected right]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[2. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of defendant]'s unconstitutional conduct caused [name of plaintiff] to suffer more than a minimal physical injury?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, [name of plaintiff] is awarded nominal damages in the amount of $1.00, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of plaintiff] should be awarded compensatory damages against [name of defendant] to compensate [name of plaintiff] for physical and/or emotional injury?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights and that punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

I. Applicability of Instructions in this Chapter

The instructions in this Chapter apply to constitutional claims asserted under 42 U.S.C. § 1983 for actions taken under color of state law and claims asserted under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for actions taken under color of federal law. *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000) ("[F]ederal courts incorporate § 1983 law into *Bivens* actions." (citation omitted)).

II. Qualified Immunity

In cases under § 1983 or *Bivens*, the named defendants will often assert on motion for summary judgment prior to trial a qualified immunity defense to be addressed by the court under the standards summarized in *Brown v. City of Huntsville, Ala.*, 608 F.3d 724, 733-34 (11th Cir. 2010). The instructions in this chapter presume that the court has previously determined that the defendants do not have a qualified immunity defense. If there is a genuine issue of material fact pertaining to the qualified immunity defense and that issue is not subsumed in the elements of the claim the plaintiff must prove, the model instructions should be revised accordingly. *See Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) ("A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury.").

III. Multiple Defendants and Government Liability

If the plaintiff claims that more than one defendant is liable for a § 1983 or *Bivens* claim, the model charges may be modified to accommodate multiple defendants. Further, if the plaintiff seeks to hold a government entity or individual supervisor liable, Pattern Instruction 5.10 *et seq.* may be incorporated into the instructions as appropriate. In doing so, the court should make clear that government entities are immune from punitive damages.

5.1

Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Retaliation

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, [describe defendant's alleged retaliation] in retaliation for [describe plaintiff's alleged protected speech or conduct] in violation of the First Amendment.

A person's right to [describe plaintiff's alleged protected speech or conduct] is protected by the Constitution.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [describe plaintiff's alleged protected speech or conduct];

Second: That [name of defendant] [describe defendant's alleged retaliation];

Third: That [name of plaintiff]'s [describe alleged protected speech or conduct] was a motivating factor in [name of defendant]'s decision to [describe alleged retaliation];

Fourth: That [name of defendant]'s [describe alleged retaliation] would likely deter a similarly situated reasonable person from engaging in similar [describe plaintiff's alleged protected speech or conduct]; and

Fifth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

[For the fifth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, then you must consider [name of defendant]'s contention that [he/she] would have [describe defendant's alleged retaliation] anyway. To succeed on this contention, [name of defendant] must prove by a preponderance of the evidence that [he/she] would have done the same thing if [name of plaintiff] had not [describe plaintiff's alleged protected speech or conduct].

If you find [name of plaintiff] has proved each of the facts [he/she] must prove and if you find that [name of defendant] has not proved [his/her] contention, you must then decide the issue of [name of plaintiff]'s damages.

However, if you find that [name of plaintiff] did not prove each of the facts [he/she] must prove, or if you find that [name of defendant] proved [his/her]

contention, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Scope of Instruction

This instruction applies to any claim in which a prisoner or private citizen who is not suing in his or her capacity as a public employee alleges that a public official retaliated against him or her for exercising a constitutional right. For public employees asserting a First Amendment retaliation claim, see Pattern Instruction 4.1.

II. Elements of the Claim

The elements of the claim are derived from *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008): (1) the speech was constitutionally protected; (2) the defendant's retaliatory conduct adversely affected the protected speech; and (3) there is a causal connection between the retaliatory actions and the adverse effect on speech. *See also Bennett v. Hendrix*, 423 F.3d 1247, 1250, 1254 (11th Cir. 2005).

a. Protected Conduct

Whether the conduct is constitutionally protected is a question of law for the court. If necessary, additional contextual information about the protected conduct may be added to the second paragraph of the instruction.

b. Adverse Effect on Protected Speech

To show the defendant's conduct adversely affected protected speech, a plaintiff must show the defendant's conduct would likely "deter a person of ordinary firmness"

from exercising his or her First Amendment rights. *See, e.g.*, *Bennett*, 423 F.3d at 1254 ("A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights."); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) ("The second element required [the plaintiff] to show that the discipline he received would likely deter a [prisoner] of ordinary firmness from complaining about the conditions of his confinement." (second alteration in original) (internal quotation marks and citation omitted)). The Committee has used the language "deter a similarly situated reasonable person" because it is easier to understand and conveys the same idea.

c. Causation

First Amendment retaliation claims have a unique causation element. "In order to establish a causal connection, the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011); *see also Smith*, 532 F.3d at 1278 ("The causal connection inquiry asks whether the defendants were subjectively motivated to discipline because [the plaintiff] complained of some of the conditions of confinement."). Courts decide the "subjective motivation issue" using the burden-shifting formula set forth by the Supreme Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Smith*, 532 F.3d at 1278.

"[O]nce the plaintiff shows that her protected conduct was a motivating factor, the burden shifts to the defendant to show that she would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable." *Castle*, 631 F.3d at 1197; *see also Smith*, 532 F.3d at 1278 n.22 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 n.4 (6th Cir. 1999) (alterations in original) ("Under the *Mt. Healthy* approach, if the government official 'can prove that [he] would have taken the adverse action in the absence of the plaintiff's protected conduct, [he] cannot be held liable.'")).

III. Damages

The Eleventh Circuit has noted that physical injury "rarely" results from a First Amendment violation. *Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011). In those rare cases where a prisoner suffers a physical injury resulting from a First Amendment violation, the jury should be instructed concerning recoverable damages. For the damages instruction, see Pattern Instruction 5.13.

5.2
Civil Rights – 42 U.S.C. § 1983 Claims – First Amendment Claim – Prisoner Alleging Retaliation or Denial of Access to Courts

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, violated [his/her] rights under the First Amendment to the United States Constitution.

Specifically, [name of plaintiff] claims that [name of defendant] violated [his/her] constitutional right of access to the courts by [describe defendant's conduct, *e.g.*, by making a disciplinary report against [him/her]] because [he/she] [attempted to use the legal system] [communicated an intent to use the legal system] about [describe plaintiff's grievance, *e.g.*, concerning [his/her] continuation in a close-confinement status].

A convicted prisoner loses some constitutional rights, such as the right to liberty, after being convicted of a criminal offense. But the prisoner keeps other constitutional rights. One of those retained rights is the First Amendment right of access to the courts to challenge the lawfulness of [name of plaintiff]'s conviction and the constitutionality of [his/her] confinement conditions. If [name of plaintiff] had no right to go to court to address these claims, the Constitution's guarantees would have no meaning, because there would be no way to enforce the guarantees.

The Constitutional right of access to the courts means that a prisoner has the right to file claims and other papers with the court, and the exercise of that right, or plan to exercise that right, cannot be the basis for a penalty or further punishment.

This is true because, once again, if [name of plaintiff] could be punished for exercising a constitutional right or for giving a good-faith notice of intent to do so, the right itself would be meaningless.

But to maintain discipline and security, prison authorities do have the right to impose reasonable restrictions on the exercise of constitutional rights.

[The prohibition against prisoners making written threats is one reasonable restriction on the exercise of First Amendment rights. And, in this case, [name of defendant] claims that [name of plaintiff]'s communication to [him/her/it] about a lawsuit was nothing more than a written threat intended to harass prison officials—not a good-faith notice of intent to sue that was given in an effort to reach a settlement in a pending, legitimate dispute.]

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] [attempted to use the legal system] [communicated [his/her] intent to use the legal system to [name of defendant]];

Second: That [name of plaintiff]'s [attempt to use the legal system] [communication to [name of defendant] of [his/her] intent to use the legal system] was made in good faith as an exercise of [his/her] First Amendment rights and was not a bad-faith threat intended as an act of harassment;

Third: That [name of defendant] intentionally retaliated against or punished [name of plaintiff] because of [his/her] [attempt to use the legal system] [communication of [his/her] intent to use the legal system to [name of defendant]]; and

Fourth: That [name of defendant] acted under color of law when [he/she] retaliated against or punished [name of plaintiff]. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the third element, [name of defendant] "retaliated against" [name of plaintiff] if [name of defendant]'s actions would likely deter a similarly situated reasonable person in [name of plaintiff]'s position from exercising First Amendment rights.

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, then you must consider [name of defendant]'s contention that [he/she] would have [describe defendant's alleged retaliation or punishment] anyway. To succeed

on this contention, [name of defendant] must prove by a preponderance of the evidence that [he/she] would have done the same thing if [name of plaintiff] had not [describe attempt to use the legal system or communication of [his/her] intent to use the legal system to [name of defendant]].

If you find [name of plaintiff] has proved each of the facts [he/she] must prove and if you find that [name of defendant] has not proved [his/her] contention, you must then decide the issue of [name of plaintiff]'s damages. However, if you find that [name of plaintiff] did not prove each of the facts [he/she] must prove, or if you find that [name of defendant] proved [his/her] contention, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Qualified Immunity

In cases under § 1983 or *Bivens*, the named defendants will usually assert on motion for summary judgment prior to trial a qualified immunity defense to be addressed by the court under the standards summarized in *Brown v. City of Huntsville, Ala.*, 608

F.3d 724, 733-34 (11th Cir. 2010). The instructions in this chapter presume that the court has previously determined that the defendants do not have a qualified immunity defense. If there is a genuine issue of material fact pertaining to the qualified immunity defense and that issue is not subsumed in the elements of the claim the plaintiff must prove, the model instructions should be revised accordingly.

II. Retaliation

The definition of retaliation provided in this instruction is derived from *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008).

III. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.1.

IV. Damages

The Eleventh Circuit has noted that physical injury "rarely" results from a First Amendment violation. *Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011). In the event a prisoner suffers a physical injury resulting from a First Amendment violation, the jury should be instructed concerning recoverable damages. For the damages instruction, see Pattern Instruction 5.13.

5.3
Civil Rights – 42 U.S.C. § 1983 Claims – Fourth Amendment Claim – Private Person Alleging Unlawful Arrest, Unlawful Search, or Unlawful Terry Stop

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law intentionally committed acts that violated [name of plaintiff]'s constitutional right[s] [not to be arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to an unreasonable investigatory stop].

Under the Fourth Amendment to the United States Constitution, every person has the right [not to be arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to an unreasonable investigatory stop].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s constitutional right [not to be arrested without probable cause] [not to be subjected to an unreasonable search of one's home or dwelling] [not to be subjected to an unreasonable investigatory stop];

Second: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and.

Third: That [name of defendant] acted under color of law. [The parties

have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

(First element for unlawful arrest claims):

[For the first element, [name of plaintiff] claims that [name of defendant] arrested [name of plaintiff] without probable cause. [Name of defendant] may arrest a person without a warrant whenever the facts and circumstances within [name of defendant]'s knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that the person has committed, is committing, or is about to commit an offense. It is a criminal offense for any person to [describe criminal offense [name of plaintiff] was alleged to have committed].]

(First element for unlawful search claims):

[For the first element, [name of plaintiff] claims there was an unreasonable search of [his/her] home. The Constitution protects against unreasonable searches. The general rule is that a law enforcement official must get a search warrant from a judicial officer before conducting any search of a home. But there are certain exceptions to this general rule. One exception is [a search conducted by consent. If a person in lawful possession of a home freely and voluntarily invites or consents to a search, law enforcement officers may reasonably and lawfully conduct the search to the extent of the consent] [recognized in emergency situations in which a

law enforcement officer may enter and make a safety inspection for the purpose of ensuring or protecting the officer's and others' wellbeing. But the officer must have a reasonable and good faith belief that there is a serious threat to the officer's safety or the safety of someone else].]

(First element for unlawful Terry stop claims):

For the first element, [name of plaintiff] claims that [he/she] was subjected to an unreasonable investigatory stop. [Name of plaintiff] may succeed in showing that the investigatory stop was unreasonable if [he/she] proves *either* that [name of defendant] did not have a reasonable suspicion that [name of plaintiff] was involved in, or was about to be involved in, criminal activity; *or* that the stop was not reasonable in scope.

A reasonable suspicion is a particularized and objective basis for suspecting an individual of criminal activity. To determine whether the scope of the stop is reasonable, you should consider the law enforcement purposes served by the stop, the diligence with which the officer[s] pursued investigation, the intrusiveness of the stop, and the length of the stop. In making these determinations, you should consider the totality of the circumstances and focus on all of the information available to [name of defendant] at the time that the officer[s] executed the stop.

For the second element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without

[name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the third element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each fact that [he/she] must prove, you must decide the issue of [his/her] damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Elements of Unlawful Arrest Claim

A warrantless arrest without probable cause violates the Constitution and provides a basis for a § 1983 claim. *Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004). However, the existence of probable cause at the time of arrest constitutes an absolute bar to a § 1983 action for unlawful arrest. *Id*. "Probable cause to arrest exists when an arrest is objectively reasonable based on the totality of the circumstances." *Id*. (citing *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998)). "This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id*. (internal quotations omitted).

II. Elements of Unlawful Search Claim

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." In regard to unreasonable searches, the Fourth Amendment protects certain areas over which individuals manifest "a subjective expectation of privacy" and where "society is willing to recognize that expectation as reasonable." *Kyllo v. United States*, 533 U.S. 27, 27-28 (2001). The home is one such area where it is readily accepted that an expectation of privacy exists. *Id*. at 34; *see also Kentucky v. King*, 563 U.S. 452, 474 (2011). Accordingly, the United States Supreme Court has held that "searches and seizures inside a home without a warrant are presumptively unreasonable." *King*, 563 U.S. at 459 (citation omitted). However, there are two principal exceptions to the search warrant requirement which are detailed in this instruction—searches conducted by consent or under exigent circumstances. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

"The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph*, 547 U.S. 103, 106 (2006). Additionally, a "well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *King*, 563 U.S. at 460 (internal quotations omitted). The Supreme Court has identified several exigencies that may justify a warrantless search of a home. This instruction includes a description of the "emergency aid" exception, under which "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Other recognized exigent circumstances include where officers are "in hot pursuit of a fleeing suspect," *King*, 563 at 460 (citing *United States v. Santana*, 427 U.S. 38, 42-43 (1976)), and where there is a need to "prevent the imminent destruction of evidence." *Id*.

Additional exceptions not detailed in this instruction include the plain view exception, *see Kyllo*, 533 U.S. 27, 38-40, and the exception for search incident to a lawful arrest. *See Maryland v. Buie*, 494 U.S. 325, 334 (2009). This instruction may be altered if an exception other than consent or an exigent circumstance is at issue in a particular case.

III. Elements of Unlawful Terry Stop Claim

"[L]aw enforcement officers may seize a suspect for a brief, investigatory *Terry* stop where (1) the officers have a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity, and (2) the stop '[is] reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011) (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20, 30 (1968)). Determining the unreasonableness of a seizure within the meaning of the Fourth Amendment requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *Courson v. McMillian*, 939 F.2d 1479, 1490 (11th Cir. 1991) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). The reasonableness of an investigatory stop is examined under the totality of the circumstances. *United States v. Lewis*, 674 F.3d 1298, 1303 (11th Cir. 2012) (citing *Samson v. California*, 547 U.S. 843, 848 (2006); *Jordan*, 635 F.3d at 1186).

"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Courson*, 939 F.2d at 1490 (quoting *Adams v. Williams*, 407 U.S. 143, 145-46 (1972)). "While 'reasonable' suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Alternatively stated, "[r]easonable suspicion need not involve the observation of illegal conduct, but does require 'more than just a hunch.'" *Lewis*, 674 F.3d at 1303 (citation omitted). "The detaining officer 'must have a particularized and objective basis for suspecting the person of criminal activity.'" *United States v. Cruz*, 909 F.2d 422, 424 (11th Cir. 1989) (quoting *United States v. Aldridge*, 719 F.2d 368, 371 (11th Cir. 1983)).

Even if an officer has reasonable suspicion to make a valid *Terry* stop, the encounter may mature into a detention that amounts to an arrest for which probable cause is required. *United States v. Acosta*, 363 F.3d 1141, 1145-46 (11th Cir. 2004). The Eleventh Circuit has set forth four non-exclusive factors which may be considered in

"drawing the line between a *Terry* stop and an arrest in an individual case." *Id.* at 1146. These factors include: "the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention." *Id.* (citation omitted).

IV. Causation

"A § 1983 claim requires proof of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation." *Troupe v. Sarasota Cnty., Fla.*, 419 F.3d 1160, 1165 (11th Cir. 2005) (citing *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986)). The requisite causation includes proof of legal and proximate causation. *Jackson v. Sauls*, 206 F.3d 1156, 1168 n.16 (11th Cir. 2000). Thus, "a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." *Id*. at 1168. The model instruction makes clear that the plaintiff must prove both legal and proximate causation in accordance with Eleventh Circuit case law.

V. Damages

For the damages instruction, see Pattern Instruction 5.13

5.4

Civil Rights – 42 U.S.C. § 1983 Claims – Fourth or Fourteenth Amendment Claim – Private Person or Pretrial Detainee Alleging Excessive Force

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally committed acts that violated [name of plaintiff]'s constitutional right to be free from the use of excessive or unreasonable force [during an arrest] [while being held in custody as a pretrial detainee].

Under the [Fourth] [Fourteenth] Amendment to the United States Constitution, every person has the right not to be subjected to excessive or unreasonable force [while being arrested by a law enforcement officer—even though the arrest is otherwise made in accordance with the law] [while being held in custody as a pretrial detainee].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s constitutional right not to be subjected to excessive or unreasonable force [during an arrest] [while being held in custody as a pretrial detainee];

Second: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Third: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

(First Element for claims asserted by arrestees):

[For the first element, [name of plaintiff] claims that [name of defendant] used excessive force when arresting [him/her]. When making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, whether the suspect resists or flees, the need for application of force, the relationship between the need for force and the amount of force used, and the extent of the injury inflicted.

You must decide whether the force [name of defendant] used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances. [Name of defendant]'s underlying intent or motivation is irrelevant.]

(First Element for claims asserted by pretrial detainees):

[For the first element, [name of plaintiff] claims that [name of defendant] used excessive force on [him/her] while [he/she] was being held in custody as a

pretrial detainee. But not every push or shove—even if it later seems unnecessary—is a constitutional violation. Also, an officer always has the right to use the reasonable force that is necessary under the circumstances to maintain order and ensure compliance with jail or prison regulations. Whether a specific use of force is excessive or unreasonable depends on factors such as the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or limit the amount of force used; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

You must decide whether the force [name of defendant] used in this case was excessive or unreasonable based on the degree of force a reasonable officer would have applied to maintain order and safety under the same circumstances. [Name of defendant]'s underlying intent or motivation is irrelevant.]

For the second element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the third element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when

[he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each fact that [he/she] must prove, you must decide the issue of [his/her] damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Number 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Excessive Force Claims by Arrestees and Pretrial Detainees

Claims of excessive force against law enforcement officials in the course of making an arrest of a private person are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388, 395 n.10 (1989). Claims of excessive force asserted by pretrial detainees, while governed by the Fourteenth Amendment's Due Process Clause, are likewise analyzed under an objective reasonableness standard. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (holding that excessive force claims asserted by pretrial detainees are governed under an objective reasonableness standard which should account for the government's need to maintain order). While this instruction applies to claims brought by both arrestees and pretrial detainees, Pattern Instruction 5.6 applies if the excessive force claim is brought by a convicted prisoner.

II. Elements of Excessive Force Claim

In *Graham v. Connor*, the Supreme Court held that claims of excessive force asserted by a private citizen are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. 490 U.S. at 388. The Court also recognized that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," but that the proper application of the Fourth Amendment's objective reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Additional factors to consider may include "the need for the application of force, . . . the relationship between the need and amount of force used, and . . . the extent of the injury inflicted." *Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002) (citing *Leslie v. Ingram*, 786 F.2d 1533, 1536 (11th Cir. 1986)). The "reasonableness" of a particular use of force is "judged [objectively] from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 397.

In *Kingsley v. Hendrickson*, the Supreme Court held that a pretrial detainee alleging a claim of excessive force "must show only that the force purposely or knowingly used against him was objectively unreasonable." 135 S. Ct. at 2473. In this regard, the Court also stated that the following factors may bear on the reasonableness of the force used against a pretrial detainee: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Id.*

III. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.5
Civil Rights – 42 U.S.C. § 1983 Claims – Fourth Amendment Claim – Malicious Prosecution

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, maliciously caused criminal proceedings to be commenced against or continued against [name of plaintiff] without probable cause and because of those proceedings, [name of plaintiff] was unlawfully seized in violation of [his/her] rights under the United States Constitution.

Under the Fourth Amendment to the United States Constitution, every person has the right not to be seized without probable cause.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] caused a criminal proceeding to be instituted or continued against [name of plaintiff];

Second: That [name of defendant] acted with malice and without probable cause;

Third: That the proceeding terminated in [name of plaintiff]'s favor. [The parties have agreed that the proceeding terminated in [name of plaintiff]'s favor, so you should accept that as a proven fact];

Fourth: That [name of plaintiff] was unlawfully seized as a result of the criminal proceeding;

Fifth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Sixth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the second element, you must decide whether [name of defendant]'s actions causing the criminal proceeding to be instituted or continued were taken with malice and without probable cause. To prove malice [name of plaintiff] must show that [name of defendant]'s actions were [insert applicable state law standard]. **(See annotation below)**. Probable cause exists whenever the facts and circumstances within [name of defendant]'s knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that the person has committed a criminal offense.

[For the third element, you must decide whether the proceeding terminated in [name of plaintiff]'s favor. The proceeding terminated in [name of plaintiff]'s favor if the termination suggests that [name of plaintiff] is innocent, but proof of actual innocence is not required. For example, the proceeding terminated in [name of plaintiff]'s favor if [name of plaintiff] was acquitted, the case was dismissed based on an affirmative decision not to prosecute, the case was dismissed due to the running of the statute of limitations, or a *nolle prosequi*

was entered. However, if the proceeding terminated as the result of a compromise or agreement reached between the government and [name of plaintiff], such as through a plea agreement, then the proceeding did not terminate in [name of plaintiff]'s favor.]

For the fourth element, you must decide whether [name of plaintiff] was unlawfully seized as a result of the criminal proceeding. A seizure under the Fourth Amendment occurs when there is an undue restraint placed on an individual's personal liberty. The seizure must have occurred after the beginning of [name of plaintiff]'s criminal proceeding. In the case of a warrantless arrest, a criminal proceeding begins after the individual is arraigned or indicted.

For the fifth element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she]

is an official.]

If you find [name of plaintiff] has proved each of the facts that [he/she] must prove, you must then decide the issue of [name of plaintiff]'s damages. If you find that [name of plaintiff] has not proved each of these facts, you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Malicious Prosecution, generally

"[L]abeling a section 1983 claim as one for a 'malicious prosecution' can be a shorthand way of describing a kind of legitimate section 1983 claim; the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead." *Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998) (quoting *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996)). "The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty." *Id.* (quoting *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). "If malicious prosecution or abuse of process is committed by state actors and results in the arrest or other seizure of

the defendant . . . we now know that the defendant's only constitutional remedy is under the Fourth Amendment . . . ." *Id.* (quoting *Smart v. Bd. of Trs. of the Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994)).

To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of her Fourth Amendment right to be free from unreasonable seizures. *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003); *Uboh*, 141 F.3d at 1004-05. "As to the constituent elements of the common law tort of malicious prosecution, [the Eleventh Circuit] has looked to both federal and state law and determined how those elements have historically developed." *Wood*, 323 F.3d at 881 (*citing Uboh*, 141 F.3d at 1002-04; *Whiting*, 85 F.3d at 584-86). While "both state law and federal law help inform the elements of the common law tort of malicious prosecution, a Fourth Amendment malicious prosecution claim under § 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law." *Id.* at 882.

II. Malice

The Eleventh Circuit has not, to date, enunciated a federal malice standard for § 1983 malicious prosecution claims. However, the Court has stated: "When malicious prosecution is brought as a federal constitutional tort, the outcome of the case does not hinge on state law, but federal law, and does not differ depending on the tort law of a particular state." *Wood*, 323 F.3d at 882 n.17. Even so, courts may need to refer to the applicable common law for any additional modification of the instruction that may be needed for the definition of malice, in the absence of controlling Eleventh Circuit precedent. *See, e.g., Blackshear v. City of Miami Beach*, 799 F. Supp. 2d 1338, 1348-49 (S.D. Fla. 2011); *Brown v. Benefield*, 757 F. Supp. 2d 1165, 1181 (M.D. Ala. 2010); *Buckner v. Shetterly*, 621 F. Supp. 2d 1300, 1302 n.2 (M.D. Ga. 2008).

III. Favorable Termination

The withdrawal of criminal charges pursuant to a compromise or agreement does not constitute favorable termination and, thus, cannot support a claim for malicious prosecution. *See Uboh*, 141 F.3d at 1006 ("It is worth noting that the charges involved in this action were not dismissed pursuant to any agreement among the parties."). Likewise, a favorable termination does not exist where the stated basis for the dismissal of criminal charges has been "in the interests of justice," or expressly remanded for retrial. *Id.* at 1005 (citing *Singer*, 63 F.3d at 118). By contrast, a favorable termination does exist by virtue of an

acquittal, an order of dismissal reflecting an affirmative decision not to prosecute, a dismissal based on the running of the statute of limitations, an entry of a *nolle prosequi*, and, in some cases, a granted writ of *habeas corpus*. *Id.* However, actual innocence is not required to satisfy the favorable termination requirement of a malicious prosecution claim. *Id.*

IV. Seizure

A seizure under the Fourth Amendment occurs when a state actor places a restraint on an individual's personal liberty. *Uboh*, 141 F.3d at 1003. A plaintiff bears the burden of proving that she was seized in relation to the prosecution, in violation of her constitutional rights. *Kingsland*, 382 F.3d at 1235. An arrest following the filing of an information suffices for a seizure after judicial proceedings have commenced. *Uboh*, 141 F.3d at 1004 (citation omitted); *Kingsland*, 382 F.3d at 1235. In the case of a warrantless arrest, the judicial proceeding does not begin until the party is arraigned or indicted. *Kingsland*, 382 F.3d at 1235; *see also, e.g.*, *Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (E.D.N.Y. 2000) ("[T]he existence, or lack, of probable cause is measured as of the time the judicial proceeding is commenced (e.g., the time of the arraignment), not the time of the preceding warrantless arrest."). Thus, the plaintiff's arrest cannot serve as the predicate deprivation of liberty because it occurred prior to the time of arraignment, and was not one that arose from malicious prosecution as opposed to an unlawful arrest. *Kingsland*, 382 F.3d at 1235.

V. Injury

The injury involved in a § 1983 claim for malicious prosecution may include both the injury which results from the unlawful seizure and injury associated with the prosecution of the criminal proceeding. *See Whiting*, 85 F.3d at 584-86.

VI. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

VII. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.6
Civil Rights – 42 U.S.C. § 1983 Claims – Eighth Amendment Claim – Convicted Prisoner Alleging Excessive Force

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, intentionally violated [name of plaintiff]'s Eighth Amendment right as a prisoner to be free from cruel and unusual punishment.

The Constitution guarantees that every person who is convicted of a crime or a criminal offense has the right not to be subjected to cruel and unusual punishment. This includes, of course, the right not to be assaulted or beaten without legal justification while incarcerated.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of defendant] intentionally [describe the alleged conduct];

Second: That the force used against [name of plaintiff] by [name of defendant] was excessive;

Third: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Fourth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

You must decide whether any force used in this case was excessive based on whether the force, if any, was applied in a good-faith effort to maintain or restore discipline, or instead whether it was applied maliciously or sadistically to cause harm. In making that decision you should consider the amount of force used in relationship to the need presented; the motive of [name of defendant]; the extent of the injury inflicted; and any effort made to temper the severity of the force used. Of course, officers may not maliciously or sadistically use force to cause harm regardless of the significance of the injury to the prisoner. But not every push or shove—even if it later seems unnecessary—is a constitutional violation. Also, an officer always has the right to use the reasonable force that is necessary under the circumstances to maintain order and ensure compliance with jail or prison regulations.

For the third element, [name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the fourth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are

outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, you must find for [name of plaintiff] and consider the issue of damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth Amendment Claims

"In the prison context, three distinct Eighth Amendment claims are available to plaintiff inmates alleging cruel and unusual punishment, each of which requires a different showing to establish a constitutional violation." *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010) (citation omitted). "The Eighth Amendment can give rise to claims challenging specific conditions of confinement, the excessive use of force, and the deliberate indifference to a prisoner's serious medical needs." *Id*. at 1303-04. "Each of these claims requires a two-prong showing: an objective showing of a deprivation or injury that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities' and a subjective showing that the official had a 'sufficiently culpable

state of mind.'" *Id*. at 1304 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Separate instructions are provided for each of these three types of claims brought by prisoners. *See* Pattern Instructions 5.6, 5.7, 5.8, 5.9.

II. Elements of Eighth Amendment Excessive Force Claim

With respect to the objective component of an Eighth Amendment excessive force claim, "not . . . every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id*. at 9-10 (internal quotations omitted). Applying that standard, the Supreme Court ruled that blows directed at a prisoner causing bruising, swelling, loosened teeth, and a cracked dental plate were not *de minimis* for Eighth Amendment purposes. *Id*. at 10.

With respect to the subjective element of an Eighth Amendment excessive force claim, prison officials must not act maliciously or sadistically for the purpose of causing harm. *Id*. at 6-7; *accord Thomas*, 614 F.3d at 1304; *see also Whitley v. Albers*, 475 U.S. 312, 319 (1986) (holding that "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment forbidden by Eighth Amendment).

The Eleventh Circuit has affirmed much of the language used in earlier versions of this instruction to define the elements of an Eighth Amendment excessive force claim, and that language was retained in the present instruction. *Johnson v. Breeden*, 280 F.3d 1308, 1314 (11th Cir. 2002), *overruled in part on other grounds, Wilkins v. Gaddy*, 130 S. Ct. 1175, 1177 (2010), *as recognized in Dixon v. Sutton, No. 2:08-cv-745-WC*, 2011 U.S. Dist. LEXIS 49945, at *46-47, n.4 (M.D. Ala. May 9, 2011). However, *Kingsley v. Hendrickson* "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners." 135 S. Ct. 2466, 2476 (2015).

III. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.7
Civil Rights – 42 U.S.C. § 1983 Claims – Arrestee, Pretrial Detainee, or Convicted Prisoner Alleging Failure to Intervene

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, failed to intervene when [name of officer] used excessive force against [name of plaintiff] in violation of the United States Constitution.

An officer who fails or refuses to intervene when a constitutional violation such as excessive force takes place in his presence may be held liable for his failure to intervene.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of officer] used excessive force on [name of plaintiff];

Second: That [name of defendant] [saw [name of officer] use excessive force] [knew [name of officer] was going to use excessive force];

Third: That [name of defendant] had a realistic opportunity to prevent harm from occurring;

Fourth: That [name of defendant] failed to take reasonable steps to prevent harm from occurring;

Fifth: That [name of defendant]'s failure to act caused [name of plaintiff]'s injuries and the injuries were a reasonably foreseeable consequence of [name of defendant]'s failure to act; and

Sixth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, you must then decide the issue of [name of plaintiff]'s damages. If you find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Elements of Failure to Intervene Claim

The elements of this claim are derived from *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002), and *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998). In *Ensley*, the Eleventh Circuit emphasized that to be held liable, the defendant must have observed the excessive force and have been in a position to intervene. 142 F.3d at 1408.

However, even if the officer did not observe the excessive force but had "an indication of the prospective use of excessive force," he may still be held liable for his nonfeasance. *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996). Further, the opportunity to intervene must have been realistic. *Id.* (citing *O'Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988)); *cf. Priester v. City of Riviera Beach*, 208 F.3d 919, 925 (11th Cir. 2000) (concluding there was a genuine issue of fact whether the defendant had an opportunity to intervene where one defendant testified the incident lasted 5-10 seconds and another testified it may have lasted two minutes).

The committee notes that the Eleventh Circuit acknowledged the possibility of a failure to intervene claim in an unlawful arrest case if a non-arresting defendant "knew the arrest lacked any constitutional basis and yet participated in some way." *Wilkerson v. Seymour*, 736 F.3d 974, 980 (11th Cir. 2013) (citing *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999)).

II. Underlying Excessive Force Claim

As noted in the first element of the claim, the plaintiff must prove another officer used excessive force. However, if the officer who allegedly used excessive force has settled or is otherwise not involved in the case, the court will need to adjust the instructions to ensure that the jury has a sufficient understanding of the underlying excessive force allegations.

III. Causation

Failure to intervene and failure to protect claims potentially present unique causation and damages issues. Necessarily, a third party or perhaps a co-defendant will have committed the actual assault. In this situation, defendants may argue that district courts should apply state law regarding joint liability and apportionment of damages. According to the Supreme Court, in the Civil Rights Statutes "Congress has directed federal courts to follow a three-step process;" the district court should (1) "look to the laws of the United States so far as such laws are suitable to carry the civil and criminal civil rights statutes into effect;" (2) consider state common law; and then (3) "apply state law only if it is not inconsistent with the Constitution and the laws of the United States." *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (internal citations, quotation marks, and

alterations omitted). However, Eleventh Circuit case law suggests that district courts should apply federal law recognizing joint and several liability. *See Finch v. City of Vernon*, 877 F.2d 1497, 1502-03 (11th Cir. 1989) ("In this case, the district court, applying a federal rule of damages, correctly held the City jointly and severally liable for the damages Finch suffered from the wrongful discharge."); *see also Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1308-09 (11th Cir. 1988) (holding that the federal common law, not law of the forum state, governs the mitigation of damages in § 1983 cases and holding that in such cases, "[i]f a federal damages rule exists, it applies"). Other Circuits have more squarely found that federal common law requires applying joint and several liability in § 1983 cases regardless of the law of the forum state. *See Weeks v. Chaboudy*, 984 F.2d 185, 188 (6th Cir. 1993) (concluding that federal common law requires joint and several liability in § 1983 cases and reversing a district court's apportionment of damages); *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985) (applying federal common law in holding that defendants were jointly and severally liable in a § 1983 case). More generally, the Eleventh Circuit has held that the purpose of § 1983 "is to compensate for the actual injuries caused by the particular constitutional deprivation." *Gilmere v. City of Atlanta*, 864 F.2d 734, 739 (11th Cir. 1989) (citation omitted). Accordingly, while courts may "look to the common law of the states where this is 'necessary to furnish suitable remedies' under 1983," resort to state law is not necessary if federal law is sufficient to serve the policies of the Civil Rights Acts. *Id*. at 738 (quoting *Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978) (quoting 28 U.S.C. § 1988)).

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.8
Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim – Convicted Prisoner or Pretrial Detainee Alleging Deliberate Indifference to Serious Medical Need

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, was deliberately indifferent to [his/her] serious medical need and caused injury to [him/her] in violation of [his/her] [Eighth/Fourteenth] Amendment rights.

The United States Constitution provides that anyone who is imprisoned is entitled to necessary medical care, and a corrections officer violates that right by being deliberately indifferent to a [prisoner's/pretrial detainee's] known serious medical need.

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of plaintiff] had a serious medical need;

Second: That [name of defendant] knew that [name of plaintiff] had a serious medical need that posed a risk of serious harm;

Third: That [name of defendant] failed to [provide/get] necessary medical care for [name of plaintiff]'s serious medical need in deliberate indifference to the risk of serious harm;

Fourth: That [name of defendant]'s conduct caused [name of plaintiff]'s injuries; and

Fifth: That [name of defendant] acted under color of law. [The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

For the first element, [name of plaintiff] must prove a serious medical need. A "serious medical need" is a medical condition that a physician has diagnosed as requiring treatment or a medical condition that is so obvious that even a lay person would easily recognize the need for medical care. In either case, the medical condition must have posed a substantial risk of serious harm to [name of plaintiff] if left unattended.

For the second element, you must determine whether [name of defendant] actually knew [name of plaintiff] had a serious medical need and required immediate attention. Put another way, it is not enough to show that [name of defendant] was careless or neglected [his/her] job duties and should have known about [name of plaintiff]'s need. And it is not enough to show that a reasonable person would have known of the serious medical need. However, you may find from circumstantial evidence that [name of defendant] knew about the risk of serious harm. Further, if the risk of serious harm was obvious, you may, based on that, find that [name of defendant] knew about that risk.

For the third element, to decide whether [name of defendant] was deliberately indifferent to [name of plaintiff]'s serious medical need, you may consider all the relevant circumstances including the seriousness of [name of plaintiff]'s injury,

the length of any delay in providing [name of plaintiff] medical care, and the reasons for any delay. But the law does not require that [name of plaintiff] receive the most advanced medical response to [his/her] serious medical need.

For the fourth element, you must determine whether [name of defendant]'s conduct caused [name of plaintiff]'s injuries. [Name of defendant]'s conduct caused [name of plaintiff]'s injuries if [name of plaintiff] would not have been injured without [name of defendant]'s conduct or if [name of plaintiff]'s injuries were worsened by [name of defendant]'s conduct, and the injuries were a reasonably foreseeable consequence of [name of defendant]'s conduct.

[For the fifth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when acting within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. § 1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form

for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth and/ Fourteenth Amendment

Claims involving the mistreatment of pretrial detainees while in custody are governed by the Fourteenth Amendment's Due Process Clause, and similar claims by convicted prisoners are governed by the Eighth Amendment's Cruel and Unusual Punishment Clause. *See, e.g.*, *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1196 (11th Cir. 2003). Regardless, with respect "to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1574 (11th Cir. 1985); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) ("[D]ecisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees."). Accordingly, this instruction applies to claims of deliberate indifference to serious medical need by both pretrial detainees and convicted prisoners.

II. Elements of Claim of Deliberate Indifference to Medical Need

The elements of this claim are derived from *Youmans v. Gagnon*, 626 F.3d 557, 563-64 (11th Cir. 2010), and *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306-07 (11th Cir. 2009). Specifically, a plaintiff must satisfy an objective component by showing that she had a serious medical need and a subjective component by showing that the prison official acted with deliberate indifference to that need. *See, e.g.*, *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007). To establish the subjective component, the plaintiff must prove (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than either mere or gross negligence. *Compare Youmans*, 626 F.3d at 564 (gross negligence), *with Mann*, 588 F.3d at 1307 (mere negligence); *see also Granda v. Schulman*, 372 F. App'x 79, 82 n.1 (11th Cir. 2010) (noting the intra-circuit split regarding the degree of negligence); *Townsend v. Jefferson Cty.*, 601 F.3d 1152, 1158 (11th Cir. 2010) (noting the split but concluding that *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. ~~1~~1996), ~~f~~first stated the more-than-gross-negligence standard and, as the earliest case, controls). The second and third elements of the instruction address the subjective component. To avoid the issue of whether more than mere or more than gross negligence is required, the instruction suggests factors the jury can consider in determining whether a defendant was deliberately indifferent. *See Goebert*, 510 F.3d at 1327. The second element in the instruction acknowledges that subjective knowledge can be demonstrated in "the usual ways," such as "inference from circumstantial evidence," and that a factfinder may infer subjective knowledge from "the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Goebert*, 510 F.3d at 1327.

III. Different Types of Claims for Deliberate Indifference to Medical Needs

The paragraph explaining the third element is well-suited for a claim based on a

delay in providing medical care. *See Goebert*, 510 F.3d at 1326-27; *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). However, there are other ways in which defendants may fail to provide adequate medical care. *McElligott*, 182 F.3d at 1255. For example, a defendant may simply deny medical care altogether, *Lancaster v. Monroe Cty.*, 116 F.3d 1419, 1425 (11th Cir. 1997), *overruled on other grounds by LeFrere v. Quezada*, 588 F.3d 1317, 1318 (11th Cir. 2009), or provide treatment "so cursory as to amount to no treatment at all," *Mandel v. Doe*, 888 F.2d 783, 789 (11th Cir. 1989). Thus, a court may wish to adjust the paragraph explaining the third element depending on the type of deliberate indifference claim at issue.

IV. Causation

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

V. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.9
Civil Rights – 42 U.S.C. § 1983 Claims – Eighth or Fourteenth Amendment Claim – Failure to Protect

In this case, [name of plaintiff] claims that [name of defendant], while acting under color of law, unlawfully failed to protect [name of plaintiff] from harm in violation of the United States Constitution.

An officer who fails to protect a prisoner from a known threat of harm posed by another prisoner may be held liable for this failure to protect.

To succeed on this claim, [name of plaintiff] must prove each of the following by a preponderance of the evidence:

First: That there was a substantial risk to [name of plaintiff] that [he/she] could be harmed by another prisoner;

Second: That [name of defendant] actually knew of that risk;

Third: That [name of defendant] disregarded that risk or failed to take reasonable measures to protect [name of plaintiff] in response to that risk;

Fourth: That [name of plaintiff] was [describe harm, *e.g.*, attacked by another prisoner];

Fifth: That [name of defendant]'s failure to protect caused [name of plaintiff]'s injuries and the injuries were a reasonably foreseeable consequence of [name of defendant]'s failure to protect; and

Sixth: That [name of defendant] acted under color of law.

[The parties have agreed that [name of defendant] acted under color of law, so you should accept that as a proven fact.]

[For the second element, it is not necessary that [name of defendant] knew precisely who would attack [name of plaintiff] if [name of defendant] knew there was a substantial risk to [name of plaintiff]'s safety. Also, if [name of plaintiff] shows that [name of defendant] had information [he/she] suspected (or believed) to be true, and if you find that such information indicated a substantial risk of serious harm to [name of plaintiff], [name of defendant] cannot escape liability for failing to confirm those facts. But it is not enough for [name of plaintiff] to show that [his/her] risk of substantial harm was obvious and that [name of defendant] should have known of the risk. [Name of plaintiff] must show that [name of defendant] actually knew of the risk.]

[For the sixth element, you must decide whether [name of defendant] acted under color of law. A government official acts "under color" of law when [he/she] acts within the limits of lawful authority. [He/She] also acts under color of law when [he/she] claims to be performing an official duty but [his/her] acts are outside the limits of lawful authority and abusive in manner, or [he/she] acts in a way that misuses [his/her] power and is able to do so only because [he/she] is an official.]

If you find [name of plaintiff] has proved each of the facts [he/she] must prove, you must then decide the issue of [name of plaintiff]'s damages. If you

find that [name of plaintiff] has not proved each of these facts, then you must find for [name of defendant].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. Eighth and Fourteenth Amendment

This instruction applies to claims brought by both pretrial detainees and convicted prisoners for the reasons discussed in the annotations following Pattern Instruction 5.8, *supra*.

II. Elements of Claim

Any condition of confinement may serve as the basis for a claim under the Eighth or Fourteenth Amendment, and the instruction addresses the common claim that prison officials failed to protect the plaintiff from attack by another prisoner. *See, e.g.*, *Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 616-17 (11th Cir. 2007). A prison official's failure to protect a prisoner from attack violates the prisoner's constitutional rights "when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk." *Carter v. Galloway*, 352 F.3d 1346, 1349 (11th Cir. 2003) (quotation omitted). "A plaintiff must also show that the constitutional violation caused his injuries." *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1028 (11th Cir. 2001), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007)). For the third element, the factors the jury can consider in determining whether a defendant responded reasonably to a known risk will depend on the nature of the claim. *See, e.g.*, *Rodriguez*, 508 F.3d at 616 (in a failure to protect case, "[a]n official responds to a known risk in an objectively unreasonable manner if 'he knew of ways to reduce the harm but knowingly declined to act' or if 'he knew of ways to reduce the harm but recklessly declined to act.'"); *see also* Pattern Instruction 5.8.

Prison officials may avoid liability by showing: (1) "that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger"; (2) "that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent"; or

(3) that "they responded reasonably to the risk, even if the harm ultimately was not averted." *Rodriguez*, 508 F.3d at 617-18 (quotation omitted). At the time of publication, no authority designates these arguments as affirmative defenses; therefore, the instruction does not include separate affirmative defenses on these grounds.

III. Causation

Failure to intervene and failure to protect claims present unique causation and damages issues. Necessarily, a third party or a codefendant will have committed the actual assault. Although the Eleventh Circuit has not addressed the issue, there is authority suggesting district courts should apply state law regarding joint liability and apportionment of damages if there is a gap in federal law and the state law is not inconsistent with the purposes of § 1983 claims. *See Katka v. Mills*, 422 F. Supp. 2d 1304, 1310 (N.D. Ga. 2006) (concluding that prior Georgia law would not permit contribution for intentional torts; but compare the Georgia Apportionment statute, O.C.G.A. § 51-12-33, which does not distinguish between negligent and intentional torts); *Rosado v. New York City Hous. Auth.*, 827 F. Supp. 179, 183 (S.D.N.Y. 1989) (considering whether to apply New York contribution law); *Goad v. Macon Cty., Tenn.*, 730 F. Supp. 1425, 1431-1432 (M.D. Tenn. 1989) (considering whether to apply Tennessee law concerning set-offs); *Hoffman v. McNamara*, 688 F. Supp. 830, 833-834 (D. Conn. 1988) (applying Connecticut law regarding the rule of set-off); *Dobson v. Camden*, 705 F.2d 759, 763-69 (5th Cir. 1983), *on reh'g*, 725 F.2d 1003 (5th Cir. 1984) (considering whether Texas one satisfaction rule should apply to § 1983 claim). Thus, this instruction and the damages instruction, Pattern Instruction 5.13, may require modification.

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

IV. Damages

For the damages instruction, see Pattern Instruction 5.13.

5.10

Civil Rights – 42 U.S.C. § 1983 Claims – Government Entity Liability
(Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of government entity], which employed [name of officer], is liable for violating [name of plaintiff]'s constitutional rights. You should consider whether [name of government entity] is liable only if you find that [name of officer] violated [name of plaintiff]'s constitutional rights.

[Name of government entity] is not liable for violating [name of plaintiff]'s constitutional rights simply because it employed [name of officer]. Rather, [name of government entity] is liable if [name of plaintiff] proves that an official policy or custom of [name of government entity] directly caused [his/her] injuries. Put another way, [name of government entity] is liable if its official policy or custom was the moving force behind [name of plaintiff]'s injuries.

An "official policy or custom" means:

(a) A rule or regulation created, adopted, or ratified by [name of government entity]; or

(b) A policy statement or decision made by [name of government entity]'s policy-maker; or

(c) A practice or course of conduct that is so widespread that it has acquired the force of law—even if the practice has not been formally approved.

You may find that an "official policy or custom" existed if there was a

practice that was so persistent, widespread, or repetitious that the [name of government entity]'s policy-maker either knew of it or should have known of it.

[Name of policy-maker] is the [name of government entity]'s "policy-maker."

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into any applicable § 1983 instructions when there is a claim against an individual defendant or defendants. In such case, jury interrogatories applicable to the government entity should be added if a special verdict form is used.

II. Elements

This charge is derived from *AFL-CIO v. City of Miami, Fla.*, 637 F.3d 1178, 1187 (11th Cir. 2011). A government entity may not be held liable under § 1983 absent a finding that an individual, typically an individual named as a defendant in the case, violated the plaintiff's constitutional rights. *See, e.g., Garczynski v. Bradshaw*, 573 F.3d 1158, 1170-71 (11th Cir. 2009).

III. Punitive Damages

As discussed in the annotations following Pattern Instruction 5.13, *infra*, punitive damages may not be assessed against a government entity.

5.11
Civil Rights – 42 U.S.C. § 1983 Claims – Government Entity Liability for Failure to Train or Supervise (Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of government entity] is liable for failing to adequately [train/supervise] its officer[s] and that this failure caused [name of officer] to violate [name of plaintiff]'s [describe constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force].

To succeed on this claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: That [name of officer] violated [name of plaintiff]'s [describe constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force];

Second: That [name of officer] was not adequately [trained, supervised] in [describe relevant area, *e.g.*, the use of deadly force];

Third: That [name of official policy-maker] knew based on at least one earlier instance of unconstitutional conduct materially similar to [name of officer]'s violation of [name of plaintiff]'s constitutional rights that [additional] [training/supervision] was needed to avoid [describe alleged constitutional violation] likely recurring in the future; and

Fourth: That [name of official policy-maker] made a deliberate choice not to provide [additional] [training/supervision] to [name of officer].

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil rights actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into applicable § 1983 instructions when there is a claim against an individual defendant or defendants. In such case, if a special verdict form is used, jury interrogatories applicable to the government entity should also be added.

II. Elements

This instruction is derived from *AFL-CIO v. City of Miami, Fla.*, 637 F.3d 1178, 1188-89 (11th Cir. 2011), and cases cited therein. A government entity may not be held liable under § 1983 absent a finding that an individual, typically an individual named as a defendant in the case, violated the plaintiff's constitutional rights. *See, e.g., Garczynski v. Bradshaw*, 573 F.3d 1158, 1170-71 (11th Cir. 2009).

The model instruction presumes that the parties do not dispute the identity of the final policymaker through which the municipality acts.

The third element of plaintiff's case may be satisfied absent proof of at least one prior incident of materially similar unconstitutional conduct by proof that unconstitutional conduct would obviously result from failing to provide additional training or supervision. *AFL-CIO*, 637 F.3d at 1188-89. This is an extremely

difficult standard to meet and it is often resolved in favor of the defendant(s) before trial. *See, e.g., Gold v. City of Miami*, 151 F.3d 1346, 1352 (11th Cir. 1998). Accordingly, the model instruction does not include a charge on obvious need for additional training or supervision. Of course, where this issue is not resolved in favor of the defendant(s) as a matter of law prior to trial, an appropriate instruction on this standard should be given.

III. Punitive Damages

As discussed in the annotations following Pattern Instruction 5.13, *infra*, punitive damages may not be assessed against a government entity.

5.12
Civil Rights – 42 U.S.C. § 1983 Claims – Supervisor Liability
(Incorporate into Instructions for Claims against Individual Defendants)

[Name of plaintiff] claims that [name of supervisor], who supervised [name of subordinate], is liable in [his/her] supervisory capacity for violating [name of plaintiff]'s [specify constitutional right, *e.g.*, Fourth Amendment right to be free from excessive force]. You should consider whether [name of supervisor] is liable only if you find that [name of subordinate] violated [name of plaintiff]'s [specify constitutional right].

[Name of supervisor] is not liable simply because [he/she] supervised [name of subordinate]. Rather, [name of plaintiff] must prove by a preponderance of the evidence that (1) [name of subordinate] violated [his/her] [specify constitutional right] and (2) one of the following circumstances was present at the time [name of plaintiff]'s constitutional rights were violated:

(a) [Name of supervisor] personally participated in the violation of [name of plaintiff]'s constitutional rights; or

(b) A history of widespread abuse, meaning abuse that was

obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences, put [name of supervisor] on notice of the need to take corrective action and [he/she] failed to do so; or

(c) [Name of supervisor] intentionally implemented an "official policy or custom" that resulted in [name of subordinate] acting with deliberate indifference, meaning reckless disregard, to [name of plaintiff]'s [specify constitutional right]; or

(d) [Name of supervisor] directed [name of subordinate] to take the action that resulted in the violation of [name of plaintiff]'s [specify constitutional right]; or

(e) [Name of supervisor] knew that [name of subordinate] would take action[s] in violation of [name of plaintiff]'s [specify constitutional right] and failed to stop [name of subordinate] from doing so.

An "official policy or custom" means a:

(a) A policy statement or decision that is made by [name of supervisor]; or

(b) A practice or course of conduct that is so widespread that it

has acquired the force of law, even if the practice has not been formally approved.

You may find that an "official policy or custom" existed if there was a practice that was so persistent, widespread, or repetitious that [name of supervisor] either knew about it or should have known about it.

NOTE: Model Jury Interrogatory Forms may be found in the appendices after the last civil rights jury instruction (Pattern Instruction 5.13) for use in actions brought under 42 U.S.C. §1983. Three types of Model Jury Interrogatory Forms are provided: (A) a simplified Interrogatory Form for use in most civil right actions; (B) an Interrogatory Form for use in actions that do not require application of the Prison Litigation Reform Act, and (C) an Interrogatory Form for use in actions that do require application of the Prison Litigation Reform Act.

ANNOTATIONS AND COMMENTS

I. General Use

This instruction may be incorporated into applicable § 1983 instructions against an individual defendant or defendants. To minimize confusion, it is suggested that the supervisor and subordinate be referenced by their actual names rather than by generic terms such as "Supervisor" and "Subordinate."

II. Elements

The instruction is derived from *Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007), and the definition of "official policy or custom" provided in Pattern Instruction 5.10, *supra*.

A supervisory liability claim fails absent a violation of plaintiff's constitutional rights by a subordinate. *See, e.g.*, *Beshers v. Harrison*, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007).

5.13
Civil Rights – 42 U.S.C. § 1983 Claims – Damages

[**For cases subject to the PLRA:** [Name of plaintiff] can recover compensatory [and punitive] damages only if you find that [name of plaintiff] has suffered more than a minimal physical injury. Thus, you must first determine whether [name of plaintiff] suffered more than a minimal physical injury. Minor cuts and bruises are examples of minimal physical injuries. If [name of plaintiff] has failed to prove that [he/she] suffered more than a minimal physical injury, then you must award nominal damages of $1.00. This is because a person whose constitutional rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. If you find that [name of plaintiff] has proved more than a minimal physical injury, then you must consider [name of plaintiff]'s claims for compensatory [and punitive] damages.]

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of name of plaintiff]'s damages—no more, no less. You must not impose or increase these compensatory damages to punish or penalize [name of defendant]. And you

must not base these compensatory damages on speculation or guesswork. But compensatory damages are not restricted to actual loss of money—they also cover the physical aspects of the injury. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like physical pain. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others: [List recoverable damages, *e.g.*:

(a) The reasonable value of medical care and supplies that [name of plaintiff] reasonably needed and actually obtained, and the present value of medical care and supplies that [name of plaintiff] is reasonably certain to need in the future;

(b) [Name of plaintiff]'s physical injuries, including ill health, physical pain and suffering, disability, disfigurement, and discomfort, including such physical harm that [name of plaintiff] is reasonably certain to experience in the future;

(c) Wages, salary, profits, and the reasonable value of working time that [name of plaintiff] lost because of [his/her] inability or diminished ability to work, and the present value of such compensation that [name of plaintiff] is reasonably certain to lose in the future because of [his/her] inability or diminished ability to work;

(d) [Name of plaintiff]'s mental and emotional distress, impairment of reputation, and personal humiliation, including such mental or emotional harm that [name of plaintiff] is reasonably certain to experience in the future; and

(e) The reasonable value of [name of plaintiff]'s property that was lost or destroyed because of [name of defendant]'s conduct.]

[**Nominal Damages:** You may award $1.00 in nominal damages and no compensatory damages if you find that: (a) [name of plaintiff] has submitted no credible evidence of injury; or (b) [name of plaintiff]'s injuries have no monetary value or are not quantifiable with any reasonable certainty; or (c) [name of defendant] used both justifiable and unjustifiable force against [name of plaintiff] and it is entirely unclear whether [name of plaintiff]'s injuries

resulted from the use of justifiable or unjustifiable force.]

[**Mitigation of Damages:** Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages—to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage. So, if you find that [name of defendant] has proved by a preponderance of the evidence that [name of plaintiff] did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of [name of plaintiff]'s damages by the amount that [he/she] could have reasonably received if [he/she] had taken advantage of such an opportunity.]

[**Punitive Damages:**

If you find for [name of plaintiff] and find that [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights, the law allows you, in your discretion, to award [name of plaintiff] punitive damages as a punishment for [name of defendant] and as a deterrent to others.

[Name of plaintiff] must prove by a preponderance of the evidence that

[he/she] is entitled to punitive damages.

[Name of defendant] acts with malice if [his/her] conduct is motivated by evil intent or motive. [Name of defendant] acts with reckless indifference to the protected federal rights of [name of plaintiff] when [name of defendant] engages in conduct with a callous disregard for whether the conduct violates [name of plaintiff]'s protected federal rights.

If you find that punitive damages should be assessed, you may consider the evidence regarding [name of defendant]'s financial resources in fixing the amount of punitive damages to be awarded. [You may also assess punitive damages against one or more of the individual Defendants, and not others, or against one or more of the individual Defendants in different amounts.]]

ANNOTATIONS AND COMMENTS

I. The Prison Litigation Reform Act of 1995 (PLRA)

Pursuant to the PLRA, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18)." 42 U.S.C. § 1997e(e). In the Eleventh Circuit, a prisoner or pretrial detainee who suffers a constitutional violation without more than a *de minimis* physical injury may recover nominal damages, but not compensatory or punitive damages. *See, e.g.*, *Brooks v. Warden*, 800 F.3d 1295, 1307-09 (11th Cir. 2015); *Al-Amin v. Smith*, 637 F.3d 1192, 1195-99 (11th Cir. 2011) (affirming district court's exclusion at trial of evidence concerning compensatory and punitive damages where there was no evidence plaintiff suffered a physical injury); *cf. Calhoun v. DeTella*, 319 F.3d

936, 940-41 (7th Cir. 2003) (noting the circuit split regarding the application of the PLRA's bar on damages). The "availability of declaratory or injunctive relief" as determined by the court is not affected by the PLRA. *Boxer X v. Harris*, 437 F.3d 1107, 1111 n.3 (11th Cir. 2006).

Although physical injury must be more than *de minimis* to recover compensatory and punitive damages under the PLRA, the physical injury need not be significant. *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999), *vacated*, 197 F.3d 1059 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970 (11th Cir. 2000) . The Eleventh Circuit has not precisely defined what constitutes *de minimis* physical injury. Case law indicates that a *de minimis* physical injury includes minor cuts and bruises. *Nolin v. Isbell*, 207 F.3d 1253, 1258 n.4 (11th Cir. 2000) (bruises received during an arrest were non-actionable *de minimis* injury); *Harris*, 190 F.3d at 1286 (holding that a forced "dry shave" was a *de minimis* injury); *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997) (finding that a sore, bruised ear persisting for three days was *de minimis*). The instruction uses more than minimal injury, rather than more than *de minimis* injury because it is easier for jurors to understand and conveys the same idea.

The damages limitations under the PLRA apply with equal force to claims by convicted prisoners and pretrial detainees. *Goebert v. Lee Cty.*, 510 F.3d 1312, 1322-25 (11th Cir. 2007) (applying PLRA to § 1983 claim by a pretrial detainee). However, the PLRA does not apply to lawsuits brought by individuals who are no longer in custody. *Napier v. Preslicka*, 314 F.3d 528, 531-34 (11th Cir. 2002).

II. Compensatory Damages

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986); *accord Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990). Damages may include monetary losses, such as lost wages, damaged property, and future medical expenses. *Slicker v. Jackson*, 215 F.3d 1225, 1231 (11th Cir. 2000)). Damages also may be awarded based on "physical pain and suffering" and " demonstrated . . . impairment of reputation[] and "personal humiliation." *Slicker*, 215 F.3d at 1231. The general rule requiring plaintiffs to mitigate damages applies in actions under 42 U.S.C. § 1983. *See, e.g.*, *Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1309-10 (11th Cir. 1988). Accordingly, the instruction

provides an optional bracketed charge regarding mitigation of damages.

"[C]ompensatory damages under § 1983 may be awarded only based on actual injuries caused by the defendant and cannot be presumed or based on the abstract value of the constitutional rights that the defendant violated." *Slicker*, 215 F.3d at 1229 (emphasis omitted). Consequently, when a plaintiff does not provide any "proof of a specific, actual injury caused by" the defendant's conduct, the plaintiff is not entitled to compensatory damages. *Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994).

III. Nominal Damages

The instruction reflects the three situations identified in *Slicker*, a non-PLRA case, where an award of nominal damages is appropriate. *Slicker*, 215 F.3d at 1232.

In cases that are not subject to the PLRA, an award of nominal damages may be sufficient to justify an award of punitive damages in a § 1983 action. *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1177-78 & n.3 (11th Cir. 2009) (noting that if plaintiff organization is successful on its claim of a First Amendment violation permitting nominal damages, then "punitive damages may be available" as well); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991) (affirming award of punitive damages even though jury awarded plaintiff nominal damages but not compensatory damages).

IV. Punitive Damages

In order to receive punitive damages in § 1983 actions, a plaintiff must show that the defendant's conduct was "motivated by evil motive or intent" or involved "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Punitive damages in § 1983 claims are not recoverable against government entities. *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1047 (11th Cir. 2008). In a case brought against both individuals and government entities, the instructions should expressly state that punitive damages may be assessed only against the individual defendants for their respective conduct.

APPENDIX A

CIVIL RIGHTS – SPECIAL INTERROGATORIES – 42 U.S.C. § 1983 CLAIMS

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of plaintiff] has proved [insert plaintiff's claim]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2.That [name of plaintiff] should be awarded compensatory damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

[3. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____]

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

ANNOTATIONS AND COMMENTS

No annotations associated with this instruction.

APPENDIX B

CIVIL RIGHTS – SPECIAL INTERROGATORIES – 42 U.S.C. § 1983 CLAIMS – FOR CASES BROUGHT BY NON-PRISONERS (PRISON-LITIGATION REFORM DOES NOT APPLY)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s right to [describe protected right]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[2. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of defendant]'s conduct caused [name of plaintiff]'s injuries?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4.a. That [name of plaintiff] should be awarded compensatory damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

– OR –

4.b. That [name of plaintiff] should be awarded nominal damages against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

[5. That punitive damages should be assessed against [name of individual defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____

APPENDIX C

CIVIL RIGHTS – SPECIAL INTERROGATORIES – 42 U.S.C. § 1983 CLAIMS – FOR CASES BROUGHT BY PRISONERS (PRISON LITIGATION REFORM APPLIES)

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [name of defendant] intentionally committed acts that violated [name of plaintiff]'s right to [describe protected right]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[2. That [name of defendant]'s actions were "under color" of state law?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

3. That [name of defendant]'s unconstitutional conduct caused [name of plaintiff] to suffer more than a minimal physical injury?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, [name of plaintiff] is awarded nominal damages in the amount of $1.00, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of plaintiff] should be awarded compensatory damages against [name of defendant] to compensate [name of plaintiff] for physical and/or emotional injury?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [name of defendant] acted with malice or reckless indifference to [name of plaintiff]'s federally protected rights and that punitive damages should be assessed against [name of defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount? $_____

SO SAY WE ALL.

_____
Foreperson's Signature

DATE: _____