6.01 PUBLIC EMPLOYEE'S FIRST AMENDMENT FREE SPEECH RETALIATION CLAIM (current 6.01)

In this case, Plaintiff claims that Defendant violated his constitutional right to free speech by [*describe alleged retaliatory conduct*] because Plaintiff [*describe protected speech or conduct*].

To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff [*describe protected speech or conduct*].

2. Defendant intentionally [*describe alleged retaliatory conduct*].

3. Plaintiff's [*describe protected speech or conduct*] was a reason, alone or with other reasons, that Defendant relied on when it [*describe alleged retaliatory conduct*].

4. [*Defendant's alleged retaliatory conduct*] likely would deter an ordinary employee in plaintiff's circumstances from engaging in similar [speech] [conduct].

5. [Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's contention that it would have [*alleged retaliatory conduct*] anyway. To succeed on this contention, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [*protected speech or conduct*] was a reason for its decision to [*alleged retaliatory conduct*], there were other reasons that would have led Defendant to [*alleged retaliatory conduct*] even if Plaintiff had not [describe protected speech or conduct].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its contention by a preponderance of the evidence, then you must find for Plaintiff and consider the issue of damages.

However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its contention, then you must find for Defendant.

Committee Comment

a. Whether plaintiff spoke as a private citizen. A government employee who makes a statement pursuant to his official duties is not protected by the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Chaklos v. Stevens*, 560 F.3d 705, 711 -712 (7th Cir. 2009). *See also Lane v. Franks*, 134 S. Ct. 2369 (2014) (testimony at trial regarding employment-related issues is protected by First Amendment). This is a question of law for the court to resolve. *See Gross v. Town of Cicero*, 619 F.3d 697, 704 (7th Cir. 2010). In cases in which there is a factual dispute that bears on the Court's determination, a special interrogatory may be submitted to the jury on this point.

b. Whether plaintiff spoke on matter of public concern. A plaintiff who satisfies the *Garcetti* standard must also satisfy the *Connick-Pickering* balancing test to determine whether he engaged in protected conduct. *See Spiegla v. Hull*, 481 F.3d 961, 965-66 (7th Cir. 2007). This involves balancing the employee's interest in commenting on the matter against employer's interest "in promoting effective and efficient public service." *Id.* This is a question of law determined by the court. *Carreon v. Illinois Dept. of Human Servs.*, 395 F.3d 786, 791 (7th Cir. 2005). In a case in which a disputed factual issue bears on the Court's determination of whether the plaintiff spoke on a matter of public concern, a special interrogatory may be submitted to the jury on this point.

c. Causation: In the wake of *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), where the Court determined that a mixed motive instruction was never appropriate in a case under the Age Discrimination in Employment Act (ADEA), the Seventh Circuit issued contradictory opinions in the First Amendment context. *Compare Fairley v. Andrews*, 578 F.3d 518, 525–26 (7th Cir. 2009) (applying "but for" standard), *with Greene v. Doruff*, 660 F.3d 975, 978 (7th Cir. 2011) (applying "motivating factor" standard). In *Kidwell v. Eisenhauer*, 679 F.3d 957 (7th Cir. 2012), discussing *Fairley* and *Greene*, the court indicated that "[i]n the end"—that is, at trial—"the plaintiff must demonstrate that, but for his protected speech, the employer would not have taken the adverse action." The court said that the "motivating factor" formulation applies at summary judgment when the plaintiff is attempting to establish a prima facie case of discrimination. *Id.* at 965. However, in *Smith v. Wilson*, 705 F.3d 674, 681 (7th Cir. 2013), the court concluded that *Greene* "held that *Gross* was 'inapplicable' to suits 'to enforce First Amendment rights.'. . . [because] 'the Supreme Court has never abandoned the *Mt. Healthy* [mixed motive] rule' for First Amendment cases." The Committee has follows this guidance in *Smith* but notes that the matter may still be subject to dispute. In drafting the instruction, to simplify, the Committee chose not to use the words "substantial or motivating," instead asking the jury to consider whether the Plaintiff's protected conduct "was a reason, alone or with other reasons" for the defendant's conduct.

d. Ordinary employee standard: The Seventh Circuit has said that the plaintiff must show that defendant's conduct would deter an ordinary person from exercising his First Amendment rights. *See Santana v. Cook Cty. Bd. of Review*, 679 F.3d 614, 622-23 (7th Cir. 2012). Other cases use the term "person of ordinary firmness," but the Committee opted for the simpler "ordinary employee" standard because the "ordinary firmness" formulation is opaque. *See, e.g., Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011); Bridges v. Gilbert, 557 F.3d 541, 552 (7th Cir. 2009); *Hutchins v. Clarke*, 661 F.3d 947, 958 (7th Cir. 2011) (Williams, J., concurring). "Adverse employment action" as that term is used in the employment discrimination context is not required, and the retaliatory conduct "need not be great in order to be actionable." *Mosley v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 534 (7th Cir. 2006); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). The Committee also concluded, though not without debate, that the standard appropriately takes into account the circumstances of the particular plaintiff's employment, and thus expressed the standard as that of an "ordinary employee in plaintiff's circumstances." The Committee notes that no Seventh Circuit case expressly adopts a context-specific formulation, but several cases take into account the particular circumstances of the plaintiff's employment in assessing what would deter an ordinary employee from exercising his First Amendment rights. *See, e.g., Swetlik v. Crawford*, 738 F.3d 818, 825 n.2 (7th Cir. 2013) (the "materially adverse" standard in

First Amendment retaliation cases is "often fact specific"); *Power v. Summers*, 226 F.3d 815, 820 (7th Cir. 2000) (taking into account. in assessing the materiality of the denial of a raise, the plaintiff's salary and the fact that she was part of a tenure system).

The Committee also notes that there may be room for dispute over whether whether the "deter an ordinary person" requirement is an element in a case involving employment termination, on the theory that retaliatory termination would deter any person from engaging in protected activity. However, *Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006), uses the "deterrence" requirement in a termination case, though the court noted the point was undisputed in that case.

e. Color of law: The fifth element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

6.02 PUBLIC EMPLOYEE'S FIRST AMENDMENT POLITICAL AFFILIATION CLAIM
(no current instruction)

In this case, Plaintiff claims that Defendant violated his constitutional right to free association by [*describe alleged retaliatory conduct*] because of his [*describe political affiliation*].

To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff [*describe political affiliation*].

2. Defendant intentionally [*describe alleged retaliatory conduct*].

3. Plaintiff's political affiliation was a reason, alone or with other reasons, that Defendant relied on when it [*describe alleged retaliatory conduct*].

4. [*Defendant's alleged retaliatory conduct*] likely would deter an ordinary employee in plaintiff's circumstances from [*describe political affiliation*].

5. [Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's contention that it would have [*alleged retaliatory conduct*] anyway. To succeed on this contention, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [*political affiliation or conduct*] was a reason for its decision to [*alleged retaliatory conduct*], there were other reasons that would have led Defendant to [*alleged retaliatory conduct*] even if Plaintiff had not [*describe political affiliation*].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its contention by a preponderance of the evidence, then you must find for Plaintiff and consider the issue of damages.

However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its contention, then you must find for Defendant.

Committee Comment

a. Authority: "It is well established that hiring, firing, or transferring government employees based on political motivation violates the First Amendment, with certain exceptions for policymaking positions and for employees having a confidential relationship with a superior." *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004) (citations omitted). *Gregorich v. Lund*, 54 F.3d 410, 414 (7th Cir. 1995), holds that such claims are analyzed "under the approach announced by the Supreme Court in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and reiterated in *Connick v. Myers*, 461 U.S. 138 (1983). . . . To be protected, a public employee's expressive activity must 'be on a matter of public concern'

and his interest in the expression must outweigh the State's interest in promoting the efficiency of its public services."

b. Causation: *See* Instruction 6.01, comment c.

c. Ordinary employee standard: *See* Instruction 6.01, comment d.

d. Policy-maker/confidential employee exception: A government employee may be fired for political reasons only when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). *See also Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 355 (7th Cir. 2005); Allen v. Martin, 460 F.3d 939, 944 (7th Cir. 2006); *Riley v. Blagojevich*, 425 F.3d 357, 359 (7th Cir. 2005). "[D]efendants bear the burden of establishing [that] political affiliation is an appropriate qualification for the job." *Milazzo v. O'Connell*, 108 F.3d 129, 132 (7th Cir. 1997); *see also Matlock v. Barnes*, 932 F.2d 658, 663 (7th Cir. 1991). There may be some cases in which the determination of whether an employee was a policy-maker or confidential employee depends on disputed facts. *See, e.g., Soderbeck v. Burnett Cnty.*, 752 F.2d 285, 288-89 (7th Cir. 1985); *Nekolny v. Painter*, 653 F.2d 1164, 1169-70 (7th Cir. 1981). If so, it may be necessary to submit to the jury the question of whether the employee had responsibilities that involved policymaking or the exercise of political judgment. In these situations, an appropriate instruction should be prepared.

e. Color of law: This element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

6.03 PRISONER/DETAINEE FIRST AMENDMENT RETALIATION CLAIM
(current 6.02, expanded in subject matter)

An inmate's right to [*describe with specificity the type of speech or conduct at issue*] is protected by the Constitution.

In this case, Plaintiff claims that Defendant [*describe alleged retaliation*] in retaliation for [*describe plaintiff's alleged speech or conduct*].

To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff [*describe protected speech or conduct*].

2. Defendant intentionally [*describe alleged retaliatory conduct*].

3. Plaintiff's [*protected speech or conduct*] was a reason, alone or with other reasons, that Defendant relied on when it [*describe alleged discriminatory conduct*].

4. Defendant's [*alleged retaliatory conduct*] would deter an average person in Plaintiff's circumstances from engaging in similar [*protected speech or conduct*].

[5. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's contention that it would have [*alleged retaliatory conduct*] anyway. To succeed on this contention, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [*protected speech or conduct*] was a reason for its decision to [*alleged retaliatory conduct*], there were other reasons which would have led Defendant to [*alleged retaliatory conduct*] even if Plaintiff had not [*describe political speech or conduct*].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its contention by a preponderance of the evidence, then you must find for the Plaintiff and consider the issue of damages.

However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its contention, then you must find for Defendant.

Committee Comment

The Committee drafted this instruction to be consistent with Instructions 6.01 and 6.02 regarding public employees' First Amendment retaliation claims.

a. Scope of instruction: This instruction applies to any claim in which a prisoner is alleging that a prison official retaliated against him for exercising a constitutional

right. Most cases involve alleged retaliation for complaining about prison conditions, either through a lawsuit or grievance, in violation of the right of access to the courts or the right to free speech under the First Amendment. *E.g.*, *Smith v. Peters*, 631 F.3d 418, 421 (7th Cir. 2011) (retaliation for "complaining about mistreatment"); *Dobbey v. Illinois Dept. of Corrs.*, 574 F.3d 443, 447 (7th Cir. 2009) (retaliation for filing grievance); *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006) (retaliation for making verbal complaint); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (retaliation for filing lawsuit). The basic elements of a retaliation claim are the same irrespective of the particular underlying constitutional right.

b. Protected conduct: The court should not ask the jury to decide whether the conduct is constitutionally protected; that is a question of law for the court that should be determined before trial, generally under the standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See, e.g.*, *Watkins v. Kasper*, 599 F.3d 791, 796-97 (7th Cir. 2010).

c. Deter an average prisoner: The case law requires a plaintiff to show that defendant's conduct would "deter a person of ordinary firmness" from exercising his First Amendment rights. *See, e.g., Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). The Committee has substituted the term "average" because it is easier to understand and conveys the same idea, and has also particularized the frame of reference to that of an "average person in Plaintiff's circumstances." Though there is no precedential Seventh Circuit case directly on point, one unpublished case, acknowledges that the standard focuses on an average person in the plaintiff's circumstances, often referred to as "a prisoner of ordinary firmness." *See May v. Trancoso*, 412 F. App'x 899, 904 (7th Cir. 2011) (considering whether an adverse action would "reasonably be expected to deter an inmate from protesting in the future.") (emphasis added). In addition, in *Swetlik v. Crawford*, 738 F.3d 818, 825 n.2 (7th Cir. 2013), a case involving a non-prisoner plaintiff, the court stated that the "materially adverse" element in First Amendment retaliation cases is "often fact specific."

The cases in other circuits and in district courts within the Seventh Circuit also near-uniformly follow the approach the Committee has taken. *See, e.g., Santiago v. Blair*, 707 F.3d 984, 992-93 (8th Cir. 2013); *Starr v. Dube*, 334 F. App'x 341, 343, 2009 WL 1782620 (1st Cir. 2009); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008); *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000). *See also Thomas v. Eby*, 481 F.3d 434, 441 (6th Cir. 2007) (using "inmates of ordinary firmness" interchangeably with "person of ordinary firmness"); *Heard v. Hardy*, No. 11 C 6683, 2013 WL 3812102, at *3 (N.D. Ill. July 22, 2013) (whether adverse act would "deter a prisoner of ordinary firmness from future First Amendment activity") (emphasis added); *Johnson v. Kingston*, 292 F. Supp. 2d 1146, 1152 (W.D. Wis. 2003) (whether "retaliatory act is . . . one that could be said to have had the effect of deterring an inmate 'of ordinary firmness' from engaging in similar activity") (emphasis added).

The Committee opted to use the term "average person in Plaintiff's circumstances" rather than "average prisoner" because the latter formulation might be confusing to lay jurors, who typically will lack the experience necessary to consider how an "ordinary prisoner" would act. This is consistent with the formulations used by the Second and Fourth Circuits. *See Blankenship v. Manchin*, 471 F.3d 523, 530 (4th Cir. 2006); *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir.2006). *Cf. Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) ("This inquiry is intensely context-driven: Although the elements of a First Amendment retaliation claim remain constant, the underlying concepts that they

signify will vary with the setting—whether activity is 'protected' or an action is 'adverse' will depend on context.").

d. Causation: The Committee has adopted the "mixed motive" standard of causation used in the instruction for non-prisoners. *See* Instruction 6.01, comment c.

e. Color of law: The fifth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.01 GENERAL: POLICE DEPARTMENT/MUNICIPALITY NOT A PARTY
(current 7.01; no change proposed)

Defendant(s) [is/are] being sued as [an] individual[s]. Neither the [*Identify state or county police department or correctional agency*] nor [*Identify state, county, or city*] is a party to this lawsuit.

Committee Comment

Monell v. City of New York Dep't of Soc. Serve., 436 U.S. 658, 691, 694 (1970); *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985). This instruction should not be given if the governmental entity is named as a defendant.

7.02 GENERAL: REQUIREMENT OF PERSONAL INVOLVEMENT
(current 7.02; no change proposed)

Plaintiff must prove by a preponderance of the evidence that [*name of individual defendant*] was personally involved in the conduct that Plaintiff complains about. You may not hold [*Individual defendant*] liable for what other employees did or did not do.

Committee Comment

Walker v. Rowe, 791 F.2d 507, 508 (7th Cir. 1986); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985). If the jury will be considering a "failure to intervene" claim, the court may wish to preface the instruction for that claim "However," and give the failure to intervene instruction immediately after this one, or take other steps to avoid jury confusion. *See* Instruction 7.22.

If the case involves a supplemental state law claim involving respondeat superior liability, this instruction should be modified to limit it to the federal claim.

7.03 GENERAL: "UNDER COLOR OF LAW" (current 7.03)

One of the elements Plaintiff must prove is that Defendant acted "under color of law."

(a) Public employee defendant

A person who is employed by the government acts "under color of law" if [he] [she] uses or misuses authority that [he][she] has because of [his] [her] official position. A person may act under color of law even if [he] [she] is violating a [state] [local] law or policy.

[You may find that Defendant acted under color of law even if [he] [she] was acting outside [his] [her] authority if [he] [she] represented [himself][herself] as having that authority or if [he][she] otherwise used [his][her] position to accomplish the act.]

(b) Non-public employee defendant

To establish that Defendant acted "under color of law," Plaintiff must prove by a preponderance of the evidence, first, that Defendant and [*a government employee; or identify government employee(s)*] reached an understanding to [*describe alleged conduct*] and second, that Defendant knowingly participated in joint activity with [*government employee*].

Committee Comment

a. Scope of instruction: The inquiry for determining whether a person acted "under color of law" under § 1983 is generally the same as determining whether a person is a "state actor" under the Constitution. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.").

The instruction includes language that may be used whether the defendant is a government employee or a private party. If the "color of law" requirement is undisputed, this instruction should be eliminated.

This instruction does not address the issue of scope of employment, which is a matter of state law and will need to be addressed separately if it is disputed.

b. Public officials: An action by a public official is taken "under color of state law" if it involves a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Estate of Sims ex rel. Sims v. Cnty. of Bureau*, 506 F.3d 509, 515-516 (7th Cir. 2007). It does not matter whether the conduct also violates state law. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). The question is

whether the defendant's conduct involves a misuse of power "possessed by virtue of state law." *Honaker v. Smith*, 256 F.3d 477, 485 (7th Cir. 2001); *see also, Wilson v. Price*, 624 F.3d 389, 392-94 (7th Cir. 2010); *Lopez v. Vanderwater*, 620 F.2d 1229, 1236 (7th Cir. 1980). A showing that a police officer is on duty is neither necessary nor sufficient, but it is a relevant factor. *Compare Estate of Sims*, 506 F.3d at 516 (sheriff who engaged in campaign of harassment not acting under color of law), *with Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995) (off-duty officer working as private security acted under color of law because he was wearing police uniform when he arrested patron). The inquiry "turn[s] largely on the nature of the specific acts the police officer performed" and may also involve whether the officer expressly or implicitly invoked his government authority when committing the alleged violation. *See Pickrel*, 45 F.3d at 1118-19.

c. Private parties conspiring with public officials: Instruction 7.03(b) is intended for cases in which the plaintiff contends that a private party acted under color of law by conspiring or acting jointly with a governmental actor. A private party acts under color of law if he conspires with a public official. *See, e.g., Lewis v. Mills*, 677 F.3d 324, 333 (7th Cir. 2012) ("[T]o establish § 1983 liability through a conspiracy theory, "a plaintiff must demonstrate that: (1) a state official and a private individual(s) reached an understanding to deprive the plaintiff of his constitutional rights, and (2) those individual(s) were willful participant[s] in joint activity with the State or its agents."); *Williams v. Seniff*, 342 F.3d 774, 785 (7th Cir. 2003) (same).

d. Other ways private parties may act under color of law: A conspiracy is not the only way to prove that a private party acted under color of law, but other ways are not as easily defined. The general question is whether the defendant's conduct may be "fairly attributable to the state." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 199 (1988); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). This "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). Because there is no single test, the Committee has not drafted a general-purpose instruction covering this point. *See generally Blum v. Yaretsky*, 457 U.S. 991 (1982) (considering government's control or encouragement of defendant's conduct); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (same); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970) (state's compulsion of action by private party); *West v. Atkins*, 487 U.S. 42, 54 (1988) (defendant acting pursuant to contract with state to provide a function ordinarily provided by state); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 831-32 (7th Cir. 2009) ("ongoing relationship" with authorities to provide care to prisoners); *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966) (entwinement with governmental policies); *Brentwood Acad.*, 531 U.S.at 298 (same).

7.04 LIMITING INSTRUCTION CONCERNING EVIDENCE OF STATUTES, ADMINISTRATIVE RULES, REGULATIONS, AND POLICIES
(current 7.04; no change proposed except to add a comment)

You have heard evidence about whether Defendant's conduct [complied with/violated] [a state statute/administrative rule/locally imposed procedure or regulation].

You may consider this evidence in your deliberations [as to [*identify claim*]]. But remember that the issue is whether Defendant [*describe constitutional violation claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*], not whether a [statute/rule/procedure/ regulation] might have been [complied with / violated].

Committee Comment

Compare Mays v. Springborn, 575 F.3d 643, 650 (7th Cir. 2009) ("[A]lthough violation of the prison's rule against public searches was not, by itself, a violation of the constitution, it was relevant evidence on which the jury could have relied to conclude that the searches were done with an intent to harass.") (citation omitted) *with Thompson v. City of Chicago*, 472 F.3d 444, 453-55 (7th Cir. 2006) (finding no abuse of discretion in exclusion of police department general order in determining reasonableness of police conduct for Fourth Amendment purposes).

If the court determines that evidence of the sort covered by this instruction is admissible as to some claims but not others (such as a supplemental state law claim), an appropriate limiting instruction should be given and this instruction should be modified accordingly.

In addition, this instruction may be inappropriate or may require modification in a case in which a policy itself can give rise to liability, for example a municipal or supervisory liability case.

7.05 FOURTH AMENDMENT: FRAUDULENTLY OBTAINED WARRANT (no current instruction)

Plaintiff claims that on [*date*], Defendant [*names*] fraudulently obtained a warrant to search [*location*]. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. The application for the search warrant [contained [a] materially false statement[s] of fact] [or] [omitted [a] material fact[s]]. A statement or omission of fact is material if, without the false statement or the omission, the application would have been insufficient to establish probable cause.

2. [For a false statement of fact, Plaintiff must prove that] Defendant knowingly made the false statement[s]. A person knowingly makes a false statement if he is aware the statement is false or if he has serious doubts about the truth of the statement, but makes it anyway.

[For an omission of fact, Plaintiff must prove that] In omitting the material fact[s], Defendant intended to mislead the [judge; magistrate] issuing the warrant.

If you find that Plaintiff proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority. *Franks v. Delaware*, 438 U.S. 154 (1978); *Michigan v. Summers*, 452 U.S. 692 (1981); *United States v. Williams*, 718 F.3d 644, 650 (7th Cir. 2013); *Harden v. Peck*, 686 F. Supp. 1254 (N.D. Ill. 1988).

b. Probable cause. For the definition of probable cause, *see* Instruction 7.08. The definition should be incorporated into this instruction or should accompany this instruction.

c. False statements / omissions. For a claim involving only alleged false statements or only alleged omissions, the court should use only the bracketed material in element 1 that applies to the particular type of claim and should not use the bracketed material in element 2. For a claim involving both alleged false statements and omissions, the bracketed material in element 2 should be used.

7.06 FOURTH AMENDMENT: *TERRY* (INVESTIGATORY) STOP (no current instruction)

Plaintiff claims that Defendant seized [him] [her] without reasonable suspicion. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant seized Plaintiff. A person is seized if his movement is restrained by the use of physical force or by a show of authority that the person obeys. [A show of authority occurs when a reasonable person would understand that he is not free to end the encounter.]

2. Defendant did not have a reasonable suspicion that Plaintiff [had committed; was committing; was about to commit] a crime. Reasonable suspicion must be based on specific facts known to the officer, together with the reasonable inferences from those facts. A hunch does not constitute reasonable suspicion.

[You may have heard the phrase, "probable cause." Probable cause is not required for the type of seizure you are considering. You should consider only whether there was reasonable suspicion for the seizure as I have defined it in this instruction.]

3. Defendant acted under color of law.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority: *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also Florida v. Bostick*, 501 U.S. 429, 434 (1991); *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *United States v. Snow*, 656 F.3d 498, 500 (7th Cir. 2011).

b. Undisputed elements: The first and third elements should be eliminated if they are undisputed. If both of these elements are undisputed, only one element will remain, and the instruction's second sentence should read: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant did not have reasonable suspicion to seize him/her." If the "color of law" element is contested, Instruction No. 7.03 should be given.

c. False arrest instruction: In most situations, the court will decide whether the seizure was sufficiently short or unintrusive to constitute a *Terry* stop. If the court finds the seizure went beyond a *Terry* stop, the court should give Instruction 7.07, for false arrest.

If there is a factual dispute as to whether an investigatory stop or an arrest took place, the court may need to give both sets of instructions and advise the jury to apply one or the other based on its resolution of the disputed facts. The Committee recommends an instruction using the following language:

> Plaintiff claims that Defendant's conduct violated his right to be free from unreasonable seizure. You must first determine whether Defendant made an investigatory stop of Plaintiff[,] or placed Plaintiff under arrest[, or neither].
>
> There is no set rule about the [length of time that a person may be detained] [the procedures that may be used] before the seizure is considered to be an arrest. Rather, you should consider [the length of the detention] [the procedures used to detain Plaintiff, taken in context] [any searches made] [the questions asked of Plaintiff] [the location of the detention] [whether Plaintiff was moved from the initial location of the detention to another location] [the officer's intent] [whether the defendant was diligent in pursuing the investigation or whether his conduct caused delay that unnecessarily lengthened the seizure] [the impression conveyed to Plaintiff].
>
> If you determine the Plaintiff was subjected to an investigatory stop, Plaintiff must show the Defendant seized him without reasonable suspicion.
>
> If you determine the Plaintiff was arrested, Plaintiff must show that Defendant did not have probable cause to arrest him.

See Dunaway v. New York, 442 U.S. 200, 212 (1979) (the pertinent facts used to determine it an arrest as opposed to an investigatory stop were "that (1) the defendant was taken from a private dwelling; (2) he was transported unwillingly to the police station; and (3) he there was subjected to custodial interrogation resulting in a confession."); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (detention constituted an arrest where government agents stopped the defendant in an airport, seized his luggage, and took him to a small room used for questioning; plurality wrote that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); *United States v. Place*, 462 U.S. 696, 709 (1983) ("[t]he length of the detention of respondent's luggage [90 minutes] alone precludes the conclusion that the seizure was reasonable in the absence of probable cause"; "[I]n assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation."); *United States v. Obasa*, 15 F.3d 603, 608 (6th Cir. 1994) (*Miranda* warnings do not automatically convert *Terry* stop to an arrest but constitute evidence the nature of the detention has become more serious).

Two Seventh Circuit cases state that the officer's intent is a factor. *See United States v. Ellis*, 70 F. App'x. 884, 886 (7th Cir. 2003) ("There is no bright line between an arrest and an investigatory stop, but among the relevant factors are the 'officer's intent, impression conveyed, length of stop, questions asked, [and] search made.'"); *United States v. Serna-Barreto*, 842 F.2d 965, 967 (7th Cir. 1988) (noting that length of time is the most important consideration in determining whether restraint is an investigatory stop or a full-fledged arrest). The Committee has included this as a factor in the revised draft instruction. Because,

however, Fourth Amendment issues are typically determined by an objective standard as opposed to a subjective one, there is reason to question whether it is appropriate to introduce a subjective factor into the analysis. Particular attention should be paid to this point in cases where a party wants to include this factor in the instructions to the jury.

In some cases, there may be a dispute over whether the encounter between the plaintiff and law enforcement amounted to a seizure at all, or a *Terry* stop, or an arrest. The instruction as drafted does not cover this type of case.

d. Probable cause not required. The purpose of this language in the instruction is to make it clear for the jury that reasonable suspicion is a different standard from probable cause, a concept that jurors may have heard of outside of court. If probable cause is to be defined, use Instruction 7.08.

7.07 FOURTH AMENDMENT: FALSE ARREST – ELEMENTS (current 7.05; no change proposed)

Plaintiff claims that Defendant falsely arrested him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant arrested Plaintiff.

2. Defendant did not have probable cause to arrest Plaintiff.

3. Defendant acted under color of law.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Undisputed elements: The first and third elements should be eliminated if they are undisputed. If both of these elements are undisputed, only one element will remain, and the instruction's second sentence should read: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant did not have probable cause to arrest him."

b. Disputed arrest: If the parties dispute whether the defendant was arrested, it may be necessary for the court to define "arrest."

7.08 FOURTH AMENDMENT: FALSE ARREST - DEFINITION OF "PROBABLE CAUSE" (current 7.06; no substantive change proposed)

Probable cause exists for an arrest exists if, at the moment the arrest was made, a reasonable person in Defendant's position would have believed that Plaintiff [had committed] [was committing] a crime. In making this decision, you should consider what Defendant knew and the reasonably trustworthy information Defendant had received.

Probable cause requires more than just a suspicion. But it does not need to be based on evidence that would be sufficient to support a conviction, or even a showing that Defendant's belief was probably right. [The fact that Plaintiff was later acquitted of [*insert crime at issue*] does not by itself mean that there was no probable cause at the time of his arrest.]

[It is not necessary that Defendant had probable cause to arrest Plaintiff for [*insert crime at issue*], so long as Defendant had probable cause to arrest him for some criminal offense.] [It is not necessary that Defendant had probable cause to arrest Plaintiff for all of the crimes he was charged with, so long as Defendant had probable cause to arrest him for one of those crimes.]

Committee Comment

a. Authority: For general authority, *see Bringer v. United States*, 338 U.S. 160, 175-76 (1949); *Anderer v. Jones*, 385 F.3d 1043, 1049 (7th Cir. 2004); *Kelley v. Myler*, 149 F.3d 641,646 (7th Cir. 1998); *Hughes v. Meyer*, 880 F.2d 967, 969-70 (7th Cir. 1989). *See also Smith v. Lamz*, 321 F.3d 680, 684 (7th Cir. 2003) ("The determination of probable cause is normally a mixed question of law and fact . . . but when 'what happened' questions are not at issue, the ultimate resolution of whether probable cause existed is a question of law . . . .").

b. Subsequent acquittal: The bracketed language in the instruction's second paragraph should only be used in appropriate situations. For authority, *see Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *Humphrey v. Staszak*, 148 F.3d 719, 728 (7th Cir. 1998).

c. Probable cause for other crimes: The bracketed language in the instruction's third paragraph should only be used in appropriate situations. *See Devenpeck v. Alford*, 125 S. Ct. 588 (2004); *Calusinski v. Kruger*, 24 F.3d 931, 935 (7th Cir. 1994) (probable cause for one of multiple charges); *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993) (probable cause for closely related charge).

d. Reasonable person: The prior version of this instruction used the phrase "prudent person." Today's prevailing standard is "objectively reasonable police officer." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Ornelas v. United States*, 517 U.S. 690, 696 (1996). The Committee modified the instruction to make clear that the jury may consider a defendant's position as an officer when determining what the defendant "knew and what reasonably trustworthy information [he] had received" at the time of an arrest.

e. Instruction regarding elements of underlying crime: As a general rule, when giving a false arrest instruction, the court should also instruct the jury regarding the definition or elements of the crime(s) for which the defendant claims to have had probable cause.

7.09 FOURTH AMENDMENT AND FOURTEENTH AMENDMENT : EXCESSIVE FORCE AGAINST ARRESTEE OR DETAINEE- ELEMENTS (current instruction 7.08)

Plaintiff claims that Defendant used excessive force against him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used unreasonable force against Plaintiff.

[2. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Unreasonable force: For authority regarding the "unreasonable force" element of the claim, *see Kingsley v. Hendrickson*, --- U.S. ---, 135 S. Ct. 2466 (2015); *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). This instruction applies to excessive force claims under the Fourteenth Amendment and the Fourth Amendment, which typically means a pretrial detainee, an arrestee or other person encountered by the police who has not yet appeared in court. Instruction 7.18 applies to an excessive force claim involving a convicted prisoner.

If the defendant contends that the application of force was accidental, the court may wish to break the first element into two:

1. Defendant intentionally used force against Plaintiff;

2. The force Defendant used was unreasonable;

This instruction needs to be modified in a case in which the force was not directed against the plaintiff.

In *Kingsley*, 135 U.S. at 2474, the Supreme Court stated that "we have limited liability for excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a 'reckless' act as well)." Because neither the Supreme Court nor the Seventh Circuit has applied a recklessness standard to date, the Committee has chosen to keep the word "intentionally" in the instruction, but courts should monitor the case law for potential changes.

b. Harm to plaintiff not required: *McAllister v. Price*, 615 F.3d 877, 882 (7th Cir. 2010) ("Injury is not an element of an excessive-force claim; rather, it is evidence of the degree of force imposed and the reasonableness of that force.")

c. Color of law: This element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.10 FOURTH AMENDMENT: EXCESSIVE FORCE AGAINST ARRESTEE- DEFINITION OF "UNREASONABLE" (current instruction 7.09)

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

In deciding whether Defendant used unreasonable force and acted with reckless disregard of Plaintiff's rights, you should consider all of the circumstances. [Circumstances you may consider include the need for the use of force, the relationship between the need for the use of force and the amount of force used, the extent of the plaintiff's injury, any efforts made by the defendant to temper or limit the amount of force, the severity of the crime at issue, the threat reasonably perceived by the officer(s), and whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing, but you are not limited to these circumstances.]

[An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad.

Committee Comment

a. Authority: *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 519–20 (7th Cir. 2012) ("An officer's use of force is unreasonable if, judging from the totality of the circumstances at the time of the arrest, the officer uses greater force than was reasonably necessary to effectuate the arrest. . . . Th[e] constitutional inquiry is objective and does not take into account the motives or intent of the individual officers."); *Florek v. Vill. of Mundelein*, 649 F.3d 594, 599 (7th Cir. 2011) ("[T]he reasonableness of a seizure depends on the totality of the circumstances."); *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir. 2005) ("reasonableness" of a particular use of force is judged from the perspective of a reasonable officer on the scene in light of the facts and circumstances). This Fourth Amendment instruction does not apply to Due Process or Eighth Amendment cases.

b. Factors: Some judges prefer to include the factors from *Graham v. Connor*, 490 U.S. at 396 (severity of crime, reasonable perception of threat, active resistance or attempt to evade arrest); *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) (relationship between need for force and amount used, severity of crime, active resistance,

perception of threat), and *McAllister v. Price*, 615 F.3d 877, 883–84 (7th Cir. 2010) (extent of injury as showing degree of force used, perception of threat, severity of crime), while others see a list as limiting. Accordingly, the Committee has bracketed the commonly used list of factors.

c. Deadly force: The bracketed paragraph applies only in cases involving an officer's use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988). With regard to the final (bracketed) sentence of this paragraph, *see Deering v. Reich*, 183 F.3d 645, 652-653 (7th Cir. 1999); *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). The fact that a particularized instruction is proposed for deadly force cases does not preclude the consideration or giving of a particularized instruction in other types of cases, for example, those involving a fleeting felon or an officer's claim of self-defense.

7.11 FOURTH AMENDMENT: MEDICAL CARE FOR ARRESTEE
(no current instruction)

Plaintiff claims that he [was denied] [received inadequate] medical care while in custody. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff was under arrest.

2. Plaintiff needed medical care.

3. Defendant [denied; failed to take action to provide] medical care to Plaintiff.

4. Defendant's [action; failure to take action] was unreasonable. You must make this decision based on the perspective of a reasonable officer facing the same circumstances that Defendant faced, not on Defendant's intentions or subjective beliefs. You should consider all of the circumstances. In considering all the circumstances, you may consider whether Defendant was aware of Plaintiff's medical need, the seriousness of Plaintiff's medical need, the nature of any necessary medical treatment, and the administrative and investigatory needs of the police, such as [*list specific points that have been raised by the evidence*].

5. Plaintiff was harmed as a result.

6. Defendant acted under color of law.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority: The Fourth Amendment objective reasonableness standard governs medical care incident to an arrest. *Florek v. Vill. of Mundelein*, 649 F.3d 594, 598 (7th Cir. 2011). The Fourteenth Amendment deliberate-indifference standard (Instruction 7.17) applies to medical care for pretrial detainees. *Minix v. Canarecci*, 597 F.3d 824, 830-31 (7th Cir. 2010). In *Ortiz v. City of Chicago*, 656 F.3d 523 (7th Cir. 2011), the Seventh Circuit quoted *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir. 2006), for the proposition that "Our cases thus establish that the protections of the Fourth Amendment apply at arrest and through the *Gerstein* probable cause hearing, due process principles govern a pretrial detainee's conditions of confinement after the judicial determination of probable cause, and the Eighth Amendment applies following conviction." *Ortiz*, 656 F.3d at 530. Elsewhere, however, the court has stated that it has "not yet had occasion to define precisely the contours of [the] temporal limitations" concerning where the Fourth Amendment stops and due process starts. *Forrest v. Prine*, 620 F.3d 739, 743 (7th Cir. 2010) (Fourteenth

Amendment standard applied to arrestee during booking at county jail). Resolution of this legal question will dictate whether to give this Instruction or Instruction 7.17.

b. Arrests vs. *Terry* stops. The Committee has included an element that the plaintiff was under arrest because the Seventh Circuit has stated in a number of cases that the duty to provide medical care is triggered upon arrest. *E.g.*, *Sallenger v. City of Springfield*, 630 F.3d 499, 503 -504 (7th Cir. 2010) ("The Fourth Amendment's objective reasonableness standard applies; the Estate's claim pertains to the medical needs of a person under arrest who has not yet had a judicial determination of probable cause."); *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir.2006) ("Our cases thus establish that the protections of the Fourth Amendment apply at arrest and through the Gerstein probable cause hearing."); *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir.1992) ("[T]he Fourth Amendment governs the period of confinement between arrest without a warrant and the [probable cause determination]."). However, the court has not decided whether the same duty applies in the context of other seizures, such as *Terry* stops. *But see Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 595 (7th Cir. 1997) (court "assum[ed] that the police officers had a duty to provide medical attention (and not to cut off medical aid) when they seized Mr. Phillips"). Accordingly, trial courts will have to make their own determination regarding whether the first element may be modified to encompass seizures that do not qualify as an arrest. *See, e.g., Sallenger v. City of Springfield*, 630 F.3d 499, 503 -504 (7th Cir. 2010) ("The Fourth Amendment's objective reasonableness standard applies; the Estate's claim pertains to the medical needs of a person under arrest who has not yet had a judicial determination of probable cause.")

c. Defendant's intent. The Committee did not include a requirement that the defendant act intentionally or knowingly in failing to provide medical care. Fourth Amendment questions are typically governed by an objective standard as opposed to a subjective one. Concern regarding the absence of an intent element was expressed by some Committee members on the ground that intent is required for any sort of claim of a constitutional violation. The view of the majority of the Committee was that any intent element is satisfied if the plaintiff shows that the defendant intended to seize him. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control. . . .[T]he detention or taking itself must be willful."). The instruction addresses the intent issue by requiring the plaintiff to show that he was under arrest. However, in Fourth Amendment cases, the plaintiff is not required to prove that the defendant intended to harm him. *See, e.g., Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596 (7th Cir. 1997) ("[W]e have remarked before that the Fourth Amendment and the Due Process Clause impose similar duties in that both prohibit excessive force, though the duties apply at different times in the adversarial process and though the respective standards of liability may vary, primarily because the Due Process Clause contains a mental component.").

d. Reasonableness of defendant's conduct: The four factors proposed are from *Williams v. Rodriguez*, 509 F.3d 392 (7th Cir. 2007), and more recently *Ortiz v. City of Chicago*, 656 F.3d 523 (7th Cir. 2011). The second factor, seriousness of the medical need, operates on a "sliding scale" with the third factor, scope of requested treatment. "The severity of the medical condition under this standard need not, on its own, rise to the level of objective seriousness required under the Eighth and Fourteenth Amendments. Instead, the Fourth Amendment's reasonableness analysis operates on a sliding scale, balancing the

seriousness of the medical need with the third factor—the scope of the requested treatment." *Williams*, 509 F.3d at 403.

e. Color of law: The sixth element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.12 FOURTH AMENDMENT: EXCESSIVE DETENTION (LESS THAN 48 HOURS) (no current instruction)

Plaintiff claims that Defendant [detained Plaintiff; caused Plaintiff to be detained] for an unreasonable length of time following Plaintiff's arrest. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff was arrested without an arrest warrant.

2. Defendant delayed or caused to be delayed [the release of Plaintiff] [the judicial hearing to determine whether there was probable cause to arrest Plaintiff].

3. The delay was unreasonable. In deciding this, you should consider both the length of the delay and the reason(s) why [the release] [the judicial hearing] was delayed.

[A delay for the purpose of conducting further investigation of the crime(s) for which Plaintiff was arrested is reasonable so long as probable cause existed to arrest Plaintiff.]

[A delay [to investigate crimes other than the one(s) for which Plaintiff was arrested] [motivated by ill will against the arrested person] [for delay's sake]] is not a reasonable delay.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority: *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Ray v. City of Chicago*, 629 F.3d 660, 663–64 (7th Cir. 2011) ("[D]etention times ranging from three to fourteen and one-half hours were not constitutionally unreasonable absent any evidence that the delay in releasing the arrested individuals was motivated by an improper purpose."); *Portis v. Chicago*, 613 F.3d 702, 705 (7th Cir. 2010); *Gramenos v. Jewel Cos.*, 797 F.2d 432 (7th Cir. 1986).

b. Delay longer than 48 hours: In cases where the Plaintiff's probable cause hearing was delayed beyond 48 hours and the Plaintiff contends that the pre-48 hours period was unreasonable, then this instruction should be used in conjunction with Instruction 7.13 (concerning delays past 48 hours), and the court should explain that this instruction governs only the period of time prior to the 48-hour mark.

c. Delays to conduct further investigation. *McLaughlin* says that an example of unreasonable delay is a delay "for the purpose of gathering additional evidence to justify the arrest . . . ." *McLaughlin*, 500 U.S. at 56. But where police have already developed probable cause for an arrest, it is not unreasonable to delay the probable cause hearing in

order to conduct additional investigation to bolster the charges against the arrestee, such as by placing the arrestee in a line-up. *United States v. Daniels*, 64 F.3d 311, 314 (7th Cir. 1995) (not unreasonable to delay hearing to allow witnesses to the crime to view a line-up). In some cases it may be disputed whether probable cause existed and thus whether delay was to gather evidence to establish probable cause or to further investigate a matter on which there was already probable cause. In such a case, the instruction may need refinement to require the jury to decide whether there was probable cause in the first instance.

Delay to investigate a different set of crimes than the one for which the plaintiff was arrested is unreasonable. *Willis v. City of Chicago*, 999 F.2d 284 (7th Cir. 1993) (where prosecutor had approved charges for sexual assault, it was unreasonable to delay the probable cause hearing to place plaintiff in line-ups for other sexual assaults). Merely conducting an investigation of other crimes during a period of delay is not sufficient to render the delay unreasonable; there must be evidence from which a jury could find that the officer's purpose in delaying the hearing was to conduct that separate investigation. *See United States v. Sholola*, 124 F.3d 803, 820 (7th Cir. 1997) (differentiating *Willis* because there was no evidence that the officer knew that a probable cause hearing was available sooner while he investigated the other set of crimes).

7.13 FOURTH AMENDMENT: EXCESSIVE DETENTION (AFTEcR 48 HOURS) (no current instruction)

Plaintiff claims that Defendant [detained Plaintiff; caused Plaintiff to be detained] for more than 48 hours without any judicial hearing to determine whether there was probable cause to arrest Plaintiff. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff was arrested without an arrest warrant.

2. More than 48 hours passed before Plaintiff [was released] [a judicial hearing was held to determine whether there was probable cause to arrest Plaintiff].

3. Defendant caused this delay.

If you find that Plaintiff has not proved each of these things by a preponderance of the evidence then you must find for the Defendant.

If you find that Plaintiff has proved each of these things, then you must go on to consider whether Defendant has proved by a preponderance of the evidence that Plaintiff's [release] [judicial hearing to determine probable cause] was delayed for longer than 48 hours as a result of [*describe the emergency or extraordinary circumstance*].

If you find that Defendant has failed to prove any one of these things by a preponderance of the evidence, then you should find for Plaintiff. If you find that Defendant has proved this by a preponderance of the evidence, then you should find for the Defendant.

Committee Comment

a. **Authority**: *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Lopez v. City of Chicago*, 464 F.3d 711, 722 (7th Cir. 2006).

b. **Emergency defense:** The court should decide as a legal matter whether the defendant's justification suffices as a "bona fide emergency or extraordinary circumstance" under *McLaughlin* and should instruct the jury on the justification only if it suffices as a legal matter. For example, weekends and holidays do not constitute extraordinary circumstances as a matter of law. *Id.*; *see also Lopez*, 464 F.3d at 722 (suspect's lying to police about his identity was not an extraordinary circumstance). If the defendant does not establish a basis in the evidence for the jury to find a bona fide emergency or extraordinary circumstance, the defendant's burden portion of the instruction should not be given.

c. **Delay shorter than 48 hours:** In a case where a plaintiff challenges the reasonableness of both the pre-48 hour and post-48 hour portions of a detention, the court should give both this instruction and Instruction 7.12 and apprise the jury that each standard governs for the respective period of time. The court should consider giving the following prefatory instruction:

In this case, Plaintiff claims that Defendant unreasonably delayed his detention for [*state the number of hours*] following arrest. The law treats delays during the first 48 hours of detention differently than delays beyond 48 hours. I will now instruct you on the requirements for each of these time periods.

7.14 FAIR TRIAL: CONCEALMENT OF EXCULPATORY EVIDENCE / FABRICATION OF EVIDENCE
(no current instruction)

Plaintiff claims that Defendant violated his right to a fair trial by [failing to disclose exculpatory and/or impeachment evidence [*optional - identify the allegedly undisclosed evidence*] that was material to Plaintiff's defense in the criminal case] [and/or] [by fabricating evidence that was used to convict Plaintiff in the criminal case]. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant [knowingly concealed [from the prosecutor] exculpatory and/or impeachment evidence, and the evidence was not otherwise available to Plaintiff, through the exercise of reasonable diligence, to make use of at his criminal trial] [and/or] [knowingly fabricated evidence that was introduced against Plaintiff at his criminal trial].

2. The evidence was material.

3. Plaintiff was damaged as a result.

"Exculpatory evidence" is evidence that tends to show that the accused is not guilty of the crime.

"Impeachment evidence" is evidence that would have made the [judge] [jury] at the criminal trial less likely to believe a witness who testified against the accused at the criminal trial.

[Exculpatory; impeachment; fabricated] evidence is "material" if there is a reasonable probability that the result in the criminal proceeding would have been different if the evidence had been disclosed.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority. *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001); *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Braun v. Powell*, 227 F.3d 908, 920 & n.11 (7th Cir. 2000).

b. Identification of allegedly undisclosed evidence. The preamble to this instruction contains a bracketed phrase that may be used, in an appropriate case, to list the allegedly undisclosed evidence. This is marked as optional because such itemization in an instruction is not required. *See Jimenez v. City of Chicago*, 732 F.3d 710, 717 (7th Cir. 2013).

c. Concealment of exculpatory / impeachment evidence. A police officer, the most typical type of defendant in a due process/fair trial case, is not responsible for turning over evidence directly to the defense in a criminal case. Rather, the officer's constitutional obligation is to provide the exculpatory information to the prosecutor, who is responsible for turning it over to the defense. Accordingly, a police officer may be held liable for a due process violation for concealing material exculpatory or impeachment evidence from the prosecutor, thereby preventing the defense from learning of the evidence. *See, e.g., Newsome*, 256 F.3d at 752; *Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). For this reason, in most cases, the bracketed language "from the prosecutor" in element one of this instruction should be used. There may be situations, however, in which the police officer is claimed to have acted in concert with a prosecutor to conceal exculpatory or impeachment evidence. Even though the prosecutor is typically immune from liability in this situation, a non-immune actor who conspires with an immune actor is not shielded by the latter actor's immunity. *See, e.g., Dennis v. Sparks*, 449 U.S. 24 (1980) (conspiracy with judge). In those situations, it may be inappropriate to use the bracketed "from the prosecutor" language, and the instruction may need to be modified in other ways.

d. Fabrication of evidence. *Whitlock v. Brueggemann*, 682 F.3d 567, 582-85 (7th Cir. 2012), recognized the viability of a claim based on fabrication of material evidence. *See also Petty v. City of Chicago*, 745 F.3d 416, 422-23 (7th Cir. 2014) (distinguishing between a claim of *coerced* false evidence, which is not actionable, and a claim of *fabricated* false evidence, which is actionable). The law in this area is still in flux, however, and courts are advised to check for developments post-dating these instructions.

The law relating to reversal of a criminal conviction based on knowing use of perjured testimony arguably requires a lesser showing of materiality than the general *Brady* standard, namely whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). It is unclear whether that is the standard to be used in the civil liability context. Even if so, the difference between this and the materiality standard given in the instruction—requiring the plaintiff to show that the evidence "had a reasonable likelihood of affecting the outcome of the criminal case"—is arguably a matter of nuance. For this reason, the Committee has not proposed a separate materiality or causation instruction for fabricated-evidence cases. Because the law in this area is still in development, the court should examine this point carefully before instructing the jury.

e. Plaintiff acquitted in the criminal trial. The Seventh Circuit has not definitively decided whether a person who was acquitted in the criminal case can maintain a *Brady*-related due process claim. *Alexander v. McKinney*, 692 F.3d 553, 556 (7th Cir. 2012) (explaining the state of the law in this circuit); *Mosley v. City of Chicago*, 614 F.3d 391, 397-99 (7th Cir. 2010) (assessing whether prosecutor's decision to go to trial would have been altered by the withheld evidence); *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009); *Bielanski v. Cnty. of Kane*, 550 F.3d 632, 644 (7th Cir. 2008) (same); *Carvajal*, 542 F.3d at 566–67 (recognizing need for prejudice from the non-disclosure generally).

f. Denial of fair trial because of suggestive identification procedure: *Alexander v. City of South Bend*, 433 F.3d 550, 555 (7th Cir. 2006), indicates that a claim that a suggestive identification procedure tainted the plaintiff's criminal trial is cognizable under §

1983. *Id.* at 555 (citing *Hensley v. Carey*, 818 F.2d 646, 649 (7th Cir. 1987)). *See also Phillips v. Allen*, 668 F.3d 912, 917 (7th Cir. 2012). Because the law in this Circuit is undeveloped on this point, the Committee has not prepared an instruction specific to this issue.

7.15 EIGHTH AND FOURTEENTH AMENDMENTS: JAIL/PRISON CONDITIONS OF CONFINEMENT – ELEMENTS (current Instruction 7.10)

To succeed on his claim challenging the conditions of his confinement, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. [*Describe allegedly unsafe condition*] subjected Plaintiff to a strong likelihood of serious harm. [A mere possibility of harm is not a strong likelihood.]

In assessing the seriousness of harm, you should consider the severity of the condition[s] and the length of time Plaintiff was exposed to [it] [them].

2. Defendant was aware of this strong likelihood that Plaintiff would be seriously harmed.

[You may infer this from the fact that the risk was obvious.]

[You may find that Defendant was aware of a strong likelihood of serious harm if you find that Defendant strongly suspected facts showing the strong likelihood of serious harm, but refused to confirm that these facts were true.]

3. Defendant consciously failed to take reasonable measures to prevent [additional] harm from occurring.

[In deciding this, you may consider whether it was practical for Defendant to take [additional] corrective action or whether Defendant had other legitimate reasons related to safety or security for failing to take [additional] action.]

4. Plaintiff [would not have been harmed] [would have suffered less harm] if Defendant had taken reasonable measures.

[5. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Scope of instruction: This instruction applies to claims brought by a convicted prisoner under the Eighth Amendment or by a pretrial detainee or civilly committed person under the Fourteenth Amendment. *See Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 664 (7th Cir. 2012) ("[C]ourts still look to Eighth Amendment case law in addressing the claims of pretrial detainees, given that the … Supreme Court has not yet

determined just how much additional protection the Fourteenth Amendment gives to pretrial detainees.") (internal citations omitted); *Rosario v. Brawn*, 670 F.3d 816, 820 (7th Cir. 2012). *See also, e.g., Thomas v. Cook Cnty. Sheriff'sDep't*, 588 F.3d 445, 452 n.1 (7th Cir. 2009); *Williams v. Rodriguez*, 509 F.3d 392, 401 (7th Cir. 2007). *But cf. Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003) (pretrial detainee is entitled "to *at least* the same protection against deliberate indifference to his basic needs as is available to convicted prisoners under the Eighth Amendment") (emphasis added).

This instruction does not apply to arrestees who have not received a judicial probable cause determination. *Williams*, 509 F.3d at 403 ("Claims regarding conditions of confinement for pretrial detainees . . . who have not yet had a judicial determination of probable cause (a *Gerstein* hearing), are instead governed by the Fourth Amendment and its objectively unreasonable standard.") In those cases, the court should apply Instruction 7.11.

b. Claims involving multiple adverse conditions: Conditions that have a "mutually enforcing effect" on "a single, identifiable human need"—such as food or warmth—may be considered in combination. Conditions that do not have such an effect may have to be considered separately. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006).

Separate instructions are available for claims involving prisoner assaults (Instruction 7.16), medical care (Instruction 7.17) and self-harm (Instruction 7.19).

c. Substantial risk of serious harm: This instruction applies to the most common type of condition of confinement claim, involving a substantial risk of serious harm. However, neither the Supreme Court nor the Seventh Circuit has held that this standard applies in every case involving conditions of confinement. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) ("No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual."). In some cases, the Supreme Court and the Seventh Circuit have described the objective component as a deprivation of "the minimal civilized measure of life's necessities" or, more simply "the serious deprivation of basic human needs," without necessarily equating that with a "substantial risk of serious harm." *E.g.*, *Rhodes*, 452 U.S. at 347; *Rice*, 675 F.3d at 664; *Vinning-El*, 482 F.3d at 924; *Gillis*, 468 F.3d at 494. *See also Delaney*, 256 F.3d at 685 ("[T]here may be some interplay between the severity of the deprivation alleged and the required showing of injury.").

Regardless which language is used, the law is clear that "restrictive" and "uncomfortable" conditions are not sufficient to prove an Eighth Amendment violation, *Rhodes*, 452 U.S. at 347; *Thomas v. Ramos*, 130 F.3d 754, 763 (7th Cir. 1997), and that the fact finder must consider both the duration and severity of the conditions. *Thomas v. State of Illinois*, 697 F.3d 612, 614 (7th Cir. 2012); *Delaney*, 256 F.3d at 684; *Tesch v. Cnty. of Green Lake*, 157 F.3d 465, 476 (7th Cir. 1998); *Dixon*, 114 F.3d at 643.

d. Strong likelihood: *See, e.g., Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006); *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 990 (7th Cir. 1998). The Committee has used the term "strong likelihood" as opposed to "substantial risk" because it is more likely to be understood by a lay jury.

e. Deliberate Indifference: Elements two and three encompass the concept of what the case law refers to as "deliberate indifference." The Committee has not included

that term in the instructions because most jurors will not be familiar with it, and the term can be described using ordinary language.

f. Actual knowledge required: It is not enough for the plaintiff to prove that the defendant could have known or should have known about the risk. *Farmer v. Brennan*, 511 U.S. 825, 837 & 843 n.8 (1994). However, circumstantial evidence can establish knowledge, including evidence showing that the risk was obvious. *Id.* at 842. In addition, the defendant may "not escape liability if the evidence show[s] that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Id.* at 843 n.8; *see also McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991) ("Being an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent. Because it is sufficient for criminal liability it is sufficient for liability under the eighth amendment's subjective standard."). *See also, e.g., Holloway v. Delaware Cnty. Sheriff*, 700 F.3d 1063, 1073 (7th Cir. 2012).

g. Consciously failed to take reasonable measures: The previous version of this instruction identified this element as "Defendant consciously disregarded this risk *by* failing to take reasonable measures." SEVENTH CIRCUIT FEDERAL CIVIL JURY INSTRUCTIONS § 7.10 (2005) (emphasis added). The Committee has reworded the element to make it clear that "failing to take reasonable measures" is not a definition of "conscious disregard." Rather, the plaintiff must show both that the defendant acted culpably *and* that the defendant knew his action or inaction was culpable. *Farmer*, 511 U.S. at 842 (plaintiff must show "that the official acted or failed to act despite his knowledge of a substantial risk of serious harm"); *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010) (plaintiff must show "a conscious, culpable refusal to prevent the harm"); *Rosario v. Brawn*, 670 F.3d 816, 821-22 (7th Cir. 2012) ("the standard …requires a showing as something approaching a total unconcern for the prisoner's welfare in the face of serious risks.").

h. Relevance of prisoner's conduct or other security concerns: Even if defendant knows that the prisoner is being subjected to a risk of harm, the defendant's refusal to act may be reasonable if the prisoner's own conduct is contributing to that risk or if there are competing security concerns. *See, e.g.*, *Gruenberg v. Gempeler*, 697 F.3d 573, 579-80 (7th Cir. 2012); *Freeman v. Berge*, 441 F.3d 543, 547 (7th Cir. 2006); *Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006); *Pearson v. Ramos*, 237 F.3d 881 (7th Cir. 2001). However, there may be limitations to this rule if the risk of harm is serious enough or if the plaintiff's conduct was the result of a mental health condition. *See Rice*, 675 F.3d at 665; *Freeman*, 441 F.3d at 547.

i. Harm: The general rule is that the plaintiff must prove that he was harmed by the defendant's conduct in order to prove liability. *Roe v. Elyea*, 631 F.3d 843, 863-64 (7th Cir. 2011). However, there is a difference between proving harm and proving damages; the latter is not required to establish liability. *Cotts v. Osafo*, 692 F.3d 564, 569 (7th Cir. 2012). Exactly what constitutes "harm" is not always clear. *See, e.g., Turner v. Pollard*, 564 F. App'x 234, 239 (7th Cir. 2014) (indicating that nominal and punitive damages may be available "due to hazard, or probabilistic harm even in the absence of physical or psychological harm" or where the plaintiff is "expose[d]. . . to a substantial risk of a serious physical injury"). In a case where there is a dispute over whether there is a sufficient degree of harm to establish a claim, careful attention should be paid to the wording of element 4 of this instruction.

j. Color of law: The fifth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.16 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROTECT – ELEMENTS (current Instruction 7.11)

To succeed on his claim regarding failure to protect him from harm by [an]other [prisoner] [detainee], Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. There was a strong likelihood that Plaintiff would be seriously harmed as the result of an assault. [A mere possibility of harm is not a strong likelihood.]

2. Defendant was aware of this strong likelihood that [Plaintiff would be seriously harmed as the result of an assault] [another prisoner/detainee would seriously harm a prisoner/ detainee in Plaintiff's situation].
[You may infer this from the fact that the risk was obvious.]
[You may find that Defendant was aware of a strong likelihood of serious harm if you find that Defendant strongly suspected facts showing a substantial risk of serious harm, but refused to confirm that these facts were true.]

3. Defendant consciously failed to take reasonable measures to prevent the assault.

[In deciding this, you may consider whether it was practical for Defendant to take corrective action or whether Defendant had legitimate reasons related to safety or security for failing to take [additional] corrective action.]

4. [Plaintiff] [would not have been harmed] [would have suffered less harm] if Defendant had taken reasonable measures.

[5. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. **Scope of instruction:** This instruction may be used for claims brought under the Eighth Amendment by convicted prisoners or claims brought under the due process clause of the Fourteenth Amendment by pretrial detainees or civilly committed patients. *See* Instruction 7.15, comment a.

b. **Substantial risk:** *See* Instruction 7.15, comment c.

c. **Deliberate indifference:** Elements two and three encompass the concept of what the case law refers to as "deliberate indifference." The Committee has not included that term in the instructions because most jurors will not be familiar with it, and it can be described using ordinary language.

d. **Actual knowledge required:** For cases discussing the actual knowledge requirement as a general matter, *see* Instruction 7.15, comment f. In the context of a failure to protect claim, the plaintiff must show that the defendant had knowledge of a specific threat. *See, e.g.*, *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008); *Klebanowski v. Sheahan*, 540 F.3d 633, 639-40 (7th Cir. 2008); *Grieveson v. Anderson*, 538 F.3d 763, 776 (7th Cir. 2008); *Butera v. Cottey*, 285 F.3d 601, 606 (7th Cir. 2002). However, "deliberate indifference can be predicated upon knowledge of a victim's particular vulnerability even if the identity of the ultimate assailant is not known in advance of attack), or, in the alternative, an assailant's predatory nature even if the identity of the ultimate victim is not known in advance of attack." *Brown v. Budz*, 398 F.3d 904, 915-16 (7th Cir. 2005).

The Committee has included alternative language for the second element for cases in which the plaintiff is claiming that the defendant knew that prisoners in plaintiff's situation were at risk, (e.g., defendant knew that a particular prisoner had a history of assaulting his cell mates , but the defendant did not know that the plaintiff was the cell mate). In those cases, the court may wish to describe the situation as part of the second element. (For example, "Defendant was aware of a substantial risk that [other prisoner's name] would seriously harm his cell mate.")

e. **Consciously failed to take reasonable measures:** For an explanation of this element as a general matter, *see* Instruction 7.15, comment g.

f. **Color of law:** The fifth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

g. **Harm:** *See* Instruction 7.15, comment i.

h. **Plaintiff as the Aggressor:** In *Santiago v. Walls*, 599 F.3d 749, 759 (7th Cir. 2010), the court held that a prisoner may maintain a claim for failure to protect even if he started the fight, at least in cases in which the Defendant was trying to provoke a fight or knew that other officers were doing so.

7.17 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROVIDE MEDICAL ATTENTION – ELEMENTS (current Instruction 7.12)

To succeed on his claim of failure to provide medical [care; attention], Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. Plaintiff had a serious medical need. A serious medical need is a condition that a doctor says requires treatment or something so obvious that even someone who is not a doctor would recognize ~~it as requiring~~ that it requires treatment.

2. Defendant was aware that Plaintiff had a serious medical need.

[You may infer this from the fact that the need was obvious.]

[You may find that Defendant was aware of the need if you find that Defendant strongly suspected facts showing a serious medical need but refused to confirm that these facts were true.]

3. Defendant consciously failed to take reasonable measures to provide treatment for the serious medical need.

[Plaintiff does not have to show that Defendant ignored him or provided no care. If Defendant provided some care, Plaintiff must show that Defendant knew[his] [her] actions likely would be ineffective or that Defendant's actions were ~~blatantly~~ clearly inappropriate.]

[In deciding whether Defendant failed to take reasonable measures, you may consider whether it was practical for Defendant to provide treatment or whether Defendant had legitimate reasons related to safety or security for failing to provide treatment.]

[*Optional instruction in case involving a defendant who is a medical professional*: You may infer that Defendant consciously failed to take reasonable measures if Defendant's [action] [failure to act] was such a substantial departure from accepted professional judgment, practice or standards that it showed a complete abandonment of medical judgment.]

[*Optional instruction in case involving a defendant who claims to have relied on the judgment of a medical professional*. If Defendant relied on the opinion of a medical professional, Defendant did not consciously fail to take reasonable measures unless it was obvious that following the medical professional's opinion would cause harm to Plaintiff.]

4. As a result of Defendant's [actions; inaction], Plaintiff was [harmed; subjected to a significant risk of harm]. [Plaintiff may prove that Defendant harmed him with evidence [that his condition worsened as a result of Defendant's conduct] [or] [that he suffered prolonged, unnecessary pain].]

[5. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority and scope of instruction: *Estelle v. Gamble*, 429 U.S. 97 (1976); *Greeno v. Daley*, 414 F.3d 645, 653-54 (7th Cir. 2005). Though *Estelle* is an Eighth Amendment case involving a convicted prisoner, the same standard applies in Fourteenth Amendment cases involving pretrial detainees and civilly committed patients. *See* Instruction 7.15, comment a. *Pittman ex rel. Hamilton v. Cnty. of Madison*, 746 F.3d 766, 775 (7th Cir. 2014) ("[T]he Fourteenth Amendment prohibits 'deliberate indifference to the serious medical needs of pretrial detainees.' . . . This provision applies essentially the same deliberate indifference analysis to detainees as the Eighth Amendment does to inmates."). This instruction also applies to claims involving inadequate dental care. *Board v. Farnham*, 394 F.3d 469, 477-78 (7th Cir. 2005) (noting that the court has found it "convenient and entirely appropriate" to apply the same standard to claims arising under the Eighth and Fourteenth Amendments).

b. Serious medical need: A serious medical need is a condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize it as requiring treatment. *Johnson v. Snyder*, 444 F.3d 579, 584–85 (7th Cir. 2006). A condition may be serious if it significantly alters the daily activities of the prisoner, *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997), or causes significant pain, *Cooper v. Casey*, 97 F.3d 914, 916–17 (7th Cir. 1996). Minor injuries are not sufficient. *Cooper*, 97 F.3d at 916. But the condition does not have to be life threatening or even produce "objective" symptoms. *Johnson*, 444 F.3d at 585; *Berry v. Peterman*, 604 F.3d 435, 442 (7th Cir. 2010); *Greeno*, 414 F.3d at 655; *Cooper*, 97 F.3d at 917. However, the plaintiff's casual response to the condition may be relevant to determine there is no serious medical need. *Pinkston v. Madry*, 440 F.3d 879, 892 (7th Cir. 2006).

c. Deliberate indifference: Elements two and three encompass the concept of what the case law refers to as "deliberate indifference." The Committee has not included that term in the instructions because most jurors will not be familiar with it and it can be described using ordinary language.

d. Actual knowledge required: The defendant must actually know of the serious medical need. *Thomas v. Cook Cnty. Sheriff'sDep't*, 588 F.3d 445 (7th Cir. 2009) (jury could infer awareness from combination of symptoms Plaintiff exhibited and his complaints); *Gayton v. McCoy*, 593 F.3d 610, 623-24 (7th Cir. 2010) (same). *See also* Instruction 7.15, comment f. The plaintiff does not have to prove that the defendant knew exactly what the plaintiff's condition was or its cause. *Ortiz v. City of Chicago*, 656 F.3d 523, 533 (7th Cir. 2011).

e. Consciously failed to take reasonable measures: For an explanation of this element as a general matter, *see* Instruction 7.15, comment g. The jury may find that the plaintiff proved this element even if the defendant provided some care. *Hayes*, 546 F.3d at 524. There is no bright-line test for determining whether a defendant violated this standard. Factors to be considered include the seriousness of the medical condition; the likelihood and imminence of further harm; and the ease and efficacy of providing treatment. *See Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011); *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010). Cost is a factor in determining what constitutes adequate care, "but medical personnel cannot simply resort to an easier course of treatment that they know is ineffective."' *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006).

f. Medical vs. non-medical staff: The deliberate indifference standard is different for non-medical staff. *See King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012). For a medical professional, treatment may be blatantly inappropriate and thus amount to deliberate indifference when the medical professional knows that it is likely to aggravate the prisoner's condition, *Greeno*, 414 F.3d at 654, or if it is clear that the treatment is not working, *Gonzalez*, 663 F.3d at 314-15.

A "mere difference of opinion" between two medical professionals is generally not enough. *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006). However, the Seventh Circuit has been more reluctant to defer to a medical professional's judgment if he or she is disregarding instructions from a specialist or has changed his or her own opinion. *E.g.*, *Ortiz v. Webster*, 655 F.3d 731, 735-36 (7th Cir. 2011); *Gil v. Reed*, 535 F.3d 551, 557 (7th Cir. 2008).

If the defendant is not a medical professional, as a general rule he is entitled to defer to those who are. *Berry*, 604 F.3d at 440-41; *Lee*, 533 F.3d at 511. The exception is if it is obvious that the prisoner is not receiving adequate care. *King*, 608 F.3d at 1018; *Hayes v. Snyder*, 546 F.3d 516, 526-28 (7th Cir. 2008); *see also Berry*, 604 F.3d at 443.

g. Harm: The plaintiff may satisfy this element with evidence that defendant "exacerbated his injuries" or that he suffered "prolonged, unnecessary pain." *Smith v. Knox Cnty. Jail*, 666 F.3d 1037, 1039-40 (7th Cir. 2012). *See also Gayton*, 593 F.3d at 624-25. Both this instruction and the prior version of the same instruction simply use the term "harm." The state of the law on the degree of harm or pain that the plaintiff must have experienced to prevail is, however, not entirely clear. *See, e.g., Turner v. Pollard*, 564 F. App'x 234, 239 (7th Cir. 2014) (indicating that nominal and punitive damages may be available "due to hazard, or probabilistic harm even in the absence of physical or psychological harm" or where the plaintiff is "expose[d]. . . to a substantial risk of a serious physical injury"). In a case where there is a dispute over whether there is a sufficient degree of harm to establish a claim, careful attention should be paid to the wording of element 4 of this instruction.

h. Color of Law: The fifth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.18 EIGHTH AMENDMENT: EXCESSIVE FORCE AGAINST CONVICTED PRISONER – ELEMENTS (current Instruction 7.15)

To succeed on his claim of excessive use of force, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. Defendant intentionally used force on Plaintiff.

2. Defendant did so for the purpose of harming Plaintiff, and not in a good faith effort to maintain or restore security or discipline.

3. Defendant's conduct harmed Plaintiff. Plaintiff does not need to prove that he suffered a serious injury. If Defendant's use of force caused pain to Plaintiff, that is sufficient harm, even if Plaintiff did not require medical attention or did not have long lasting injuries.

[4. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

In deciding whether Plaintiff has proved that Defendant used force for the purpose of harming Plaintiff, you should consider all of the circumstances. When considering all the circumstances, among the factors you may consider are the need to use force, the relationship between the need to use force and the amount of force used, the extent of Plaintiff's injury, whether Defendant reasonably believed there was a threat to the safety of staff or prisoners, [and] any efforts made by Defendant to limit the amount of force used[, **and whether Defendant was acting pursuant to a policy or practice of the prison that in the reasonable judgment of prison officials was needed to preserve order, discipline and security]**.

[An officer is entitled to use some force if a prisoner disobeys a valid command. You may still consider, however, whether the amount of force used was excessive.]

Committee Comment

a. Scope and authority: *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-321 (1986); *Williams v. Boles*, 841 F.2d 181 (7th Cir. 1988). This instruction applies only to cases involving claims brought under the Eighth Amendment by convicted prisoners. Excessive force claims brought by an arrestee or pretrial detainee are governed by the Fourth and Fourteenth Amendments, respectively, and are contained in Instruction 7.09. The Committee did not modify this instruction after *Kingsley v. Hendrickson*, -

-- U.S. ---, 135 U.S. 2466, 2476 (U.S. June 22, 2015), in the absence of further guidance from the Supreme Court or the Seventh Circuit.

b. Amount of force: Some cases have suggested that a *de minimis* use of force does not violate the Eighth Amendment. *Hudson*, 503 U.S. at 9-10; *Hendrickson v. Cooper*, 589 F.3d 887, 890-91 (7th Cir. 2009). However, in *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012), the court stated that "it is . . . time that the formula '*de minimis* uses of physical force' was retired," because there are some cases in which force might be excessive even when it is slight, such as if an officer fondled a prisoner's genitals or burned him with a lit cigarette. Accordingly, the Committee has not included a reference to quantum of force as an element, though it has listed this as a factor that may be considered in relation to the need for force.

c. Intentional use of force for the purpose of harm: "Unreasonable" force is not enough in the Eighth Amendment context. *Whitley*, 475 U.S. at 322. Courts often use the phrase "malicious[ ] and sadistic[ ]" when describing the intent requirement, *id.* at 320-21, but the Committee has omitted the phrase because it appears to be redundant of the phrase "for the purpose of harming."

d. Failure to comply with order: A correctional officer may use force when a prisoner disobeys an order, but the degree of force used may still amount to a constitutional violation. *See Lewis v. Downey*, 581 F.3d 467, 476-77 (7th Cir. 2009).

e. Color of law: The fourth element should be eliminated if the "under color of law" issue is undisputed. If the element is contested, Instruction No. 7.03 should be given. If the element is contested, Instruction No. 7.03 should be given.

f. Deference to prison official policies: The Supreme Court has stated that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Whitley*, 475 U.S. at 322-34 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)). In a case in which the defendant claims to have acted pursuant to a policy or practice of the prison, the last (bracketed) factor in the list of factors included at the end of the instruction may be appropriate. The Committee notes that a significant minority of its members were of the view that this admonition from *Bell* and *Whitley* should not be included in the instruction on the ground that it is a policy consideration that informs why the Eighth Amendment standard is as it is, not a matter on which to instruct the jury.

g. Serious injury not required: A prisoner may prevail on an excessive force claim even if his injuries are not serious and only "*de minimis*." *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1179-80 (2010); *Guitron*, 675 F.3d at 1046. Pain is a sufficient harm. *Lewis*, 581 F.3d at 475; *Hendrickson*, 589 F.3d at 891. However, the jury may consider the extent of the injury as a factor in determining whether the defendant used excessive force. *Wilkins*, 130 S. Ct. at 1178-79; *Lunsford v. Bennett*, 17 F.3d 1574, 1582 (7th Cir. 1994).

h. Factors: Some judges prefer to include the factors from *Graham v. Connor*, 490 U.S. at 396 (fifth, sixth, and seventh factors), and *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996) (first, second, third, fourth, and sixth factors), while others see a list as limiting. Accordingly, the Committee has bracketed the commonly used list of factors.

7.19 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROTECT FROM SELF HARM
(no current instruction)

The Constitution requires [prison] [jail] officials to protect [prisoners] [detainees] from harming themselves under certain circumstances. To succeed on this claim, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. There was a strong likelihood that [Plaintiff] [Decedent] would seriously harm [himself] [herself] [in the near future]. [A mere possibility of serious harm is not a strong likelihood.]

2. Defendant was aware of this strong likelihood that [Plaintiff] [Decedent] would seriously harm [himself] [herself] in the near future. [You may infer this from the fact that the risk was obvious.]

[You may find that Defendant was aware of a strong likelihood that [Plaintiff] [Decedent] would seriously harm [himself] [herself] if you find that Defendant strongly suspected facts showing a strong likelihood of serious harm but refused to confirm that these facts were true.]

3. Defendant consciously failed to take reasonable measures to prevent [Plaintiff] [Decedent] from [committing suicide] [seriously harming [himself] [herself].

[In deciding this, you may consider whether it was practical for Defendant to take [additional] corrective action or whether Defendant had legitimate reasons related to safety or security for failing to take [additional] action.]

4. [Plaintiff] [Decedent] [would have survived] [would have suffered less harm] if Defendant had not disregarded the risk.

5. [Defendant acted under color of law.]

If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these elements by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority and scope of instruction: *Rice ex rel. Rice v. Corr. Med.Servs.*, 675 F.3d 650 (7th Cir. 2012); *Frake v. City of Chicago*, 210 F.3d 779 (7th Cir. 2000); *Tesch v. Cnty. of Green Lake*, 157 F.3d 465, 475 (7th Cir. 1998); *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254

(7th Cir. 1996); *Hall v. Ryan*, 957 F.2d 402 (7th Cir. 1992). As with claims regarding medical care and assaults by other prisoners, the standard for detainees under the Fourteenth Amendment provides "at least" as much protection as the Eighth Amendment), *Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003), but the court generally applies a "deliberate indifference" standard in both types of cases. *Rosario v. Brawn*, 670 F.3d 816, 820-21 (7th Cir. 2012); *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010).

b. Deliberate indifference: Elements two and three encompass the concept of what the case law refers to as "deliberate indifference." The Committee has not included that term in the instructions because most jurors will not be familiar with it and it can be described using ordinary language.

c. Actual knowledge required: For cases discussing the actual knowledge standard generally, s*ee* Instruction 7.15, comment f. In some cases, the Seventh Circuit has likened a risk of suicide to "a serious medical need." *E.g.*, *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 989 (7th Cir.1998).

Factors relevant in determining whether actual knowledge has been established include whether the prisoner: (1) said he was having suicidal thoughts or expressed a need for mental health treatment, *Minix*, 597 F.3d at 833; *Collins*, 462 F.3d 757; *Sanville v. McCaughtry*, 266 F.3d 724, 736 (7th Cir. 2001); (2) had a known history of suicide attempts or mental illness, *Bradich ex rel. Estate of Bradich v. City of Chicago*, 413 F.3d 688, 690 (7th Cir. 2005); *Hall*, 957 F.2d at 405; and (3) had been on suicide watch recently, *Cavalieri*, 321 F.3d at 621. *But see Collignon*, 163 F.3d at 990 (placement on suicide watch not sufficient); *Estate of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 529 (7th Cir. 2000) ("strange behavior" not enough by itself); *Mathis v. Fairman*, 120 F.3d 88, 91 (7th Cir. 1997) (same); *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996) (labeling detainee "potential" suicide risk not enough).

d. Temporal element: In some cases, the Seventh Circuit has stated that the defendant must be aware of a substantial risk that the prisoner "may *imminently* seek to take his own life," but it has not provided further clarification regarding the meaning of "imminent." *Collins*, 462 F.3d at 761 (emphasis added). However, other cases suggest that a duty may exist in other circumstances, but that an official's duties might vary depending on the obviousness of the risk. *See Collignon*, 163 F.3d at 990 (defendant had a "constitutional obligation to provide some level of care and treatment" because she knew of detainee's serious mental illness and previous suicide attempt, but satisfied duty by psychotropic medication plan; additional measures might have been required if the defendant knew that the detainee was on "the verge of committing suicide.") In *Miller v. Harbaugh*, 698 F.3d 956, 962 (7th Cir. 2012), the court considered but did not resolve whether "state officials violate the Constitution when they fail to prevent the suicides of inmates who are not actively or 'imminently' suicidal." Because the Seventh Circuit has not resolved this issue, the Committee has used the term "imminently" in brackets in element 2. The court will have to determine whether to include this temporal element.

e. Conscious disregard by failing to take reasonable measures: For an explanation of this element as a general matter, *see* Instruction 7.15, comment g. If officials are aware of a substantial risk, they may consciously disregard the risk if they take no

responsive action. *See, e.g.*, *Hall*, 957 F.2d at 403. *See also, e.g., Cavalieri*, 321 F.3d at 621; *Sanville*, 266 F.3d at 739.

f. Cases involving medical professionals: If the defendant is a psychiatrist or other mental health professional, the court may wish to include language from Instruction 7.15 regarding the use of medical judgment. *See Fromm*, 94 F.3d at 261-62.

g. **Color of law:** The fifth element should be eliminated if "color of law" is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.20 EQUAL PROTECTION: CLASS OF ONE
(no current instruction)

Committee Comment

The Committee did not draft an instruction for this claim because the elements of the claim remain unsettled in light of *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 687 (7th Cir. 2012) (en banc). *See also Thayer v. Chiczewski*, 697 F.3d 514, 531 (7th Cir. 2012) ("[T]he class-of-one standard in this circuit is in flux. . . . Our recent attempt to clarify the standard in *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (en banc) resulted in a tie vote with no controlling opinion.").

7.21 DUE PROCESS: STATE-CREATED DANGER
(no current instruction)

Plaintiff claims that Defendant violated [his] [her] rights by [*describe Defendant's alleged conduct*].

To succeed on this claim, Plaintiff must prove the following things by a preponderance of the evidence:

1. Defendant's act[s] [created a strong likelihood of serious harm to Plaintiff] [increased Plaintiff's risk of serious harm].

2. [Defendant was aware of the risk and consciously failed to take reasonable measures to prevent harm to Plaintiff.] [You may infer that Defendant was aware of the risk from the fact that the risk was obvious.] [You may find that Defendant was aware of the risk if you find that Defendant strongly suspected facts showing that a risk existed but refused to confirm that these facts were true.]

or

[Defendant acted maliciously or with intent to inflict injury.]

3. It was foreseeable by Defendant that the act[s] would lead to injury to Plaintiff or to a group of persons that included Plaintiff.

4. Defendant's act[s] caused Plaintiff's injury.

5. [Defendant acted under color of law.]

If you find Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority: *See, e.g., Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011); *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827-28 (7th Cir. 2009); *Sandage v. Bd. of Comm'rs of Vanderburgh Cnty.*, 548 F.3d 595, 599-600 (7th Cir. 2008); *King v. E. St. Louis School Dist. 189*, 496 F.3d 812, 817-18 (7th Cir. 2007). *See also Paine v. Cason*, 678 F.3d 500, 510-11 (7th Cir. 2012). The precise contours of a state-created danger claim are not completely clear. The cited cases establish the elements as set forth in the pattern instruction, but one recent case suggests an arguably simplified standard: "Shouldn't it be

enough to say that it violates the due process clause for a government employee acting within the scope of his employment to commit a reckless act that by gratuitously endangering a person results in an injury to that person?" *Slade v. Bd. of Sch. Dirs. of City of Milwaukee*, 702 F.3d 1027, 1029-33 (7th Cir. 2012).

b. "Affirmative act": Several Seventh Circuit cases discuss the need for an "affirmative act." *See, e.g., Sandage*, 548 F.3d at 599-600. The meaning of "affirmative," however, is less than clear, and the court has recently questioned the helpfulness of that term. *Slade*, 702 F.3d at 1030. In an effort to make the instruction understandable, the Committee has used the term "act" rather than "affirmative act" in the first element. Determining what constitutes an affirmative act is not necessarily easy. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("We do not pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is."). But an affirmative act suggests "a willful deviation from the *status quo*." *Windle v. City of Marion*, 321 F.3d 658, 662 n. 2 (7th Cir. 2003). On at least two occasions, the Seventh Circuit found that a defendant's promise to keep plaintiff safe was an affirmative act. *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Wallace v. Adkins*, 115 F.3d 427 (7th Cir. 1997). However, after *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the Seventh Circuit questioned whether a broken promise of protection is still sufficient for liability. *Sandage v. Board of Comm'rs of Vanderburgh Cnty.*, 548 F.3d 595, 600 (7th Cir. 2008).

c. Creating danger and increasing risk of danger: A claim exists not only for creating a danger to the plaintiff, but also for increasing the risk of danger to the plaintiff. *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 708 n.7 (7th Cir. 2002). There is no Seventh Circuit case defining the extent the danger must be increased to be actionable. *See Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 992 (7th Cir. 1998) (discussing "incremental risk"). In *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1177 (7th Cir. 1997), the Seventh Circuit stated in *dicta* that to recover under the state created danger theory, the state must "greatly" increase the danger. *See also Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990) (suggesting that when state "greatly increased the risk" claim may be stated). But more recent cases say simply that the state "must create or increase a danger faced by an individual." *Sandage*, 548 F.3d at 599; *Buchanan-Moore*, 570 F.3d at 827. The instruction does not attempt to define the extent danger must be increased to be actionable.

d. Restricting other avenues of aid: Earlier Seventh Circuit decisions appeared to require an additional element for a state created danger claim, namely, that the defendant not only placed the plaintiff in danger or increased the risk of danger, but also cut off all other avenues of aid without providing a reasonable alternative. *See Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1177 (7th Cir. 1997); *Ross v. United States*, 910 F.2d 1422, 1431 (7th Cir. 1990); *Archie v. Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988). But more recently the Seventh Circuit has rejected this as an additional requirement, *see Monfils v. Taylor*, 165

F.3d 511, 517 (7th Cir. 1998), and it is not included in the formulations of the elements of the claim that are found in the cases cited in Comment a.

e. Causation: The cases enumerating the general elements of this claim identify causation in terms of "proximate cause." *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817 (7th Cir. 2007). In the context of state created danger, causation is based on a danger to the particular plaintiff or a small subset of individuals that included the plaintiff, not the general public. *Buchanan-Moore*, 570 F.3d at 828 ; *Waubanascum v. Shawano Cnty.*, 416 F.3d 658, 669 (7th Cir. 2005); *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993) (plaintiff on specific road during narrow time frame sufficiently foreseeable victim).

f. Intent requirement: A state-created-danger claim is a "substantive" due process claim, and as a result the cases say the plaintiff must establish that the defendant's action "shocks the conscience." *See, e.g., Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 653 (7th Cir. 2011); *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827-28 (7th Cir. 2009). This phrase, however, is not particularly useful as an element in a jury instruction. *See, e.g., Slade*, 702 F.3d at 1033 ("It's not a very illuminating expression . . . ."). The Seventh Circuit has equated this with a requirement of recklessness or deliberate indifference. *See Sandage*, 548 F.3d at 599. The court has suggested that it is an open question whether the proper definition of reckless is the criminal or civil standard, though it is unclear that the difference is significant; *Slade* says that "all that remains in doubt is the choice between the civil and criminal standards of recklessness—between the known versus the merely obvious risk—but that difference as we have said had little practical significance . . . ." *Slade*, 702 F.3d at 1033. The Committee has adapted here the definition of "deliberate indifference" from other instructions, such as Instruction 7.15.

In *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812 (7th Cir. 2007), the Seventh Circuit stated that

> when the circumstances permit public officials the opportunity for reasoned deliberation in their decisions, we shall find the official's conduct conscience shocking when it evinces a deliberate indifference to the rights of the individual. On the other hand, where circumstances call for hurried judgments in order to protect the public safety or maintain the public order, and thereby render reasoned deliberation impractical, conduct must reach a higher standard of culpability approaching malicious or intentional infliction of injury before we shall deem official conduct conscience shocking.

Id. at 819. Other cases do not make reference to this distinction, and it is unclear what level of "deliberation" is required under the *King* formulation. In a case in which a "hurried judgment" is involved, the second alternative under element 3 should be used. There may be cases in which the amount of time that the defendant had to reflect on the act is a disputed question for the jury. In these situations, the jury should be given an intent instruction that

poses this threshold issue and gives both intent alternatives, with the correct choice depending on the jury's resolution of the threshold issue. The Committee anticipates that these cases will be rare and thus is not offering a draft instruction on this point.

g. Color of law: The fifth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

7.22 CLAIM FOR FAILURE OF "BYSTANDER" OFFICER TO INTERVENE – ELEMENTS
(current Instruction 7.16; no change proposed)

To succeed on his failure to intervene claim against Defendant, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Name of Officer alleged to have committed primary violation*] [*describe constitutional violation claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*].

2. Defendant knew that [*Officer*] was/was about to [*describe constitutional violation claimed, e.g., "falsely arrest Plaintiff" "use excessive force on Plaintiff"*].

3. Defendant had a realistic opportunity to do something to prevent harm from occurring.

4. Defendant failed to take reasonable steps to prevent harm from occurring.

5. Defendant's failure to act caused Plaintiff to suffer harm.

[6. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

Committee Comment

a. **Authority and usage:** *See Lanigan v. Vill. of East Hazel Crest*, 110 F.3d 467, 477-78 (7th Cir. 1997); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). This instruction applies in the case of a "bystander officer."

b. Color of law: The sixth element should be eliminated if the "color of law" issue is not in dispute. If the element is contested, Instruction No. 7.03 should be given.

c. Principal actor out of case: If the officer who engaged in the alleged constitutional violation 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 constitutional issue.

7.23 LIABILITY OF SUPERVISOR
(current instruction 7.17)

To succeed on his claim against [*Supervisor*], Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Name of Officer alleged to have committed primary violation*] [*describe constitutional violation or conduct claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*];

2. [*Supervisor*] knew that [*Officer*] was about to [*describe constitutional violation claimed*];

or

[*Supervisor*] knew that [*Officer/Officers he supervised*] had a practice of [*describe constitutional violation claimed*] in similar situations;

3. [*Supervisor*] [approved/assisted/condoned/purposely ignored] [*Officer's*] [*describe constitutional violation claimed*];

4. As a result, Plaintiff was injured.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority: *See Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994); *Rascon v. Hardiman*, 803 F.2d 269, 273-274 (7th Cir. 1986).

b. Principal actor out of case: If the officer who engaged in the alleged constitutional violation has settled, or is otherwise not involved in the case, a court will need to adjust the instruction to ensure that the jury has a sufficient understanding of the underlying constitutional issue.

c. Cat's paw: There may be cases in which a supervisor knowingly directs a subordinate to engage in conduct that violates the plaintiff's constitutional rights, but the subordinate lacks the requisite mental state and therefore does not himself or herself commit a constitutional violation. In such a case, this instruction will require modification.

7.24 LIABILITY OF MUNICIPALITY
(current Instructions 7.19-7.20)

If you find that Plaintiff has proved a constitutional violation by a preponderance of the evidence, you must consider whether [*Municipality*] is [also] liable to Plaintiff. [*Municipality*] is not responsible simply because it employed [*Officer(s) or employee(s)*].

To succeed on this claim, Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. [*Describe underlying constitutional violation, e.g., Plaintiff was unreasonably detained, as defined in the instructions for Plaintiff's first claim*]

2. At the time, [*Municipality*] had a policy of [*describe underlying policy claimed to have caused constitutional violation*]. The term policy means *(Choose applicable definition)*:

- [A rule or regulation passed by [*Municipality*]'s [*identify Municipality's legislative body, e.g., Smallville City Council*].]
- [A decision or policy statement made by [*Name*], who is a policy-making official of [*Municipality*]. [This includes [*Name*]'s approval of a decision or policy made by someone else, even if that person is not a policy-making official.]
- [A custom of [*describe acts or omissions alleged to constitute constitutional violation*] that is persistent and widespread, so that it is [*Municipality*]'s standard operating procedure. A persistent and widespread pattern may be a custom even if [*Municipality*] has not formally approved it, so long as Plaintiff proves that a policy-making official knew of the pattern and allowed it to continue. [This includes a situation where a policy-making official must have known about a subordinate's actions/failures to act by virtue of the policy-making official's position.]

3. The policy as described in paragraph 2 caused [described constitutional violation, e.g., Plaintiff's unreasonable detention.]

Committee Comment

a. Authority: *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Monell v. City of New York Dep't of Soc. Servs.*, 436 U.S. 658, 690-691 (1978); *Estate of Moreland v. Dieter*, 395 F.3d 747, 759-760 (7th Cir. 2005); *Monfils v. Taylor*, 165 F.3d 511, 517-518 (7th Cir. 1998); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 511 (7th Cir. 1993).

b. Usage: In a case involving a single constitutional claim, the Committee suggests that courts use this instruction in conjunction with the relevant elements instruction. In a case involving multiple constitutional claims, the Committee suggests that courts use this instruction separately after the jury has been instructed on the elements of each individual claim.

c. Policymaker: Determination of whether a particular official is a policymaker for purposes of *Monell* liability is an issue for the court, not the jury. *Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 675-76 (7th Cir. 2009). The trial judge will have made that determination and will incorporate it into the instruction if appropriate. In some circumstances, there may be evidence that the final policymaker delegated policymaking authority to another person or entity. In such cases, the court should consider whether there is a factual question for the jury on the delegation issue and craft an appropriate instruction.

1.

7.25 LIABILITY OF MUNICIPALITY FOR FAILURE TO TRAIN, SUPERVISE OR DISCIPLINE (current Instruction 7.21, expanded)

To succeed on his claim against [*Municipality*] for a policy of failure to [train/supervise/discipline] its [officers/employees], Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Municipality's* training program was not adequate to train its [officers/employees] to properly handle recurring situations] [or] [*Municipality* failed to adequately [supervise/discipline] its [officers/employees]];

2. [*Official/Policymaker/Policymaking Body*] knew that it was highly predictable that [*describe alleged constitutional violation(s)*] would occur without [more/different training] [adequate supervision/discipline] of its [officers/employees], [because there was a pattern of similar constitutional violations] [or] [it was highly predictable even without a pattern of similar constitutional violations]; and

3. [*Municipality's*] failure to provide adequate [training/supervision] caused [describe alleged violation(s) of Plaintiff's constitutional rights].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you must find for Defendant, and you will not consider the question of damages.

Committee Comment

a. Authority: *See Connick v. Thompson*, 131 S. Ct. 1350, 1365 (2011) (while "highly predictable" is a viable basis to establish deliberate indifference, it was not highly predictable in this case that failure to better train prosecutors on *Brady* obligations would have had resulted in the production of the exculpatory evidence and prevented plaintiff's wrongful conviction); *City of Canton v. Harris*, 489 U.S. 378, 388-391 (1989) (presenting the municipal liability that would flow from the hypothetical scenario of arming police with no training in the constitutional use of deadly force; the "highly predictable" consequence of a constitutional violation in this context could result in municipal liability without a pattern of prior constitutional violations); *Robles v. City of Fort Wayne*, 113 F.3d 732, 735 (7th Cir. 1997).

b. Deliberate indifference: *See Board of Cnty. Comm'rs of Bryan Cnty.*, 520 U.S. 397, 407-408 (1997); *City of Canton v. Harris*, 489 U.S. at 388-391; *Robles*, 113 F.3d at 735. In

Connick, the court held that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 131 S. Ct. at 1360 (quoting *Bryan Cnty. v. Brown*, 520 U.S. at 409). There may also be a "narrow range of cases" where the probability of constitutional violations is so "patently obvious" that liability may be found without a pre-existing pattern, such as providing guns to officers without training them on the limits of excessive force.

c. Whose knowledge required: Determination of whose knowledge is required in order to render a municipality liable is a question of law to be determined by the court. *See Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 675-76 (7th Cir. 2009).

d. Failure to screen or fire a particular employee. This instruction does not apply to the situation where the municipality is charged with failing to screen out an applicant, or fire an employee, who later violated the plaintiff's rights. In *Bryan Cnty. v. Brown*, 520 U.S. at 411, the Court held that "[o]nly where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'"

e. Policymaker. Determination of whether a particular official is a policymaker for purposes of *Monell* liability is an issue for the court, not the jury. *Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 675-76 (7th Cir. 2009). The trial judge will have made that determination and will incorporate it into the instruction. If there are factual questions that need to be resolved (e.g, whether policymaker delegated policymaking authority to another person), the court should craft an appropriate instruction.

f. Multiple-theory *Monell* claim. Where the plaintiff relies on multiple theories of *Monell* liability—for example, *both* failure to train *and* failure to discipline—in order to facilitate post-trial and appellate review, the court should strongly consider presenting the jury with special interrogatories regarding the bases on which it is imposing liability, or should consider giving a separate elements instruction for each theory, in essence treating each as a separate claim.

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7.26 DAMAGES: COMPENSATORY
(current Instruction 7.23)

If you find in favor of Plaintiff [on one or more of Plaintiff's claims], then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained [and is reasonably certain to sustain in the future] as a direct result of [*insert appropriate language, such as "the failure to provide plaintiff with medical care," etc.*]

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork~~ or conjecture~~.
This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

- [The physical [and mental and emotional] pain and suffering [and [disability] [or] [loss of a normal life]] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental and emotional] pain and suffering [or [disability] [or] [loss of a normal life]] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of these factors. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.] [Plaintiff's estate may seek damages for loss of life.]
- [The decedent's loss of the capacity to carry on and enjoy her life's activities in a way she would have done had she lived.]
- [The reasonable value of property damaged or destroyed.]
- [The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]]
- [The [wages, salary, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability/diminished ability] to work.]]

[When I say "present value," I mean the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those monetary losses at the times in the future when they will be sustained.]

[If you return a verdict for Plaintiff, but Plaintiff has failed to prove compensatory damages, then you must award nominal damages of $1.00.]

Committee Comment

a. Types of damages available: Damages that may be recovered under 42 U.S.C. § 1983 are: actual or compensatory, nominal and punitive. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986). Actual or compensatory damages are to "compensate person for injuries that are caused by the deprivation of constitutional rights." *Id.* at 307. Actual damages include compensation for out-of-pocket loss, other monetary losses and for impairment of reputation, personal humiliation, mental anguish and suffering. *Id.* This instruction lists the more common elements of damages in cases under 42 U.S.C. § 1983, but it is not intended to be exhaustive, so the court may need to supplement the instruction in particular cases. The court should include in the instruction given to the jury only those types of damages that are requested in the particular case.

b. Wrongful death actions and "loss of life" damages: In a wrongful death case, the award of damages will depend on whether the action is brought on behalf of the decedent's estate or on behalf of the decedent's survivor(s). In an action brought on behalf of the decedent's estate, the estate may recover damages for conscious pain and suffering experienced by the decedent prior to death, *see Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1187-89 (7th Cir. 1983), as well as for loss of life. *See, e.g., Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1105-06 (7th Cir. 1990). In an action brought on behalf of the decedent's survivors, the survivors may recover only for pecuniary injuries (including, but not limited to, monetary losses and loss of consortium or society) they suffered as a result of the death, not for emotional pain and suffering. *In re Air Crash Disaster,* 771 F.2d 338, 339 (7th Cir. 1985) (under Illinois wrongful death statute, plaintiff can recover damages only for pecuniary injury). "Loss of life" damages are not recoverable by the decedent's survivors. *See Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

The Seventh Circuit has not provided a standard for awarding damages for loss of life. In *Sherrod v. Berry*, 827 F.2d 195, 205-07 (7th Cir. 1987), *rev'd on other grounds on reh'g en banc*, 856 F.2d 802 (7th Cir. 1988), a case involving a fatal shooting by a police officer, the court ruled that damages for loss of decedent's life could include the hedonic or pleasurable value of his life and found that economist's expert testimony on this issue, although somewhat uncertain, was not speculative. However, post-*Daubert* decisions have often excluded expert testimony on the value of life. *See Richman v. Burgeson*, No. 98 C 7350, 2008 WL 2567132, at *3-4 (N.D. Ill. June 24, 2008) (collecting cases). The measure of loss of life damages is difficult to define. Some state courts use an approach similar to personal injury cases where damages are sought for loss of enjoyment of life's activities as a result of a permanent disability. These jurisdictions compensate the decedent for her lost "capacity to carry on and enjoy life's activities in a way she would have done had she lived." *Katsetos v. Nolan*, 368 A.2d 172, 183 (Conn. 1976). Thus, New Hampshire defines "loss of life" as "the inability to carry on and enjoy life over the probable life expectancy." *See Marcotte v. Timberlane/Hampstead Sch. Dist.*, 143 N.H. 331, 733 A.2d 394 (1999); *see also*, N.H. Civil Jury

Instructions §§ 16.1-16.6. *But see, Durham v. Marberry*, 356 Ark. 481, 492-93, 156 S.W. 242, 248-49 (2004) (using a subjective approach and ruling that loss of life damages should "compensate a decedent for the loss of the value that the decedent would have placed on his or her own life.").

c. Speculation is not permissible basis to award damages: *See Henderson v. Sheahan*, 196 F.3d 839, 849 (7th Cir. 1999) ("Damages may not be awarded on the basis of mere conjecture or speculation; a plaintiff must prove that there is a reasonable certainty that the anticipated harm or condition will actually result in order to recover monetary compensation.").

d. Difficulty in arriving at amount does not preclude damage award. *See Horina v. City of Granite City*, 538 F.3d 624, 638 (7th Cir. 2008).

e. Present value. Regarding the definition and determination of "present value," *see In re: Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 644 F.2d 633, 642 (7th Cir. 1981), relying on Illinois law. *Americontainer Ltd. P'ship v. Rankin*, Nos. 95-2269 & 95-2375, 1996 WL 164291, at *2 (7th Cir. 1996). *Cf. Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537 (1983) ("The discount rate [in determining the net present value of damages consisting of a lost future stream of income] should be based on the rate of interest that would be earned on the best and safest investments.").

f. Nominal damages. In *Carey v. Piphus*, 435 U.S. 247, 266 (1978), the Court held that nominal damages are available for the denial of a constitutional right even absent actual injury. But the instruction is not appropriate unless it is a "true no-injury case." *See Clarett v. Roberts*, 657 F.3d 664, 673 (7th Cir. 2011) ("Everyone agreed that [plaintiff] sustained injuries during the course of her confrontation with [defendant]. In this situation, a nominal-damages instruction—perhaps appropriate in a true no-injury case—would have been inappropriate here."); *Stachniak v. Hayes*, 989 F.2d 914, 923 (7th Cir. 1993) (rejecting defendants' contention that the trial judge should have given a nominal damages instruction to the jury because such an "instruction is appropriate only when the deprivation of constitutional rights did not cause actual, provable injury, which was not so in this case.").

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7.27 COMPENSATORY DAMAGES IN PRISONER CASES
(no current instruction)

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained [and is reasonably certain to sustain in the future] as a direct result of [*insert appropriate language, such as "the failure to provide plaintiff with medical care," etc.*]

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. [This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.]

[In this case the parties dispute whether Plaintiff [suffered a physical injury] [was subjected to a sexual act]. If you find that Plaintiff has proven by a preponderance of the evidence that [he] [she] [suffered a physical injury] [was subjected to a sexual act], you may award damages for any mental or emotional injury Plaintiff suffered as well. If you find that Plaintiff [did not suffer a physical injury] (was not subjected to a sexual act], you may not award damages for mental or emotional injury, [but you may award damages for any other type of injury listed below.] [Whether or not Plaintiff proves a [physical injury] [sexual act], you may award nominal damages and punitive damages, so long as you find that Plaintiff has met the standard for obtaining those damages.]]

You should consider the following types of compensatory damages, and no others:

- [The physical [and mental and emotional] pain and suffering [and disability/loss of a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental and emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.] [Plaintiff's estate may seek damages for loss of life.]
- [The decedent's loss of the capacity to carry on and enjoy her life's activities in a way she would have done had she lived.]
- [The reasonable value of property damaged or destroyed.]

- [The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]]
- The [wages, salary, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability/diminished ability] to work.]]

[When I say "present value," I mean the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those monetary losses at the times in the future when they will be sustained.]

Committee Comment

a. Authority and scope of instruction: This instruction is based on Instruction 7.26; the only difference relates to damages for mental or emotional injury. Under 42 U.S.C. § 1997e(e), "[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 in the commission of a sexual act (as defined in section 2246 of Title 18)."

In cases in which it is undisputed that the prisoner suffered a physical injury or sexual act, the instruction should be identical to Instruction 7.22. In cases in which it is undisputed that the prisoner did not suffer a physical injury or sexual act, the court should omit all the bracketed references to mental or emotional injury, but no additional instruction is necessary. In cases in which there is a factual dispute whether the plaintiff suffered a physical injury or sexual act, the court should include the bracketed third paragraph above.

b. Definition of prisoner: Section 1997e(e) defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." The limitation applies only to plaintiffs who were prisoners at the time they filed the lawsuit, even if the lawsuit relates to prison conditions. *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998).

c. What qualifies as a "physical injury": The Seventh Circuit has not addressed in depth the question of what qualifies as a "physical injury" under the statute. In *Pearson v. Welborn*, 471 F.3d 732, 744 (7th Cir. 2006), the court stated that the plaintiff failed to show that lost weight and depression could qualify, at least under the facts of the case. In *Robinson v. Page*, 170 F.3d 747. 749 (7th Cir. 1999), the court left open whether the injury must "be a palpable, current injury (such as lead poisoning) or a present condition not

injurious in itself but likely to ripen eventually into a palpable physical injury." If there is a legal dispute whether an injury is "physical" within the meaning of § 1997e(e), the court should resolve that dispute before trial.

d. What qualifies as a "sexual act": Section 1997e(e) uses the definition from 18 U.S.C. § 2246(2), which lists four acts that qualify:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

If there is factual dispute between the parties regarding whether the defendant committed a sexual act, the court may wish to include the definition from § 2246(2) in the instruction.

e. Loss of life: See comment b to Instruction 7.26.

f. Other damages still available: Even if the plaintiff does not prove a physical injury, he may still recover nominal damages, punitive damages or any kind of compensatory damages other than those for mental or emotional injury. *Calhoun v. DeTella*, 319 F.3d 936, 940-41 (7th Cir. 2003). *See also Smith v. Peters*, 631 F.3d 418, 421 (7th Cir. 2011).

g. Limitation applies to all federal claims: The limitation applies not only to § 1983 cases, but to any case brought by a prisoner under a federal statute. *Koger v. Bryan*, 523 F.3d 789, 804 (7th Cir. 2008) (Religious Land Use and Institutionalized Persons Act); *Cassidy v. IndianaDep't of Corr.*, 199 F.3d 374, 376-77 (7th Cir. 2000) (Americans with Disabilities Act).

7.28 DAMAGES: PUNITIVE
(current Instruction 7.24)

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his or her conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that his conduct was malicious or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, Defendant simply did not care about Plaintiff's [safety] [or] [rights].

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendant's conduct;
- the impact of Defendant's conduct on Plaintiff;
- the relationship between Plaintiff and Defendant;
- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;
- [Defendant's financial condition;]
- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

Committee Comment

a. Authority: Punitive damages are recoverable under § 1983 if Plaintiff makes a showing of "evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 35, 56 (1983). *See also Woodward v. Corr. Med. Servs. of Illinois, Inc.,* 368 F.3d 917, 930 (7th Cir. 2004)("Punitive damages are recoverable in § 1983 actions where the defendant had a reckless or callous disregard to the federally protected rights of others."). *Calhoun v. DeTella,* 319 F.3d 936, 942 (7th Cir. 2003) (same); *Kemezy v. Peters,* 79 F.3d 33, 34 (7th Cir.1996)(punitive damages are "to punish the defendant for reprehensible conduct and to deter him and others from engaging in similar conduct.").

b. Burden of proof: The Seventh Circuit has not yet articulated the required burden of proof for punitive damages in § 1983 cases. *See Coulter v. Vitale,* 882 F.2d 1286, 1289 (7th Cir.1989) (declining to decide the issue because the objection had not been properly preserved). Furthermore, § 1983 does not prescribe a particular burden of proof for punitive damages. However, in two cases the appellate court has affirmed without comment a district court's decision to apply a preponderance of the evidence standard. *See Spanish Action Comm. of Chicago v. City of Chicago,* 766 F.2d 315, 318 n.2 (7th Cir. 1985), the court noted without deciding the propriety of the instruction that read: "The jury instruction on punitive [damages] read: To recover punitive damages against an individual defendant, plaintiff must prove by a preponderance of the evidence ... that the actions of that defendant were done knowingly and maliciously to deprive plaintiff of its constitutional rights."); *McKinley v. Trattles,*732 F.2d 1320, 1326 (7th Cir.1984)(without analysis finding jury instruction on punitive damages in a § 1983 case that included a "preponderance of the evidence" standard was "accurate and complete."). Other circuits have applied the preponderance standard to awarding punitive damages in Title VII actions. *See White v. Burlington Northern & Santa Fe R. Co.,* 364 F.3d 789, 805–808 (6th Cir.2004); *Karnes v. SCI Colorado Funeral Servs., Inc.,* 162 F.3d 1077, 1080–82 (10th Cir. 1998); *Notter v. N. Hand Prot.,* 89 F.3d 829, 1996 WL 342008, at *10-11 (4th Cir. 1996) (unpublished). In light of the unsettled state of the law, the district court in *Fogarty v. Greenwood,* 724 F. Supp. 545, 546 (N.D. Ill. 1989), set forth a procedure requiring the jury to indicate on a special verdict form whether punitive damages were proven by a preponderance or by clear and convincing evidence.

c. Defendant's financial condition: The language should only be given if evidence was admitted on that topic.

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