**ANNOTATIONS AND COMMENTS**

1. **Eighth and Fourteenth Amendment**

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

1. **Elements of Claim**

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

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

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

1. **Causation**

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

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

1. **Damages**

For the damages instruction, see Pattern Instruction 5.13.