# 9.33A Particular Rights—Fourteenth Amendment—Due Process—Deliberate or Reckless Suppression of Evidence

 As previously explained, the plaintiff has the burden of proving that the [act[s]] [failure to act] of the defendant deprived the plaintiff of particular rights under the United States Constitution. The Fourteenth Amendment protects against a person being subjected to a criminal trial when favorable evidence has been deliberately or recklessly withheld from the prosecutor. In this case, the plaintiff alleges the defendant deprived [him] [her] [other pronoun] of [his] [her] [other pronoun] rights under the Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff’s claim*].

 For the plaintiff to prevail on [his][her] [other pronoun] claim of deliberate or reckless suppression of evidence, the plaintiff must prove the following elements by a preponderance of the evidence:

First, the defendant suppressed evidence that was favorable to the accused from the prosecutor and the defense;

Second, the suppression harmed the accused; and

Third, the defendant acted with deliberate indifference to an accused’s rights or for the truth in suppressing the evidence.

 “Deliberate indifference” is the conscious or reckless disregard of the consequences of one’s acts or omissions.

**Comment**

 Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8.

In *Tatum*, the Ninth Circuit permitted a criminal defendant to pursue a due process claim for 27 months of pretrial detention that would not have occurred if “significant exculpatory evidence” had been disclosed by law enforcement to prosecutors. *Tatum v. Moody*, 768 F.3d 806, 819-820 (9th Cir. 2014). The Ninth Circuit resolved the appeal without deciding “the scope and protections established by *Brady* and its progeny,” (*id.*) instead, the court “emphasize[d] the narrowness of the constitutional rule we enforce today,” which it restricted to: “detentions of (1) unusual length, (2) caused by the investigating officers' failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that the officers understood the risks to the plaintiff’s rights from withholding the information or were completely indifferent to those risks.” *Id*. (“If police officers have been instrumental in the plaintiff’s continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded.”).

*See also Mellen v. Winn*, 900 F.3d 1085, 1096 (9th Cir. 2018) (stating elements); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1087, 1089 (9th Cir. 2009) (“We therefore hold that a § 1983 plaintiff must show that police officers acted with deliberate indifference to or reckless disregard for an accused’s rights or for the truth in withholding evidence from prosecutors. This standard is consistent with the standard imposed in the substantive due process context, in which government action may violate due process if it ‘shocks the conscience.’”); *see also Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1219 (9th Cir. 2015) (“The law in 1984 clearly established that police officers were bound to disclose material, exculpatory evidence.”).

*Revised November 2024*