# 9.33 Particular Rights—Fourteenth Amendment—Due Process—Deliberate Fabrication 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 being subjected to criminal charges on the basis of false evidence that was deliberately fabricated. 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 fabrication of evidence, the plaintiff must prove [at least one of] the following element[s] by a preponderance of the evidence:

[The defendant deliberately fabricated evidence that was used to [[criminally charge][prosecute][convict][*other deprivation of liberty*]] the plaintiff.]

*or*

[The defendant continued [his] [her] [other pronoun] investigation of the plaintiff despite the fact that [he] [she] [other pronoun] knew that the plaintiff was innocent, or was deliberately indifferent to the plaintiff’s innocence, and the results of the investigation were used to [[criminally charge][prosecute][convict] [*other deprivation of liberty*]] the plaintiff.]

*or*

[The defendant used techniques that were so coercive and abusive that [he][she] [other pronoun] knew, or was deliberately indifferent, that those techniques would yield false information that was used to [[criminally charge][prosecute][convict] [*other deprivation of liberty*]] the plaintiff.

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

 [If the plaintiff proves that the defendant deliberately fabricated evidence that was used to [criminally charge][prosecute][convict] [*other deprivation of liberty*] the plaintiff, then the plaintiff is not required to prove that the defendant knew the plaintiff was innocent or was deliberately indifferent to the plaintiff’s innocence.]

**Comment**

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

 “[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). The deliberate fabrication of evidence implicates “the fundamental due process right to a fair trial.” *Richards v. County of San Bernadino*, 39 F.4th 562, 572 (9th Cir. 2022). This is true “regardless of the plaintiff’s innocence or guilt . . . the right to a fair trial is impinged either way.” *Id.* In *Devereaux*, the Ninth Circuit stated that to establish deliberate fabrication of evidence, a plaintiff:

must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [the plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information.

263 F.3d at 1076. Stated another way, “[t]o prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty.” *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017) (citations omitted). To establish the second element of causation, the plaintiff must show “that (a) the act was the cause in fact of the deprivation of liberty, meaning that the injury would not have occurred in the absence of the conduct; and (b) the act was the ‘proximate cause’ or ‘legal cause’ of the injury, meaning that the injury is of a type that a reasonable person would see as a likely result of the conduct in question.” *Spencer*, 857 F.3d at 798 (citations omitted). In *Richards*, the court said that rather than a but-for causation standard, the appropriate standard of causation is the “materiality causation standard,” under which causation is established if the plaintiff “can show a reasonable likelihood that the allegedly fabricated [] evidence could have affected the judgment of the jury.” *Richards*, 39 F.4that 573-74; s*ee Caldwell v. City & Cnty. of San Francisco,* 889 F.3d 1105, 1115 (9th Cir. 2018) (“[P]laintiff need not be convicted on the basis of the fabricated evidence to have suffered a deprivation of liberty—being criminally charged is enough.”).

 Inaccuracies in an investigative report do not all give rise to a constitutional claim. “Mere carelessness is insufficient, as are mistakes of tone. Errors concerning trivial matters cannot establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot show the fabrication actually injured her in some way.” *Spencer*,857 F.3d at 798 (citations and internal quotations omitted); *see also O’Doan v. Sanford*, 991 F.3d 1027, 1046 (9th Cir. 2021) (following *Devereaux v. Abbey*,but noting that “a minor discrepancy” is not fabrication).

 The language in a Ninth Circuit case suggests that the mere use of fabricated evidence is violative of due process regardless of whether the person was convicted. In *Richards*, the plaintiff had been convicted of first-degree murder, but that conviction was later vacated based on false evidence. *Richards*, 39 F.4that 566. The plaintiff then filed a § 1983 action against the County and various law enforcement officers. The court said “regardless of the plaintiff’s innocence or guilt, that “[i]t would be anomalous to turn away a plaintiff who has been injured by deliberately fabricated evidence simply because that evidence alone was not sufficient to cause the conviction - the right to a fair trial is impinged either way.” *Id.* at 573. Other courts have held that such evidence may not be used to prosecute or convict an individual. *Devereaux*, 263 F.3d. at 1075 (“the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution”); *Cole v. Carson*, 802 F.3d 752, 768 (5th Cir.2015) (“a victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted”). Thus, the instruction should be modified depending on whether the plaintiff was criminally charged, prosecuted, or convicted based on fabricated evidence. This instruction includes prosecution as a means to satisfy the three elements for a trial court to consider.

 “Typically, in constitutional tort cases the ‘[f]iling of a criminal complaint immunizes

investigating officers . . . because it is presumed that the prosecutor filing the complaint

exercised independent judgment in determining that probable cause for an accused’s arrest

exists at that time.’” *Caldwell*, 889 F.3d at 1115 (quoting *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008)). However, the presumption can be overcome if a plaintiff establishes that officers “either presented false evidence to or withheld crucial information from the prosecutor.” *Caldwell*, 889 F.3d at 1116. At that point, “the analysis reverts back to a normal causation question” and the issue again becomes whether the constitutional violation caused the plaintiff’s harm. *Id*.

 An official’s deliberate fabrication of evidence or use of perjury also violates the rights

of a parent or child when introduced in a civil dependency proceeding. “[G]overnment perjury

and knowing use of false evidence are absolutely and obviously irreconcilable with the

Fourteenth Amendment’s guarantee of Due Process in our courts . . .There are no

circumstances in a dependency proceeding that would permit government officials to bear false

witness against a parent.” *Hardwick v. Vreeken*, 844 F.3d 1112, 1120 (9th Cir. 2017). For claims against social workers involving fabrication of evidence in child dependency proceedings, *see* 9.32 (Particular Rights—Fourteenth Amendment—Due Process—Interference with Parent/Child Relationship).

 Imposing a deliberate indifference or reckless disregard for an accused’s rights or for the truth standard is appropriate in the substantive due process context. *See Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013) (approving a deliberate indifference instruction, stating that “[d]eliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result”); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1089 (9th Cir. 2009). Deliberate indifference encompasses recklessness. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), noted that the “deliberate indifference” standard, at least in the context of a Fourteenth Amendment failure to protect claim, requires the plaintiff “to prove more than negligence but less than subjective intent—something akin to reckless disregard.” *See Gantt*, 717 F.3d at 708 (concluding no error in the portion of instruction stating “deliberate indifference is the conscious or reckless disregard of the consequences of one’s acts or omissions”); *see also Tatum v. Moody*, 768 F.3d 806, 821 (9th Cir. 2014) (approving alternative instruction that also encompassed recklessness).

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