**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 [*name*] 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 by the defendant. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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] 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 [*name*] deliberately fabricated evidence that was used to [[criminally charge][prosecute][convict]] the plaintiff.]

*or*

[The defendant [*name*] continued [his] [her] investigation of the plaintiff despite the fact that [he] [she] 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]] the plaintiff.]

*or*

[The defendant [*name*] used techniques that were so coercive and abusive that [he][she] knew, or was deliberately indifferent, that those techniques would yield false information that was used to [[criminally charge][prosecute][convict]] 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] 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 9.3–9.9.

 In *Devereaux v. Abbey*, the Ninth Circuit stated that in order 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 1070, 1076 (9th Cir. 2001) (en banc). The court held that “there 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.” *Id*. at 1074-75 (emphasis added).

 Not all inaccuracies in an investigative report 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 v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017) (citations and internal quotations omitted); *see also O’Doan v. Sanford*, 991 F.3d 1027, 1046 (9th Cir. 2021) (confirming *Devereau v. Abbey* but noting technical inaccuracy is not fabrication).

 The Ninth Circuit has not specifically considered a case involving the use of fabricated evidence to prosecute when a criminal defendant was acquitted or the charges dismissed. However, other courts have held that such evidence may not be used to prosecute or convict an individual. *See*, *e.g*., *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 v. City & Cnty. of San Francisco*, 889 F.3d 1105, 1115 (9th Cir.

2018) (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.” *Id*. 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).

 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); *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 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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