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An Overview of Police Liability Pursuant to 42 U.S.C. § 1983 for Claims of Wrongful Conviction

Lisa Skehill Maki
Town Solicitor
Braintree, MA

Susan M. Weise
First Assistant Corporation Counsel
Boston, MA

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An Overview of Police Liability Pursuant to 42 U.S.C. § 1983 for Claims of Wrongful Conviction

According to the National Registry of Exonerations, 2,009 people have been exonerated since 1989.[1] Wrongful convictions occur for a myriad of reasons, mistaken witness identification, perjured testimony, inaccurate forensic science, and prosecutorial and/or police misconduct, and ineffective assistance of counsel. This paper will provide an overview of police liability pursuant to 42 U.S.C. § 1983 stemming from wrongful convictions based on official misconduct.

I. The Favorable Termination Requirement

To bring a 42 U.S.C. § 1983 claim against a police officer for damages associated with a wrongful conviction, a plaintiff must first have the conviction at issue terminated in his favor.[2] In *Heck v. Humphrey*, the Supreme Court announced that a prisoner cannot pursue monetary damages for a wrongful conviction through a Section 1983 claim without first demonstrating that his conviction was terminated in his favor.[3] Therefore, in order for a criminal defendant to bring a Section 1983 claim for damages against a police officer for a wrongful conviction, he must first overturn or vacate the conviction through appeal, executive order expungement, writ of habeas corpus, or declared invalid by an authorized state tribunal.[4] The *Heck* requirement is often referred to as the "favorable termination" rule.

Furthermore, a conviction cannot be overturned or vacated through a 42 U.S.C. § 1983 claim.[5] In *Preiser v. Rodriguez,*[6] the Supreme Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release from that imprisonment, his sole federal remedy is a writ of habeas corpus."[7] Thus, a prisoner cannot overturn his conviction through a Section 1983 claim.

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1 The National Registry of Exonerations, www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited April 7, 2017).

2 *Heck v. Humphrey*, 512 U.S. 477 (1994).

3 *Id*.

4 "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Heck*, 512 U.S. at 486.

5 *Preiser v. Rodriguez,* 411 U.S. 475 (1973).

6 411 U.S. 475 (1973).

7 *Id. at* 500. Federal habeas relief may be sought by a state prisoner through 28 U.S.C. § 2254, where the petitioner claims that his or her imprisonment violates the Constitution or federal law. 28 U.S.C. § 2254(a) (2012).

a. Statute of Limitations for Wrongful Convictions

Section 1983 claims are governed by the state law statute of limitations for personal injury torts while federal law governs the time that a claim accrues.[8] If the state where the civil rights violation took place has a three-year statute of limitations for personal injury, then there is a three-year statute of limitations for Section 1983 claims. For wrongful conviction claims, the accrual date is governed by *Heck v. Humphrey*.[9] Thus, the date a wrongful conviction begins to accrue, is the date the defendant's conviction was favorably terminated.

II. Prosecutorial Immunity

It is important to note at the outset that prosecutors are protected by absolute immunity from 42 U.S.C. § 1983 liability based on wrongful convictions.[10] In the seminal case of *Imbler v. Pachtman*, the Supreme Court held that prosecutors are immune from civil liability for acting within the scope of their duties.[11] In its reasoning, the Court held that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[12] However, absolute immunity may not apply when a prosecutor is not acting as "an officer of the court," but is instead engaged in investigative or administrative tasks.[13] Further, the prosecutor's office is not entitled to absolute immunity under a *Monell* claim.[14]

Because absolute immunity generally shields prosecutors from Section 1983 liability for wrongful convictions, a plaintiff seeking to obtain damages through a Section 1983 claim must generally bring such claims against the law enforcement investigators involved in the case.

III. Wrongful Conviction Claims—Police Liability

Once a criminal defendant overturns or invalidates his conviction in accordance with the procedures set forth in *Heck v. Humphrey*, he may then pursue a claim 42 U.S.C. §1983 claim for damages for a violation of his constitutional rights. In order to prove a 42 U.S.C. § 1983 claim, the Plaintiff is required to show that (1) he was deprived of a federal right; and (2) the deprivation was imposed upon him by one or more persons acting under color of state law.

The first step in assessing any wrongful conviction claim is to determine the constitutional right that is alleged to have been violated. Many Section 1983 wrongful conviction claims brought against police officers stem from the plaintiff's Fourteenth Amendment right to procedural due process. An individual's right to due process is violated

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8 *Wilson v. Garcia*, 471 U.S. 261, 2380 (1985).

9 512 U.S. 477 (1994).

10 *Imbler v. Pachtman*, 424 U.S. 409, 427-430 (1976).

11 *Id.* at 422–23, n.20

12 *Id.* at 423.

13 *Id.*, at 431, n. 33. *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74 (1993).

14 *Connick v. Thompson*, 563 U.S. 51, 61-63 (2011).

when the state fabricates evidence to obtain a conviction or fails to disclose exculpatory evidence that is material. The Fifth Amendment may be implicated where police obtain a coerced confession that was introduced at trial. The Sixth Amendment right to counsel may also serve as the basis of a wrongful conviction claim where, for example, police use a jailhouse informant to interrogate an individual after his Sixth Amendment rights have attached,[15] or conduct a post-arraignment line-up without the defendant's counsel.[16]

a. Fabrication of Evidence

Since at least 1935, it has been well-established that a government official who uses "deliberate deception" to secure a conviction violates that individual's due process rights under the United States Constitution.[17] In *Mooney v. Holohan*, Thomas Mooney filed a federal writ of habeas corpus alleging that his due process rights had been violated by the prosecution's introduction of perjured testimony at his trial and the deliberate suppression of exculpatory evidence.[18] There, the Supreme Court held that a criminal defendant is denied due process when a conviction is obtained through the use of perjured testimony and the suppression of favorable evidence.[19]

Mooney and its progeny clearly establish that a police officer violates a criminal defendant's constitutional right to due process if he deliberately suppresses exculpatory evidence or fabricates evidence for the purpose of securing a conviction. Thus, any post-*Mooney* claim that an officer fabricated evidence or deliberately concealed evidence for the purpose of securing a conviction will not be defeated by qualified immunity.

b. *Brady* Violations/Failure to Disclose

The more frequently litigated Section 1983 claims arise out of allegations that a police officer failed to disclose exculpatory evidence to the prosecution. Unlike a claim under *Mooney*, *Brady* claims do not require a showing of fabrication and/or a showing that the officer suppressed the evidence with the intent to deceive the court.

In the seminal case of *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[20] *Brady* was expanded to include evidence even when the defense has not made a request.[21] Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

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15 *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010).

16 *United States v. Wade*, 388 U.S. 218 (1967) (holding that Sixth Amendment provides right to counsel at post-indictment lineup).

17 *Mooney v. Holohan*, 294 U.S. 103 (1935).

18 *Id.*

19 *See also Pyle v. State of Kansas*, 317 U.S. 213 (1942).

20 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

21 *United States v. Agurs*, 427 U.S. 97, 107 (1976).

different."[22] "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[23]

Brady imposes an affirmative obligation on prosecutors to turn over exculpatory evidence to the defense.[24] The Supreme Court expanded the *Brady* obligation to include impeachment evidence as well as exculpatory evidence in *United States v. Bagley*.[25] The Supreme Court further expanded the *Brady* obligation in *Kyles v. Whitley*,[26] to encompass evidence "known only to police investigators and not to the prosecutor.[27] Thus, in order to satisfy *Brady* a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including police."[28] *Kyles* has been interpreted by courts to extend the *Brady* obligation to create an affirmative obligation on police officers to turn over exculpatory information to the prosecutor.[29]

Thus, in order to establish a *Brady* violation, a defendant must show that "the evidence at issue must be material to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[30] A *Brady* violation also requires that the evidence withheld is material, which "in the *Brady* context is the same thing as prejudice."[31] Further, a *Brady* violation does not occur if the material exculpatory evidence is known to the defendant.[32] The *Brady* obligation also extends throughout the trial, including appeals and post-conviction proceedings if the exculpatory evidence was known at the time of the original trial.[33]

i. Qualified Immunity: Application to Police of Brady's "No Fault" Disclosure Obligation

In reviewing a claim for wrongful conviction, one must first conduct a qualified immunity analysis of the facts alleged in the complaint and the clearly established law at the time of the alleged violation. That is because the defense of qualified immunity must be asserted at the earliest stage of the litigation as possible. Given that constitutional law is always evolving and many wrongful conviction claims arise out of convictions that occurred many years earlier, it is imperative to define the conduct and the contours of the clearly established law surrounding that conduct at the time of the conviction.

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22 *United States v. Bagley*, 473 U.S. 667, 682 (1985).
23 *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).
24 *See, e.g., Porter v. White*, 483 F.3d 1294, 1305 (11th Cir. 2007).
25 473 U.S. 667, 676 (1985).
26 514 U.S. 419 (1995).
27 *Id*. at 438.
28 *Id.* at 437.
29 *Haley v. City of Boston*, 657 F.3d 39, 51 (1st Cir. 2011).
30 *Stickler v. Greene*, 527 U.S. 263, 281-82 (1999).
31 *United States v. Wilson*, 481 F.3d 475, 480 (7th Cir. 2007).
32 *United States v. Lee*, 399 F.3d 864 (7th Cir. 2005).
33 *Steidl v. Fermon*, 494 F.ed 623, 25 (7th Cir. 2007).

According to *Brady* and its progeny, a criminal defendant suffers a due process deprivation if evidence that is exculpatory or could be used for impeachment purposes is suppressed either willfully or inadvertently and he is prejudiced as a result. Presently, the courts are in disagreement as to when the "no-fault" or "affirmative duty" disclosure standard of *Brady* was clearly established so as to impose 42 U.S.C. § 1983 liability against a police officer for failure to disclose exculpatory evidence.[34] Some circuit courts have held that the law was clearly established as far back as 1964.[35] Others have held that *Brady* obligations did not extend to police officers until the Supreme Court's decision in *Kyles.*[36]

Further, the courts are in disagreement as to what level of culpability a plaintiff must demonstrate in a Section 1983 claim to hold a police officer liable for failing to turn over exculpatory evidence. Thus, as a practitioner, it is crucial to determine at the outset when your jurisdiction's authoritative circuit court has held that an officer's affirmative obligation to turn exculpatory evidence over to the prosecutor was clearly established and if your jurisdiction allows for a "negligent" *Brady* violation or requires a showing of "bad faith" for a *Brady* claim. This determination will not only shape the qualified immunity argument but will also shape discovery.

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[34] *See Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) ("to speak of the duty binding police officers as a *Brady* duty is simply incorrect. The Supreme Court has always defined the *Brady* duty as one that rests with the prosecution); *See also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("[Whether the non-disclosure was a result of negligence or design, it is the responsibility of the prosecutor."). *But see Moldowan v. City of Warren*, 578 F.3d 351, (6th Cir. 2009) ("[a]s far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same.") *Compare Gibson v. Super., N.J. Dept. of Law & Pub. Safety*, 411 F.3d 427, 443-44 (3d Cir. 2005) (holding that *Brady* did not extend to police officers until the Supreme Court's decision in *Kyles*) *and Drumgold v. Callahan*, 707 F.3d 28, 43 (1st Cir. 2013) (holding that affirmative *Brady* obligation did not apply to police officers until Supreme Court's decision in *Kyles* but that it was clearly established that deliberate suppression violated the Constitution in 1989) *with Carillo v. County of Los Angeles*, 798 F.3d 1210, 1222 (9th Cir. 2015) (recognizing circuit split and holding that *Brady* extended to police officers as early as 1964 in *Barbee v. Warden of Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964).

[35] *See Carillo v. County of Los Angeles*, 798 F.3d 1210, 1222 (9th Cir. 2015) (recognizing circuit split and holding that *Brady* extended to police officers as early as 1964 in *Barbee v. Warden of Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir. 1964); *see also Moldowan v. City of Warren*, 578 F.3d 351, 382 (6th Cir. 2009); *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992) ("The constitutional duty to disclose exculpatory evidence has its roots in *Brady*. . .. [T]he police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors.").

[36] *See Gibson v. Super., N.J. Dept. of Law & Pub. Safety*, 411 F.3d 427, 443-44 (3d Cir. 2005) (holding that *Brady* did not extend to police officers until the Supreme Court's decision in *Kyles*); *see also Drumgold v. Callahan*, 707 F.3d 28, 43 (1st Cir. 2013) (holding that affirmative *Brady* obligation did not apply to police officers until Supreme Court's decision in *Kyles* but that it was clearly established that deliberate suppression violated the Constitution in 1989).

ii. *Proof of State of Mind?*

In order to prove a *Brady* claim against a police officer, a plaintiff must show that (1) "the evidence at issue was favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) the evidence must have been material, meaning there is a reasonable probability that the result of the proceeding would have been different."[37] Under the third element, a plaintiff "need only show that the new evidence undermines the confidence of the verdict."[38]

In the context of a Section 1983 claim against a police officer for a *Brady* violation, the Supreme Court has not squarely addressed the issue of the requisite state of mind that the police officer must have acted with to establish liability.[39] In *Daniels v. Williams*, the Supreme Court held that a police officer cannot inadvertently violate an individual's Fourteenth Amendment rights to due process.[40] According to *Daniels*, a police officer cannot be held liable pursuant to Section 1983 for inadvertently or negligently failing to turn over exculpatory evidence, conduct that in the criminal context results in a *Brady* violation, i.e. a deprivation of due process.[41]

The circuit courts are in disagreement as to what a plaintiff must show in order to support a *Brady* claim against a police officer to establish liability under Section 1983.[42] Some courts require a plaintiff to show that the defendant acted in bad faith in order to prove a violation of that plaintiff's constitutional rights based on *Brady*.[43] "The rationale for this view is that the police officer's *Brady* obligation to the prosecutor is not identical, and should not be analyzed in the same manner, as the prosecutor's *Brady* obligation to the defense."[44] Other Courts have held that deliberate or reckless conduct suffices to support a *Brady* claim but do not require a showing

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37 *Beaman v. Freesmeyer*, 776 F.3d 500, 506 (7th Cir. 2015).

38 *Id. See also Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016 (per curiam) (petitioner "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict.").

39 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Jury Instructions § 9.01[A] Brady v. Maryland Violations* (2016 Supplement).

40 *Daniels v. Williams,* 474 U.S. 327, 328 (1986) ("the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.").

41 *Jean v. Collins*, 221 F.3d 656, 660 (4th Cir. 2000).

42 *Id.*

43 *Id.*; *See, e.g., Helmig v. Fowler*, 828 F.3d 755, 762 (8th Cir. 2016) (holding "recovery of Section 1983 damages from a law enforcement officer for a *Brady* violation requires the intentional or bad faith failure to disclose *Brady* evidence to the prosecutor or the defense."); *Briscoe v. County of St. Louis*, 690 F.3d 1004, 1113 (8th Cir. 2012); *Porter v. White*, 483 F.3d 1294 (11th Cir. 2006); *Villasana v. Wilhoit*, 368 F.3d 976 (8th Cir. 2004); *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001); *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc).

44 *Id.*

of bad faith on the part of the officer.[45] Others have suggested that mere negligence could be sufficient to establish Section 1983 liability for failure to disclose. [46]

Thus, it is clear that a police officer who intentionally or recklessly withholds exculpatory material evidence may be held liable for a violation of that individual's Fourteenth Amendment rights pursuant to Section 1983. What still remains unclear is whether a police officer may be held liable pursuant to Section 1983 for strictly an inadvertent failure to disclose exculpatory evidence.

iii. *Brady Claim Without A Conviction?*

Although this article provides an overview for wrongful convictions, it is worth pointing out that courts are in disagreement as to whether an individual can recover pursuant to Section 1983 for a Fourteenth Amendment *Brady* violation if he is acquitted at trial or the charges are dismissed prior to trial. Some courts have held that where the plaintiff was acquitted, he has not suffered a due process violation because it cannot be said that he did not receive a fair trial, or that the withheld evidence was "material."[47] Others have held that a plaintiff can bring a Section 1983 claim for a *Brady* violation even if they were ultimately acquitted if they were held as a pretrial detainee prior to trial.[48] The Plaintiff, does however, have a remedy under Section 1983 for a Fourth Amendment violation if he was arrested and held in pretrial detention without probable cause.[49] The Defendant may also have a state law claim for malicious prosecution.

c. Lost or Destroyed Evidence

In addition to the due process obligation to disclose exculpatory evidence, due process also imposes a limited requirement that police officers preserve certain evidence. This duty was first addressed by the Supreme Court in *California v. Trombetta*, where it held that due process requires that evidence be preserved if it "might be expected to play a significant role in the

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45 *Tennison v. City and Cty of San Francisco*, 570 F.3d 1078 (9th Cir. 2009); *Steidl v. Fermon*, 494 F.3d 623 (7th Cir. 2007).

46 *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009) (suggesting without holding that a Section 1983 claim could be established without proof of intent or "bad faith").

47 *Mogan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999) ("[T]he withholding or destruction of evidence violates a criminal defendant's constitutional rights only if, as a result of the withholding or destruction of evidence, the criminal defendant is denied a fair trial.... Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial."); *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998) ("Plaintiff ... was never convicted and, therefore, did not suffer the effects of an unfair trial. As such, the facts of this case do not implicate the protections of *Brady*.")

48 *Cf. Cairel v. Alderden*, 2016 WL 2641836, at * 5 (7th Cir. May 5, 2016) (plaintiffs' evidence-fabrication due process claims foreclosed by the fact that plaintiffs "were quickly released on bond following their arrests"). *See Zahrey v. Coffey*, 221 F.d 342 (2d Cir. 2000) (holding due process claim where fabrication of evidence caused plaintiff to be held pretrial). *But see Ambrose v. City of New York*, 623 F.Supp.2d 454, 471-72 (S.D.N.Y. 2009) (and cases cited).

49 *Manuel v. Joliet*, -- U.S. – 2017 WL 1050976 * 5-7 (2017).

suspect's defense."[50] The Court stated that the evidence had to be material and must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[51] In *Trombetta*, the defendant argued that his due process rights were violated when the police failed to preserve an ampoule of his breath for independent analysis for blood-alcohol content.[52] The Court held that because it was highly unlikely a separate breath sample would have yielded a different result, there was no apparent exculpatory value in preserving a breath sample.[53] On the other hand, deliberate destruction of exculpatory evidence would be a violation of the *Brady* obligation to disclose exculpatory evidence.[54]

In *Arizona v. Youngblood*, the Supreme Court held that if the police destroyed or lost evidence that was only "potentially useful" but did not meet the *Trombetta* "materiality" standard, then the criminal defendant must show that the police officers acted in bad faith when they failed to preserve potentially useful evidence in order to demonstrate a denial of due process of law.[55] The *Youngblood* bad faith requirement differs significantly from the *Brady* analysis for suppression of evidence, which applies "irrespective of the good faith or bad faith of the prosecution."[56] Thus, if the destroyed or lost evidence is "potentially useful" but not did not rise to the "materiality" standard set forth in *Trombetta*, then the defendant must demonstrate bad faith to establish a due process violation.[57]

d. Coerced Confessions

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment[58] requires that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. A violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.[59] Thus, a coerced confession that is obtained but not used in a legal proceeding is not a constitutional violation.[60] Further, a police officer's failure to read *Miranda* warnings to a suspect does not

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50 *California v. Trombetta*, 467 U.S. 479, 488 (1984). *But see Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992); *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 2000) (holding that Section 1983 liability could be imposed for deliberate violation of *Miranda*, even if the suspect was not arrested or prosecuted and the statement was never used at trial. These cases reasoned that a Fifth Amendment violation is completed by any questioning outside *Miranda*, regardless whether or not the statement is ever used against the suspect, and therefore a violation of *Miranda* in and of itself could give rise to Section 1983 liability).

51 *Id*.

52 *Id.* at 490-91.

53 *Id.*

54 *See Armstrong v. Daily*, 786 F.3d 529, 549 (7th Cir. 2015).

55 *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

56 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

57 *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004).

58 *Malloy v. Hogan*, 378 U.S. 1, 84 (1964).

59 *Chavez v. Martinez*, 538 U.S. 760 (2003).

60 *Id*.

violate that suspect's constitutional rights and cannot be grounds for a Section 1983 action.[61] Generally, a Fifth Amendment violation stemming from the introduction of a coerced confession does not accrue until the plaintiff's conviction has been overturned pursuant to *Heck* because such a finding would undermine the validity of the conviction.

A plaintiff may also bring a Fourteenth Amendment substantive due process claim based on "police torture or other abuse that results in a confession."[62] "Convictions based on evidence obtained by methods that are so brutal and offensive to human dignity that they shock the conscience violate the Due Process Clause."[63] Further, coercive tactics may also amount to a *Brady* violation where, although the defendant is aware of the coercion that took place during the interrogation, he may not be aware of systemic torture tactics used by the police department outside the interrogation room.[64]

e. Suggestive Line-Ups/False Identification

Studies have shown that false witness identifications are responsible for nearly 75% of wrongful convictions that were overturned as a result of DNA evidence.[65] Courts have held that an officer who intentionally manipulates a line-up for the purpose of securing a false identification is a violation of the Fourteenth Amendment.[66] As a general matter, Courts have held that the right to be free from criminal charges on the basis of false evidence that is deliberately fabricated through a suggestive line-up is clearly established and thus, an officer is not entitled to qualified immunity on the basis of such. Thus, if an officer is alleged to have used "suggestive procedures with the intent of obtaining an identification of [the plaintiff], irrespective of whether he was in fact guilty," he has violated the plaintiff's Fourteenth Amendment rights.[67] Similarly, a failure by a police officer to disclose the line-up procedure utilized for identification, may give rise to a *Brady* violation.

f. Sixth Amendment Right To Counsel

Another potential Section 1983 claim based on a wrongful conviction may stem from a violation of the Sixth Amendment right to counsel.[68] Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at

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61 *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda*'s warning requirement is "not itself required by the Fifth Amendmen[t] . . . but is instead justified only by reference to its prophylactic purpose");

62 *Chavez, 538* U.S. at 773.

63 *Id.* at 774.

64 *Smith v. Burge*, -- F.Supp.2d -- , 2016 WL 6948387 (N.D. Ill November 28, 2016,)

65 Kevin Johnson, *Police Rules for Eyewitness IDs Get a Closer Look*, USA TodayJune 12, 2013 (US Ed.).

66 *Good v. Curtis*, 601 F.3d 393, 398-400 (5th Cir. 2010) (and cases cited).

67 *Brewster v. Shasta County*, 27 Fed.Appx. 908, 912-13 (9th Cir. 2001) (unpublished).

68 In *Stewart v. Wagner*, 836 F.3d 978, 986-87 (8th Cir. 2016) (granting officers qualified immunity for allegations of a Sixth Amendment violation through the use of jail house informants and noting that as of September 12, 2016, no precedent existed that clearly defined the contours of the Sixth Amendment right to counsel in the Section 1983 context).

all critical stages of the criminal proceedings, including interrogation by the State.[69] An example of a potential Sixth Amendment violation is where law enforcement conducts a post-indictment interrogation or line-up without defense counsel present. The use of jail house informants to interrogate a defendant post-indictment has been found to violate the Sixth Amendment.[70] If the Section 1983 plaintiff is able to show that his Sixth Amendment rights were violated, he still must then show that the Sixth Amendment violation *caused* injury.[71] An exonerated defendant may also allege a violation of the Sixth Amendment where law enforcement conducts a post-indictment line up without the defendant's lawyer present.[72]

g. Coercion of Witnesses

Generally, an allegation that a police officer coerced statements from a witness does not give rise to a constitutional deprivation but rather, forms the basis of a malicious prosecution claim.[73] That is because the criminal defendant's constitutional rights are not violated through a coercive interrogation of another individual. An exonerated plaintiff may, however, have a *Brady* claim against police investigators who employ coercive tactics in interrogating witnesses if the officers fail to disclose such tactics.[74] The coercive interrogation of a witness is not in and of itself a violation of the defendant's due process rights, though it may be a violation of the witness's rights,[75] because the information obtained may in fact, be truthful. Indeed, coercive interrogation tactics differ from the introduction of perjured testimony in that the coerced/paid for testimony may actually be true.[76] Because coerced testimony is not always false, "a plaintiff's due-process right to a fair trial is not implicated absent a violation of the *Brady* duty to disclose facts about the coercive tactics used to obtain it."[77] If a police officer withholds exculpatory information about the coercion or fabricated evidence through the coerced witness,

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69 *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *Massiah v. United States*, 377 U.S. 201-204-05 (1964).

70 *United States v. Henry*, 447 U.S. 264, 274 (1980) (A Sixth Amendment violation occurs whenever the state "intentionally creat[es] a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel."); *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (Sixth Amendment violation occurs when a state actor "knowing[ly] exploit[s]" a situation in order to obtain incriminating information from a defendant "without counsel being present [.]").

71 *Stewart v. Wagner*, 836 F.3d 978, 986-987 (8th Cir. 2016).

72 Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. Pub. Int. L.J. 439, 439 (2009).

73 *Petty v. City of Chicago*, 754 F.3d 416, 421-22 (7th Cir. 2014) (holding that a claim based upon allegations that police officers coerced statements from co-defendants or witnesses constitutes a malicious prosecution claim rather than a due process claim on the basis that "fabricating evidence that she knows to be false is different than getting a reluctant witness to say what may be true.") (internal quotations and citation omitted)

74 *Avery v. City of Milwuakee*, 847 F.3d 433, 439 (7th Cir. 2017).

75 *Buckley v. Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994).

76 *Fields v. Wharrie (Fields II)*, 740 F.3d 1107, 1123 (11th Cir. 2014).

77 *Avery*, 847 F.3d at 439.

the defendant will have a viable Section 1983 claim against the officers involved.[78] Further, if the coercion actually produced false testimony, the plaintiff may also have a fabrication of evidence claim.

h. "Fair" Criminal Investigation

The Eighth Circuit recognizes a due process right to a fair criminal investigation.[79] In *Wilson v. Lawrence County*, the Eighth Circuit Court of Appeals expanded due process to impose a duty upon criminal investigators to follow up with potential leads and to ensure that potentially exculpatory evidence is not overlooked.[80] In *Wilson*, investigators elicited a false murder confession from Wilson, who was mentally disabled, and then secured a guilty plea from him despite leads that indicated that a different individual had been involved in the murder.[81] After serving nine years in prison, Wilson received a pardon.[82] The Eighth Circuit recognized that Wilson's liberty interest included the right to obtain fair criminal proceedings and held that "no countervailing equally important governmental interest that would excuse the [defendants-appellants] from fulfilling their responsibility to investigate these leads when faced with an involuntary confession and no reliable corroborating evidence." [83] Currently, no other Circuit has recognized such a right to a "fair" criminal investigation.

IV. Materiality and Causation

In the *Brady* context, materiality and causation are two discrete inquiries and must be considered separately. The threshold question in a Section 1983 suit is whether there has been a violation of a federally secured right.[84] Materiality properly is a component of a *Brady* violation and therefore, must be determined as part of the question of whether a constitutional violation has occurred.[85] The causation inquiry begins only after a violation has been established.[86]

a. Materiality

The *Brady* materiality determination is extremely fact specific. Indeed, courts have recognized that "materiality in the *Brady* context is a difficult test to meet. . .."[87] To establish materiality, "the nondisclosure [must be] so serious that there is a reasonable probability that the

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78 *Fields (Fields II)*, 740 F.3d at 1123.

79 *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001).

80 *Id*. at 957 ("Law enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly as illustrated by the *Brady* line of cases requiring the state to disclose exculpatory evidence to the defense.").

81 *Id*. at 949, 957.

82 *Id.* at 949.

83 *Id.* at 956 n. 8, 957.

84 *See Baker v. McCollan*, 443 U.S. 137, 140 (1979).

85 *Id.*

86 *Drumgold v. Callahan*, 707 F.3d 28, 68 n. 13 (1st Cir. 2013) (citing *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 50 (1st Cir. 2009)).

87 *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002).

suppressed evidence would have produced a different verdict."[88] Evidence is not material if there is merely a reasonable possibility that the suppressed evidence might have produced a different outcome; rather, the plaintiff must show that there was a reasonable probability that the outcome would have been different.[89] "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'"[90] In determining whether evidence is "material," courts must analyze the evidence "collectively, not item by item."[91] "In evaluating th[e] question [of prejudice], it is necessary to consider *all* the relevant evidence that the jury would have had before it if [the defense] had pursued [a] different path—not just the mitigation evidence [the defense] could have presented, but also the [other] evidence that almost certainly would have come in with it."[92]

b. Causation

As an initial matter, courts must take into account the "boundaries separating tort law from constitutional law."[93] In the Section 1983 context, "only those tort causation principles that are compatible with the underlying constitutional right" may be used.[94] "[T]he essential elements of actionable Section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort."[95]

To recover damages in a civil trial based on a *Brady* violation, a Section 1983 plaintiff "must demonstrate a stronger causal link than is inherent in *Brady's* materiality standard."[96] After proving a constitutional violation by demonstrating a "*reasonable probability*" that he would not have been convicted but for the withholding of the evidence, a Section 1983 plaintiff must then make an additional showing by the *preponderance* of the evidence that the constitutional deprivation is the "but for" cause of his conviction. In other words, the factual causation inquiry essentially replicates the materiality inquiry with a heightened burden of proof.[97]

Thus, in order to succeed on a Section 1983 *Brady* claim, the plaintiff must demonstrate (1) that the evidence withheld was "material" and as such, a "reasonable probability" that he would not have been convicted if the evidence had not been withheld; and (2) that the *Brady* violation was the "but for" cause of the harm, i.e. wrongful conviction, by a preponderance of the

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88 *Strickler v. Greene*, 527, 263, 281 (1999).

89 *Id.* at 291 (stating that "[t]he District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of [the witness's] testimony might have produced a different result" but that "petitioner's burden is to establish a reasonable *probability* of a different result").

90 *United States v. Bagley*, 473 U.S. 667, 682 (1985).

91 *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

92 *Wong v. Belmontes*, 558 U.S. 15, 18 (2009).

93 *Nix v. Franklin County School District*, 311 F.3d 1373, 1379 (11th Cir. 2002).

94 *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995).

95 *Drumgold v. Callahan*, 707 F.3d 28, 48 (1st Cir. 2013).

96 *Id*.

97 *Id.*

evidence.[98] In the context of allegations of non-*Brady* constitutional violations, it is not sufficient for the plaintiff to show only that his rights were violated; rather he must also demonstrate that the constitutional violation was the "but for" cause of the wrongful conviction.

Causation may also be broken by intervening superseding causes between the defendant-officer's misconduct and the wrongful conviction, such as the admission of a coerced confession or suggestive line-up, so long as the prosecutor and judge are aware of the constitutional deficiencies at the time the evidence is introduced at trial.[99]

V. Municipal Liability

Another thing to consider in wrongful conviction cases is the municipality's liability under Section 1983. While, it is well established that a municipality cannot be held liable pursuant to Section 1983 under a theory of *respondeat superior*, a § 1983 claim against a municipality may be established if a plaintiff can show a custom or practice of withholding exculpatory evidence, fabricating evidence, or utilizing coercive tactics in obtaining confessions.

Unlike prosecutors who are protected by absolute immunity and law enforcement officers who are protected by qualified immunity, municipalities are not afforded any Section 1983 immunity.[100] Municipalities, however, can only be held liable when the violation of the plaintiff's constitutional rights is directly attributable to a municipal custom, policy, or practice. For instance, if a plaintiff can demonstrate that a municipality had a practice of withholding exculpatory evidence, such as the Chicago "street files" cases,[101] and as part of that practice, a police officer withheld exculpatory information, the municipality could be held liable under Section 1983.[102] A municipality could also be held liable for having a pattern or practice of using systemic torture to obtain coerced confessions.[103] Further, a municipality could be held liable if a plaintiff were able to show that his *Brady* rights were violated and the municipality had a pattern of *Brady* violations.[104]

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98 *Id.* at 53.

99 *Wray v. City of New York*, 490 F.3d 189, 194 (2d Cir. 2007).

100 *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit either absolute or qualified under § 1983.").

101 *Jones v. City of Chicago*, 856 F.2d 985, 995-96 (7th Cir. 1988) (acknowledging jury's implicit finding that long-standing department-wide practice of maintaining "street files" separate and apart from the official file that was turned over to the prosecutor violated due process and was directly attributable to the City under *Monell*).

102 In December 2016, a jury awarded Nathson Fields $22 million for a wrongful conviction and found that the City had an unconstitutional practice of keeping secret "street files" in homicide investigations, despite the fact that the practice was said to have been abolished in 1983. Jason Meisner and Elyssa Cherney, *Jury Awards $22 million in Damages to Wrongly Convicted Ex-El Rukn*, Chicago Tribune (December 15, 2016).

103 *Tillman v. Burge*, 813 F.Supp.2d 946, 979 (N.D. Ill. 2011).

104 *Cf. Connick v. Thompson*, 563 U.S. 51, 61-63 (2011).

Because municipalities are not entitled to qualified immunity, a municipality is held to the state of the law *at the time of the suit* rather than at the time of the alleged constitutional violation.[105] Thus, an officer may be entitled to qualified immunity because the state of the disclosure obligation was not clearly established at the time of the conviction, but the municipality may still be held liable under a *Monell* theory for failing to train/ discipline based on the state of the law at the time of the lawsuit.

VI. Damages

Wrongful conviction cases involve enormous exposure to cities and towns as plaintiffs' verdicts have historically resulted in a damage award of one million dollars per-year of incarceration. Indeed, some verdicts have calculated damages at $1.5 million dollars per year of incarceration. For plaintiffs who have been wrongfully convicted and spent a significant number of years incarcerated, a municipality faces potential exposure of tens of millions of dollars.

While the mitigation of damages in a wrongful conviction case is extremely difficult, evidence that the plaintiff may have been incarcerated during that particular time period for a separate crime, or was actually guilty of the crime, albeit he did not receive a fair, may aid in mitigating the damage award.

[105] *Haley v. City of Boston*, 657 F.3d 39, 51 (1st Cir. 2011); (citing *Barber v. City of Salem*, 953 F.2d 232, 237–38 (6th Cir.1992).