DENIAL OF RIGHT TO A FAIR TRIAL UNDER SECTION 1983

I. General Background

A. Second Circuit recognizes this claim. A civil rights plaintiff may bring an action under Section 1983 against "a police officer [who] creates false information likely to influence a jury's decision and [who] forwards that information to prosecutors," because such conduct violates the accused's right to a fair trial. *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997).

B. The courts recognize a constitutional right "not to be deprived of liberty as a result of the fabrication of evidence" by an officer. *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000). In order to prove the claim, plaintiff must show that defendants fabricated evidence that was material to his conviction. *Ricciuti*, 124 F.3d at 130 (fabrication must be "likely to influence a jury's decision").

C. "In order to have a cognizable claim for denial of the right to a fair trial under § 1983, … a plaintiff must establish a causal connection between the fabricated evidence and a deprivation of liberty." *See Zahrey*, 221 F.3d at 348)) "The manufacture of false evidence, in and of itself, does not impair anyone's liberty and therefore does not impair anyone's constitutional right." *Id*.

D. The causation standard is the familiar one – proximate cause. In this context, plaintiffs must prove that the allegedly fabricated evidence was "use[d] … before the grand jury" that indicted him, *see Zahrey, supra*, or the jury that convicted him. *Ricciuti*, 124 F.3d at 130.

E. Immunity for testimony comes into play in this connection. As the Second Circuit recognized in *Jovanovic v. City of New York*, 486 Fed. Appx. 149 (2d Cir. 2012): "A person suffers a constitutional violation if an (1) investigating official (2) fabricates evidence (3) that is likely to influence a jury's decision, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of liberty as a result." Id. at 152 (citing Jocks v. Tavernier, 316 F.3d 128, 138 (2d Cir. 2003); Ricciuti, 124 F.3d at 130).

F. Moreover, "[p]robable cause is not a defense." *Id*. (citing *Ricciuti*, 124 F.3d at 129-30). The court in Jovanovic found that the plaintiff "cannot show causation—i.e., that the alleged fabrication of evidence led to a deprivation of his liberty …. because the only avenue by which the testimony could reach the jury was through [the defendant officer's] testimony, for which he enjoys absolute immunity …." *Id*. (citing *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983); *Rehberg v. Paulk*, --- U.S. ---, 132 S. Ct. 1497, 1505 (2012)).

G. Discuss Second Circuit en banc decision in *Poventud* and *Brady* claims.

H. Discuss decisions from other circuits.

II. Malicious Prosecution Claims Compared

A. Probable cause is not a defense to a fair trial claim. Discuss *Poventud*.

B. Even where the plaintiff admits guilt to some crime, he may still be able to recover damages for denial of a fair trial (*see Poventud*). Query what damages the plaintiff can recover in such circumstances, however.

C. With regard to Brady claims, police officers fulfill their constitutional duties by making full disclosure of all exculpatory, Brady material in their possession. *See Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992). Some overlap here with the "initiation" element of malicious prosecution claims, i.e., where the police make full disclosure to the prosecution, and the prosecutors decide to present the case to the grand jury, the officers are not deemed to have "initiated" or "commenced" the proceeding for purposes of the malicious prosecution claim.

D. State of mind requirement:

1. In *Fappiano v. City of New York*, 2016 U.S. App. LEXIS 4210 (2d Cir. Mar. 7, 2016), the Second Circuit held: "Our limited precedent addressing fair trial claims sounding in a *Brady* violation confirms our understanding that police officers may be held liable for *Brady* violations when they intentionally suppress exculpatory evidence …. We have never held that anything less than an intentional *Brady* violation establishes a § 1983 due process claim for damages, however, and we decline to do so here."

2. In criminal context, of course, the defendant does not have to show an intentional non-disclosure in order to demonstrate a *Brady* violation. Even negligence or inadvertence may result in a new trial if the *Brady* test is met, regardless of the state of mind of the actor who failed to make the required disclosure.

E. Malicious Prosecution claims require a finding of "malice," but the courts infer malice from the absence of probable cause.

F. Materiality – key concept in fair trial claims. Not every purported omission or "fabrication" will result in Section 1983 liability. The plaintiff must show that the non-disclosure or the alleged fabrication denied him a fair trial and brought about his conviction.

G. Authorities are divided on whether the plaintiff must proceed to trial and verdict (and be convicted) in order to establish the claim.