



NYPD officers listen to their captain speak in Foley Square, Manhattan, New York on September 21, 2020. Photo: Ryland West/ALM

## Defending Police Officers in Wrongful Conviction Cases

As there has been a substantial increase in civil litigation concerning wrongful convictions, police officers and municipalities face potential liability for their involvement in the arrest and criminal prosecution of the wrongly accused. While wrongful conviction cases are incredibly nuanced, these cases are still highly defensible and there are a multitude of ways that police officers and municipalities can be defended against such claims.

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Civil Rights

By Kenneth E. Pitcoff and Frank H. Foster | July 23, 2024 at 10:00 AM

Over the past few decades, there has been a dramatic rise in civil lawsuits for alleged wrongful convictions. This increase has been fueled by the scientific and technological advancements made, especially in DNA testing, and the various organizations dedicated to exonerating those that may have been wrongfully convicted.

Consequently, this has led to many more civil cases being brought against the police officers and the municipalities that they serve regarding the arrest and criminal prosecution of wrongfully convicted individuals.

In fact, New York State's Court of Claims Act §8-b was created to ensure that innocent individuals who were wrongly convicted and imprisoned can seek compensation for damages, beyond the prototypical tort damages. Specifically, individuals whose criminal conviction was vacated can recover damages under this statute if they prove with clear and convincing evidence that:

- (a) they were convicted of one or more felonies or misdemeanors, sentenced to a term of imprisonment, and served part or all of that sentence;
- (b) they were pardoned, or conviction was overturned and charges were dismissed;
- (c) they did not commit the acts described in the charges, or their actions were not criminal; and
- (d) they did not cause their own conviction through their own actions.

N.Y. Court of Claims Act §8-b(5)(a-d).



Event

If the court determines that a claimant meets this burden, then the court will award damages in an amount that it deems suitable to fairly and reasonably compensate them. *Id.* at §8-b(6).

Besides this available remedy, an alleged wrongfully convicted individual will often bring several federal claims under 42 U.S.C. §1983 for alleged constitutional violations and related state law claims against the police officers and municipalities involved in their

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arrest and criminal prosecution. These claims typically consist of: (1) malicious prosecution; (2) due process claims for denial of right to a fair trial; (3) violation of the Fifth Amendment right against self-incrimination; and (4) unlawful pretrial detention.

It should be noted that a complicating factor in these cases is that settlements under §8-b cannot present a set-off with respect to the §1983 claims. *Peacock v. City of Rochester*, No. 6:13-CV-6046-MAT, 2016 WL

4150445, at \*5 (W.D.N.Y. Aug. 5, 2016). In other words, §8-b imposes liability on the state regardless of whether the state is liable in the sense of a “traditional” tortfeasor and as such, those settlements are not relevant to §1983 claims. *Id.*

## **Malicious Prosecution**

In order to succeed on a malicious prosecution claim, a plaintiff must prove that: (1) a criminal proceeding was commenced or continued against them; (2) the proceeding terminated in their favor; (3) there was a lack of probable cause for initiating the proceeding; and (4) the defendant acted with actual malice. *Adams v. City of New York*, 226 F. Supp. 3d 261, 269 (S.D.N.Y. 2016); *Stampf v. Long Island R. Co.*, 761 F.3d 192, 198 (2d Cir. 2014).

Probable cause is measured at the time of the criminal arraignment, not at the time of the arrest. *Morgan v. Nassau County*, No. 03-CV-5109 (SLT) (WDW), 2009 WL 2882823, at \*10 (E.D.N.Y. Sept. 2, 2009). Notably, if a grand jury indictment was obtained for plaintiff’s criminal charges, then there is a presumption that probable cause existed that can only be rebutted by showing that the indictment was procured by either fraud, perjury, the suppression of evidence, or other bad faith conduct. *Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003).

## **Due Process Claims**

Plaintiffs usually allege due process violations for denial of a right to fair trial on several grounds, such as fabrication of evidence, unduly suggestive identification procedures, and failure to disclose exculpatory evidence.

**Fabrication of Evidence.** To set forth a due process claim based on alleged fabrication of evidence, a plaintiff must show that an investigating official: “(1) fabricates information; (2) which is likely to influence a jury’s verdict; (3) forwards that information to prosecutors; and (4) plaintiff suffers a deprivation of life, liberty, or property as a result.” *Overby v. Fabian*, No. 17-CV-3377 (CS), 2018 WL 3364392, at \*11 (S.D.N.Y. July 10, 2018). While there is no requirement that the fabricated evidence be presented to the jury, a plaintiff must demonstrate that such evidence caused an actual deprivation of life, liberty, or property. *Bennett v. Vidal*, 267 F. Supp. 3d 487, 497 (S.D.N.Y. 2017); *Harris v. City of New York*, 222 F. Supp. 3d 341, 351 (S.D.N.Y. 2016).

Even when a District Attorney or their office admits post-conviction that the accused is innocent, the police officer defendants may contest plaintiff’s innocence in the *civil suit* since that admission has no collateral estopped effect on them. According to the Second Circuit, police officers defending against §1983 claims are allowed to dispute findings from the underlying criminal cases. *Jenkins v. City of New York*, 478 F.3d 76, 85 (2d Cir. 2007).

**Identification Procedures.** Plaintiffs may also try to claim their right to a fair trial was violated based on unduly suggestive or unreliable identification procedures. However, the impermissible identification procedure is not what intrudes upon a constitutionally protected interest, it is the fairness of the trial that violates the protected right. *Wray v. City of New York*, 490 F.3d 189, 193 (2d Cir. 2007). Accordingly, such identification procedures amount to a constitutional violation *only if* it was admitted into evidence at the plaintiff's *criminal trial* based on an officer misleading or pressuring the prosecutor or trial judge. *Id.* In the absence of such conduct, the prosecutor's decision to enter the identification into evidence and the trial judge's decision to accept same, constitute a superseding cause that precludes liability regarding the officer's conduct. *Id.* at 193-94.

**Failure To Produce Exculpatory Evidence (Brady).** In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the U.S. Supreme Court held that the suppression of evidence that is material, either to guilt or punishment, and favorable to the accused is a violation of due process. Specifically, evidence is only considered suppressed within *Brady* if exculpatory material has not been disclosed in time for effective use at trial. *United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001).

In order to prevail on such a claim, plaintiffs must show that they were prejudiced and demonstrate a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. *Bellamy v. City of New York*, 914 F.3d 727, 751 (2d Cir. 2019). In any event, police officers satisfy *Brady* when they turn exculpatory evidence over to the prosecutors. *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992).

## Coerced Confessions

In cases involving confessions, plaintiffs may assert a claim under the Fifth Amendment if it is alleged coercion was used to obtain a waiver of a plaintiff's rights against self-incrimination and/or to obtain inculpatory statements, and those statements were used against them in a *criminal* proceeding. *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998).

A "plaintiff must point to circumstances indicating that [they] could not make a knowing and voluntary decision." *Tankleff v. County of Suffolk*, No. 09-CV-1207(JS) (AYS), 2017 WL 2729084, at \*16 (E.D.N.Y. June 23, 2017). Courts will determine whether a statement was improperly obtained by coercion through examining the totality of the circumstances. *Higazy v. Templeton*, 505 F.3d 161, 170 (2d Cir. 2007).

## Unlawful Pretrial Detention

With respect to unlawful pretrial detention claims, a plaintiff must establish: (1) that s/he had the right to be free from continued detention due to police officers mishandling or suppressing exculpatory evidence; (2) that the officers' actions violated that right; and (3) that the officers' actions shock the conscience. *Russo v. City of Bridgeport*, 479 F.3d 196, 205 (2d Cir. 2007).

There, the plaintiff, who was accused of robbing an auto service station and was identified as the assailant, remained in custody for over seven months even though the officers were in exclusive possession of a videotape—that definitively proved plaintiff's innocence—for almost four months and they did not disclose it to the prosecutors. *Id.* at 202, 205. In that extremely narrow circumstance, the Second

Circuit found that the plaintiff had stated a viable Fourth Amendment claim despite the existence of probable cause to arrest. *Id.*

## Conclusion

As there has been a substantial increase in civil litigation concerning wrongful convictions, police officers and municipalities face potential liability for their involvement in the arrest and criminal prosecution of the wrongly accused. While wrongful conviction cases are incredibly nuanced, these cases are still highly defensible and there are a multitude of ways that police officers and municipalities can be defended against such claims.

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