

SECOND CIRCUIT REVIEW

Expert Analysis

'Brady'-Based §1983 Claims Allowed Despite Guilty Plea to Lesser Offenses

This month, we discuss *Poventud v. City of New York*,¹ in which the U.S. Court of Appeals for the Second Circuit, sitting en banc, considered whether a plaintiff whose initial conviction was tainted by disclosure violations under *Brady v. Maryland*² could pursue a 42 U.S.C. §1983 claim despite having pleaded guilty to lesser offenses in a second trial. The court weighed whether *Heck v. Humphrey*³—in which the U.S. Supreme Court ruled that plaintiffs in §1983 suits may not seek damages by challenging existing convictions—barred a §1983 suit relating to plaintiff's factually related but previously vacated conviction. In a majority opinion by Judge Richard C. Wesley, joined by eight other judges, the court held that the claim was not barred because the suit was aimed at procedural harms and did not necessarily imply that plaintiff's standing guilty plea was invalid.

The case is notable for the disparate views it generated among the members of the court: Judge Gerard E. Lynch and Judge Raymond J. Lohier, who both joined the majority opinion, each wrote a concurring opinion; Lohier's concurrence was joined by five judges. Judge Denny Chin concurred in part and dissented in part. Five other judges dissented, with Judge Dennis Jacobs and Judge Debra Ann Livingston each writing opinions joined by all the other dissenting judges.

Background

In 1998, Marcos Poventud was convicted of attempted murder and several related crimes; the only eyewitness to place Poventud at the scene was the victim. Poventud and other witnesses claimed that he had been elsewhere at the time of the crime, and Poventud's counsel attempted to impeach the credibility of the victim's identification. Both the prosecution and defense, however, were unaware that the victim initially had identified Poventud's brother, who



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

was incarcerated at the time. Further, the victim first identified Poventud himself only after being shown his picture by police officers on four different occasions. The officers involved failed to disclose these facts to prosecutors.

Still unaware of the circumstances surrounding his identification by the victim, Poventud appealed on other grounds. His conviction was affirmed by the First Department and leave to appeal to the New York Court of Appeals was denied. Poventud's co-defendant's conviction, however, was overturned by the Court of Appeals, and the prosecutor assigned to his retrial discovered the circumstances surrounding Poventud's identification. On the basis of this evidence, Poventud moved to vacate his conviction; the Bronx Supreme Court did so, finding disclosure obligation violations under *Brady* and New York law.

The District Attorney's Office opposed Poventud's release on bail and indicated that it would appeal the court's decision to vacate. The parties then agreed that Poventud would plead guilty to attempted robbery in the third degree and receive a stipulated one-year sentence. Poventud, who had already served 10 years, was released on time served.

Poventud then initiated a §1983 suit against the City of New York, the Bronx District Attorney, and various police officers, alleging that his original conviction violated his constitutional right to due process. Defendants moved for summary judgment, asserting that *Heck* barred Poventud's claims. Judge Deborah A. Batts of the Southern District of New York agreed. Because the evidence impeaching Poventud's identification would have supported his alibi in the initial trial, it could

not, in her view, be the basis of a §1983 claim, as it would call into question his later—and still extant—guilty plea.

Poventud appealed. A panel of the Second Circuit held that *Heck* did not bar Poventud's lawsuit because he had already been released from prison and thus no longer had access to state habeas remedies. The Second Circuit then ordered rehearing en banc and vacated the panel opinion.

The court held that the §1983 claim was not barred because the suit was aimed at procedural harms and did not necessarily imply that plaintiff's standing guilty plea was invalid.

The Second Circuit's Decision

The court began by unpacking the U.S. Supreme Court's and its own precedent regarding §1983 claims. It paid particular attention to *Heck*, in which a still-imprisoned inmate brought a §1983 lawsuit alleging that police had destroyed exculpatory evidence that could have proved his innocence. The court rejected his claims, holding that "in 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, declared invalid, or otherwise nullified.⁴ As the Second Circuit detailed, this requirement resulted from the Supreme Court's analogy of Heck's §1983 claim to the tort of malicious prosecution, which requires favorable termination. Applying such a rule to §1983 suits, as in malicious prosecution cases, recognizes that civil actions are not the appropriate vehicles for challenging the validity of outstanding criminal judgments.

In *DiBlasio v. City of New York* and other cases, the Second Circuit imposed a similar requirement that the relevant criminal cases "finally end in

MARTIN FLUMENBAUM and BRAD S. KARP are members of Paul, Weiss, Rifkind, Wharton & Garrison. They specialize in complex commercial litigation and white-collar criminal defense matters. AUSTIN THOMPSON, a litigation associate at the firm, assisted in the preparation of this column.

failure.”⁵ In *DiBlasio*, the plaintiff successfully challenged his initial conviction with a habeas suit in the Eastern District of New York, but was convicted for lesser offenses after the Eastern District remanded his case to New York state court for a new trial. DiBlasio sued for malicious prosecution under §1983, claiming that he was entitled to damages for evidence withheld in the initial trial. The Second Circuit held that the proceedings—meaning the initial trial, appeal and remand trial—had not ended in DiBlasio’s favor, and thus he could not be entitled to damages under a malicious prosecution theory.

In *Poventud*, the Second Circuit endorsed *DiBlasio*, ruling that it was correctly decided because, as it had previously concluded, the proceeding as a whole had ended in a conviction. Nonetheless, the court carefully distinguished the case, noting that DiBlasio had alleged malicious prosecution, not just procedural violations. Because it was a malicious prosecution suit, the plaintiff’s conviction meant that either the outstanding conviction for the lesser offense was invalid—and thus a civil suit for damages was not the appropriate vehicle for challenging the conviction—or the elements of malicious prosecution were not met—and thus a claim could not be stated.

Still, the court observed, other §1983 claims do not present the same logical problems: claims like excessive force, arrest without probable cause, and unreasonable search and seizure can lead to §1983 actions that exist independent of the criminal proceedings.

Brady claims—like *DiBlasio*—do not usually fit in this category: because a Brady claim necessarily implies the invalidity of the conviction in the trial in which the Brady violation occurred, a §1983 Brady claim is barred by *Heck* and its progeny unless the underlying proceeding has ended in failure. A Brady claim has three elements: (1) evidence, exculpatory or impeaching, favorable to the accused that (2) is suppressed by the state, willfully or inadvertently, thus (3) resulting in prejudice. Prejudice is determined without reference to the evidence’s impact on the verdict: “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.”⁶

The Second Circuit illustrated this by reference to its seminal *Brady / Heck* case *Amaker v. Weiner*.⁷ In *Amaker*, the Second Circuit held that, because the still-incarcerated plaintiff was claiming that police, prosecutors, a judge, and various other parties had manufactured inculpatory evidence and suppressed evidence of their misconduct, his “claim sounds under *Brady v. Maryland*, and therefore does indeed call into question the validity of his conviction.”⁸ Success on plaintiff’s claim would mean that his incarceration was the product of a Brady violation, and thus his §1983 claim was barred by *Heck*.

As with *DiBlasio*, the court distinguished *Amaker* because it alleged malicious prosecution. The court viewed a case like Poventud’s

differently: Where plaintiff’s previous conviction has been expunged and a retrial has proceeded, a Brady-based §1983 suit relating to the trial from which the expunged conviction resulted does not imply the invalidity of the vacated conviction. Nor does it imply the invalidity of the subsequent retrial in which, by definition, the constitutional violations could not have been replicated.

in the Second Circuit’s view, the district court was wrong in concluding that, because Poventud was challenging an earlier trial with a similar result, granting relief under §1983 would impugn the result of the second proceeding in which Poventud pleaded guilty.

Thus, in the court’s view, the district court was wrong in concluding that, because Poventud was challenging an earlier trial with a similar result (a finding that Poventud was present at the scene and guilty of some offense), granting relief under §1983 would impugn the result of the second proceeding in which Poventud pleaded guilty. The issue was not whether Poventud was innocent, but whether his rights to a fair trial were harmed.

The court analogized its view to a decision by the U.S. Court of Appeals for the First Circuit, *Olsen v. Correiro*, in which the plaintiff in a §1983 case had secured vacatur of a prior conviction based on the prosecution’s failure to disclose impeachment evidence relating to its chief witness, but later pleaded nolo contendere to a lesser charge, and was sentenced to time served.⁹ The district court overturned a jury verdict of \$1.5 million based on plaintiff’s incarceration; on a second trial, the court allowed a \$6,000 verdict. The district court’s decisions were upheld by the First Circuit.

The second award, the First Circuit reasoned, flowed not from the defendant’s incarceration—which now, legally, was the effect of his own plea—but from the “evidence of other damages associated with his murder trial and conviction.”¹⁰ This, in the Second Circuit’s view, supported the notion that Poventud could be allowed to make procedural claims under §1983, just as other plaintiffs had in other contexts.

Still, the court concluded, Poventud’s claims (and presumably those of future plaintiffs) were closely circumscribed in three ways: First, Poventud’s claim had to relate to his first conviction, not the second, still-effective conviction stemming from his guilty plea. Second, his complaint could not sound in malicious prosecution—only the procedure-focused Brady claim. Third, Poventud could not seek any damages relating to the time (one year) he served as a result of his plea (the court left it to the reader to infer that he could seek damages for the remaining nine years

he served). Given these limitations, the court held, Poventud had stated a §1983 claim.

Dissents and Concurrences

The dissents and concurrences, to the extent we can cover them here, address two points: (1) whether Poventud’s complaint actually sounded in malicious prosecution, and (2) whether *Brady* is a mere trial right or can form the basis of a §1983 claim.

In his dissent, Judge Jacobs stressed that Poventud’s complaint, contrary to the court’s view, did sound in malicious prosecution: Jacobs highlighted excerpts in the complaint, an affidavit submitted by Poventud, and the papers supporting the complaint in which Poventud explicitly stated that he was innocent of any involvement in the activities to which he later pleaded guilty. In Jacobs’ view, this suggested that his guilty plea could not be consistent with his §1983 claims, and thus that his §1983 claims were barred by *Heck*.

Judge Lohier challenged this view in his concurrence, arguing that the complaint’s assertions should be read narrowly in line with the court’s appellate obligations. Under such a reading, even the broadest allegation—including one stating that “evidence of innocence” was among the wrongly undisclosed evidence—should be seen as relating to the prejudice/materiality prong of the Brady inquiry, not as suggesting that Poventud was actually innocent and thus that his claim sounded in malicious prosecution.¹¹ In support of his point, Lohier annexed the complaint to his opinion.

Both Judge Jacobs and Judge Livingston also suggested that *Brady* was being contorted into something more than a mere trial right. They argued that there can be no Brady violation where the truth-finding function of the court has not been thwarted. In their view, the majority opinion ignored the materiality element of *Brady* by failing to recognize the facts as the court must view them in light of Poventud’s plea: his guilty plea placed him at the scene of the crime and thus the victim’s identification was—whatever its circumstances—unimpeachable. That identification thus cannot be a suitable basis for damages in a civil suit relating to Poventud’s inability to impeach it.

.....●.....

1. No. 12-12-1011-CV, ___F.3d___, 2014 WL 182313, (2d Cir. Jan. 16, 2014).

2. 373 U.S. 83 (1963).

3. 512 U.S. 477 (1994).

4. *Id.* at 486-87.

5. 102 F.3d 654, 657 (2d Cir. 1996).

6. *Poventud*, 2014 WL 182313 at *9, quoting *Leka v. Portuondo*, 257 F.3d 89, 104 (2d Cir. 2001).

7. 179 F.3d 48 (2d Cir. 1999).

8. *Amaker*, 179 F.3d at 51.

9. 89 F.3d 52, 55 (1st Cir. 1999).

10. *Id.* at 55.

11. *Poventud*, 2014 WL 182313 at *22.