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Coerced Testimony of a Witness, As Opposed to the Fabrication of Evidence, Should Not Be Used as a Basis to Satisfy a § 1983 Claim for Alleged Due Process Violations in an Underlying Criminal Matter, 55 UIC L. Rev. 40 (2022)

Jonathan Federman

Kyle Fleck

COERCED TESTIMONY OF A WITNESS, AS OPPOSED TO THE FABRICATION OF EVIDENCE, SHOULD NOT BE USED AS A BASIS TO SATISFY A § 1983 CLAIM FOR ALLEGED DUE PROCESS VIOLATIONS IN AN UNDERLYING CRIMINAL MATTER

JONATHAN L. FEDERMAN AND KYLE FLECK*

I. INTRODUCTION

Due process requires establishing a set of rules to determine admissible evidence.[1] In a criminal trial, the trial judge acts as a

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1. *See* Lisenba v. People of State of California, 314 U.S. 219, 236 (1941) (explaining "[t]he aim of the requirement of due process is not to exclude

"gatekeeper" for determining whether evidence proffered by the prosecution, or the defense is relevant and therefore admissible. Of course, these rulings are subject to the rules of evidence that govern every state and federal court.[2] The principal exception under these rules (among the many) is that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[3] Ultimately, these evidentiary rulings set the contours for what evidence the jury will review when rendering its verdict. Due Process requires certain limitations as to what evidence is properly before a jury.

While acting as the first line of defense, the trial judge is often not the final authority of whether evidence is accepted or admissible. First, the jury has the duty to accept the admitted evidence as true or false and to determine the weight given to each piece thereof.[4] Second, as a matter of law, parties to a criminal matter may appeal the admissibility of evidence, whether admitted or excluded, at the appellate level (up the highest Court in the land) *via* a proper objection or an offer of proof, respectively.[5] On appeal, the higher courts review the trial judge's evidentiary decision by applying an "abuse of discretion" standard.[6] This multitier system is designed to protect against the admission of irrelevant or prejudicial evidence and to ensure that proper evidence is not wrongfully excluded.

Nevertheless, this is not a perfect process. Inevitably, our criminal judicial system will render wrongful convictions based on an improper acceptance or exclusion of evidence.[7] In light of this untenable yet inevitable result, the federal government enacted Title 42 U.S.C. § 1983 to provide an avenue for civil recourse to those who were not afforded due process during their antecedent

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presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false").

2. *See* Michigan v. Bryant, 562 U.S. 344, 370, n.13 (2011) (noting that, consistent with the federal and state rules of evidence, "the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence").

3. FED. R. EVID. 403.

4. *See* United States v. Park, 421 U.S. 658, 680-81 (1975) (noting "[w]e must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence").

5. Fed. R. Evid. 103.

6. United States v. Abel, 469 U.S. 45, 54-55 (1984).

7. *See* Emily Haavik, *'They didn't let me be great' Wrongfully Convicted Minneapolis man spent nearly 6 years behind bars*, KARE 11 (June 1, 2021), www.kare11.com/article/syndication/podcasts/record-of-wrong/javon-davis-minneapolis-wrongful-conviction/89-f251262d-0154-4084-9c6a-4fa463ce01af [perma.cc/7RK3-CH2L] (identifying a specific individual spent six years in prison after inadmissible evidence was introduced in his criminal trial).

criminal trial.[8] As such, § 1983 provides an individual the right to sue state government employees and others acting "under color of state law" for civil rights violations.[9]

The standards by which a § 1983 suit is administered are different than those in the underlying criminal matter. Primarily, a § 1983 claim must be rooted in a violation or deprivation of a right secured by federal, not state law.[10] Thus, a review of the evidence used to convict a then-defendant in a subsequent § 1983 claim is adjudged by this same federal standard; not the state's evidentiary standard initially at issue in such cases.[11]

Under this purview, courts across the country differ on whether the admission and use of coerced witness testimony at the criminal level violate a defendant's due process rights when reviewed under the civil § 1983 standard. However, as this comment will detail, the Seventh Circuit in *Petty v. City of Chicago*[12] correctly held that coerced witness testimony, as opposed to fabricated evidence/testimony, does not grant a defendant the necessary standing nor provide a cognizable due process claim required in a § 1983 suit.[13] In short, and as explained in greater detail, *infra*, coerced witness testimony does not invoke the defendant's constitutional rights as the violation (if any) is perpetrated against the *witness*, not the defendant. Moreover, the veracity of coerced witness testimony is an open question, subject to further investigation. Meanwhile, fabricated evidence is patently false. Therefore, a § 1983 plaintiff lacks standing to raise a claim for the deprivation of due process if the only basis is that witness testimony was spurned by alleged coercion.

II. THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE AND § 1983

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[14] Historically, courts applied due process to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property."[15] As an example, the Due Process Clause is violated if a prosecutor knowingly uses perjured testimony or deliberately suppresses evidence favorable to

8. 42 U.S.C. § 1983 (2022).

9. *Id*.

10. *See* Owen v. City of Indep., Mo., 445 U.S. 622 648, n.30 (1980) (noting that federal causes of action are governed by federal law).

11. *Id*.

12. Petty v. City of Chicago, 754 F.3d 416, 422-23 (7th Cir. 2014).

13. *Id*. at 422.

14. Daniels v. Williams, 474 U.S. 327, 331 (1986).

15. *Id*. (emphasis in original).

the accused.[16] Thus, "[w]hen the quantum of proof supporting a conviction falls sufficiently far below this standard, then the Due Process Clause requires that the conviction be set aside, even in the absence of any procedural error."[17] Understanding that not all due process violations are discerned and rectified at their inception, Congress enacted 42 U.S.C. § 1983, which states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[18]

Given that due process claims historically required deliberate acts or decisions on behalf of government officials to deprive a person of life, liberty, or property, there was still an open question as to whether negligent conduct was sufficient to constitute a due process violation as well.[19] In consideration of due process, "the question is whether intent is required before there can be a 'deprivation" of life, liberty, or property.'"[20] "In *Daniels*, the United States Supreme Court considered that very question.[21] The Court resoundingly rejected this argument.[22] "Where a government official's act causing injury to life, liberty, or property is merely negligent, no procedure for compensation is *constitutionally* required."[23] It has been noted that a ruling to the contrary would trivialize the right of action provided by § 1983 as

> [t]hat provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law.[24]

Accordingly, there is a distinction between protectable legal interests and those injuries protected by the United States

16. Albright v. Oliver, 510 U.S. 266, 299 (1994).
17. *Id.* at 300 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).
18. 42 U.S.C. § 1983 (2022).
19. *Daniels*, 474 U.S at 329.
20. Parratt v. Taylor, 451 U.S. 527, 548 (1981) (J. Powell concurring).
21. *Daniels*, 474 U.S. at 332.
22. *Id*.
23. *Id*. (citation omitted) (emphasis in the original).
24. *Parratt*, 451 U.S. at 549 (J. Powell concurring).

Constitution, such as governmental negligence, which could lead to the creation of protectable legal interests.[25] To that end, as the *Daniels* Court recognized, States maintain the ability to enact tort claims statutes to redress such injuries, but the United States Constitution does address the same concerns as traditional tort law.[26] Therefore, and as will be discussed, *infra*, § 1983 is the vehicle in which prior defendants-turned-litigants seek to civilly and retroactively recover for *intentional* violations of the Due Process Clause which may have occurred at their preceding criminal trial.

A. History of Title 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 was derived from § 1 of the Civil Rights Act of 1871 (a.k.a. the "Ku Klux Klan Act.")[27] The necessity of enacting § 1983 sprang from the fact that "[t]he very language of the Fourteenth Amendment indicates Congress did not intend it to be self-enforcing."[28] Consequently, without an activating force, certain protections afforded under the Fourteenth Amendment would lay dormant – a reality that was anathema during Reconstruction.[29] Accordingly, on March 28, 1871, Congressman Samuel Shellabarger introduced the Civil Rights Act of 1871 (the "Act"), as modeled after Section 2 of the Civil Rights Act of 1886.[30]

The Act was initially enacted as a response to the widespread violence spawned by racism which state courts and prosecutors in the South had frankly been unmotivated to deter under state law.[31] Accordingly, § 1983 became "one of the means whereby Congress

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25. *Id*. at 333.

26. *Id.*

27. Adickes v. S. H. Kress & Co., 398 U.S. 144, 183 (1970).

28. Magana v. Northern Mariana Islands, 107 F.3d 1436, 1441 (9th Cir. 1997).

29. *See* Krum v. Sheppard, 255 F. Supp. 994, 995 (1966) (describing that on March 23, 1871, President Grant sent a message to Congress stating, "I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.")

30. Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR. (Apr. 20, 2021), www.constitutioncenter.org/interactive-constitution/blog/looking-back-at-the-ku-klux-klan-act [perma.cc/43D8-7U6X].

31. *See* Cong. Globe, 42d Cong., 1st Sess., App. 428 (stating that

> [w]hile murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.)

exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment."[32] As Senator George Edmunds, Chairman of the Senate Committee on the Judiciary, stated:

> The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution.[33]

Originally drafted in 1871, § 1983's predecessor protected rights, privileges, or immunities secured by the Constitution, however "the provision included by the Congress in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well."[34] Still in its infancy, § 1983's protections were severely circumscribed relative to its current reach.

It was not until 1961, in *Monroe v. Pape*, that § 1983 took its first step towards becoming a tool to address and prevent abuses by state officials.[35] In *Monroe*, the United States Supreme Court granted certiorari in review of the judgment against Monroe in his suit against police officers and city officials.[36] The plaintiffs contended that the invasion of his home, subsequent search without a warrant, and arrest and detention without a warrant and without arraignment constituted a deprivation of their rights, privileges, and immunities secured by the Constitution within the meaning of 42 U.S.C.S. § 1983.[37]

In his subsequent § 1983 suit, Monroe alleged that these police officers acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and the City of Chicago.[38] The Court initially noted that "[t]here can be no doubt . . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[39] However, the Court went on to grapple with the narrower issue of whether, by enacting § 1983, Congress intended to provide a remedy to individuals deprived of constitutional rights, privileges, and immunities by an official's

32. Monroe v. Pape, 365 U.S. 167, 171 (1961) (overruled on other grounds).

33. Cong. Globe, 42d Cong., 1st Sess., App. 68, 80, 83-85.

34. Mitchum v. Foster, 407 U.S. 225, 244, n.30 (1972).

35. *See generally Monroe*, 365 U.S. at 172 (noting that the narrow question that the Court considered is a narrow one as to whether in exacting § 1983, Congress "meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position").

36. *Id.* at 168-69.

37. *Id.* at 169.

38. *Id.*

39. *Id.* at 171-72.

abuse of his or her position.[40]

In reviewing § 1983, the Court held that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[41] In defining what "under of color" of state law meant, the Court turned to its decision in *United States v. Classic*, where Justice Stone held: "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[42] However, even with this guiding principle, the Court determined that Congress did not undertake to bring municipal corporations within the ambit of § 1983.[43] Accordingly, the Court was not of the opinion that the word "person" was intended to include municipalities, and therefore the complaint against the City of Chicago was dismissed.[44] Nevertheless, the Court held that the complaint should not have been dismissed against the officials and reversed the judgment.[45]

Since *Monroe*, however, § 1983 has enjoyed an expansion of the entities covered by its protections. A key piece in this evolution was decided in *Monell v. Dep't of Social Services*, when the United States Supreme Court overruled its decision in *Monroe* by finding that municipalities and other local governmental units were persons who could, in fact, be sued under § 1983.[46] Accordingly, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[47] Moreover, these local governing bodies may also be sued "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official

40. *Id*. at 172.

41. *Id*. at 183.

42. *Id*. at 184 (quoting U.S. v. Classic, 313 U.S. 299, 326 (1941)).

43. *Id*. at 187 ("[T]he House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law").

44. *Id*. at 192.

45. *Id*.

46. Monell v. Dep't of Social Services, 436 U.S. 658, 663 (1978). It is also important to note that, while this decision held that municipalities *could* be held liable for the deprivation of constitutional rights, it clarified that § 1983 did not "impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692. Rather, "Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id*.

47. *Id*. at 690.

decision making channels."[48] In other words, a *prima facie* case for a § 1983 claim is established if a plaintiff can show that a state-based governing body implemented an actual or implied policy that deprived an individual of their constitutional rights.

B. Testimonial Witness Immunity in § 1983 Claims

The decision in *Monell* has provided the foundation for a litany of litigation averred against municipalities for alleged violations of an individual's constitutional rights. Within this area of jurisprudence lies a specific subset of § 1983 claims involving witness testimony provided in an underlying criminal trial as a factor in determining whether the then-defendant was deprived of his Fourteenth Amendment due process rights to a fair trial.

Fittingly, in 1983, the United States Supreme Court reviewed whether allegations that a police officer gave false testimony were sufficient to state a claim under § 1983.[49] There, the Court held two reasons exist as to why § 1983 does not allow recovery of damages against a private party or police officers for testimony in a judicial proceeding. "First, § 1983 does not create a remedy for all conduct that may result in violation of 'rights, privileges, or immunities secured by the Constitution and laws.'"[50] "Second, since 1951, . . . it has been settled that the all-encompassing language of § 1983, referring to '[every] person' who, under color of law, deprives another of federal constitutional or statutory rights, is not to be taken literally."[51] Thus, the tort liability afforded by § 1983 claims must be viewed in a light that does not presuppose that the statute was enacted to supplant "defenses previously recognized in ordinary tort litigation . . . absent specific provisions to the contrary."[52] Accordingly, "with respect to private witnesses, it is clear that § 1983 did not abrogate the absolute immunity existing at common law."[53]

In quoting a 19th Century opinion, Justice Stevens echoed: "[T]he claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible."[54] By reinforcing a private witness's immunity in a subsequent § 1983 claim, the Court aimed to avoid a situation

48. *Id*. at 690-91; *see also Adickes*, 398 U.S. at 168 (finding that "because of the persistent and widespread discriminatory practices of state officials . . . such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law).

49. Briscoe v. Lahue, 460 U.S. 325, 327 (1983).

50. *Id*. at 329.

51. *Id*. at 330 (citing Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

52. *Briscoe*, 460 U.S. at 330.

53. *Id*. at 334.

54. *Id*. at 333 (quoting Calkins v. Sumner, 13 Wis. 193, 197 (1860)).

wherein "[a] witness . . . might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence."[55]

The Court then went on to apply this immunity to police officer witnesses as well.[56] In doing so, the Court first recognized that "[t]here is, of course, the possibility that, despite the truth-finding safeguards of the judicial process, some defendants might indeed be unjustly convicted on the basis of knowingly false testimony by police officers."[57] However, "in the end [it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[58]

C. Absolute Immunity and Qualified Immunity

The United States Supreme Court has recognized two kinds of immunities under § 1983.[59] Most public officials may be entitled only to qualified immunity.[60] Under qualified immunity, "government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[61]

The United States Supreme Court has also recognized that certain officials perform "special functions" which deserve absolute protection from damages liability.[62] A public official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.[63] The United States Supreme Court admits that it is "quite sparing" in recognizing absolute immunity for state actors in the context of § 1983 claims.[64]

Courts have considered whether police and/or prosecutors are entitled to absolute or qualified immunity for allegations of coerced testimony or falsification or fabrication of evidence. In these considerations, courts have generally found that police and/or prosecutors are not entitled to absolute immunity for such claims.[65]

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55. *Briscoe*, 460 U.S. at 333 (citing Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 470 (1909)).

56. *Briscoe*, 460 U.S. at 345.

57. *Id*.

58. *Id.* (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950)).

59. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993).

60. *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)); Butz v. Economou, 438 U.S. 478, 508 (1978).

61. *Buckley*, 509 U.S. at 268 (citing *Harlow*, 457 U.S. at 818).

62. *Buckley*, 509 U.S. at 268-69.

63. *Id.* (citing Burns v. Reed, 500 U.S. 478, 486 (1939)); Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432, n.4 (1993)).

64. *Buckley*, 509 U.S. at 269.

65. *See* Wearry v. Perrilloux, 2020 U.S. Dist. LEXIS 111142, *5 (MD LA,

In *Buckley*, the United States Supreme Court reviewed whether prosecutors were entitled to absolute immunity for a claim that they conspired to manufacture false evidence against a criminal defendant.[66] While a prosecutor may have absolute immunity as to his or her role as an advocate for the State, which may include out-of-court efforts to control the presentation of a witness's testimony, a "prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity."[67] The Court recognized that the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor, as qualified immunity represents the norm.[68] Specifically, the Court identified:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.[69]

The Court added that, when "a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'"[70] Ultimately, the Court held that that the prosecutors did not meet their burden and were not entitled to absolute immunity as to claims of fabrication of evidence during the investigation of a crime.[71]

In *Wearry*, the Court held that a prosecutor was acting as an advocate rather than an investigator when he allegedly coerced a witness to implicate a defendant in a murder charge and coached the witness on how to testify.[72] The Court noted that, "nothing in the willful fabrication of witness testimony is so essential to the judicial process that a prosecutor or law enforcement officer should be granted absolute immunity when he engages in it."[73] The Court further added that "[t]he judicial process is a search for truth.

June 24, 2020) (applying Fifth Circuit precedent, absolute immunity not proper for allegations of coerced testimony); *see also* Watkins v. Healy, 2019 U.S. Dist. LEXIS 134950, *27 (E.D. Mich. Aug. 12, 2019) (finding no absolute immunity for prosecutor alleged to have coerced a witness into testifying against a defendant); *and see also* Bledsoe v. Vanderbilt, 934 F.3d 1112, 1118 (10th Cir. 2019) (holding no absolute immunity for prosecutor).

66. *Buckley*, 509 U.S. at 272.

67. *Id.* at 273.

68. *Id.*

69. *Id.*

70. *Id.* (citing Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

71. *Buckley*, 509 U.S. at 276.

72. *Wearry*, 2020 U.S. Dist. LEXIS 111142 *7.

73. *Id.* at *19.

Coercion of untruthful testimony is not essential to the judicial process; it is the antithesis of the judicial process."[74]

Under this purview, the threshold question as to if a governmental official is entitled to qualified immunity revolves around whether that official violated the plaintiff's constitutional rights.[75] While certain limitations on absolute immunity are detailed above, the official may still be entitled to qualified immunity if the right was not clearly established at the time of the underlying event.[76] "Government officials performing discretionary functions are generally protected from civil damages liability as long as their 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" [77]

Further, courts generally agree that police officers and/or prosecutors are not entitled to qualified immunity for claims of fabrication of evidence as the fabrication of evidence is not something the Fourteenth Amendment tolerates.[78] This is because it is firmly established that there exists a constitutional right not to be deprived of liberty on the basis of false evidence fabricated by a police officer or prosecutor.[79]

Thus, while absolute immunity and qualified immunity may play a role depending on the specific allegations of a former criminal defendant, a criminal defendant may be able to assert allegations sufficient to remove either of the immunities depending on the specific violation(s) at issue.

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74. *Id.*; *but see* Beckett v. Ford, 384 F.App'x 435, 449-50 (6th Cir. 2010) (holding that a prosecutor was entitled to absolute immunity for allegedly coercing an individual to falsely implicate the plaintiff in a murder investigation by pressuring, threatening, and enticing witnesses to lie, present false testimony, failure to disclose a deal the prosecutor and a police officer made with a witness, and conspired with a police officer to frame the plaintiff for murder).

75. Washington v. Buraker, 322 F. Supp. 2d 702, 705 (W.D. Va., June 23, 2004) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

76. *Buraker*, 322 F. Supp. 2d at 705 (citing Clem v. Corbeau, 284 F.3d 543, 549 (4th Cir. 2002)).

77. *Buraker*, 322 F. Supp. 2d at 705 (citing *Harlow*, 457 U.S. at 818).

78. *See* Washington v. Wilmore, 407 F.3d 274, 284 (4th Cir. 2005) (finding no qualified immunity for police officer accused of fabricating evidence, citing Miller v. Pate, 386 U.S. 1, 7 (1967) as the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence); Zahrey v. Coffey, 221 F.3d 342, 355 (2d Cir. 2000) ("it is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer"); Truman v. Orem City, 1 F.4th 1227, 1241 (10th Cir. 2021) ("any reasonable prosecutor understand that providing a medical examiner fabricated evidence and then putting him on the stand to testify based on that false information offends the Constitution"); Fields v. Wharrie, 740 F.3d 1107, 1114 (7th Cir. 2014) ("Fields II") (ruling there is no qualified immunity for fabrication of evidence).

79. See cases cited *supra* note 78.

III. WHETHER COERCED TESTIMONY OF A NON-DEFENDANT WITNESS VIOLATES A DEFENDANT'S RIGHT TO A FAIR TRIAL

While *Briscoe* held that private parties and police officers were immune from § 1983 liability for testimony given at a criminal trial, the question remained as to whether these same officers were subject to § 1983 when they coerced a witness to give testimony that was ultimately proven false.[80]

Of course, *Miranda v. Arizona* and its progeny have preserved the protections against self-incriminating testimony that is the result of coercion and compulsion as rights guaranteed by the Fifth and Fourteenth Amendments.[81] However, the precedents set in those cases are mostly inapplicable when determining if a criminal defendant's due process rights are violated under § 1983 when a non-defendant witness provides testimony that was the product of police and/or prosecutorial coercion. Without guidance from the United States Supreme Court, this issue has become muddied by differing and/or non-existent rulings on this fundamental aspect of any § 1983 claim predicated on the validity of the testimony used at the underlying criminal trial,[82]

For example, in *United States v. Mattison*, the Ninth Circuit ruled that because the witness's testimony — as opposed to earlier statements the witness made prior to trial — was not the product of coercion, the testimony was properly allowed.[83] However, this left the door open for the proposition that if a witness's testimony was the product of coercion, then the defendant's Due Process rights may be violated. To date, the issue remains as to whether a criminal defendant has a cognizable § 1983 claim when the prosecution relies upon a third-party witness's testimony coerced by law enforcement officials.

At the center of this matter lies two issues: (1) whether a former criminal defendant has standing to bring suit for ancillary

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80. *Briscoe*, 460 U.S. at 346-47.

81. *See* 384 U.S. 436, 458 (1966) (holding that unless compulsion inherent in custodial surroundings is dispelled, no statement is truly a product of free choice); *see also* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (holding that "[t]estimony given in response to a grant of legislative immunity is the essence of coerced testimony").

82. Trammell v. Ducart, 2015 U.S. Dist. LEXIS 96334, *27 (E.D. Cal. 2015).

83. United States v. Mattison, 437 F.2d 84, 85 (9th Cir. 1970) (affirming the allowance of the testimony because

> [n]one of the witness statements obtained at his illegal interrogation were introduced at trial, by the time of trial, the coercive atmosphere of the interrogation was dissipated, the witness was not told what to say on the stand, and his identification of defendant was made in open court, subject to cross-examination, where the jury observed his demeanor and gauged his credibility

coercive acts taken against a testifying third-party witness; and (2) how the potential truthfulness of coerced testimony as compared to fabricated evidence should factor into whether the then-defendant's due process rights were in fact violated. Each is taken in turn below.

A. A Plaintiff Must Have Standing to Recover for his or her Claims

To understand what standing a plaintiff must possess when bringing a § 1983 suit, it is first necessary to understand how coercion can trigger an individual's due process rights. To that end, coercion jurisprudence finds its origins in an individual's right against being *compelled*, in any criminal case, to be a witness against him or herself.[84] Inherent in the application of this fundamental tenet is a right, personal in nature, that affords protection against governmental coercion and compulsion in the pursuit of self-incrimination.[85] Nevertheless, "confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."[86] However, as confessions may serve as the most incriminating form of evidence available to the prosecution, "[t]he realization of the convincing quality of a confession tempts officials to press suspects unduly for such statements."[87] Such temptations have led to the application of intolerable, even dehumanizing, tactics in the pursuit of such damning evidence.[88]

In response, fundamental constitutional constructs have been designed and enforced to ensure that the corrosive effects of a confession derived from coercion are not heard at trial.[89]

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84. U.S. CONST., amend. V (emphasis added).

85. Doe v. United States, 487 U.S. 201, 202 (1998) ("[F]or an accused's communication to be protected by the Fifth Amendment privilege against self-incrimination, it is not enough that the compelled communication is sought for its content--instead, the content itself must have testimonial significance

86. Illinois v. Perkins, 496 U.S. 292, 297 (1990) (citing *Miranda*, 384 U.S. at 478).

87. McNabb v. United States, 318 U.S. 332, 348 (1943) (Reed, J., dissenting).

88. *See, e.g.,* Brown v. Mississippi, 297 U.S. 278 (1936) (prolonged isolation from family or friends in a hostile setting); Gallegos v. Colorado, 370 U.S. 49 (1962) (creating a desire on the part of a physically or mentally exhausted suspect to have a seemingly endless interrogation end); Watts v. Indiana, 338 U.S. 49, 52-53 (1949) (being interrogated for days on end while being held in solitary confinement in a cell called "the hole" without being afforded a prompt preliminary hearing).

89. Miller v. Fenton, 474 U.S. 104, 109-10 (1985)

> [a]sking whether the confession was 'involuntary,' *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that 'ours is an accusatorial and not an inquisitorial system,' *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth

Accordingly, coercion — whether physical or mental — is forbidden by the Fourteenth Amendment when it is the conduit through which a confession is secured.[90] However, while certain methods of securing confessions against *one's self* have been necessarily rooted out, the distinction between coerced self-incrimination and coerced witness testimony is one with a significant difference. Whereas, in the former, the constitutional violation is being directly imposed upon the defendant thereby guaranteeing him standing against the alleged coercive conduct.[91] The same is not true in the latter as it is in-fact, the witness's individual rights (if anyone's), and not the defendant's rights, that may have been violated.[92] Herein lies the crux of the issue as a party generally may only seek redress for injuries done to him or her but may not seek redress for injuries done to others.[93] Therefore, it has been held that this degree of separation, in general, fails to invoke the concomitant federal violation necessary to trigger a § 1983 suit since a party without standing may not seek redress for a constitutional deprivation.[94] More specifically, here, while this issue remains unresolved by the Supreme Court, a circuit split exists as to whether a plaintiff may assert a § 1983 claim for coercion when the specific coercive acts were conducted towards a third party, not the defendant.[95]

On the more permissive side of this issue, at least one jurisdiction has held that a violation of a criminal defendant's due process rights exists when a witness is coerced to provide adversarial testimony. Specifically, the Sixth Circuit has explicitly held that the use of another person's coerced testimony may violate a defendant's rights under the Due Process Clause of the Fourteenth Amendment.[96] This position was also held by the

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Amendment's guarantee of fundamental fairness

90. Levra v. Denno, 347 U.S. 556, 558 (1954).

91. *See Buckley*, 20 F.3d. at 794 (7th Cir. 1994) (noting that coercing witnesses to speak is a genuine constitutional wrong in which the aggrieved party is the witness, not the defendant).

92. *Id.*

93. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972)*; see also* Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (holding a person cannot "acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; its bears repeating that a person cannot predicate standing on injury which he does not share").

94. *See* Collins v. W. Hartford Police Dep't, 324 F. App'x 137, 139 (2d Cir. 2009) (holding that the plaintiff could not establish a right to relief under § 1983 because he lacked standing as he failed to allege a cognizable deprivation of his liberty or property and had no standing to challenge constitutional deprivations alleged to have been experienced by his mother).

95. White v. McQuiggin, 2011 U.S. Dist. LEXIS 137279, *19 (E. D. Mich. Nov. 30, 2011) ("The Supreme Court had not yet decided whether the admission of a coerced third-party statement against a criminal defendant is unconstitutional").

96. Bradford v. Johnson, 476 F.2d 66, 66 (6th Cir. 1973); White v.

Kansas Court of Appeals.[97]

Other courts have held that a criminal defendant's rights are violated by coercive tactics directed towards separate individuals. In *United States v. Gonzales*, a case that did not involve a § 1983 claim, the Tenth Circuit reviewed whether it was proper to allow the defendants to challenge the voluntariness of the subject witness's testimony.[98] There, the court held that while a defendant's rights are not violated when the police use coercive tactics to procure testimony from a witness, "the defendants' due process rights would be implicated if the subject witness was coerced into making false statements and those statements were admitted against defendants at trial."[99] Additionally, the Supreme Court of Kansas has affirmed the decision in *Shumway* in holding that "a conviction based, in whole or in part, on a witness' coerced statement may deprive the defendant of due process."[100] As was the case in *Gonzales*, such rights are implicated if the testimony was actually coerced, and the testimony was introduced at trial.[101]

However, the rationales buttressing these decisions do not take into consideration the totality of the issue as the Seventh Circuit did previously. In *Petty v. City of Chicago*, the Seventh Circuit recognized that, while "obtaining a statement with coercive tactics that inculpated the arrestee may have violated the witness's rights," it does not, at the same time "violate the arrestee's due process rights."[102] Moreover, "[c]oercively interrogating witnesses, paying witnesses for testimony, and witness-shopping may be deplorable, and these tactics may contribute to wrongful convictions, but they do not necessarily add up to a constitutional violation even when their fruits are introduced at trial."[103] The primary reason for this holding was that "[e]vidence collected with these kinds of suspect [coercive] techniques, unlike falsified evidence and perjured testimony, may turn out to be true."[104] Accordingly, under *Petty*, witness trial testimony elicited by governmental coercion does not violate a defendant's due process rights such that it would invoke a

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McQuiggin, 2011 U.S. Dist. LEXIS 137279, *18 (E.D. Mich., Nov. 30, 2011) (citing *Bradford*, 476 F.2d at 66).

97. State v. Shumway, 30 Kan. App. 2d 836, 841 (2002) (citing United States v. Gonzales, 164 F.3d 1285, 1289 (10th Cir. 1999) (concluding that, although a defendant's rights are not directly implicated by police coercion of a witness' statements, the defendant's right to due process is implicated by admission of false statements involuntarily elicited from the witness).

98. United States v. Gonzales, 164 F.3d 1285, 1289 (10th Cir. 1999).

99. *Id*. at 1289 (citing *Buckley*, 20 F.3d at 794-95); Clanton v. Cooper, 129 F.3d 1147, 1158 (10th Cir. 1997)).

100. State v. Lloyd, 299 Kan. 620, 630 (2014).

101. *Id*.

102. 754 F.3d 416, 422 (2014) (citing *Buckley*, 20 F.3d at 794).

103. *Petty*, 754 F.3d at 422 (quoting *Whitlock v. Brueggemann*, 682 F.3d 567, 584 (7th Cir. 2012)).

104. *Petty*, 754 F.3d at 422.

federal basis to substantiate a § 1983 claim.[105]

B. Coerced Testimony Versus Fabricated Evidence / Testimony

The law considers coercion in both the civil and criminal context. Though this comment focuses on coerced testimony in a civil action, brought as a claim pursuant to § 1983, the issue necessarily arises out of a criminal trial in which police and/or prosecutors allegedly engaged in coercing witness testimony against the criminal defendant.[106] The question that this comment addresses is whether coerced testimony has a legal distinction separate and apart from fabricated evidence to support that the two concepts should be treated differently in the context of a § 1983 claim.

Coercion requests a court to "weigh the circumstances of pressure against the power of resistance of the person confessing."[107] "Coerced testimony is testimony that a witness is forced by improper means to give; the testimony may be true or false."[108] A court can only determine whether a confession was coerced by reviewing the circumstances surrounding the confessions.[109] Thus, coercion is determined from the perspective of the suspect.[110] "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."[111] As such, the issue of 'voluntariness' "is a legal question requiring independent federal determination."[112]

Conversely, a "police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of his liberty in some way."[113] A plaintiff must demonstrate that the police officers created evidence that they knew to be false, and the evidence must also have been

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105. *Id.*

106. *See generally Owen*, 445 U.S. at 651 (noting that § 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well").

107. Thomas v. Arizona, 356 U.S. 390, 393 (1958) (citing Fikes v. Alabama, 352 U.S. 191, 197 (1957)).

108. *Fields II*, 740 F.3d at 1110; Lopez v. City of N.Y., 105 F.Supp.3d 242, 248 (E.D.N.Y. 2015).

109. *Fields II*, 740 F.3d at 1110.

110. Illinois v. Perkins, 496 U.S. 292, 296 (1990).

111. *Id.* at 297.

112. Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (citing *Miller*, 474 U.S. at 110); Mincey v. Arizona, 437 U.S. 385, 398 (1978); Davis v. North Carolina, 384 U.S. 747, 741-42 (1966); Haynes v. Washington, 373 U.S. 503, 515 (1963); Chambers v. Florida, 309 U.S. 227, 228-29 (1940).

113. Anderson v. City of Rockford, 932 F.3d 494, 510 (7th Cir. 2019) (citing *Whitlock*, 682 F.3d at 580).

used in some way to deprive the plaintiff of liberty.[114] Further, "[f]abricated testimony is testimony that is made up; it is invariably false."[115] The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.[116] Accordingly, a prosecutor that deliberately misrepresents the truth by using false evidence violates the defendant's rights and the evidence is, therefore, not constitutionally valid.[117] Put simply, fabricated evidence is a constitutional violation.[118] In furtherance of this principle, in *Napue v. Illinois*, the United States Supreme Court specifically held that the government may not knowingly use false testimony to obtain a conviction.[119]

A critical factor as to how coercion should be differentiated from fabricated evidence is how the two inherently involve fundamentally different principles. As will be detailed, *infra*, outside of the Seventh Circuit, courts generally do not explicitly recognize the distinction between coerced testimony and falsification or fabrication of evidence.[120] Rather, those courts treat allegations of coerced testimony as synonymous with allegations of fabricated evidence.[121] Yet, within the Seventh Circuit, courts explicitly distinguish between coerced testimony and falsification or fabrication of evidence on the grounds that the former may be true while the latter is invariably false. This approach takes further recognition of the fact that not all societal ills are remedied by the United States Constitution, as some are instead considered under other areas of law. Ultimately, the distinction between approaches and recognition of the fundamental differences between the two types of evidence may create a split in the circuits as the Seventh Circuit will not find a valid § 1983 claim built solely on coerced testimony while other jurisdictions appear poised to permit such a claim to go forward.

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114. *Anderson*, 932 F.3d at 510 (citing *Petty*, 754 F.3d at 423); *Whitlock*, 682 F.3d at 580.

115. *Anderson*, 932 F.3d at 510.

116. Miller v. Pate, 386 U.S. 1, 7 (1967) (citing Mooney v. Holohan, 294 U.S. 103 (1935)).

117. *Miller*, 386 U.S. at 7.

118. *Whitlock*, 682 F.3d at 582.

119. Napue v. Illinois, 360 U.S. 264, 272 (1959).

120. The exception appears to be Lopez v. City of N.Y., where the Court did explicitly recognize the distinction. 105 F.Supp.3d 242, 248 (E.D.N.Y. 2015).

121. *See Wearry*, 2020 U.S. Dist. LEXIS 111142, *19 (M.D. LA, June 24, 2020) (finding that absolute immunity would not be warranted under the facts of the case because nothing in the willful fabrication of witness testimony was so essential to the judicial process that a prosecutor or law enforcement officer should be granted absolute immunity when he engaged in it).

1. The Seventh Circuit's Approach Distinguishes Coerced Testimony from Fabricated Evidence Claims

In *Whitlock v. Brueggemann*, the Seventh Circuit reviewed whether the alleged usage of coerced testimony in a wrongful murder conviction violated the then-defendants' due process rights.[122] In ruling on this issue, the court held that "[c]oercively interrogating witnesses, paying witnesses for testimony, and witness-shopping may be deplorable, and these tactics may contribute to wrongful convictions, but they do not necessarily add up to a constitutional violation even when their fruits are introduced at trial."[123] Because "[e]vidence collected with these kinds of suspect techniques, unlike falsified evidence and perjured testimony, may turn out to be true[,]" the court did not extend § 1983 coverage in this instance [124].

Next, in *Field v. Wharrie* ("*Fields II*"), the Seventh Circuit reviewed a similar § 1983 suit wherein the plaintiff, Fields, also claimed that his due process rights were violated when the police and prosecution allegedly used coercion to elicit false testimony to implicate him in a double murder.[125] In *Fields v. Wharrie* ("*Fields I*"), the defendant was wrongfully convicted of two murders.[126] Twenty-five years after the ordeal started, the defendant was exonerated, and he brought claims against, amongst others, Assistant State Attorneys, alleging that they induced false testimony during both his trial and subsequent retrial.[127] The defendant claimed that police officers and an assistant state attorney solicited false testimony against him from a fellow gang member.[128] The witness testified and received a no prosecution

122. 682 F.3d 567, 580 (2012). In *Whitlock*, two individuals were convicted of murders and spent twenty-one and seventeen years in prison, respectively, before each was able to get their convictions reversed. *Id.* at 570. The individuals then filed suit against a variety of state officials asserting violations of their constitutional rights. *Id.* The investigating police officers of the murders relied on a person who claimed he was present during the murders, and, at a subsequent meeting, the witness identified the two individuals who were ultimately found guilty. *Id.* at 571-72. The investigators put the witness in seclusion, supplied him with money and alcohol, and, allegedly, fed him details about the crimes. *Id.* at 572. The plaintiffs further alleged that the investigators coerced a separate woman, with a known history of mental illness and drug abuse, to provide information about the murders. Both witnesses testified at trial. *Id.* The witnesses' testimony and credibility were the *sine qua non* of the State's case. *Id.* Years later, different Illinois State Police officers reviewed the case and concluded that the witnesses' trial testimony was false, and that the criminal defendants were innocent. *Id.*

123. *Id.* at 584.

124. *Id.* (emphasis added).

125. Fields v. Wharrie,740 F.3d 1107, 1109 (2014).

126. 672 F.3d 505, 508 (7th Cir. 2012).

127. *Id.*

128. *Id.* at 509.

agreement in exchange for his testimony.[129] Finally, the witness ultimately confessed that his testimony was false.[130]

Following the confession, Fields filed for post-conviction relief and ultimately received a new trial on separate evidence that a co-defendant had bribed the initial trial judge.[131] Fields was acquitted, and he received a certificate of innocence.[132] The defendant claimed that he was deprived of due process through suggestive identification procedures, deliberately suppressed exculpatory evidence, suborning perjury, and witnesses coerced to provide false evidence.[133]

In reviewing this claim in *Fields II*, the court first noted that Fields used the terms "coerced," "fabricated," and "false testimony" interchangeably to substantiate his civil claim.[134] The Seventh Circuit discussed how, while similar in nature, the definition of these terms — in particular how the application of each affected the credibility of the prosecution — constituted non-pedantic distinctions as "they mean three different things."[135] Specifically, "[c]oerced testimony is testimony that a witness is forced by improper means to give."[136] Therefore, "the testimony may be true or false."[137] Conversely, "[f]abricated testimony is testimony that is made up; it is invariably false."[138] In other words, false testimony "is testimony known to be untrue by the witness and by whoever cajoled or coerced the witness to give it."[139] In drawing the distinction between the two, the court held that while "[m]uch testimony is inaccurate," if it is "not deliberately so . . . [it is] not false or fabricated as we are using these words." [140] Ultimately, the court held that the prosecutor was unable establish absolute immunity as the evidence demonstrated that fabrication of evidence occurred at the underlying trial.[141]

2. The Seventh's Circuit Further Elaborated the Distinction Between Coerced Testimony and Fabricated Evidence in Petty v. City of Chicago

The Seventh Circuit echoed these same distinguishing factors

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Fields II*, 740 F.3d at 1110.
135. *Id.*
136. *Id.*
137. *Id.* (emphasis added).
138. *Id.*
139. *Fields II*, 740 F.3d at 1110.
140. *Id.* (alteration in original).
141. *Id.* at 1114.

and expanded upon them in *Petty*.[142] In *Petty*, following a murder, police officers brought in witnesses for questioning.[143] The police questioned the witnesses between thirteen to seventeen hours when one of the witnesses identified Petty.[144] Petty was arrested on an outstanding warrant, and the other witness then positively identified Petty, leading to murder charges.[145] During the criminal trial, Petty filed a motion to suppress one of the witnesses identification testimony, alleging that the witness only made the initial false identification because the police told him who to pick.[146] The witness claimed that police threatened to have his parole revoked if he did not help convict Petty.[147]

The judge denied Petty's motion, finding that the witness identified Petty to the police and that the police acted in good faith.[148] After a bench trial, Petty was found not guilty, at which point he filed a § 1983 claim.[149] Petty claimed that the City was liable under the *Monell* standard.[150] The City moved to dismiss, claiming that Petty did not suffer a constitutional violation because he was not the person detained, and, therefore, he could not establish a direct connection between the City's alleged policy of detaining people believed to be witnesses to crimes for extended periods of time against their will and his alleged injury.[151]

Petty also alleged that individual police officers violated his due process right to a fair trial by inducing prosecutors to wrongfully prosecute him and deprived him of exculpatory information in violation of *Brady v. Maryland*.[152] The court noted that Petty's allegations were concerning and required close scrutiny of police tactics, but the record did not reveal that his due process rights were violated.[153]

Specifically,, the court reiterated the *Fields II* standard such that "[i]n fabrication cases, the police or prosecutor manufactures evidence that he knows to be false."[154] However, "a prosecutor fabricating evidence that she knows to be false is different than getting 'a reluctant witness to say what may be true.'"[155] Thus, Petty's § 1983 claim failed because "his claim is a 'coercion' case for which there is no cognizable due process claim, as opposed to an

142. *Petty*, 754 F.3d at 416.
143. *Id.* at 418.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 419.
149. *Id.*
150. *Id.*
151. *Id.*
152. Brady v. Maryland, 373 U.S. 83, 83 (1963); *Petty*, 754 F.3d at 419.
153. *Petty*, 754 F.3d at 421.
154. *Id.* at 422.
155. *Id.* (quoting *Fields II*, 740 F.3d at 1112).

'evidence fabrication' case where there is a cognizable claim."[156] This was despite the fact that Petty alleged:

> CPD officers coerced [the witness] into giving false evidence by threatening him with jail time if he did not cooperate, holding him against his will in a locked room without food or water for over 13 hours, badgering him, and pressuring him to identify Petty as one of the assailants.[157]

Rather, the court focused on the fact that this was different than alleging that CPD officers created evidence that they knew to be false, *i.e.*, the hallmark of a fabrication case.[158] To that end, Petty's complaint which used terms and phrases such as "manufactured false evidence" and "false identification" was not sufficient because, "when one closely examines the evidence, it is clear that his case is a coercion case."[159] Accordingly, the terms "'[m]anufactured false evidence' and 'false identification' are not magic talismans that will transform a coercion case into an evidence fabrication case and give rise to a cognizable claim where one does not exist."[160] Therefore, Petty's claim failed because he never alleged that CPD officers manufactured evidence that they knew to be false.[161]

Importantly, the discerning traits between coerced testimony and fabricated testimony were critical in the analysis of whether Petty's due process rights were violated *via* the violation of witness's rights to be free from coercion when testifying.[162] The court clarified that while "[c]oercing witnesses to speak . . . is a genuine constitutional wrong, the persons aggrieved [are the witnesses] rather than [the arrestee]."[163] Accordingly, "obtaining a statement with coercive tactics that inculpated the arrestee may have violated the witness's rights, but it did not violate the arrestee's due process rights."[164] Therefore, the mere fact that a constitutional wrong was committed against the witness was insufficient to substantiate a defendant's § 1983 claim.[165]

After *Petty*, the Seventh Circuit continued elaborating on the distinction between coercion and fabrication of evidence. In *Anderson v. City of Rockford*, the plaintiffs' primary contention was that the police officer defendants coerced two witnesses to give statements implicating the plaintiffs that the defendants knew to

156. *Petty*, 754 F.3d at 422-23.
157. *Id.* at 423.
158. *Id.*
159. *Id.* (alteration in original).
160. *Id.*
161. *Id.*
162. *Id.* at 422.
163. *Id.* (alteration in original) (quoting *Buckley*, 20 F.3d at 794).
164. *Petty*, 754 F.3d at 422.
165. *Id.*

be false.[166] The plaintiffs alleged that detectives secured a false statement by threatening one witness with jail time if he failed to cooperate, and detained that witness for more than ten hours.[167] The plaintiffs further contended that the officers coerced a different witness into falsely implicating the plaintiffs through physical force, and by threatening the witness with additional charges if he failed to cooperate.[168] The plaintiffs further alleged that one of the detectives instructed both witnesses to testify consistently with their statements, even though he knew those statements were false.[169]

The court identified that coercion and fabrication are not synonyms.[170] The court repeated that an allegation that a police officer coerced a witness to give incriminating evidence does not, standing alone, violate the wrongly convicted person's due process rights.[171] Noting that coerced testimony, forced by improper means to give, may be true or false, while fabricated testimony is invariably false, the court repeated its position that only fabricated testimony supports a due process claim.[172] The court identified that claims of fabrication only support a due process violation if the record shows that the officers created evidence that they knew was false.[173] The court held that were was more than mere coercion as to one of the detectives, who admitted he knew that the witness' statements were false, and nonetheless instructed them to testify consistently with their false statements at the criminal defendants' trials.[174]

The Seventh Circuit also held that police officers' nondisclosure of coercive acts used to obtain incriminating evidence from people other than the criminal defendant sounds in malicious prosecution rather than a due process claim.[175] Thus, while a criminal defendant may have a malicious prosecution claim, there is not necessarily a due process claim.[176] Such a result is consistent with established United States Supreme Court precedent, which recognizes that torts serve a different purpose from constitutional violations.[177]

166. *Anderson*, 932 F.3d at 510.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* (citing *Avery*, 847 F.3d at 439).
172. *Anderson*, 932 F.3d at 510.
173. *Id.* (citing *Avery*, 847 F.3d at 439, and *Whitlock*, 682 F.3d at 584).
174. *Anderson*, 932 F.3d at 511.
175. Phillips v. City of Chicago, 2018 U.S. Dist. LEXIS 39753 *77 (N.D. Ill. 2018) (internal citation omitted).
176. *See* Taylor v. City of Chicago, 80 F. Supp. 817, 826 (N.D. Ill. 2015) (recognizing that due process claims based upon alleged coercion of co-defendants and a separate witness are actually malicious prosecution claims and the Court dismissed the plaintiff's due process claims based on alleged coercion).
177. *See Daniels*, 474 U.S. at 331 (finding that due process claims require

However, the availability of a state-law remedy for malicious prosecution does not defeat a federal due process claim against an officer who fabricates evidence that is later used to obtain a wrongful conviction.[178]

The Seventh Circuit clearly treats coerced testimony separately and as distinct from fabricated evidence. The Seventh Circuit specifically acknowledged that coerced testimony may or may not be true, while fabricated evidence is always false. The distinction is relevant, as a plaintiff may not have a valid § 1983 claim for allegations of coercion, while that plaintiff may have a valid § 1983 claim for allegations of fabricated evidence. As the prior cases demonstrate, the Seventh Circuit will permit claims of coercion in which the officer or prosecutor knew or reasonably should have known that the coerced testimony is false.[179] The Seventh Circuit's approach also considers that a plaintiff may not have standing to assert a § 1983 claim for conduct directly related to third parties.[180] That said, however, this approach recognizes that there are more suitable causes of action to pursue such remedies.[181]

3. Other Jurisdictions Generally Fail to Recognize a Distinction Between Coerced Testimony and Fabricated Evidence Claims

Outside of the Seventh Circuit, jurisdictions do not generally consider the distinction between coerced testimony and fabricated evidence. These jurisdictions generally lump coerced testimony in with fabricated testimony, ignoring the subtle, yet real, distinction: coerced testimony may be true and is not invariably false.

In *Villegas v. City of El Paso*, the District Court for the Western District of Texas considered coercion and fabrication of evidence issues.[182] The court noted that "[o]fficers violate a criminal defendant's right when they pressure a specific witness through specific threats targeted to secure the conviction of an individual defendant."[183] The court held that such conduct violates the Fourteenth Amendment.[184] The court, however, did not analyze the

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deliberate conduct by governmental entities, not merely negligence, as torts and constitutional violations are separate considerations).

178. *Philips*, 2018 U.S. Dist. LEXIS 39753 at *79 (citing *Avery*, 847 F.3d at 441).

179. *Philips*, 2018 U.S. Dist. LEXIS 39753 at *79.

180. *Buckley*, 20 F.3d at 794 ("Coercing witnesses to speak . . . is a genuine constitutional wrong, but the persons aggrieved would be [the witnesses] rather than [a party to the suit]").

181. *Taylor*, 80 F. Supp. 817 at 826.

182. 2020 U.S. Dist. LEXIS 34907 *32-33 (W.D. Tex. 2020).

183. *Id.* at *32.

184. *Id.* at *33.

difference between coerced testimony and fabricated evidence.[185] Instead, the court noted that there were allegations that the officers knew the testimony was false.[186] Thus, the court held that the officers were not entitled to qualified immunity.[187]

In *McGhee v. Pottawattamie County*, the plaintiffs alleged that defendants engaged in coercion of witnesses and fabrication of false testimony by making promises to putative witnesses that criminal charges would be dismissed or reduced, as well as well as by coaching and altering witness statements.[188] The court first held that the prosecutors were not entitled to absolute immunity as to the allegations.[189] Additionally, the prosecutors were entitled to absolute immunity for claims that prosecutors fabricated and coerced evidence via jailhouse informants.[190] Lastly, the court found that the prosecutors were necessarily acting in an investigatory capacity.[191]

At least one other jurisdiction appears willing to consider whether coerced testimony should be treated differently from fabrication of evidence claims. In *Watkins v. Healy*, a district court case from the Sixth Circuit, a prosecutor argued that the plaintiff's fabrication of evidence claim failed because the plaintiff did not allege that the prosecutor fabricated a witness" statement.[192] The prosecutor claimed that the plaintiff alleged the prosecutor was confronted with two different versions of events, one implicating the plaintiff and the other not, and concluded that the version implicating the plaintiff was true.[193] The prosecutor argued that such conduct was "coercion" and not fabrication, citing decisions from the Seventh Circuit.[194] The court disagreed, finding that the plaintiff did allege that the prosecutor fabricated a false statement.[195] Specifically, the court found that the plaintiff alleged that the prosecutor forced the witness to implicate the defendant after the witness had recanted and labeled as "not true" an earlier statement accusing the plaintiff of killing the victim, and that the witness told the prosecutor that the plaintiff had nothing to do with the murder.[196] The court held such allegations were sufficient to support that the prosecutor knew or should have known that the witness' statement implicating the plaintiff was false, which was

185. *See id.* at *9 (holding that the plaintiff alleged a viable claim under § 1983 as all of the officers knew the confession was false and used it anyway).
186. *Id.*
187. *Id.* at *34.
188. 475 F. Supp. 2d 862, 894-95 (S.D. Iowa 2007).
189. *Id.* at 895.
190. *Id.* at 897.
191. *Id.*
192. Watkins, 2019 U.S. Dist. LEXIS 134950, at *35.
193. *Id.* at *36.
194. *Id.*
195. *Id.*
196. *Id.* at *36-7.

sufficient to support that the plaintiff alleged fabrication of evidence.[197]

Watkins, on its face, infers that courts may consider whether there is a distinction between fabricated evidence and coerced testimony. However, the court did not actually analyze the issue. Rather, the court held that while the prosecutor "may enjoy absolute immunity for introducing allegedly-false testimony [by the witness] at trial does not somehow retroactively immunize [the prosecutor's] fabrication of [the witness's] statement long before trial and prior to the commencement of the judicial process.[198] *Watkins* supports that some other jurisdictions may begin to recognize that distinction expressly recognized by the Seventh Circuit. However, most jurisdictions fail to analyze whether coerced testimony is different and distinct from the fabricated evidence. The courts that do not consider a distinction between coerced testimony and fabricated evidence essentially gloss over the potential issue. As described, *supra*, the courts that do not find a distinction simply combine the analysis without exploring the specific potential issues.

IV. THE SEVENTH CIRCUIT CORRECTLY DISTINGUISHES BETWEEN COERCED TESTIMONY AND FABRICATION OF EVIDENCE/TESTIMONY AS THE ANALYSIS FALLS IN LINE WITH ESTABLISHED LEGAL CONCEPTS

Most jurisdictions do not recognize a distinction between coerced testimony and fabricated evidence. Yet, the Seventh Circuit's recognition of this distinction is the better policy. Specifically, coerced testimony, as opposed to fabricated evidence, may be true, as the Seventh Circuit explicitly recognizes. Accordingly, because there is not an inherent constitutional deprivation in such claims, there is no policy reason to permit a § 1983 claim premised on testimony the officer or prosecutor did not know was false.[199] This is precisely why coerced testimony should and must be distinguished from situations in which an officer or prosecutor knows or reasonably should know that testimony is fabricated. Furthermore, without direct knowledge or the reasonable expectation of knowing testimony was mendacious, a then-defendant turned civil plaintiff lacks standing to raise a § 1983 suit as the purported wrong was committed against the witness, not

197. *Id.* at *37.

198. *Id.* *42 (citing Spurlock v. Satterfield, 167 F.3d 995, 1000 (6th Cir. 1999) ("The simple fact that acts may ultimately lead to witness testimony does not serve to cloak these actions with absolute testimonial immunity").

199. Redd v. Dougherty, 578 F. Supp. 2d 1042, 1054 (N.D. Ill. 2008) (dismissing witness's § 1983 witness coercion claim and noting that the plaintiff "has not cited, nor has the Court's research revealed, any cases recognizing the viability of a coercive-questioning claim").

the individual on trial.[200]

This is further based on the fact that due process claims historically apply to deliberate decisions of government officials to deprive a person of life, liberty, or property.[201] In *Daniels*, the United States Supreme Court considered whether negligent conduct was sufficient to support a constitutional deprivation under the Fourteenth Amendment and rejected this notion.[202] "Where a government official's act causing injury to life, liberty, or property is merely negligent, 'no procedure for compensation is *constitutionally* required.'"[203] Moreover, "[t]hat injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests."[204] Accordingly, the *Daniels* Court recognized that states could enact tort claim statutes as a redress for such injuries, but that the United States Constitution does not address the same concerns as traditional tort law.[205]

To be clear, the distinction between coerced testimony and fabricated evidence should be relatively thin. When there is evidence that the police and/or prosecutors knew or reasonably should have known that testimony is false, courts properly recognize that there is a valid § 1983 claim. However, simply because there are situations in which coerced testimony may overlap with fabricated evidence sufficient to support a constitutional deprivation, does not reduce the distinction between the two types of conduct to irrelevancy. Rather, the better approach for courts to take is to analyze and determine whether there is a valid claim to support that the police and/or prosecutors engaged in fabrication of evidence, *i.e.*, when a cognizable claim exists, or whether coercion of witness testimony existed such that there is not a valid § 1983 claim.

This solution is further supported by the relevant concept of standing. A criminal defendant does not suffer a constitutional deprivation when police and/or prosecutors engage in coercive conduct towards another person.[206] That is, a party may only seek redress for injuries done to him or her, but not for injuries to

200. *Buckley*, 20 F.3d at 794.

201. *Buraker*, 3dd F. Supp. 2d at 707 (citing *Daniels*, 474 U.S. at 331).

202. *Daniels*, 474 U.S. at 332.

203. *Id.* at 333 (internal citation omitted) (emphasis in the original).

204. *Id.*

205. *Id.*

206. *See* Phillips, 2018 U.S. Dist. LEXIS 39753 at *77 (quoting *Petty*, 754 F3d at 422) ("[P]olice officers' nondisclosure of coercive acts used to obtain incriminating evidence from people other than the plaintiff sounds in malicious prosecution rather than due process," the court concluded, "since the officers' coercive conduct 'may have violated the witness's rights, but it did not violate the arrestee's due process rights.'").

others.[207] Accordingly, when the police and/or prosecutors engage in conduct that includes coercing testimony from a separate witness, there is no injury to the criminal defendant, and a plaintiff cannot establish a right to relief under § 1983.[208] Thus, the injury cannot arise unless, and until, it specifically affects the criminal defendant. However, if the police and/or prosecutors do not know that the testimony is false or do not have reason to know that the testimony is false, then there is no injury to the criminal defendant as well. Thus, the more sound approach is to recognize that coercive conduct is not a cognizable claim through which the criminal defendant can pursue a § 1983 claim. The basic concepts of standing support the Seventh Circuit's approach to distinguishing the difference between coerced testimony and fabricated evidence.[209]

As a final clarification, this recommended approach does not implicate a defendant's own coerced confessions. Obviously, a defendant that is coerced into providing a false confession has standing to assert constitutional deprivations.[210] But a criminal defendant who faces testimony from a witness who was coerced into testifying is separate and distinct. That witness's constitutional deprivation cannot, and should not, become the defendant's constitutional deprivation. Constitutional rights do not flow from one party to another, but rather are specific to the individual.[211] As such, any improper coercive tactics used against a witness do not flow to the criminal defendant. Rather, the proper question is whether the conduct could possibly violate the criminal defendant's constitutional rights. Absent a showing that police or the prosecution knew or reasonably should have known that the testimony was false, there is no constitutional deprivation against the criminal defendant. Thus, the Seventh Circuit's distinction

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207. *Moose Lodge No. 107*, 407 U.S. at 166; s*ee also Allee*, 416 U.S. at 828-29 (holding that a person cannot "acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; its bears repeating that a person cannot predicate standing on injury which he does not share . . ." and a person may not get standing via a backdoor in the context of a class action).

208. *See* Collins v. W. Hartford Police Dep't, 324 F. App'x 137, 139 (2d Cir. 2009) (concluding that the plaintiff could not establish a right to relief under § 1983 because he lacked standing as he failed to allege a cognizable deprivation of his liberty or property and had no standing to challenge constitutional deprivations alleged to have been experienced by his mother).

209. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (holding that injury in fact, the first and foremost of standing's three elements).

210. Jackson v. Denno, 378 U.S. 368, 376 (1964). It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. *Id.*

211. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized").

between coerced testimony and fabricated evidence falls in line with established constitutional jurisprudence. The circuits that do not distinguish between coerced testimony and fabricated evidence improperly blur the lines between these exogenous concepts thereby entangling them in constitutional quandaries not specific to each.

V. CONCLUSION

While fabrication of evidence requires some constitutional deprivation, coerced testimony does not necessarily. The crucial distinction between coerced testimony and fabrication of evidence is how such evidence may be used against a criminal defendant. As the Seventh Circuit recognizes, coerced testimony of a third-party witness is not necessarily false.[212] With the answer to this question remaining unknown at the time of the trial, how can the use of such testimony be a constitutional deprivation of the criminal defendant when the prosecutor or police officer does not know it may unfairly deprive the defendant of his or her liberty? Rather, it is unclear whether the use of such evidence unfairly deprives a person of his or her liberty. Thus, there is a crucial distinction between fabricated evidence and coerced testimony, and the Seventh Circuit's jurisprudence accurately reflects just that.

To be clear: allegations of police misconduct are important and should not be trivialized. The United States Supreme Court has explicitly recognized that the United States Constitution does not address the same concerns that torts may, and that negligence cannot support a due process violation. And while public policy should not favor coercion as a proper interrogation technique, the party who actually suffers from coercion is the party being coerced. Simply because coercion is a societal ill does not necessarily mean that said conduct is always a constitutional deprivation. As such, the Seventh Circuit's approach adequately balances the constitutional analysis with concepts of standing and state tort laws such that it's the premiere methodology other jurisdictions should adopt by separating coerced testimony from fabricated evidence and testimony in§1983 claims.

212. Harvey v. City of Chicago, 2021 U.S. Dist. LEXIS 184293, *10-11 ("[Plaintiff] has not provided, and the Court has not found, any authority establishing that [Plaintiff], as a coerced witness, may bring such a § 1983 claim").