REMARKS OF JOEL B. RUDIN TO THE UNIVERSITY OF IOWA LAW SCHOOL'S AMERICAN CONSTITUTION SOCIETY ON OCTOBER 12, 2023

Thank you for inviting me to speak and for that kind introduction, Siduri. Being invited to speak before an audience of idealistic law students reminds me of when I was in the same place -- it was a long time ago, yet it also seems like yesterday. So much has happened in my nearly 45 years of law practice. I thought I would talk about some of the lessons I've learned -- both about how careers evolve and how the law can be used to make a difference in people's lives.

The first lesson I've learned is that there's no right path to achieving a satisfying career. Not law review, not clerkships, not a prestigious corporate law job. For certain kinds of jobs, these credentials are necessary. But excelling in whatever you do, forging professional connections, seizing opportunities to do something special or new -- these, for me, have been far more important than paper credentials. Life, at least for me, hasn't followed any defined path; it's been ruled by serendipity.

As a child of the 60s, passionate about the anti-Vietnam War and civil rights movements, I wanted to fight against government oppression, and deeply mistrusted prosecutors and government agents. I knew, as I began college, that I would never wear a suit, work or live in a high-rise building, or live in congested Manhattan, near Queens, where I had grown up.

During college, I was an editor of my college newspaper and wanted to be an investigative journalist like Woodward and Bernstein, exposing government corruption like Watergate. But, during my first job in Springfield, Massachusetts, I ran into a brick wall of mediocre and timid newspaper editors. I went to law school to burnish my credentials so that I'd be hired by the NY Times. But at law

school, I became brainwashed into thinking that law would be a more satisfying career and never went back.

During law school, I was briefly sidetracked by the pressure to work during my second summer for a prestigious big corporate law firm and burnish my resume, but my lack of genuine interest must have been transparent. I didn't get a single callback interview. Instead, I wound up working for the enemy -- interning at the US Attorney's Office in Manhattan -- and found to my surprise that the prosecutors and agents I worked with were likeable, decent, and as idealistic as I was. I learned from the inside how federal agents and prosecutors put together a case. Public defender or public interest organizations that demand 100% public interest resumes do not do themselves a favor. Understanding how your adversary thinks is critical to being persuasive. After that experience, I found my way back to my true passion of being a criminal defense lawyer. During my final year of law school, I took a terrific, year-long criminal defense clinic.

Upon finishing law school, I took a position as an associate in a private criminal defense firm in New York, where I wore a suit, worked in an office building, and lived in a Manhattan high rise. The lawyer I worked for, though he had many personal flaws, was a brilliant advocate, and he taught me some invaluable lessons:

1. Treat judges and adversaries with respect and honesty: your reputation for trustworthiness is everything.

2. Write clearly, directly, and forcefully, but not pejoratively: use facts, not name calling or meaningless adjectives, to tell a persuasive story that makes your reader want to do what you are asking. Be succinct: as the great little volume by Strunk & White teaches, "Omit needless words."

3. Be imaginative and think creatively: even when the solution to a problem isn't apparent or seems foreclosed, keep thinking until you figure out a path. Think, think, work hard, think some more: there's a human being whose life is in your hands. You must find that client a way forward. The law is elastic, and most rules have workarounds and exceptions.

4. When you have a good issue, get up to the appellate court to argue it before another, less skillful or diligent lawyer botches it for everybody.

I left my first job to hang my shingle after three years as an associate. I started a partnership with another optimist who thought that clients would entrust their lives to 28-year-old lawyers with almost no trial experience. We developed a practice writing briefs for other private defense firms and handling court-assigned cases. The partnership failed after three years. I was then on my own for two and felt a bit lost -- was law practice really going to work? I had thoughts of going back to school to pursue my passion for earth science. Then, while in another short-lived partnership, serendipity struck.

The Supreme Court granted cert. in a federal criminal appeal I had been handling. And I went off to Washington to tell Justices Rehnquist, Scalia, Stevens, and O'Connor, and my heroes, the great Thurgood Marshall and William Brennan, in *Gomez v. United States,* why they should not permit federal magistrates to conduct jury selection at federal criminal trials over a defendant's objection. The amazing part was that, in thoroughly researching the Federal Magistrates Act's legislative history, I found material that not one lawyer or judge in 10 federal appellate cases had ever bothered to find. The materials proved that Congress never intended magistrates to have this authority. The argument was thrilling, and I won unanimously.

Private criminal defense practice in the late 1980s and 1990s was treacherous. There was a War on Drugs and defense lawyers became collateral damage. Federal prosecutors subpoenaed our fee information, would send informants to try to set us up, and tried to turn us against our own clients. The sentences meted out to clients who lost at trial, under mandatory minimum sentencing statutes and the federal sentencing guidelines, made trial something to be avoided at all costs. Our trial skills became less important than our ability to get on our knees, cooperate our clients, and beg for mercy. I was beginning to think about that geology career again. And then opportunities arose that led me to transition to a plaintiff's civil rights lawyer. Serendipity.

While in my first partnership, one of my clinical law school professors had referred to me an appellate client, convicted of murder, and I had managed to get his sentence cut in half. Several years later a relative of his, convicted of child sexual abuse, retained me. It was one of the notorious daycare center sexual abuse cases of the 1980s. All across the country, beginning with the McMartin case in California, day care teachers and workers had been convicted of violently and ritualistically raping and abusing 3, 4, and 5 year old kids -- crimes, as it turned out, that in many instances had not occurred at all but had been fantasized by children responding to overbearing, suggestive interrogation techniques. Five men -- all completely innocent -- had been convicted at trial in the Bronx, NY, and received sentences ranging from 25 to 90 years in prison.

Four of the men had been convicted based upon duplicitous indictments: the indictments failed to charge single crimes per count as seemingly required by statute, but what prosecutors called a "continuous crime" of rape, sodomy and sexual abuse supposedly committed over many months. How could one possibly defend against the vague label of being a child rapist or sex abuser without any

specific incident to confront? I rushed to brief this and other novel issues the case presented before the other defendants did so, and succeeded in getting the NY Court of Appeals to overturn my client's conviction and got the indictment dismissed. The other three defendants all then won their appeals based upon this precedent. Meanwhile, the fifth of the Bronx 5, Alberto Ramos, having heard of my success, retained me.

Alberto was a 21-year-old substitute teacher at a Bronx daycare center when he was accused of violently raping a 5-year-old girl in the class bathroom during naptime. There was no physical or medical evidence, no other corroboration, but the teaching at that time was, "Believe the Children," and Alberto was convicted and sent to prison for 25 years. Evidence emerged several years after trial that the girl had been pressured to fabricate her story and that the prosecutor knew it but had suppressed the evidence. I confronted the prosecutor during an evidentiary hearing, and in June 1992, won a strong decision by the court vacating the conviction. Alberto was released after spending seven horrible years in prison. His mother and I walked him out of prison, a truly joyous moment. We then won a strong Appellate Division decision decrying the prosecution and upholding the lower court's decision. By then, a Second Circuit decision had serendipitously opened my eyes to a possible theory of civil recovery under Sect. 1983.

Initially, I had assumed that absolute or prosecutorial immunity under the Supreme Court's decision in *Imbler v. Pachtman* precluded any lawsuit for this egregious *Brady* violation. However, in between our victories in the lower court and then on appeal, in *Walker v. City of New York,* the Second Circuit Court of Appeals held that New York City could be sued under the Supreme Court's *Monell* decision upholding municipal liability under Sect. 1983. The City could be sued where a county DA's unlawful office-wide *Brady* policy could be shown to have

caused a line prosecutor to violate *Brady*. The Court distinguished between the District Attorney's administrative function of personnel management, or mismanagement, which was a local function and thus actionable under Sect. 1983, and prosecuting an individual case on behalf of the State, which cannot be sued under the 11th Amendment or sovereign immunity. But the problem, after *Walker* upheld bringing such a claim, was, how does one prove it? No DA's office is likely to have an official or published policy to suppress *Brady* material.

I had to learn a new set of skills as a civil lawyer: drafting pleadings, obtaining discovery, taking depositions, briefing issues involving tort liability, immunity, and municipal liability under *Monell,* and, most difficult of all, negotiating monetary settlements. Being a civil rights lawyer was the dream of any investigative reporter: you had subpoena power and the extraordinarily powerful tools of federal civil discovery to ferret out the information that government officials wanted to keep secret. You could compel arrogant prosecutors, who in a criminal case wouldn't even answer your phone calls, to come to your office for sworn depositions and answer hours and hours of questions under oath.

My office set out to show that the Ramos violation was part of a pattern that indicated an unlawful policy, custom or practice. We found 18 cases finding *Brady* violations in the years immediately before and after Ramos's prosecution, and another 54 cases where prosecutors had utilized false, misleading, or inflammatory evidence or argument to similarly bring about unfair convictions. The problem was that the court decisions likely were inadmissible as hearsay. Nor could they be used against the City, which wasn't a party to prosecutions brought on behalf of the State of New York. Re-proving the underlying misconduct in these cases meant conducting a series of trials within a trial -- it would be impossibly cumbersome.

But a very talented lawyer who worked for me, and who I tasked with finding the solution, found it.

In a series of *police* misconduct lawsuits brought under *Monell,* the Second Circuit had upheld liability on a failure to supervise or discipline theory. Judicial or other findings of misconduct by police could be used, not for the "truth" of what had occurred, but as notice to the policymaker of a need for discipline or supervision. *Monell* liability under Sect. 1983 could be imposed where a Police Commissioner's deliberate indifference to supervision or discipline of officers could be shown to have led to another police officer's misconduct in the plaintiff's case. I set out to apply this theory of liability to prosecutors' offices. I brought the case in the Bronx in state court. Despite the delays that plagued that court, I thought it would be a receptive venue given my client's ethnicity and the victories we already had won in state court in his case. In the long run, the strategy worked, but the case took 10 years.

We demanded, in civil discovery, the identities of the prosecutors who had handled the 72 cases at trial and their personnel records. NYC resisted. The lower court dismissed most of our case and granted us very little discovery. We brought an appeal and then won a complete victory. In what is still the leading New York State appellate decision on municipal liability under Sect. 1983 for *Brady* violations, the Appellate Division upheld our theory of liability and our right to the discovery necessary to prove it. We then received a trove of documents that only a lawyer with discovery power, as opposed to an investigative reporter, could obtain. The records showed that, out of 73 prosecutors, only one had been disciplined. He had been named in five appellate decisions for misconduct and suspended for a brief period, after which the District Attorney told the court's grievance committee that he had taken care of the problem and they need not do anything. He then

promoted the prosecutor with back pay. That was it. Personnel records included evaluations praising prosecutors for their toughness and for winning cases with very little evidence. We then won a $5 million settlement, which in 2003 was the largest in NY State history. The NY Times then published a big expose about the failure to discipline prosecutors based upon the documents I had obtained in discovery and made available to its reporters.

The Ramos cases led to many others. I brought cases using the same approach for clients who had been wrongfully convicted in Brooklyn, Queens, and Manhattan. One of those cases involved the remarkable Jabbar Collins.

Jabbar had been convicted of murder in Brooklyn in 1995, during the height of the crack epidemic and the war on drugs. Police and prosecutors sought to curb the drug problem by taking young black men off the street and they did so often on slim or manufactured evidence. In Jabbar's case, police had two brothers as suspects, but they lawyered up and detectives were stymied. They shifted focus to Jabbar following an anonymous tip, quite likely phoned in by one of the suspects to divert police suspicion. Several eyewitnesses failed to pick out Jabbar from a lineup, so police had to let him go, but then they succeeded in turning a heroin addict against him and obtaining identifications by two other witnesses. Prosecuted by the top trial attorney in the Brooklyn DA's Office, Jabbar was convicted at trial and sent to state prison to serve 25 years to life.

Jabbar, a high school dropout, became a highly skilled jailhouse lawyer who helped argue several fellow inmates out of prison. He became an expert in using the State Freedom of Information Law to pry helpful documents from government offices. Hearing about me from the Ramos case, he referred to me several private clients, including Danny Colon. More about Danny later. Jabbar would tell me that he was reinvestigating his own case but didn't want to claim his innocence,

like every other prisoner, until he had the goods to prove it. Then, after about three years, he was ready.

Jabbar had succeeded from prison in obtaining witness statements and documentary evidence showing how each of the three witnesses had been manipulated and coerced by police, then prosecutors, into falsely accusing him. One eyewitness turned out to be a drug addict who really hadn't seen anything. Another, also an addict, initially had said he knew nothing, but suffering from heroin withdrawal, he then changed his story and was rewarded with a lenient deal on his own pending case. When he recanted shortly before trial, he was threatened with parole revocation and sent upstate until he cooperated; after he testified for the prosecution, he was immediately released. A third witness had fled his own probation and gone to Puerto Rico, but he was secretly promised his probation violation would be taken care of if he testified and it was. Jabbar learned this by calling him and posing as a D.A.'s investigator trying to rebuild the office's file supposedly destroyed during 9/11. None of the above circumstances had been disclosed.

The state courts, protecting the DA's office as they usually do, gave us nothing. Compliant state court judges are a major cause of wrongful convictions. By the time we filed our motion in 2006, the trial prosecutor was the chief of the rackets division and renowned for prosecuting political corruption, even going after judges in a highly-publicized investigation. The state judge dismissed our motion because Jabbar had misrepresented his identity in calling that third witness and prohibited Jabbar from filing any more FOIL applications. But Jabbar persisted. Jabbar filed another FOIL application, but in another inmate's name, and struck gold. He obtained Corrections documents showing that one of the addict-witnesses had been secretly held in jail as a material witness until he testified

favorably for the prosecution. This was the final straw for Federal District Judge Dora Irizarry, who ordered an evidentiary hearing even after the DA's office agreed to a new state trial. She ordered a rare hearing into whether the misconduct had been so outrageous that retrial in state court should be barred.

As our first witness, we called the former addict who had been held in jail. At trial, the prosecutor claimed he had been threatened by Jabbar's family after the crime occurred, even though his identity had been kept secret until the beginning of the trial. This witness then testified that the only threat he had received came from the prosecutor himself. The witness had been held illegally in jail for a week, then as a literal captive in a padlocked motel room for another week. When he still refused to lie, the witness recalled, the prosecutor threatened to hit him over the head with a coffee table. Before any more testimony could be taken, District Attorney Charles Hynes, who had been vigorously defending Jabbar's conviction, threw in the towel. The case was dismissed. Jabbar Collins was released to his family, including the three wonderful children he had helped raise from prison.

A young former federal prosecutor and civil rights attorney, Ken Thompson, was inspired by Jabbar's case to make his first run for political office. He announced he would oppose the sitting DA, Charles Hynes, and made wrongful convictions and the need for a robust conviction review unit the centerpiece of his campaign. Meanwhile, our Sect. 1983 lawsuit was in the discovery phase in federal court. Through document discovery, we obtained proof that the D.A.'s Office had a widespread "hotel custody" program where, as in Jabbar's case, they would literally imprison dozens of potential witnesses in padlocked motel rooms, under guard by DA's investigators, until they agreed to give favorable testimony. I filed the evidence in federal court during a related discovery dispute and tipped off

reporters, and the tabloids had a field day reporting on these authoritarian tactics, calling this the “Hotel Hynes” program.

The lawsuit was rough. The attorney for the city continually denounced me personally, but to my relief, the news media, which heavily reported on the case, ignored his attacks. Meanwhile, I developed evidence of Hynes’s unremitting failure, during 24 years in office, to ever discipline prosecutors; instead, he promoted them, gave them bonuses, and recommended them for judgeships, despite dozens of cases finding serious misconduct. During his videotaped deposition, Hynes, during his last week in office, admitted he had sent a supervisor to federal court to argue Jabbar was guilty even though the case had fallen apart and he had concluded by that time that Jabbar likely was innocent. I was using my subpoena and discovery powers to uncover evidence of official wrongdoing and then investigative reporters were using it for their stories.

Ultimately, after Thompson defeated Hynes and became DA, he established what was at the time the most robust CRU in the nation, with 10 assigned prosecutors and a million-dollar budget. He overturned more than 20 murder and other felony convictions in two years, before, tragically, dying of cancer. Jabbar Collins became a wrongful conviction consultant, operating a highly successful business, and this year was appointed to the NYC Mayor’s Commission to Combat Police Corruption, where he meets regularly with the NYC Police Commissioner to discuss reforming the Police Department.

I’d like to return to the case of Jabbar’s friend, Danny Colon. It illustrates the relationship between due process and protecting the innocent against wrongful convictions.

Jabbar, as a jailhouse lawyer, helped Danny, at Greenhaven State Prison, locate a heroin addict who had testified against Danny in 1993 at his murder trial. The addict revealed undisclosed benefits he had received for testifying, although he didn't fully recant, and Jabbar referred Danny to me. The lower court denied our motion to vacate the conviction, and the Appellate Division affirmed, but the NY Court of Appeals reversed and eventually the case was dismissed. I brought a civil lawsuit for Danny and his codefendant, whose conviction also was vacated, alleging disciplinary indifference to *Brady* violations at the Office of the legendary Manhattan DA, Robert Morgenthau.

The problem with our case is that Danny looked guilty. The main witness against him may have had an undisclosed motive to lie, but Danny had been a drug dealer and there was no question his van had been used in the shooting. Danny's looked like the stereotype of a case where a guilty person got off on a technicality.

I have long preached about the importance of enforcing procedural rules not only because of the value to a democratic society of due process, but also because fair proceedings protect against conviction of the innocent. It is the importance of enforcing procedural rules, even if it means sometimes letting a guilty person go free, that was the hallmark of the liberal Supreme Court in the 1960s and 1970s. This approach was turned on its head during the War on Drugs. The approach became doing everything to make sure *no* guilty person goes free -- even if it means sometimes convicting the innocent. All sorts of exceptions were created to constitutional requirements and countless convictions were saved under the doctrine of "harmless error." The courts' new approach encouraged detectives and prosecutors to have a win-at-all-costs mentality, since there was little adverse consequence to violating the rules. No wonder so many wrongful conviction cases

are emerging now. Wars, as we sadly see in today's news, produce collateral consequences.

Near the end of the civil case, I was contacted out of the blue by the van's driver during the crime. He had been in and out of prison over the years, and previously had refused to speak with me. He hadn't had any contact with Danny for more than 20 years. He was now an alcohol abuse counselor and wanted to come clean. He explained how the brother of Danny's girlfriend had borrowed the van; he told me who was present when the crime was committed -- it wasn't Danny. He had nothing to do with it. I told Danny. This prison-hardened, now middle-aged man burst into tears. He had been claiming innocence all his life but knew how it looked. Now he had been proven innocent. His vindication was far more important than the money we recovered -- although the money did help. The procedural violation in his case did make a difference. It caused the jury to believe a lying witness and to convict an innocent man.

The beauty in litigating Sect. 1983 cases is that courts really do focus on policy and justice. Section 1983 was enacted in 1870 and was known as the Ku Klux Klan Act. It was intended to provide freed slaves and their white supporters a remedy against state and local officials who used the power of the state to repress them. There had been hundreds of murders and violent acts committed against them in the years following the Civil War and the emancipation of slaves. The statutory language is general and was intended to have broad application. The statute provides:

> 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 at law ... .

So what are the elements of a Sect. 1983 claim under this statute? I can find four in that language: (1) commission of a violation of the federal Constitution or federal law, (2) committed by a person who is a citizen or within the jurisdiction of the United States, (3) which directly inflicted, or caused, (4) an injury to the plaintiff. Beyond that, the statutory language raises far more questions than it answers. I'll mention a few.

First, what are the specific constitutional rights for which this statute provides a civil remedy? Most of the rights against state actors that we now take for granted under the Bill of Rights were not recognized by the Supreme Court until the 1960s and later, and they're still evolving. What are the elements of each such type of claim? Right now, the elements of a Sect. 1983 claim for a prosecution without probable cause, which traditionally has been considered a federal malicious prosecution claim, are in flux. The Supreme Court has viewed Fourth Amendment violations objectively: the subjective intent of the actor doesn't matter, but objectively unreasonable conduct does. So how does the common law element of malice fit in to a claim under Sect. 1983? Similarly, since a deprivation of liberty without probable cause violates the Fourth Amendment, why need there be a favorable termination of the underlying prosecution, as there must be under common law malicious prosecution, to make out a wrongful prosecution claim under Sect. 1983?

Second, what is the statute of limitations under Sect. 1983? None is stated in any federal statute. When should it begin to run: from when the underlying wrongful conduct occurred or from when the harm, such as a criminal conviction, has been remedied? If it's from when the wrongful conduct occurred, then what

happens to prisoners whose convictions aren't overturned until years later? The Second Circuit actually held several years ago that such claimants are out of luck, but fortunately, in *McDonough v. Smith,* the Supreme Court overruled that heartless decision.

Third, should common law causation principles apply? Tough versus loose causation rules can greatly affect the ability of a victim of government misconduct to hold a government actor accountable.

Fourth, the statute is silent about common law immunities, such as qualified and absolute immunity. Should they apply, and in what contexts? Absolute immunity protects prosecutors no matter how horrendous their behavior. Qualified immunity has been broadly applied to prevent recovery unless a virtually identical case was decided before the wrongdoing and gave notice to the official that his conduct would be unlawful. Interestingly, the Supreme Court reasoned that qualified and absolute immunities should apply, both as a matter of policy and in the absence of any expression by Congress in 1870 that it didn't want common law immunities to apply. However, scholars have recently uncovered new, compelling evidence that Congress did wish to abrogate common law immunities. That seems consistent with the statutory language applying Sect. 1983 to "All persons…" Challenges to existing immunity doctrine will certainly be forthcoming.

Finally, should municipalities have liability under Sect. 1983? The statute refers to "persons" having liability: is a municipality a "person"? Should municipalities have liability under a respondeat superior theory, that is, held responsible for all their employees' constitutional violations that cause injury, or only where injury directly results from a municipal policy? What is a "policy"? Does it include, in addition to something written or official, a practice that policymakers tolerate through inaction? Does it include inherently lawful behavior

that is known to lead to unconstitutional effects? May a municipality be held liable for conduct that, at the time, was not clearly established as unconstitutional? Courts have answered these questions, but there's always room to argue facts that distinguish the precedent or, as a matter of policy, should result in a different outcome.

Two cases I've handled, in addition to the *Monell* cases I've described, stand out in my mind as examples of the opportunities for creative lawyering that Sect. 1983 provides. The first was the *Zahrey* case. Zack Zahrey was the first Palestinian undercover narcotics detective for the NYPD, and he was prolific and highly decorated. However, immediately after public hearings were held and a report was issued on police corruption in New York, he fell under an Internal Affairs detective's suspicion. The Brooklyn DA's office, together with the Internal Affairs Bureau, developed one witness, a career robber and crack addict, into manufacturing false allegations in exchange for a promise of a "very, very sweet deal." However, they couldn't corroborate the witness, and then brought the case to the U.S. Attorney's Office, where they convinced an AUSA to investigate. He then caused another witness to change her original, exculpatory statement to police and also accuse Zahrey. Zahrey was indicted for murder and robbery and spent nine months in protective custody at the local federal lockup until he was acquitted, literally, in 10 minutes.

I had represented him at his criminal trial and then on his behalf brought a Sect. 1983 lawsuit naming everyone under the sun -- Internal Affairs detectives, their supervisors, Brooklyn assistant D.A.s, and their supervisors, and the Assistant U.S. Attorney -- for allegedly fabricating evidence in an investigatory capacity. Prosecutors have absolute immunity for misconduct in prosecuting cases, but only

qualified immunity for investigative misconduct when they function, in effect, like police.

I thought we had only a marginal case against the federal prosecutor, and really was hoping he'd defend himself by blaming the state actors who were most to blame. But then his attorney with the Civil Division of the U.S. Attorney's Office made the mistake of getting the case dismissed. He argued, consistent with a Seventh Circuit decision, that the fabrication of evidence, in and of itself, causes no harm; it's the *use* of fabricated evidence during a criminal prosecution that causes harm, but that use is protected by absolute immunity. The district judge agreed and dismissed the case against the federal prosecutor.

I had no choice but to appeal. This decision might be applied to all the state prosecutors we had sued as well. I cited common law causation principles under which the predictable use by a prosecutor of false evidence he had helped manufacture could not be a superseding or independent cause of harm to break the chain of causation his own wrongdoing had set in motion. The issue fascinated the panel, which heard argument for 1 ½ hours, and then we won a resounding victory. The case was reinstated, the federal prosecutor did point a finger at the local officials, and we then let him out of the case. Unfortunately for him, the case, *Zahrey v. Coffey,* bears his name and the decision assumes that he did what he was charged with doing. In the end he would have been much better off just testifying and quietly settling, as the municipal defendants ultimately did.

Serendipitously, the Zahrey case brought me, at least in spirit, to Iowa, long before my remote appearance of today. Many years after the Second Circuit's decision, the renowned Supreme Court litigator, Paul Clement, had a Supreme Court case presenting the same issue as in Zahrey out of Pottawattamie County, Iowa. A local prosecutor there allegedly had acted together with police to fabricate

evidence and frame a plaintiff named McGee. Zahrey was the leading case on the subject, and Mr. Clement contacted me to discuss it. I then convinced the National Association of Criminal Defense Lawyers to let me author an amicus brief in support of McGee. Paul did a superb oral argument, leading Pottawattamie County to settle and moot the Supreme Court case.

The final case I'd like to mention is one that I'm particularly proud of, *Marcos Poventud v. City of New York.* Prosecutors withheld evidence that the sole eyewitness had identified at a photo array a man who had been in jail when the crime occurred. Our client spent more than eight years in prison, before the *Brady* violation was discovered and his conviction was overturned. However, the Bronx DA's office announced it would appeal and kept him in jail, where he had been severely abused. Then one day, a prosecutor surprised him in court with an unrefusable offer: reduction of the offense level to a lower level of robbery and a sentence of one year, which he already had served. He took the deal and was released immediately.

I believed we could successfully argue that detectives and the City were liable for the *Brady* violation and the additional years he had served in prison, regardless of the plea. But there were two obstacles. First, under the Supreme Court's decision in *Heck v. Humphrey,* we could not bring a lawsuit which, if successful, would call into question the result of the criminal case. Such a challenge had to be brought under federal habeas corpus, with all its rules making such challenges so difficult. However, if we conceded the validity of our client's guilty plea, what court or jury would want to give him any recovery?

My co-counsel and I navigated this course carefully. We presented the underlying circumstances in a way that suggested he likely was innocent, but we stopped short of questioning the validity of his guilty plea or calling him innocent.

We argued that success in the civil suit would not impugn the guilty plea because we were challenging only the process used to reach the original trial verdict, which the state court already had overturned. The district judge didn't buy it and dismissed the case. She couldn't understand how a criminal defendant could recover damages for a *Brady* violation involving the reliability of testimony that he was guilty, when he was admitting, in effect, that the testimony was accurate.

On appeal, we convinced the brilliant Guido Calabresi, the renowned torts scholar from Yale Law School sitting on the Second Circuit, to overrule this decision. However, the Circuit's chief judge, the conservative Dennis Jacobs, a long-time antagonist of Judge Calabresi, vehemently disagreed in his dissent. After being unable to attract the third judge to his side, Judge Jacobs got a majority of the full court to vote to rehear the case en banc, something that occurs in the Second Circuit only once every two or three years.

The oral argument in many ways was more challenging than arguing before the Supreme Court. There were 15 judges, and all wanted a turn. I had to keep true to our pleadings and our brief: implying innocence but not overtly arguing it and thereby challenging Poventud's guilty plea. Some of the conservatives called me out. But in the end, we won 9-6. While the majority opinion didn't directly address Poventud's likely innocence, Judge Gerard Lynch, in his concurring opinion, totally got it. He wrote:

> The choice of freedom in exchange for an admission would be easy for a guilty man, but even an innocent one would be hard pressed to decline the prosecution's offer. A hero might resist the bargain and insist that he would not accept the ignominy of falsely admitting guilt. One is reminded of John Proctor, falsely accused of witchcraft in Arthur Miller's play The Crucible, who goes to the gallows rather than accept an offer that would let him go free in ex-change for a false confession. It is difficult to expect such heroism of mere mortals. Proctor, though based on a historical figure, is after

> all a fictional character, and even he first signed the false confession before having a change of heart. Poventud did what I suspect most ordinary human beings would do in his situation, even if they were innocent.

Judge Lynch then went on to agree with the majority that *Brady* was a procedural protection that everyone enjoys, whether guilty or innocent. Just because Poventud pleaded guilty to avoid the ordeal of a retrial and the possibility of another conviction, Judge Lynch observed, doesn't mean we know the objective truth of whether he committed the crime or not. We then went on to settle his case for $2.75 million. I guess the City's lawyers believed a jury would get it just like Judge Lynch did.

Thank you for listening to me. I'm happy to take questions.