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Section 1983 – Wrongful Convictions
Part 2: Practice Pointers in Defending Against Claims

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Introduction

Reversed conviction cases present significant challenges to defense counsel representing law enforcement agencies and prosecutors. These cases are highly fact specific, and may involve evidence from years ago, witnesses who no longer have a clear memory of what happened, and application of new technologies unavailable to the defendant decision-makers when the incidents giving rise to the litigation occurred. In addition, from the outset the defense is faced with a sympathetic plaintiff – an individual who was convicted of a serious crime often resulting in long periods of incarceration, but who received some form of exoneration.

These plaintiffs are regularly represented by one of the "innocence projects" now in existence – organizations dedicated to exonerating those who they believe were wrongfully convicted. These organizations are often associated with law schools having access to an abundance of free staffing and other resources assisting them. Many times these groups have spent years in post-conviction litigation developing evidence and theories leading to the renewal of the conviction. Defense counsel brought in to defend the lawsuit must then catch up on years of litigation.

This paper will identify major challenges in defending reversed conviction cases and offer some suggestions on meeting them.

Defense Strategy

Reversed conviction cases are a relatively recent genre of civil litigation arising out of some failed activity in the criminal justice system. Civil litigation from arrests and what the common law considers malicious prosecution is nothing new going back to early common law. But the advent of DNA evidence to test prosecutions occurring before the science developed shook a general public faith that the criminal justice system "gets it right." The various innocence projects gave life to the movement, as did multiple multi-million dollar verdicts and settlements these cases produced. When an accused was acquitted, the general view taken was that the system worked, and litigation over the failed prosecution was generally disfavored by courts. *Joiner v. Benton Community Bank*, 82 Ill. 2d 40 (1980). Reporting of crime and a vigorous response to such reports was to be encouraged, not chilled by fear of liability. On the other hand, when an old conviction is reversed after someone spends a significant time in prison, the view is the system didn't work, and someone is to blame for it.

One difficult aspect of a wrongful conviction case to overcome is that usually some reviewing or collateral court has identified a defect in the earlier

prosecution that caused the failure, creating laser beam targets for a civil case. If a witness recanted some inculpatory testimony, was the earlier falsehood somehow caused by improper police tactic. If exculpatory evidence was withheld, did police investigators contribute in some way to the violation, even if the prosecutor knowingly withheld the evidence? If scientific evidence proved a confession was wrong, why else would the accused confess if not coerced or tricked by the interrogators? Was an eyewitness identification tainted by how it was brought about?

The beginning of the defense strategy should be to precisely identify the cause of the conviction being reversed, and work to show that the cause was not the result of your defendant's wrongful actions. The plaintiff will spread the blame along the entire investigation and prosecution. Claims of deficient investigation, tunnel vision, or botched crime scene analysis will be equated with physical or mental coercion and an effort to purposely frame an innocent person. The scope of the plaintiff's attack has to be narrowed as much as possible, at the pleading stage, during discovery, by summary judgment, and of course by motions *in limine* and carefully drafted jury instructions at trial.

Intake and Discovery

When a reversed conviction lawsuit is filed, defense counsel is faced with the daunting task of collecting records and evidence from years ago – evidence which may be in the deepest corners of a police department's archives, compromised, corrupted, or lost completely.

Of course, prosecutor and police department files should be obtained, but the files of the plaintiff's attorneys in the criminal prosecution should also be obtained, and the plaintiff likely will seek the prosecutor's file, all of which will raise complex attorney-client and work-product privilege issues.

Photographs could be on microfilm, witness statements on cassette tapes playable on machines no longer made, videos in VHS format only, and newspaper articles which that are yellowed and hardly readable. Physical evidence such as skin and fingernails could be deteriorated to the point of being unusable or unrecoverable. Defense counsel may also be required to ask the police department to reopen the actual physical evidence files – creating chain of custody issues and the potential to damage evidence. The prosecutors and police are usually represented by different law firms, requiring their defense counsel to work together closely and present a united front even in the face of conspiracy claims.

Defense counsel will be faced with a highly challenging initial investigation for evidence compilation. Spending weeks to reconstruct the evidence and index and organize it can create discovery timeline crunches in both federal and state court. In addition, witnesses may be dead or missing, requiring substantial investigation to track people down. Such discovery issues should be addressed in the beginning

stages of the litigation by informing the court that a normal discovery time-frame may not be workable for reversed conviction cases.

Pleading Practice

Most reversed conviction cases are brought in federal court under 42 U.S.C. §1983. Federal claims usually involves allegations of police or prosecutorial misconduct, the withholding or destruction of exculpatory evidence, coerced confessions, erroneous eyewitness identification, or false or misleading forensic evidence. However, wrongful conviction cases can be brought in state court, involving state claims like malicious prosecution.

Some issues that could arise at the pleadings stage are defenses such as absolute and qualified immunity (both defenses will be discussed more below). The statute of limitations regarding all or a portion of the claims should be raised at the early pleadings stage. For a statute of limitations defense, in federal claims brought under Section 1983, look to the personal injury statute of limitations of the state where the cause of action accrued, including state rules on equitable tolling and date of accrual. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). The timeliness of state law malicious prosecution claims and other state law torts are generally easy to identify merely through the allegations of the complaint. Similarly, for example, a Fifth or Fourteenth Amendment claim based on an involuntary statement and improper coercion is easily identifiable as time-barred because such a claim is immediately actionable – regardless of whether the involuntary statement is used in criminal proceedings. *Gonzalez v. Entress*, 133 F.3d 551 (7th Cir. 1998). Defense can argue the plaintiff was aware his constitutional rights had been violated when the alleged improper interrogation tactics were used and, thus, his cause of action accrued at that time. *Wallace v. Kato*, 549 U.S. 384 (2007). The effects of the Supreme Court's recent decision in *Manuel v. City of Joliet*, 2017 WL 1050976, will raise some interesting questions about wrongful conviction claims under the 4th Amendment.

Whether the complaint pleads a legally cognizable claim against an individual can also be addressed at this stage. For example, in order to state a Section 1983 claim against an individual, the plaintiff "must prove that the defendant personally participated in our caused the unconstitutional actions." *Grieveson v. Anderson*, 538 F.3d 763 (7th Cir. 2008). A plaintiff must allege facts, not mere conclusions, indicating the defendants' personal involvement in the allegedly unconstitutional activities. *Perez v. Lane*, 794 F.Supp.286 (C.D.Ill. 1992). With that in mind, for example, a claim against an evidence technician who had no involvement in the prosecution of the plaintiff, shown through the language of the complaint, could be dismissed early on.

Collateral estoppel or issue preclusion can also be addressed at the pleadings stage. Federal courts will give the same preclusive effect to state court findings as

will the state court. *University of Tennessee v. Elliott,* 478 U.S. 788 (1986). In Illinois, a post-conviction proceeding can advance through three stages, the last stage involving a full-blown evidentiary hearing in which the convicted defendant bears the burden of proof by a preponderance of the evidence. 725 ILCS 5/122-5, 5/122-6. If a state court in those proceedings makes certain factual findings, those findings could establish, for example, the police defendants did not withhold evidence from the prosecution, thus barring a plaintiff's due process claim.

Conspiracy claims can also be dismissed early on if a plaintiff fails to properly plead such a claim. Although there is no heightened pleading standard for allegations of a conspiracy to violate a plaintiff's constitutional rights, the United States Supreme Court under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) requires at least some factual detail to sufficiently allege a conspiracy. For a reversed conviction plaintiff that may be difficult to do without full blown discovery. Thus, bringing a motion to dismiss a conspiracy claim can be successful based on the lack of specific detail about the alleged conspiracy between police and prosecutors, for example.

Motions for summary judgment generally should be considered at the close of discovery, despite the highly fact specific nature of reversed conviction cases. The underlying facts of the crime on which the conviction was based will likely not have changed much from the time of the conviction to the time the civil complaint is filed. As such, while motions for summary judgment will be long and fact intensive, successful motions for summary judgment are possible based on the undisputed nature of many of the facts and the court's interpretation of them.

Expert Discovery

Expert witnesses are regularly retained by plaintiffs in reversed conviction cases. The type of experts may vary but there is no shortage of them.

Plaintiffs may retain police procedure experts to opine on how the criminal investigation was conducted or whether sufficient probable cause existed for the plaintiff's arrest. Defense counsel should keep in mind that probable cause is a question of law and experts cannot testify as to that ultimate legal conclusion.

Further, while an expert may have the benefit of 20/20 hindsight, the probable cause determination is based on what the police knew at the time, not what the expert knows now about the case – such as information or evidence that came to light in post-conviction proceedings. Thus, expert testimony on the officers' interpretation of undisputed evidence is necessarily part of the legal question before the court, and expert testimony on that issue is improper.

Post-Conviction Evidence

Plaintiffs may also attempt to use evidence learned only in post-conviction proceedings to attack the actions and decisions of the police or prosecutors at the time of the criminal investigation. Post-conviction criminal proceedings allow a criminal defendant to challenge the outcome of a conviction or judgment that has otherwise become final. However, this type of evidence is disfavored by both state and federal courts.

For example, in malicious prosecution cases, courts have held evidence that a third-party was later convicted of the crime for which the accused was prosecuted was not relevant to the issue of malice and, therefore, inadmissible. *Porter v. City of Chicago*, 393 Ill.App.3d 855, 863 (1st Dist. 2009). Similarly, in *Sang Ken Kim*, 368 Ill.App.3d 648, 660 (1st Dist. 2006), a witness' later recantation did not affect the probable cause inquiry because probable cause is measured at the time of the prosecution decision. Finally, in *Manzanares v. Higdon*, 575 F.3d 1135, 1144 (10th Cir. 2009), the Tenth Circuit noted "[i]nformation gleaned post-hoc does not bear on the probable cause inquiry."

Pardons/Certificates of Innocence

Along with other post-conviction evidence, plaintiffs may also attempt to use evidence such as a certificate of innocence or governor's pardon to attack the police or prosecutor's decisions. A plaintiff may argue, for example, that because he received a certificate of innocence or governor's pardon, he was never guilty to begin with and probable cause must not have existed for the arrest or prosecution. Such post-conviction evidence has no relevance in reversed conviction cases.

A pardon is an act of the executive of a state or country whereby a person is forgiven of a crime. In Illinois, petition for certificate of innocence proceedings is established under the Illinois Code of Civil Procedure, 735 ILCS 5/2-702. The purpose of the proceeding is to allow a person who has been incarcerated to seek certain relief from the State in the Illinois Court of Claims. It is a non-adversarial proceeding, which provides no ability of the municipal police agency or police officers to participate.

By the express language of the statute, the issuance of a certificate of innocence can have no impact in a reversed conviction cases because it played no role in the decisions or actions made by the police or prosecutors during the criminal investigation and prosecution. Similarly, a governor's pardon (also usually issued years after a conviction) has no bearing on what happened during the investigation and prosecution, despite a plaintiff's attempt to make it relevant.

Absolute and Qualified Immunity Defenses

Judicially created immunity is an important defense for both police and prosecutors. Prosecutorial immunity is absolute and shields prosecutors from liability for actions in the course of their official prosecutorial duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

Because prosecutorial immunity is absolute, but only available to prosecutors, defense counsel can use this immunity to defend police by attributing conduct to prosecutors and not the police. For example, defense counsel can argue that police have no ability to initiate criminal prosecution against a plaintiff, the prosecutors made the decision about who to charge, and the police only investigate the case for, and at the direction of, the prosecutor's office.

Qualified immunity is a defense available to police, as far as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009). A rule of law is not "clearly established" if a defendant could not be said to know that it forbade his or her conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In other words, qualified immunity protects defendants who act in ways they reasonably believe to be lawful. *Wheeler v. Lawson*, 539 F.3d 629, 639 (7th Cir. 2008).

The United States Supreme Court recently discussed qualified immunity in *White v. Pauly*, 137 S.Ct. 548 (2017). In *White*, a police officer who – having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers – shot and killed an armed occupant of the house without first giving a warning. The Supreme Court held that qualified immunity applied because clearly established law does not prohibit a reasonable officer who arrives late to assume that proper procedures have already been followed. *Id.* at 552. The Supreme Court went on to state that "No settled Fourth Amendment principle that requires an officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the officer] confronted here." *Id.*

Insurance Coverage

Insurance coverage plays an important role in reversed conviction cases because of the potential for significant exposure. Exposure can be extremely high due to damages that include emotional injury for time spent incarcerated, physical abuse in prison, lost employment, injury to reputation, etc. However, because these cases are based on convictions that may have occurred years ago, a municipality's insurance policy from 20 years ago, for example, may not be easily obtainable. Further, that insurance company may no longer even be in existence.

Finally, it may not be clear which insurance policy covers the reversed conviction lawsuit. Whether coverage exists depends on what act under "triggers" the coverage. The concept of "trigger" as it applies to an insurance policy refers to the threshold event that must occur for coverage to be provided. Courts have historically been divided between whether the favorable termination of a malicious prosecution or the commencement of a malicious prosecution triggers coverage.

In *St. Paul Fire and Marine Insurance Company*, 2014 IL App (2d) 131312, the Illinois Appellate Court (for the first time since 1978) examined the issue of trigger for malicious prosecution claims. *St. Paul* arose from a lawsuit filed by Jerry Hobbs who was arrested and charged with the murders of his daughter and her friend in Zion, Illinois. Hobbs alleged he was wrongfully incarcerated as the result of a confession coerced from him by the defendant police and that he was exonerated in August, 2010.

The insureds tendered the defense of the case to their insurers in 2005, when the charges were filed, and the insurers in 2010. The Circuit Court of Lake County found that coverage was triggered by the initial filing of the criminal prosecution against the accused, and not at the time of the favorable outcome of the prosecution. The Illinois Appellate Court affirmed, finding the occurrence that triggered coverage was the date of the alleged malicious prosecution, and thus there was no liability coverage.

In so holding, the Illinois Appellate Court moved away from a series of Seventh Circuit cases that followed a 1978 Illinois Appellate Court decision on the trigger of coverage for malicious prosecution, *Security Mutual Cas. Co. v. Harbor Ins., Co.*, 65 Ill.App.3d 198 (1st 1978). *Security Mutual* concluded the trigger for purposes of a claim alleging malicious prosecution occurs when the prosecution is terminated in favor of the accused who contends that he was wrongfully prosecuted, that is, when he is exonerated. Although the Illinois Supreme Court reversed the decision in *Security Mutual*, finding the Appellate Court exceeded its scope of review when it addressed the trigger issue, the Seventh Circuit continued to rely on the Appellate Court's decision, because the Supreme Court's reversal did not in any way impugn or question the actual decision on the issue of trigger.

For example, in *National Casualty Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010), the Seventh Circuit followed the reasoning in *Security Mutual*. The court there addressed whether law enforcement and general liability policies covered the claims brought by plaintiff Gordon Steidl for wrongful arrest, prosecution and conviction against the state's attorney. The Seventh Circuit observed that "In determining whether the insurance companies must provide former Edgar County State's Attorney Michael McFatridge with coverage – a legal defense and/or indemnity – for liability arising from Steidl's prosecution and conviction, we look to Illinois law, which the parties agree governs this dispute." 604 F.3d. at 338. The court observed that Steidl's exoneration occurred long after the polices had

lapsed, "[s]o Steidl did not have a complete cause of action, and there was no offense of wrongful conviction or deprivation of due process until June 17, 2003, when the district court issued the writ of *habeas corpus"* which exonerated Steidl. *Id.* at 344. Because the policy in question was not in effect when Steidl's claim became ripe, McFatridge was not entitled to coverage under the policy, even though the policy was in effect when the prosecution took place. The Seventh Circuit in *American Safety Casualty Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012) applied that same principle to find coverage.

In contrast, the *St. Paul* court rejected the Appellate Court's decision in *Security Mutual* and instead looked to out-of-state authority for guidance. The *St. Paul* court agreed with the majority of other court rulings throughout the country that addressed the issue, which generally hold that the commencement of a malicious prosecution is the event that triggers insurance coverage. 2014 IL App (2d) 131312, ¶19. The court cited, for example, *City of Erie v. Guaranty National Insurance Co.*, 109 F.3d 156 (3d Cir. 1997) and *Muller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J.Super. 564 (App.Div. 1967). The *St. Paul* court further agreed that favorable termination of a prosecution cannot be the injury that triggers coverage because the termination marks the beginning of the judicial system's remediation of the wrong committed, not the commencement of the injury or damage. 2014 IL App (2d) 131312, ¶23.

Other Illinois state courts such as *Indian Harbor Insurance Co. v. City of Waukegan*, 2015 IL App (2d) 1402903 and *County of McLean v. States Self-Insurers Risk Retention Group, Inc.*, 333 N.E.3d 1012 (4th Dist. 2015), have followed the *St. Paul* decision, creating a split between the Illinois state courts and the federal courts deciding the issue of insurance coverage trigger for Illinois state malicious prosecution claims. To date, the Illinois Supreme Court has not weighed in on the decision.

In sum, the "majority" rule (followed by the recent Illinois state court decisions) holds that coverage in reversed conviction cases is triggered at the time criminal proceedings are initiated against the underlying plaintiff – the date of the arrest, charging, or prosecution. The "minority" rule (followed by the Seventh Circuit) holds that coverage is triggered at the time of the exoneration and a malicious prosecution claim accrues. Trigger disputes for reversed conviction lawsuits may create additional litigation between insurance companies while the reversed conviction case is proceeding.

Conclusion

Reversed conviction cases are some of the most challenging cases government defense attorneys can face. Creative, aggressive and skillful defense tactics are required to protect the client from potential for substantial exposure.