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Defending the Defenders- Police Liability Litigation and Wrongful Convictions

Roundtable Discussion on Defending Police, Municipalities, and Prosecutors Against Wrongful Convictions Claims

Moderator:

Mara S. Georges
Katten Muchin Rosenman, LLP
Chicago, Illinois

Presenters**:**

Andrew M. Hale
Andrew M. Hale & Associates
53 W. Jackson, Suite 1800
Chicago, IL 60604
312-870-6929
ahale@ahalelaw.com

Eileen M. Letts
Greene & Letts
111 W. Washington Suite 1650
Chicago, Illinois 60602
312-346-1100
emletts@greeneandletts.com

Avi T. Kamionski
Andrew M. Hale & Associates
53 W. Jackson, Suite 1800
Chicago, IL 60604
312-870-6928
akamionski@ahalelaw.com

James G. Sotos
James G. Sotos & Associates LTD
550 East Devon Avenue, Suite 150
Itasca, IL 60143
630-735-3301
jsotos@jsotoslaw.com

Terrence M. Burns
Dykema Gossett PLLC
10 South Wacker Drive Suite 2300
Chicago, IL 60606
312-627-2172
tburns@dykema.com

Jeffrey N. Given
James G. Sotos & Associates LTD
550 East Devon Avenue, Suite 150
Itasca, IL 60143
630-735-3315
jgiven@jsotoslaw.com

Daniel Noland
Dykema Gossett PLLC
10 South Wacker Drive Suite 2300
Chicago, IL 60606
312-627-2100
dnoland@dykema.com

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Wrongful Conviction Cases – What are they?

DNA Exonerations**:**

A "wrongful conviction" lawsuit is a lawsuit that is filed after a criminal defendant turned plaintiff is exonerated in some manner from the allegations for which he was charged by either a judge or gubernatorial pardon. The most famous cases stem from DNA exonerations, where DNA evidence not previously tested reveals that a plaintiff did not commit the crime charged. Typically, these plaintiffs have spent years in prison and were first incarcerated when DNA testing was not available. These plaintiffs will usually sue at least the municipality and the police officers involved alleging some sort of misconduct caused them to be put in prison. Moreover, plaintiffs are now also suing others involved in their convictions, such as prosecutors, crime labs and personnel, and even witnesses against them. A recent example of a DNA exoneration lawsuit is the case of Kenneth Waters from Ayer, Massachusetts. Kenneth Waters spent 18 years in prison for the murder of his neighbor. He was able to locate physical evidence still preserved from the crime scene and DNA testing revealed he did not commit the crime. His story gained national attention last year with the release of a movie on his DNA exoneration titled "conviction." Waters sued the town of Ayer and certain police officers, alleging they committed misconduct in their handling of the physical evidence that was collected in the investigation. His case eventually settled.[1]

An interesting subset of these cases involves plaintiffs who were arrested and jailed –often for several years – until they were either acquitted at trial or the charges were dropped prior to trial. These cases present not only the issues discussed below, but others such as whether a *Brady* claim can be asserted if the plaintiff was never convicted.

Witness Recantation

A recent phenomenon in wrongful conviction lawsuits involves eyewitnesses recanting their original identifications. In these cases, the plaintiff does not have any physical evidence exonerating him from the crime. Instead, the plaintiff has presented new evidence that an eyewitness who identified him has now recanted his or her testimony. A recent example of this occurred in Los Angeles several months ago in the case of Francisco "Franky" Carrillo. Carrillo served 19 years in prison for a murder and now the witnesses who testified against him have recanted their testimony.[2] A Southern California judge has vacated his conviction and Carrillo has been released from prison. Carrillo will likely file a lawsuit against the Los Angeles County Sheriff alleging the police either coerced the

[1] http://www.wrongfulconvictionlawsuitdefense.com/tags/kenneth-waters/
[2] http://www.aolnews.com/2011/03/26/francisco-franky-carrillo-freed-19-years-after-wrongful-convic/

witnesses into identifying him or that the police used suggestive identification procedures to cause the witnesses to identify Carrillo.

Brady Material Withheld

Another way convictions are being overturned is through the disclosure of *Brady* material. Under *Brady v. Maryland*, police officers have a duty to disclose material exculpatory evidence. If the police withhold that evidence, the criminal defendant is denied his right to a fair trial. In certain instances, plaintiffs will uncover or allege that *Brady* material was withheld and convince a judge to overturn a conviction. In those circumstances, the plaintiff will allege in his lawsuit that the withholding of this evidence caused his wrongful conviction. In a pending wrongful conviction case in Chicago, Ronald Kitchen is alleging that the police and prosecutors failed to disclose to Kitchen's defense team that a key witness against him was relocated at the expense of the government. Kitchen is alleging that withholding this evidence (among other things) deprived him of his right to a fair trial.

Jurisdiction & Claims Filed

Wrongful conviction lawsuits can be filed in both state and federal court. In almost all cases, plaintiff files a claim for malicious prosecution. In certain jurisdictions like the Seventh Circuit, a plaintiff may not file a federal malicious prosecution claim. *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001). To circumvent that bar, plaintiffs will typically file a state law malicious prosecution claim, plus a federal Fourteenth Amendment Due Process claim alleging that they were denied their right to a fair trial because *Brady* material was withheld. In the last few years, plaintiffs alleging coerced confessions will also file a claim under the Fifth Amendment claiming their confessions were coerced. *Chavez v. Martinez*, 538 U.S. 760 (2003); *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006)

Statute of Limitations

The Supreme Court established in *Wallace v. Kato*, 549 U.S. 384, 388 (2007), that a section 1983 false arrest claim accrues at the moment the alleged constitutional violation occurs. In other words, at the moment the plaintiff is arrested the claim begins to run. Therefore, as most wrongful conviction plaintiff do not file suit until many years after their arrest, they will not be able to proceed under a false arrest claim.

The statute of limitations on malicious prosecution and due process claims, on the other hand, do not begin to run until a plaintiff's conviction is vacated or overturned. *Parish v. City of Elkhart*, 614 F.3d 677, 682 (7th Cir. 2010)

The law is not settled on when a Fifth Amendment coerced confession claim begins to accrue. There are several courts that hold that a Fifth Amendment claim accrues after the conviction is vacated. In *Hill v. City of Chicago*, a pending wrongful conviction case, the Court concluded that the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), delayed accrual of a Fifth Amendment claim until after the plaintiff's conviction was vacated. Under *Heck*, a plaintiff is barred from filing suit until he has had his conviction vacated so as not to undermine the validity of the conviction.

There are some courts, however, that do not agree that *Heck* bars the filing of a coerced confession claim before the conviction is overturned. Adopting the same reasoning of the Supreme Court in *Wallace* that claims accrue at the moment of the constitutional violation, these courts have held that a plaintiff's Fifth Amendment claim begins to run at the moment the alleged coerced confession occurred. *See Lanza v. City of Chicago*, No. 08 C 5103, 2009 WL 1543680, at *3 (N.D. Ill. June 2, 2009) (Anderson, J.); *Hudson v. Cassidy*, No. 05 C 5623, 2006 WL 3524420, at *21 (N.D. Ill. Dec. 5, 2006) (Schenkier, J.). This debate takes on added significance in cases where the plaintiff was not convicted.

Potential Liability

Plaintiffs winning these lawsuits can receive $1M to $2M per year for every year they were incarcerated. This is a standard we have seen across the country. These high awards are also being upheld by appellate courts. The most famous national case to discuss these high awards is *Limone v. US*, 579 F. 3d 79 (1st Cir. 2009). In *Limone*, a wrongful conviction lawsuit, a federal district court judge (not a jury) awarded plaintiffs $1M per year for every year they were incarcerated. On appeal, the First Circuit explained:

> In concluding that the awards in this case fall short of shocking the conscience, we think it important to make clear that the $1,000,000 annuity selected by the district court as the baseline for its calculation should not be understood as a carob seed for measuring the harm caused by wrongful incarceration generally. Applying a literal reading of the statement in *Limone IV* that "wrongfully imprisoned plaintiffs were entitled to compensation of *at least* $1 million per year of imprisonment," one district court recently has treated the $1,000,000 per year baseline as a floor for damages arising out of wrongful incarceration. *See Smith v. City of Oakland,* 538 F.Supp.2d 1217, 1242-43 (N.D. Cal. 2008).

Limone v. US, 579 F. 3d 79 (1st Cir. 2009)

Here are some other examples cited by *Limone*: *Thompson v. Connick*, 553 F.3d 836, 865-66 (5th Cir.2008) (upholding jury award of $14,000,000 for 18 years of wrongful incarceration), *vacated on other grounds by* 562 F.3d 711 (5th Cir.2009) (en banc); *Newsome v. McCabe*, 319 F.3d 301, 302-03 (7th Cir.2003) (involving award of $15,000,000 for 15 years of wrongful incarceration); *White v. McKinley*, No. 05-203, 2009 WL 813001, at *22 (W.D.Mo. Mar.26, 2009) (upholding jury award of $14,000,000 in compensatory damages for 5½ years of wrongful incarceration); *Sarsfield v. City of Marlborough*, No. 03-10319, 2006 WL 2850359, at *1 (D.Mass. Oct.4, 2006) (reflecting judicial award of more than $13,000,000 for 9½ years of wrongful incarceration).

Here are some other awards we have seen that awarded over $2M per year: In 2008, a jury in the Western District of Missouri awarded Ted White, who spent five years in prison, $16M. This case just settled in July for $15.5M. In 2010, in the Northern District of Illinois, a federal jury awarded Juan Johnson $22M for spending 11 years in prison. Johnson was not freed based on DNA evidence. Johnson was freed because the witnesses recanted their testimony. And perhaps most alarming, a jury awarded Kevin Fox and his wife $15.5M in total damages for eight months in jail. *See Fox v. Hayes*, 600 F.3d 819 (7th Cir. 2010).

In addition, like all civil rights litigation, under Section 1988, if a plaintiff prevails on his federal claims he will be entitled to attorneys' fees. Given the nature of this litigation and the amount of time generally spent, you can expect to see attorneys' fees petitions for at least $1M.

Plaintiffs can also pursue and receive punitive damages against the individual defendant police officers. Depending on the jurisdiction, police officers are not generally indemnified for punitive damages. We have seen cases in which the plaintiffs have also sued the estates of deceased officers as well.

We also note, however, that a number of these cases resulted in verdicts in favor of law enforcement defendants. Even many high profile plaintiffs whose cases received major media attention have lost their claims and received $0 in damages. Among these plaintiffs are Gary Gauger, Anthony Porter, Michael Evans and Oscar Walden.

Current Issues

According to the Innocence Project, there have been over 270 post-conviction DNA exonerations between 1989 and 2011.[3] Here is a break down by state as reported by the Innocence Project:

Texas	43	Indiana	5
Illinois	31	Mississippi	5
New York	27	New Jersey	5
Virginia	13	Washington	3
Florida	13	Arizona	3
Louisiana	11	Montana	3
Pennsylvania	11	Michigan	3
Oklahoma	10	Maryland	3
California	9	Connecticut	3
Ohio	9	Kansas	2
Massachusetts	9	Tennessee	2
Georgia	8	Alabama	2
Missouri	7	Washington DC	2
North Carolina	7	Idaho	1
Nebraska	6	Nevada	1
Wisconsin	6	Utah	1
West Virginia	6	Kentucky	1
		South Carolina	1

DNA exonerations have received much media attention and have highlighted the concept of a wrongful conviction. As result, judges across the country are overturning convictions much quicker and are ready to do so even without scientific proof of innocence. The latest trend we have seen involves eyewitnesses recanting.

Eyewitness Recants:

Post conviction and plaintiff lawyers will spend many hours working on witnesses to change their testimony. The lawyers will arrange meetings with the witnesses and present them with other pieces of evidence to challenge their initial identifications. Two cases that we have seen that highlight this issue are *Jimenez v. City of Chicago* and *Logan v. City of Chicago* – two pending lawsuit in the Northern District of Illinois. In *Jimenez*, post conviction lawyers obtained a recant from an eyewitness who has since been diagnosed as a paranoid schizophrenic. The witness originally identified the plaintiff 16 years prior,

[3] http://www.innocenceproject.org/know/

testified against him in two trials and never changed his contention that he witnesses the plaintiff commit a murder until he was approached by the plaintiff's investigator 16 years later. The lawyers submitted this recant to the prosecutors and never disclosed that the witnesses mental condition. Also in *Jimenez*, plaintiff took this paranoid schizophrenic witness, who recanted, to meet with other witnesses to persuade them to sign affidavits and change their testimony as well. There have been similar issues in *Logan*.

Gang Members:

We have seen several cases involving gang members who have previously implicated a fellow gang member in a crime will recant and claim police coercion. A case that highlights this point is *Juan Johnson v. City of Chicago*. In *Johnson* there were two witnesses who specifically testified that they saw Johnson commit this murder. These two witnesses later changed their story at the behest of gang leaders. In *Johnson*, the Court kept out all reference to gang evidence and thus the jury was unable to hear why the witnesses flipped.

Innocence Projects:

There are Innocence Projects opening up on university campuses across the country. The goal of these projects is to get inmates out of jail and many of the freed inmates are then referred to plaintiff's lawyers to file wrongful conviction lawsuits. In one case we learned the head of one such project admitted in a deposition that he does have a financial interest in the outcome of civil litigation filed by inmates he helped free.

Recently, the Medill Innocence Project at Northwestern University has made national headlines for the way students in a journalism class were investigating the Anthony McKinney case. The State's Attorneys office alleged that students were paying off witnesses and using inappropriate means to secure witness statements. David Protess, the head of the Medill Innocence Project was forced to resign over the controversy.[4] This is not the first time such allegations have been made against him; similar claims underlie the case of Alstory Simon, who says he was persuaded by the Innocence Project to admit to a murder he did not commit, thereby helping to free Anthony Porter from Illinois' death row. A similar controversy arose out of the Innocence Clinic at the University of Michigan Law School.[5] The Wayne County, MI prosecutor had accused students investigating Dwayne Provience's criminal case of committing misconduct in their re-investigation.

[4]http://www.wrongfulconvictionlawsuitdefense.com/2011/03/articles/news/northwestern-university-to-david-protess-were-done-with-you/

[5] http://www2.metrotimes.com/news/story.asp?id=14895

The Plaintiffs' Bar:

Be aware – they are organized. Plaintiff's lawyers are collaborating on these cases across the country. We have seen numerous examples of it. Defense counsel should do more of the same.

How Do You Win Your Case?

Pre-Lawsuit Investigations:

You will need to start investigating potential lawsuits as soon as possible. As it could take several years for a person to be exonerated, plaintiff lawyers will know a lot more about the case before they even file. Once a lawsuit is filed, you only have a limited time to learn the case. It's important to learn about potential wrongful conviction lawsuits before they are filed. Get as much information about the underlying criminal case as possible.

Convince the Jury He Did It:

Although your plaintiff may have been exonerated, to win your civil lawsuit, if you can, you must convince the jury he was involved in the crime, even though that issue is usually framed in the context of "probable cause". If the plaintiff in your case confessed, then you will need to prove he committed the crime for which he was charged. Otherwise you are forced to explain why an innocent man would confess to a crime he did not commit. A case that highlights this approach was Oscar Walden. The Oscar Walden case dates back to 1951. Walden was arrested for raping a woman. The woman testified she was raped for over an hour in a vacant lot that was well lit. During the rape, the victim testified that Walden put his fingers into her mouth and she bit them. Walden was arrested in January 1952 when an employee at a drug store called the police and said that he looked like the person depicted in a police sketch who was wanted for rape. Once brought to the police station, Walden was identified by the rape victim as being the man who attacked her. The next day, Walden gave a confession to police officers. Walden was convicted at his criminal trial. For the last 50 years, Walden claimed his confession was coerced by the officers twisting his hand causing permanent fingernail marks on his fingers. Walden eventually received a pardon on the grounds of innocence by former Governor George Ryan. At trial, the defense strategy was to convince the jury Walden was involved in the rape – despite the pardon. The defense argued that the marks on Walden's fingers were more likely cause by the rape victim biting him than by an officer twisting his hand. By showing Walden was involved in the rape, the defense was able to argue that Walden's confession was not false and thus rebut his coerced confession claim.

If You Can't Prove He Did It – Then You Must Show The Police Had Probable Cause:

If your plaintiff has been truly exonerated, by DNA or otherwise, and your plaintiff has not confessed, then you must show that the police had probable cause for his arrest. A case that highlights this point is Jerry Miller. Jerry Miller was the 200th inmate freed based on DNA evidence. His case received a lot of media attention, including appearances on Jim Lehrer and the Colbert Report. Jerry Miller was imprisoned for 25 years for a rape that DNA proved he did not commit. The DNA evidence actually matched a known perpetrator Robert Weeks who is currently serving prison time for other sexual assaults. In 1981, a woman was raped and car jacked in a parking garage on the North Side of Chicago. After the perpetrator raped the victim, he stuffed her in the trunk of her car, and attempted to drive her car out of the parking garage. Two parking attendants working at the garage recognized the victim's car but did not recognize the driver. The attendants confronted the driver about the car and he got out of the car and fled from the scene. The parking attendants described the perpetrator to the police and a composite sketch was drawn up. A week later two Chicago police officers saw the sketch and believed it resembled an individual they encountered a week prior to the rape in the same general vicinity of where the rape occurred. They picked up the person – who happened to be Jerry Miller – and brought him to the detectives investigating the case. Miller was placed in lineup and identified by the parking attendants. Miller was eventually convicted based on the identifications.

In his lawsuit, Miller alleged that the police suggested to the witnesses to identify Miller in the lineup. The defense was able to disprove that through an expert. The defendants hired an eyewitness expert to show the statistical likelihood that the witnesses would have identified Miller.[6] The expert showed fifty people on a college campus a picture of Robert Weeks, the actual perpetrator, and told them that the witnesses to a crime saw this man driving a victim's car. These same fifty people were then shown a photograph of the lineup from 1981 with Jerry Miller in the line up. The fifty people were then asked to pick the perpetrator out of the lineup. Sixty seven percent chose Miller. This confirmed the defendant's theory that Jerry Miller was identified because he looked like Robert Weeks and not because of police misconduct. Contact Avi T. Kamionski at akamionski@ahalelaw.com if you would like to see a copy of this report.

Some cases involve a plaintiff who has confessed, but whose confession turns out to be "false" – for instance, where some key portions of the confession turn out to be contradicted by new evidence. *See, e.g. Aguirre v. City of Chicago* 382 Ill.App.3d 89 (1st Dist. 2008). While such cases are harder to defend, they are still

[6] Ironically, this study was adopted from a similar study conducted by a well known plaintiff's eyewitness expert – Gary Wells. In *Newsome*, Gary Wells conducted a similar study at an airport to demonstrate the statistical likelihood of an identification.

winnable. One example is *Gauger v. Hendle*. Gary Gauger confessed to killing his parents; evidence discovered after Gauger's conviction showed that they were killed by two motorcycle-gang members. Gauger received a pardon based on innocence from former Governor George Ryan, and sued claiming malicious prosecution. Despite Gauger's "false confession," defendants were able to demonstrate that his statements to the police were not coerced and, together with other evidence, provided probable cause for his arrest.

Summary Judgment

You will always want to posture your wrongful conviction case for summary judgment. Here is some basic law on the major claims you will find in wrongful conviction cases. While the law cited below is from Illinois federal and state cases, similar standards apply in most jurisdictions.

Malicious Prosecution claims

In Illinois, a Plaintiff must prove five elements in order to prevail on his malicious prosecution claim: (1) the officers commenced or continued the criminal proceeding against him; (2) probable cause for the proceeding did not exist; (3) the proceeding terminated in his favor; (4) malice; and (5) damages. *See Swick v. Liautaud*, 662 N.E.2d 1238, 1242 (Ill. 1996); *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 921-22 (7th Cir. 2001). The absence of even one of these elements precludes Plaintiff from pursuing his claim. *Id.*

Due Process Claims

To establish a *Brady*-type due process claim, a plaintiff must show that: (1) "the evidence at issue is favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) there is a reasonable probability that prejudice ensued." *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) (quoting *Carvajal v. Dominguez*, 542 F.3d 561, 566-67 (7th Cir. 2008)). "Prejudice exists if there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Harris v. Kuba*, 486 F.3d 1010, 1014 (7th Cir. 2007) (internal quotation marks omitted). "Evidence is 'suppressed' when (1) the prosecution failed to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *Carvajal*, 542 F.3d at 567.

It is established in the Seventh Circuit that the government has a duty only to disclose exculpatory evidence; it does not have a duty to "create truthful exculpatory evidence." *Gauger v. Hendle*, 349 F.3d 354, 360 (7th Cir. 2003) (overruled on other grounds). To that end, "*Brady* does not extend so far as to provide relief in a situation where 'a police officer makes a false statement to a

prosecutor.'" *Carvajal*, 542 F.3d at 567. Similarly, *Brady* does not provide a cause of action against police officers for failing to disclose to prosecutors that a confession was unlawfully coerced. *Harris*, 486 F.3d at 1017 (interpreting *Sorenberger v. City of Knoxville*, 434 F.3d 1006, 1029 (7th Cir. 2006)). Nor does *Brady* require that police officers render truthful records of interrogations to prosecutors. *Harris*, 486 F.3d at 1017 (interpreting *Gauger*, 349 F.3d at 360).

How Do You Prove He Did It?

Discovery**:**

These cases are very time and fact intensive. They involve investigating cases that could be as much as 25 years old. You will need a lot of resources to defend these cases.

You must dig, dig, dig…..and dig some more to uncover evidence of plaintiff's guilt. This might entail taking a hundred depositions. One case that highlights the value of digging is *Evans v. City of Chicago*. In 1976, Michael Evans, who was then 17 years old, was convicted of the kidnaping, rape and murder of nine-year old Lisa Cabassa on Chicago's southeast side. An eyewitness, Judith Januszewski, testified at Evans' criminal trial that she saw her neighbor, Evans, struggling with Lisa Cabassa on the street corner the night Lisa disappeared. Evans spent 27 years in prison before he was released in 2003 after DNA from a rectal swab taken from Lisa Cabassa that had been preserved did not match Evans. Subsequently, Evans received an innocence pardon from Governor Rod Blagojevich. In 2004, Evans filed suit against ten former Chicago Police Officers and the City of Chicago alleging the Police Officers conspired to frame him for the crimes committed against Lisa Cabassa. In *Evans*, the defense deposed every individual from the neighborhood of the crime they could locate. Only after deposing many people from the neighborhood, were they able to locate a witnesses who would make important links to the plaintiff to help prove their case.

Do not limit your investigation to what the police originally did in the case. Brainstorm on new investigative tools or witnesses to speak with that have never been explored.

Forensic Testing

DNA does not always mean the person is innocent – know the difference and expose it. In *Evans*, the defense argued that the police officers had probable cause to arrest Evans based on the eyewitness testimony, as well as other corroborating evidence. Plaintiff tried to argue that the exclusion of Evans from the rectal swab dismissed any weight to be given to the eyewitness. The defense explained why the DNA could not be used to make that leap: Ms. Januszewski claimed to have seen Evans struggle with Cabassa on the corner, but she never testified that she

actually saw Evans rape her. The defense convinced the jury that while Evans was seen struggling with Cabassa, someone else ultimately raped her.

You should always evaluate potential physical evidence to test or re-test. You should be open to conducting new kinds of tests never done on the evidence.

Experts

The right expert can help you win your case; a bad expert can sink you. There are, of course, standard experts that you should always consider:

Eyewitness Identification, Audio Visual, Police Procedure, False confession, psychological and damages experts are just some of the experts you may consider.

Be sure to investigate your experts as much as possible before retaining them; call other defense attorneys who have used them. Also, be aware that Federal Rule of Civil Procedure 26 has been significantly revised so that most attorney-expert communications are not discoverable.

Be Creative With Experts

For instance, in *Robinson v City of Chicago*, the plaintiff alleged that he was beaten with a TV antenna into confessing to a murder. Several days after the alleged beating, Robinson produced photos of injuries to his chest which he claimed occurred as a result of a TV antenna beating. To counter this, the defense purchased some TV antennas on Ebay and reconstructed the plaintiff's allegations to demonstrate that the beating could never have occurred as plaintiff alleged. The expert video showed that the wound patterns were inconsistent with the injuries the plaintiff photographed. A forensic pathologist then opined that plaintiff's injuries were consistent with self inflicted scratches.

In *Jimenez* the defense has retained the use of dialect expert to establish that a statement of a witness was false based on the dialect of a speaker actually recorded on a tape.

***Monell* Claims in Wrongful Conviction Suits**.

Increasingly, plaintiffs are also suing police officers' municipal employers on "custom or practice" claims. Although a plaintiff receives no extra damages from proving a claim against the municipality, there may be a number of reasons why such claims are brought.

To prevail on a §1983 claim against a municipality, a plaintiff must show: 1) a violation of his constitutional rights; 2) an injury; and 3) that the injury and violation of rights was directly caused by the City's own action or inaction that carried the requisite degree of fault. *Monell v. Department of Social Servicesof the*

City of New York, 436 U.S. 658 (1978); *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 403-04 (1997). The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *Bryan County*, 520 U.S. at 404, 117 S.Ct. at 1388. To establish the requisite causation, the plaintiff must plead and prove that: (1) the municipality had an express policy that caused a constitutional deprivation when enforced; (2) the municipality had a widespread practice that was so permanent and well-settled as to constitute a custom or usage with the force of law, even though there was no express municipal policy or law authorizing the practice; or (3) the constitutional injury was caused by a municipal official who had "final policymaking authority.

Just as with any alleged practice and policy, a municipality's failure to train or discipline its employees may serve as the basis for §1983 liability only where that failure amounts to deliberate indifference to the rights of citizens. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). The Supreme Court established that deliberate indifference involves an obvious need for more or different training—and by extension, discipline—where the inadequacy of training or discipline is likely to result in the violation of constitutional rights. *Id.* at 390; *see also Bryan Cty*, 520 U.S. at 411 ("A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.")

Plaintiffs' Motivations For Including a *Monell* Claim in Wrongful Conviction Cases

<u>To Obtain More Discovery</u>

As a result of the elements of a *Monell* claim, the plaintiff must usually prove a widespread practice of similar misconduct to meet his burden of proof. While theoretically difficult, it allows the plaintiff to seek a significant amount of discovery of other cases having nothing to do with the underlying case. With *Monell* in the picture, it is not difficult for a plaintiff to allege a failure to discipline or supervise claim and suggest that any discovery request he asks for falls within those general allegations. We see alleged *Monell* practices as vague and general as a "practice of malicious prosecution" or a "practice of withholding exculpatory information." When allowed to proceed at the pleading stage, there are few limits on *Monell* discovery.

<u>Prejudices the defendant officers</u>

A plaintiff rarely cares if he can prove the widespread practice. He does not receive any additional money for proving a *Monell* claim, though his attorneys'

Section 1988 legal fees will certainly be higher. The plaintiff simply wants to introduce other alleged bad acts of the defendant officers, or if he can't find any, to introduce other bad acts against non-party officers to establish the "pattern" to taint the defendant officers and the municipality.

Creates additional media buzz or perceived settlement pressure

The allegation that multiple individuals may have been wrongfully convicted based on the same alleged practice (witness manipulation, *Brady* violations), or that other innocent people are in prison as a result of the practice, often garners more attention from the media. Some may also believe that filing *Monell* claims, with the threat of higher attorneys fees, costs and time for the parities and the courts, may cause the municipality to seek settlement rather than defend the case.

Political/Social Agendas

Certain attorneys, possibly affiliated with a law school or "innocence project," may pursue *Monell* claims to further their political or social agendas or the political or social agenda of the cause with which they are affiliated.

Combating *Monell* through Bifurcation

Federal Rule of Civil Procedure 42(b) allows district courts to separate the trial of any issue if separation is warranted "for convenience, to avoid prejudice, or to expedite and economize…." Bifurcation allows the municipality to avoid potentially unnecessary discovery and litigation costs should plaintiff fail to establish a constitutional violation and thus, as a matter of law, be unable to prove any *Monell* violation. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Treece v. Hochstetler*, 213 F.3d 360, 361 n.2 (7th Cir. 2000)

Courts may bifurcate *Monell* if the municipality agrees to a direct judgment against it if an underlying constitutional violation is found. *See Almaraz v. Haleas*, 602 F. Supp. 2d 920 (N.D. Ill. 2008) (Hart, J.); *Cruz v. City of Chicago*, 2008 WL 5244616 (N.D. Ill. 2008) (Dow, J.)

Waiving Proofs

To support *Monell* bifurcation, one strategy is for the municipality to waive the plaintiff's requirement of proving all the elements of a *Monell* claim, except for the constitutional violation. In other words, the municipality could agree, through stipulation or otherwise, that the plaintiff need not prove an illegal policy and practice, deliberate indifference of the final policy maker, or causation. With this strategy, the municipality advises the court it will accept a judgment against it if the plaintiff can prove his constitutional rights were violated. *See Almaraz v. Haleas*, 602 F. Supp. 2d 920 (N.D. Ill. 2008) (Hart, J.); *Cruz v. City of Chicago*, 2008 WL 5244616 (N.D. Ill. 2008) (Dow, J).

Why Agree to Waive Proofs?

Doesn't *Monell* protect the municipality? A municipality must ordinarily pay a judgment against a police officer due to its Collective Bargaining Agreement, state statute, or municipal ordinance. While perhaps intending to insulate municipalities from liability for certain acts of its employees, in practice, *Monell* doesn't have that effect. Since *Monell* ordinarily provides no practical protection, and in fact provides plaintiffs certain litigation advantages, there is usually no advantage to litigate *Monell* if the municipality does not have to.

Bifurcation serves to focus the Court on the case before it, rather than trials within trials, saves costs, and conserves judicial resources

Plaintiffs' Bar Resistance to Bifurcating *Monell* Claims

Amato v. City of Saratoga Springs, 170 F.3d 311 (2nd Cir. 1999). In response to assertions that *Monell* does not provide plaintiffs with any additional recovery, plaintiffs' attorneys often cite *Amato*. In *Amato*, the district court dismissed the plaintiff's *Monell* claim, but did not clearly specify its basis for doing so. On appeal, the Second Circuit reversed the district court's dismissal of the *Monell* claim to the extent it was based on the fact that only nominal damages would be recoverable. The Second Circuit included some language civil rights plaintiffs rely upon in asserting there is a societal benefit to *Monell* claims above and beyond any monetary recovery for the underlying plaintiff. Id. at 317-19.

Among other responses, we rebut plaintiffs' over-reading of *Amato* with *Owen v. City of Independence*, 445 U.S. 622 (1980), wherein the Supreme Court found that any deterrent comes from the fact that the municipality will be found liable. As the Supreme Court stated in *Owen*: "a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen,* 445 U.S. at 650.

"Liability Gap" Theory and Attacking the General Requirement of an Underlying Constitutional violation against a named defendant. (*Evans v. City of Chicago*, 513 F.3d 735, 741-42 (7th Cir. 2008); *Logan v. City*).

In recent wrongful conviction cases, the plaintiffs' have sought to avoid bifurcation by contending there might be unknown, unidentified, or non-defendant officers who caused the constitutional violations. As a result, plaintiffs reason *Monell* is necessary to prevent a "liability gap": *i.e.* where plaintiff cannot establish liability against a named defendant but can establish an illegal practice and that some unidentified person in the municipality caused the constitutional violation. Plaintiffs rely upon *Thomas v. Cook County Sheriff's Department*, 588 F.3d 445, 456 (7th Cir. 2009)), which involved alleged deliberate indifference to

the plaintiff pretrial detainees' medical needs by County medical technicians. *Thomas v. Cook County Sheriff's Department*, 588 F.3d 445, 456 (7th Cir. 2009). The jury in *Thomas* found the medical technicians not liable of deliberate indifference to the plaintiff's medical needs, but the County liable because of its practice of failing to review inmates' timely filed medical requests. We have argued with some success *Thomas* is inapplicable to the police context as there must be an underlying constitutional violation by an identified municipal employee in Section 1983 police cases. *Brown v. Parker*, 09 C 4535 (N.D. Ill. March 15, 2010, J. Manning); *Tanner v. City of Waukegan*, 2011 WL 686867 (N.D. Ill. February 16, 2011)(Keys, M.J.).

Overlapping Discovery through Supervisory Liability.

Another strategy employed by plaintiffs to avoid *Monell* bifurcation is to sue high-profile municipal officials and then contend *Monell* bifurcation is unnecessary as the policy and practice and deliberate indifference discovery must proceed anyway against the defendant politicians or police chiefs. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), is an effective response to that strategy, however, as it makes it more difficult to plead supervisory liability. In addition, since supervisory liability requires a showing of personal involvement, it is effective to differentiate the amount of discovery necessary to show personal involvement of an individual versus deliberative indifference of a final policymaker such as a City Council or other legislative body.

Monell Bifurcation Is Often Appropriate, But Not Always

Scope of Employment

If the municipal employee's conduct is outside the scope of his employment, or otherwise not subject to municipal indemnification, then *Monell* bifurcation may be inappropriate. After all, if the municipality may not have to pay an underlying judgment for a constitutional violation against the employee, then the municipality should assert its *Monell* defenses and hold plaintiffs to their proofs.

Fifth Amendment Cases

There may be a variety of circumstances where the civil defendant invokes his Fifth Amendment rights. Prior to seeking bifurcation, the municipality may want to evaluate the effect on indemnity or coverage before seeking bifurcation. But if there is no effect, then bifurcation may still be the best option.

Qualified Immunity

The plaintiffs' bar often argues that bifurcation should be denied because the City may escape liability if the officer successfully asserts qualified immunity. We usually defeat this argument by stipulating that the municipality will accept a

judgment against it so long as the jury finds a constitutional violation. As a result, due to the stipulation, it is possible the officer may prevail on qualified immunity even though he violated the plaintiff's constitutional rights because the right was not clearly established at the time of the incident, but the municipality could be found liable since it does not have a qualified immunity defense. Accordingly, where there is a possibility of a successful qualified immunity defense for the municipal employee because the constitutional right was not clearly established, the decision whether to move to bifurcate must be closely scrutinized.

If You Must Defend *Monell*

Connick v. Thompson, 131 S.Ct. 1350 (2011). While involving prosecutors *Brady* violations, the Supreme Court's recent decision in *Connick* solidifies the law as it applies to the evidence a plaintiff must adduce to establish a widespread practice. In particular, the Supreme Court held the County prosecutor was not liable in *Connick* based on a failure to train theory due to a single *Brady* violation, albeit a series of alleged violations over a series of years in the subject case. According to the Court, a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference. Without notice that a course of training is deficient, the Court found that decision makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Causation is also a powerful defense

The decision in *Connick* also supports the strong body of Supreme Court case law holding that the alleged illegal policy was the moving force behind the constitutional violation in the underlying case. *Connick v. Thompson*, 131 S.Ct. 1350 (2011); *Bryan County*, 520 U.S. at 407-08 ("Mere probability" that the alleged policy will cause an officer to inflict a constitutional injury is insufficient; rather, a plaintiff must show that the defendant officer "was highly likely to inflict the particular injury suffered by the plaintiff," and the injury must have been the "plainly obvious consequence" of the alleged policy); *City of Canton*, 489 U.S. at 390-91)(For municipal liability to attach, the identified deficiency in a city's training program must be "closely related to the ultimate injury); *Oklahoma City v. Tuttle* 471 U.S. 808, 823-24 (1985)(a policy or custom was "likely" to cause a particular violation is insufficient; instead, an "affirmative link" must be proven between the policy and the specific constitutional violation).

Who is the Final Policymaker?

The question of who the final policymaker is for purposes of *Monell* liability is determined by local and state law. The practitioner defending *Monell* cases should ensure to consult her local laws on this issue. In Chicago, for instance,

there is an argument the City Council is the final policymaker for purposes of *Monell* liability relative to most Chicago police issues (*Auriemma v. Rice*, 957 F.2d 397 (1992), but the plaintiffs' bar sometimes asserts the Superintendent of Police or other officials fills that role. *Vodak v. City of Chicago*, 639 F.3d 730 (7th Cit. 2011).

Deliberate Indifference.

As noted above, one of the elements of a *Monell* claim a plaintiff must prove is that the municipalities final policymaker was deliberately indifferent to the illegal custom, policy, or practice. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). This can be a very difficult hurdle for a plaintiff to overcome and is often ripe for summary judgment. The municipality will be wise to consider police administration and practices experts to evaluate the facts of the case.

Wrongful Conviction Claims Against Prosecutors, and Some Defenses Against Them

Exonerated plaintiffs are increasingly suing State's Attorney Offices, State's Attorneys, and Assistant State's Attorneys for their roles, real and alleged, in the plaintiffs' prosecutions and reversed convictions.

The legal claims typically brought against those parties usually relate to or mirror the claims against the police officers and their municipal employers: federal "coerced confession," *Brady*, failure to intervene, conspiracy and *Monell* claims under the 4th, 5th and 14th Amendments and Section 1983; and state law malicious prosecution, IIED, and conspiracy claims. Moreover, prosecutors who made statements (usually at press conferences) about the plaintiffs' guilt may get sued for defamation. Factually, plaintiffs typically allege that the state's attorney defendants participated in the plaintiffs' investigation, interrogation and/or confession, either personally or through direct supervision of the police officers.

Absolute Prosecutor Immunity - Federal Claims

With regard to most claims against them, state's attorney defendants will raise the issue of absolute prosecutorial immunity. The Supreme Court recognized absolute immunity for prosecutors in §1983 suits in *Imbler v. Pachtman*, 424 U.S. 409, 425-26 (1976), where the Court explained the importance of extending absolute immunity to prosecutors: "Frequently acting under serious constraints of time and even information, a prosecutor makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials . . . If prosecutors were hampered in exercising their judgment . . . by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence."

As a result of these considerations, the Court held that prosecutors are immune from civil suits for damages under §1983 "in initiating a prosecution and in presenting the State's case." *Id.* at 426. Prosecutors are entitled to absolute immunity for any actions they take as advocates of the State at trial, "even if they present unreliable or wholly fictitious proofs." *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("*Buckley IV*," on remand from *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("*Buckley III"*)); *see also Smith v. Power*, 346 F.3d 740, 742 (7th Cir. 2003) (absolute immunity applies even when prosecutor acts "maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence").

"Prosecutorial immunity does not simply apply to the bringing of charges and the presentment of the state's case. 'Preparation, both for the initiation of the criminal process and for trial, may require the obtaining, reviewing, and evaluating of evidence.'" *Patterson v. Burge*, 2010 WL 3894438, at *8 (N.D. Ill. Sept. 27, 2010), *citing Imbler*, 424 U.S. at 431 n.33. A prosecutor's role as an advocate for the State involves "actions preliminary to the initiation of a prosecution" and "include the professional evaluation of the evidence assembled by the police." *Buckley III*, 509 U.S. at 273; *see, e.g., Hunt v. Jaglowski*, 926 F.2d 689, 692-93 (7th Cir. 1991) (prosecutor's taking suspect's statement after interrogation by police considered part of a prosecutor's advocacy role). Even where prosecutors engage in some forms of investigatory conduct, the Seventh Circuit has found absolute immunity applies where it is "the sort of preliminary pre-prosecution activity that directly relates to the advocate's role." *Srivastava v. Newman*, 12 Fed. Appx. 369, 372 (7th Cir. 2001); *see also Sanders v. Taylor*, 3 Fed. Appx. 561, 562-63 (7th Cir. 2001).

"An exception to prosecutorial immunity exists when prosecutors perform functions normally performed only or mainly by a police officer." *Andrews*, 660 F. Supp. 2d at 875-76, *citing Buckley III*, 509 U.S. at 273-74. Absolute immunity does not apply when prosecutors' acts are "investigatory or administrative in nature" and "unrelated to the preparation and initiation of judicial proceedings." *Burns v. Reed*, 500 U.S. 478, 490-91 (1991); *Smith*, 346 F.3d at 742. Even if absolute prosecutorial immunity does not apply, a state's attorney defendant may still be entitled to qualified immunity.

While the Supreme Court has issued new cases in the past few years that strongly support the continued viability of absolute prosecutor immunity (*see, e.g., Connick, Van de Kamp*), district courts nonetheless continue to see increased litigation over the roles of prosecutors in reversed conviction cases.

Absolute Prosecutor Immunity - State Law Claims

In Illinois, plaintiffs often bring malicious prosecution claims against state's attorney defendants, alleging they "initiated and/or continued" a prosecution "with malice." Courts have generally held, however, that prosecutors have the

same absolute immunity from plaintiffs' state law claims as they do from federal claims, with no exception for "malice." *See, e.g., Patterson*, 2010 WL 3894438, at *11; *Andrews,* 660 F. Supp. 2d at 879; *Fonseca v. Nelson*, 2009 WL 78144, at *7 (S.D. Ill. Jan. 12, 2009); *Hughes v. Krause*, 2008 WL 2788722, at **1-2 (N.D. Ill. July 17, 2008) (on reconsideration, prosecutors entitled to absolute immunity from state law claims with no exception for malice); *Barham v. McIntyre*, 2007 WL 1576484, at *8 (S.D. Ill. May 30, 2007) (concluding that Illinois Supreme Court would follow federal law to "hold that absolute prosecutorial immunity extends to willful and malicious conduct"); *White v. City of Chicago,* 861 N.E.2d 1083, 1088-89 (1st Dist. 2006) (relying on *Imbler* and progeny to apply absolute immunity to prosecutors).

Plaintiffs efforts to save their state law malicious prosecution claims against state's sttorney defendants by pleading malice is usually premised on an apparent discrepancy between the case law cited above and *Aboufariss v. City of DeKalb,* 713 N.E.2d 804 (2d Dist. 1999). There, one federal court has stated that "the Illinois Court of Appeals analysis of a prosecutor's immunity is not based on federal law but rather on the doctrine of 'public official immunity,'" which, "while similar to absolute immunity in the federal sphere, has a caveat that actions taken by public officials with a 'malicious motive' are not subject to immunity." *Beaman v. Souk*, No. 10-CV-1019, 2011 WL 832506, at *12 (C.D. Ill. March 3, 2011). (The decision in *Beaman* is currently under reconsideration.)

A closer reading of *Aboufariss,* however, reveals that it does not support the denial of absolute immunity to prosecutors on state law claims where a plaintiff alleges malice. Initially, while *Aboufariss* referred generally to "public official immunity" in its discussion of immunity on state law claims (713 N.E.2d at 812), the court further explained that in applying immunity specifically to prosecutors, "[a] prosecutor acting within the scope of her prosecutorial duties enjoys immunity from civil liability, *the same immunity afforded to the judiciary.*" *Id.* (emphasis added). It is beyond dispute that judicial immunity in Illinois is absolute and unqualified. *See, e.g., Generes v. Foreman*, 277 Ill. App. 3d 353, 356 (1st Dist. 1995) (judges are not liable in civil actions for their judicial acts, even where such acts "are alleged to have been done maliciously or corruptly").

Other than simply mentioning the malice exception to public official immunity generally, *Aboufariss* did not purport to incorporate that exception into principles of absolute immunity for prosecutors for acts within the scope of their traditional functions; indeed, the *Aboufariss* court held the prosecutor was immune from plaintiff's malicious prosecution claim for the same reasons the prosecutor was immune from plaintiff's §1983 claims. 713 N.E.2d at 812. Thus, *Aboufariss* (which predated the Illinois appellate court decision in *White*) does not undermine state's attorney defendants' entitlement to absolute immunity from plaintiffs' malicious prosecution claims. *See e.g., Hughes,* 2008 WL 2788722, at **1-2 (discussing *Aboufariss* and *White* in extending absolute immunity to prosecutors even where malice alleged); *Barham*, 2007 WL 1576484, at *8 (same).

Failure to Intervene

"Failure to intervene" claims are usually brought against police officers for failing to stop the unconstitutional actions of a fellow officer when the former have a reasonable opportunity to do so. Plaintiffs sometimes bring similar claims that state's attorney defendants failed to intervene against police officers. Such claims fail, however, because "neither the Seventh Circuit, nor any Northern District of Illinois court, has recognized a failure to intervene claim against a prosecutor." *Gordon v. Devine*, 2008 WL 4594354 at *17 (N.D. Ill. Oct. 14, 2008). Prosecutors have different roles and powers than police; consequently, the former do not have a duty to intervene with the latter. *Andrews v. Burge*, 660 F. Supp. 2d 868, at 876 n.6 (N.D. Ill. 2009); *cf. Anderson v. Simon*, 217 F.3d 472, 476 (7th Cir. 2000) ("police are not obligated to adhere to the suggestions of the state's attorney's office, a separate and distinct organization with no command authority" over the police department).

Defamation

Plaintiffs sometimes allege that state's attorney defendants make statements, usually at press conferences following an exoneration, that state that the plaintiffs are nonetheless guilty of the crimes for which they were originally convicted. Such statements are usually protected from state law defamation claims by the absolute executive privilege recognized by the Illinois Supreme Court in *Blair v. Walker*, 349 N.E.2d 385 (1976) (Governor is protected from defamation actions when issuing statements legitimately related to matters committed to his responsibility). In a similar context, in *Patterson v. Burge*, 328 F. Supp. 2d 878 (N.D. Ill. 2004), the Cook County State's Attorney and an Assistant State's Attorney publically condemned the plaintiff's pardon, referring to the plaintiff as "evil" and a "convicted murderer," and stating that plaintiff "was guilty of the murders." *Id.* at 885-86. The court dismissed plaintiff's defamation claim, holding that "[p]rosecutors in the Illinois State's Attorney's Office have an absolute privilege to comment on issues within the scope of their employment" and that "commenting to the public on criminal cases" is within the scope of a prosecutor's employment. *Id.* at 902, relying on *Ware v. Carey*, 394 N.E.2d 690, 693-97 (1st Dist. 1979) (extending *Blair*'s absolute executive privilege for public statements to state's attorneys).

The rationale behind the absolute executive privilege derives from *Barr v. Matteo*, 360 U.S. 564, 571 (1959), which held that an absolute privilege applied to an acting director's press release announcing reasons for some employees' suspensions to effectively allow for open functioning of government. *See Blair*, 349 N.E.2d at 389 (Governor has inherent, discretionary authority to inform the public of the actions he has taken, and despite the potential for libel, the effective functioning of a free government depends largely on informed public opinion); *Ware*, 394 N.E.2d at 696-97 (State's Attorney's press release legitimately related to responsibilities as leader of law enforcement community to inform the public

about issues of importance); *Hartigan v. Knecht Services Inc.*, 575 N.E.2d 1378, 1390-91 (2d Dist. 1991) (the Attorney General "must be allowed to keep public informed of his actions without fear of personal liability"); *see also, Klug v. Chicago School Reform Bd. of Trustees*, 197 F.3d 853, 861 (7th Cir. 1999) (Illinois officials' immunity from defamation claims is not overcome by knowledge of statement's falsity or by improper motivation, including malice).

Eleventh Amendment/Sovereign Immunity

A state's immunity from suit is a fundamental aspect of its sovereignty. *Alden v. Maine,* 527 U.S. 706, 713 (1999). This immunity is recognized in the Eleventh Amendment, which provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Eleventh Amendment "forbids the federal courts to entertain diversity suits against states and thus is clearly jurisdictional." *Higgins v. Mississippi,* 217 F.3d 951, 953 (7th Cir. 2000). The Eleventh Amendment itself does not explicitly provide for immunity when a citizen sues his resident state; however, the Supreme Court has extended state sovereignty to bar federal courts from hearing suits against a state by one of its own citizens. *Hans v. Louisiana,* 134 U.S. 1, 21 (1890).

State sovereign immunity rules also apply to state law causes of action brought in federal court against state officials. *Omosegbon v. Wells,* 335 F.3d 668, 673 (7th Cir. 2003). In 1970, Illinois ratified a new constitution which abolished sovereign immunity except as provided by the General Assembly; at the same time, the General Assembly enacted the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 1994)), which gave the Illinois Court of Claims exclusive jurisdiction to hear, *inter alia,* "all claims against the State for damages in cases sounding in tort . . ." *Sneed v. Howell,* 716 N.E.2d 336, 339-40 (5th Dist. 1999). And in *Garcia v. City of Chicago,* 24 F.3d 966, 969 (7th Cir. 1994), the Seventh Circuit noted that the Illinois Supreme Court held that Illinois state's attorneys are state officials, citing *Ingemunson v. Hedges,* 549 N.E.2d 1269, 1272 (1990); *see also, McGrath v. Gillis,* 44 F.3d 567, 571 (7th Cir. 1995) (same). Thus, a suit against a state's attorney in Illinois is treated as a suit against the State. *See, e.g., Carillo v. Chambers,* 2007 WL 257634, at **3-4 (N.D. Ill. Jan. 22, 2007).

Against that backdrop, state law claims against state's attorney defendants must be brought in the Illinois Court of Claims. *See, e.g., Brooks v. Ross,* 578 F.3d 574, 580 (7th Cir. 2009)(dismissing state law malicious prosecution claim against defendants including assistant state's attorneys because it was barred by sovereign immunity); *Redd v. Dougherty,* 578 F. Supp. 2d 1042, 1056 (N.D. Ill. 2008) (state law claims against assistant state's attorney dismissed without prejudice to being raised in Illinois' Court of Claims); *Young v. Rogers,* 2008 WL 5235366 (N.D. Ill. Dec. 15, 2008) (sovereign immunity barred state law claims against assistant state's attorney); *White,* 861 N.E.2d at 1095-96 (exclusive jurisdiction over tort

claims against state's attorneys lies in Court of Claims); *Price v. State*, 820 N.E.2d 104, 107 (1st Dist. 2004) (circuit court lacks subject matter jurisdiction over state law tort claims against state's attorney).

Know your opponent and be prepared

The top plaintiff law firms in the country file wrongful conviction lawsuits. It's important that you retain the right expertise to defend against them. There are several examples of municipalities who have hired lawyers who have no experience in defending against these claims and have suffered losses of tens of millions of dollars.