International Municipal Lawyers Association

2022 Mid-Year Seminar

Washington, D.C.

Seminar: Section 1983 Program – Defending Local Governments

Litigating Reverse Conviction Claims Pursuant to § 1983

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Litigating Reverse Conviction Cases Pursuant to § 1983

Reverse conviction cases present unique litigation challenges. Most arise from the reversal of convictions for violent felonies after lengthy periods of incarceration. There are many species of reverse conviction cases—DNA, recanting witnesses, fabricated or suppressed evidence, to identify a few. Most cases will present a combination of claims. Particularly complicated are cases involving *Brady*[1] claims of suppressed evidence or claims of fabricated evidence. Nonetheless, in all of these cases, the defense will require reconstructing events that took place years, or even decades, prior. The passage of time necessarily affects the availability and reliability of both documentary and testimonial evidence. In particular, most cases will present questions of fact that require extensive discovery. The age of most of the underlying events will complicate discovery on even straightforward claims. Documents may be difficult—at best—to locate and witnesses may be—at best—uncertain.

While most of these cases will not be trial matters, planning for trial from the start is always a winning strategy. The bigger a case for trial, the greater the likelihood of a plaintiff's verdict, and the larger the potential damages. Thus, a good defense strategy is to remove claims and parties through whatever means possible. This is an effective approach for any defense, but particularly useful in reverse conviction cases, given the complexity of the issues presented. Limiting the scope of claims and damages will improve defendants' settlement posture in addition to improving the likelihood of success at trial.

I. Pleadings

a. Review the Complaint

The first step to limiting a case is to carefully review the allegations of the complaint. Discovery is limited by relevance to the claims or defenses at issue in the action.[2] The complexity and potential exposure on a reverse conviction case may favor early motion practice that might be discouraged in actions where fees[3] are a driving consideration. That is, the expense of early motion practice may be warranted, if it will limit damages and fees later.

Because reverse convictions can involve various complex claims, they may also be more suitable for motions to dismiss[4] than other § 1983 cases. All claims must be pled to a facial plausibility standard. That is, a plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."[5] Claims that

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[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

[2] Fed. R. Civ. P. 26(b).

[3] 42 U.S.C. § 1988 authorizes recovery of attorney's fees and costs by a prevailing party in § 1983 action.

[4] Fed. R. Civ. P. 12(b) and 12(c).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

are not plausibly pled should be challenged early—to weed them out or to force amendments with more specificity.

Consider the individual elements of each claim, as well as the requirements of § 1983 claims, generally. In particular, scrutinize allegations—or lack thereof—of personal involvement. Personal involvement is a prerequisite to an award of damages under § 1983. Generally, claims for supervisory or vicarious liability will not meet this standard.[6] Individual defendants who are not plausibly alleged to have personally participated in unconstitutional conduct should be dismissed as early as possible. This will limit the claims and narrow the scope of discovery.[7] It is common in § 1983 cases for many, or all, officers involved in an investigation to be named as defendants, even before their involvement in any alleged misconduct has been determined. In high-profile reverse conviction cases, the personal involvement of some defendants may be well-established. Even still, there may still be defendants named against whom no specific misconduct is alleged who are ripe for early dismissal.

There may also be instances in which an early qualified immunity motion is warranted in reverse conviction cases. If such a motion would successfully eliminate any claims or defendants entirely, it should be made. While qualified immunity is typically not available on fabrication of evidence claims,[8] the specific facts of a case may leave room for an argument that the unconstitutionality of an officer's alleged misconduct was not clearly established at the time of the act. Defendants should bear in mind that courts have been repeatedly admonished not to define "clearly established" at a high level of generality.[9]

Claims for *Monell* liability should also be scrutinized. A municipality can be found liable under § 1983 only where it causes the alleged constitutional violation at issue.[10] *Monell* claims may arise from allegations of official policy, widespread unlawful practices, failure to train, or decisions by policymakers. Most frequently, *Monell* claims in the reverse conviction context will be premised on alleged failures to train, discipline or supervise, or widespread unlawful practices relating to investigative or prosecutorial functions. These may include allegations arising from the policies and practices of prosecutors' offices.[11] These claims are subject to the same plausibility standard as any other.

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[6] *See, e.g.*, *Tangreti v. Bachmann*, 983 F. 3d 609, 618 (2d Cir. 2020); *Taylor v. Ways*, 999 F. 3d 478, 493-94 (7th Cir. 2021); *Lemire v. California Dep't of Corr. and Rehab.*, 726 F. 3d 1062, 1074-75 (9th Cir. 2013); *Argueta v. U.S. Immigration & Customs Enf't*, 643 F. 3d 60, 71 (3d Cir. 2011); *Grinter v. Knight*, 532 F. 3d 567, 575 (6th Cir. 2008); *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997).

[7] *See, Hincapie v. City of N.Y.*, 434 F. Supp. 3d 61, 71 (S.D.N.Y. 2020) (granting motion to dismiss, in part, based on failure to plausibly plead personal involvement).

[8] *See*, *Zahrey v Coffey*, 221 F. 3d 342, 356 (2d Cir. 2000).

[9] *See*, *White v. Pauly*, 137 S. Ct. 548 (2017) (holding the right at issue must have been particularized and placed beyond debate); *D.C. v. Wesby*, 138 S. Ct. 577 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

[10] *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 691 (1978);

[11] *See*, *Bellamy v. City of N.Y.,* 914 F.3d 727, 756 (2d Cir. 2019).

Monell claims must sufficiently allege a municipal custom policy or practice which was the moving force behind any alleged constitutional deprivation.[12] Boilerplate allegations will not suffice to sustain these claims, nor to unlock the doors of discovery.[13] Failure to attack these claims early, however, may lead to unnecessary and expansive *Monell* discovery.

b. Examine Procedural History

Defendants should review the complete procedural history of the underlying criminal and post-conviction proceedings. This may provide additional grounds for motion practice—for example, in instances where conditions precedent to suit have not been met, or statutes of limitations have been exceeded. This review will also facilitate the discovery process, as each phase of a reverse conviction case will have generated its own record that is essential to the defense of the § 1983 action. Additionally, defendants should look for parallel litigation that may form the basis for a motion for abstention pursuant to the *Colorado River* doctrine.[14]

c. Respond to the Complaint

If a complaint is not suitable for motion practice, be sure to identify and carefully plead all applicable affirmative defenses. Affirmative defenses are also subject to *Twombly's* plausibility standard.[15] Care should be taken to plead—to the extent known—the facts or contentions supporting each affirmative defense, including qualified immunity.

II. Discovery

The heart of most reverse conviction cases will be piecing together what actually happened during the underlying crime, investigation, and prosecution. Because the material facts of these cases will be hotly disputed and may have gone through numerous iterations over the years, it is essential to assemble and assimilate a complete record for each phase of the case.

a. Document Discovery

In most § 1983 actions, the municipality will hold most of the discoverable information. However, reverse convictions may also require extensive document collection from the plaintiff and non-parties. While the original investigation and prosecution files will likely be within the municipality's control, there are other critical sources of information. Starting at the inception of a case, defendants should work to identify all possible sources of discoverable information.

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[12] *See*, *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 399 (1997).

[13] *See*, *e.g.*, *Fleming v. City of N.Y.*, No. 18 Civ. 4866 (GBD), 2020 U.S. Dist. LEXIS 142414 at *16 (S.D.N.Y. July 23, 2020) (dismissing a *Monell* claim when the plaintiff made conclusory allegations "without citing to any materials, such as 'procedural manuals or training guides,' or pointing to 'particular aspects' of their 'training or supervision' that would support this conclusion") *see also*, *Connick v. Thompson*, 131 S. Ct.1350 (2011) (rejecting use of prior unrelated incidents or legally irrelevant facts to establish a municipal pattern of conduct).

[14] *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).

[15] *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F3d 92, 98 (2d Cir. 2019).

The extent of paper discovery and the particular types of records at issue will vary by case. However, there are certain records that will almost certainly be relevant in a reverse conviction case. These include:

- Investigation files
- Prosecution files
- Defense files
- Court files
- Post-conviction files
- Conviction review files
- Plaintiff's files
- Inmate files

Most importantly, for claims of *Brady* violations or fabrication of evidence, the file maintained by a plaintiff's criminal defense counsel must be obtained if still available. Plaintiffs themselves may also hold documents accumulated over the life of the criminal prosecution and post-conviction proceedings which should be obtained. Additionally, files maintained by the plaintiff's post-conviction counsel may also be a fruitful source of discovery, as will the court files for those matters. If the conviction was reviewed by a conviction review unit, that file must also be obtained. Post-conviction files should contain any newly discovered evidence—DNA testing, witness statements, *etc*.—that the plaintiff will use to attack the integrity of the underlying investigation and prosecution.

b. Privilege Issues

Due to the nature of the claims advanced in reverse conviction cases, it may be appropriate to pierce the attorney-client privilege between the plaintiff and his criminal defense counsel. A plaintiff arguably waives the privilege by bringing claims that put communications with their criminal defense counsel at issue.[16] Thus, in some instances, the contents of attorney-client communication may be discoverable. Regardless, attorney-client privilege will not shield discovery of facts known to the criminal defense attorney from sources other than client communication. The contents of the criminal defense attorney's file, thus, will be largely discoverable.

c. Third-Party Discovery

The paper trail in reverse conviction cases can extend beyond the sphere of investigatory and legal records. It is not uncommon for high-profile cases to receive significant media coverage or be subject to civilian investigations. This coverage can be a fruitful source of discovery. Defendants should locate these materials early, serve preservation notices, and subpoena source materials. Media files may be subject to objections and subsequent motion practice, so it is better to flush out those issues sooner rather than later.

[16] *See*, *Taylor v. City of Chicago*, No. No. 14-cv-737, 2015 U.S. Dist. LEXIS 126352, at *14 (N.D. Ill. Sep. 22, 2015) (granting motion to compel testimony of criminal defense attorney with regard to conversations with plaintiff regarding circumstances surrounding allegedly coerced confession).

d. Depositions

Depositions should be taken of all plaintiffs and potential trial witnesses. Eyewitnesses in reverse conviction cases pose a unique challenge. In some instances, eyewitnesses will have fully recanted or made allegations of misconduct themselves against investigators that undermine their own prior testimony for the prosecution. Those witnesses are typically treated as hostile and should be deposed to lock in their testimony for impeachment purposes later.

In other instances, eyewitnesses may be more equivocal about their confidence in their prior testimony. In those cases, it is advisable to depose the witness even though their testimony may be largely favorable to the defense. At a minimum, an equivocal witness should be recommitted to their prior testimony, particularly any confidence statements offered. Either type of witness should also be deposed regarding their communications with the plaintiff or their representatives, from the time of the underlying offense to the present.

Another useful strategy is to bifurcate the plaintiff's deposition. If a plaintiff will consent, or a court will so order, it can be useful to depose the plaintiff early on liability issues and reserve damages issues to a later time. This can help to further limit the scope of discovery, as a plaintiff's actual allegations may be less expansive than those pled in the complaint.

Defendants should remember that limitations on depositions apply, without a court order. Unless a plaintiff has been granted leave by the Court or local rules, they are limited to ten depositions of seven hours each. Defendants should leverage this rule when possible narrow the scope of discovery.

e. *Monell* Discovery

Discovery on putative *Monell* claims is likely to be time and resource-intensive. Every effort should be made to limit the scope of *Monell* discovery. Without an underlying constitutional violation, there can be no claim for *Monell* liability. Thus, if possible, *Monell* discovery should be bifurcated from discovery on claims for individual liability at the earliest opportunity. A stipulation or order to bifurcate should be the goal, if *Monell* claims cannot be eliminated on a motion to dismiss. Alternatively, courts may endorse sequencing discovery to permit motion practice prior to the commencement of *Monell* discovery. If bifurcation or sequencing are not available, defendants should attempt to limit the scope of *Monell* discovery by agreement during their Rule 26(f) conference.[17] Whether such an agreement is reached or not, defendants will likely need to object to the scope of requests for *Monell* discovery throughout the course of the litigation. These objections must be timely and specific. Motions for protective orders[18] should be made as soon as an impasse is reached with regard to the scope of *Monell* discovery.

The substantive scope of *Monell* discovery can be wide-ranging. In reverse conviction cases, this type of discovery can be especially problematic where allegations are made of both police and prosecutorial practices. Discovery on these claims may implicate evidence of the internal workings of these agencies, and other criminal proceedings. Establishing the scope of *Monell*

[17] Fed. R. Civ. P. 26(f).

[18] Fed. R. Civ. P. 26(c).

discovery as early as possible will enable you to timely collect, review, and produce necessary information.

When faced with demands for *Monell* discovery, defendants should timely interpose all applicable objections, with an emphasis on proportionality.[19] Discovery sought must be proportional to the needs of the case:

> considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[20]
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> The proportionality analysis does not explicitly favor one factor over another, so objections should be tailored to the needs of the case. However, the third and fourth factors carry more relative weight, as a Court is likely to prioritize the actual relevance of discovery over the burden of production on a municipality.[21]

f. Expert Discovery

Reverse conviction cases can implicate a wide array of experts. Liability experts may be called in the fields of DNA analysis, police practices, eyewitness identification, or ballistics, to name a few. Damages experts may include medical, psychological, economic, or vocational witnesses.

Defendants should challenge the sufficiency of expert disclosures as early as possible to preserve objections. Retained experts are required to disclose: i) a complete statement of opinions, including basis and reasons; ii) facts and data considered; iii) exhibits that will be used to summarize or support opinions; iv) qualifications, including publications authored in last 10 years; and v) a list of other cases in the last four years in which the witness has testified at trial or by deposition.[22] Failure to make necessary disclosures may warrant preclusion or limitation of an expert's testimony, but those deficiencies should be noticed to the plaintiff and court early.

Defendants should review decisions regarding the admissibility of similar expert testimony in comparable cases to evaluate the strength of plaintiff's experts. It may be necessary to engage rebuttal experts, or consultants, to review the opinions of a plaintiff's experts.

Deciding when to depose a plaintiff's expert is case-specific. If an expert report is particularly weak, deposing the witness may only be offering them the opportunity to fill in the gaps. If the reliability of the facts and data, or the methodology, an expert relies upon is questionable, it may be appropriate to depose that witness to lock them in to the parameters of their report. Defendants

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[19] Fed. R. Civ. P. 26(b)(1).

[20] *Id.*

[21] *See*, *Prince v. Kato*, 2020 U.S. Dist. LEXIS 65981 (N.D. Ill. 2020) (ordering production of four years of homicide files in *Monell* discovery).

[22] Fed. R. Civ. P. 26(a)(2)(B).

should bear in mind, though, that deposing an expert witness can often reveal too much of a future cross-examination.

g. Investigation

Reverse conviction cases will often warrant further investigation, outside of formal discovery processes. In particular, witness interviews should be conducted as early as practicable for several reasons. First, witnesses may themselves be a source of information in identifying discoverable materials. Additionally, it is helpful to identify as early as possible what contact plaintiff's representatives have had with the witness and to gauge their value to the defense. An eyewitness who has gone on record during post-conviction proceedings as lacking confidence in an identification may turn up alleging coercion or duress by the time of a deposition. Early contact with witnesses may also counteract the effect of communications with the plaintiff.

Visiting the scene can be a fruitful investigative tool, even despite the passage of time. Where a plaintiff challenges a witness's opportunity to observe, for example, visiting and documenting the physical scene will be critical.

III. Trial Practices

a. Limiting Damages at Trial

There are a number of steps defendants can take to mitigate their exposure at trial. Every effort should be made to keep the municipality off a verdict sheet at trial, to avoid the perception of a deep pocket that could influence a jury to return a plaintiff's verdict. If *Monell* claims are not before the jury—the municipality is only a party by way of *respondeat* liability, for example—defendants should move to instruct the jury only as to claims for individual liability.

Defendants should also consider moving to bifurcate the liability and damages phase of the trial. Reverse conviction cases command—or at least give the appearance of—high damages. The knowledge that the plaintiff spent any length of time incarcerated, only to have their conviction reversed, is likely to elicit sympathy and skew the jury's perception of the underlying facts. If a jury's attention can be focused on the underlying facts of the crime, investigation, and prosecution—and not the period of time the plaintiff spent incarcerated—they may be more objective in assessing liability.

b. Controlling the Evidence

i. Motions in limine

Defendants should use motions *in limine* to control the scope and flow of evidence at trial. In particular, defendants should request that the jury be instructed regarding the disposition of the conviction. The jury is going to learn that the plaintiff's conviction was reversed. Thus, defendants should request, at a minimum, that the Court explicitly instruct the jury not to consider that fact or to speculate as to why.

Additionally, objections should be made generally to cumulative, confusing, and unduly prejudicial evidence.[23]

ii. Daubert Motions

In cases involving experts, motions should be made as appropriate to exclude their testimony to the extent it is not reliable or relevant. Reliability is principally a function of the soundness of the methods applied, the expert's experience, and the facts and data relied upon. "The admissibility of expert testimony is governed by Federal Rule of Evidence 702[24] and the Supreme Court's opinion in *Daubert*[.]"[25] Trial judges act as gatekeepers to screen expert evidence for relevance and reliability. Questions regarding the sufficiency of the facts and data underlying an opinion may be relegated to the jury. However, where an expert deviates from accepted practices in their field, their testimony may properly be excluded as unreliable.[26]

IV. Conclusion

Reverse conviction cases are challenging to defend. They are large and can carry an imprimatur of merit because the plaintiff has already prevailed in having their conviction reversed. A municipal attorney defending against these claims needs to examine each case carefully, working at each stage of litigation to narrow the scope of the plaintiff's claims.

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[23] Fed. R. Civ. P. 403.

[24] Under Rule 702, a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion" if the following conditions are satisfied:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

[25] *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009) (citing *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993))

[26] *See Rosario v. City of N.Y.*, 2021 U.S. Dist. LEXIS 91675, at *4 (S.D.N.Y. May 13, 2021) (excluding testimony of one defense expert for failure to adequately explain deviation from diagnostic criteria in psychiatric diagnosis, but permitting testimony of second expert on the same diagnosis based on relative reliability of their opinions.)