

THE IDC MONOGRAPH:

Wrongful Conviction Claims

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Donning a Sherlock Holmes super sleuth hat, magnifying glass, and briefcase, journalists and law students across America have been investigating criminal cases for years. In particular, much of their work is dedicated to persuading judges and prosecutors to release prisoners convicted of serious and heinous crimes such as rape and murder—based upon the prisoners being “wrongfully convicted.”

After these “super sleuths” succeed in obtaining pardons, releases, or complete reversals of convictions on behalf of these prisoners, many of the “newly freed” file legal claims, contending they are entitled to compensation for being wrongfully convicted.

In the landmark opinion *Brady v. Maryland*,¹ the U. S. Supreme Court stated, “[s]ociety wins, not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”

In the last decade, there have been an alarming number of instances in which individuals convicted of serious crimes

have been exonerated and released from prison, some after spending substantial time in prison. There are now over 30 “innocence organizations” throughout the United States, most affiliated with law schools and universities, dedicated to investigating the cases of individuals that believe they were wrongfully convicted and subjected to unjust imprisonment.

In cases which resulted in exoneration, the inevitable civil lawsuit soon follows. Because of the sensational nature of these cases, and the natural sympathy factor present for a civil plaintiff seeking compensation for time spent unjustly in prison, jury awards for successful plaintiffs have been substantial. This article will discuss some recent wrongful conviction and malicious prosecution cases in federal and Illinois state courts and some of the defenses available to public entities and their employees facing such a claim.

Wrongful Conviction Claims in the Federal Arena

When claims are filed in federal court, those wrongfully convicted claim § 1983 violations.

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or

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Dustin S. Fisher received his Juris Doctor from the John Marshall Law School in May of 2008, graduating Cum Laude. While in law school, Mr. Fisher was a Dean's Scholar, a member of The John Marshall Law Review and the Trial Advocacy and Dispute Resolution Honors Council. His article, *Selling the Payments: Predatory Lending Goes Primetime*, was published in volume 41 of the John Marshall Law Review. He received the CALI Award for Excellence in both Civil Procedure and Property Law, and is a member of the Order of John Marshall. Prior to joining *Judge, James & Kujawa, LLC*, Mr. Fisher worked as an insurance fraud investigator.



Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress.²

Typical allegations in a complaint for wrongful conviction based upon a § 1983 violation include: (1) bad DNA testing or results; (2) police or prosecutorial misconduct; (3) bad or improper identification procedures; (4) confessions coerced through torture; and (5) destruction or withholding of exculpatory evidence.

As a legal backdrop, the United States Supreme Court case of *Heck v. Humphrey*³ set forth the prerequisites for filing a § 1983 action for wrongful conviction. In *Heck*, criminal defendant Heck was convicted of involuntary manslaughter in Indiana and sentenced to 15 years imprisonment. While appeal from his conviction was pending, criminal defendant Heck filed a § 1983 action in federal court, claiming prosecutors and state police engaged in a faulty investigation which resulted in his arrest, destroyed exculpatory evidence, and employed an illegal voice identification at his trial. Heck's civil complaint sought compensatory and punitive damages, but did not request injunctive relief or release from custody.

After the federal district court dismissed Heck's claim without prejudice, the Indiana Supreme Court upheld Heck's conviction and sentence for involuntary manslaughter and rejected Heck's two petitions for federal habeas corpus relief.

The United States Supreme Court went on to outline the prerequisites for establishing a § 1983 violation by holding:

In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus [citation omitted]. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must con-

sider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.⁴

More recently, in the case of *Ienco v. City of Chicago*,⁵ *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002), the Seventh Circuit Appellate Court set forth the standards for a successful § 1983 action as follows:

The standards for a successful Section 1983 action against local public officers or a municipality are well known. To prove the officers' liability, Ienco must show that (1) he was deprived of a federal right and (2) that the deprivation was imposed upon him by one or more persons acting under color of state law [citation omitted]. To establish liability for the City of Chicago, Ienco must prove that: (1) he suffered a deprivation of a federal right; (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority for the City; which (3) was the proximate cause of his injury [citations omitted].⁶

Absolute Immunity

With wrongful conviction claims on the rise, several defenses have been employed by defendants accused of violating a former prisoner's civil rights. One defense commonly invoked to defeat § 1983 claims is absolute immunity. Absolute immunity shields prosecutors from liability for actions related to their official duties.⁷ Prosecutors are absolutely immune from liability for money damages under § 1983 for acts "within the scope of [their] duties in initiating and pursuing a criminal prosecution."⁸

Courts are "quite sparing" in recognizing absolute immunity for prosecutors in § 1983 actions and require the defendant prosecutors to carry the burden of showing that such immunity is justified in each particular case.⁹ Immunity does

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not rest on an individual's status as a prosecutor, but "is grounded in the nature of the functions he was performing in the case."¹⁰ This "functional approach" to determining immunity "looks to the nature of the function performed, not the identity of the actor who performed it."¹¹ "If a [prosecutor's] function was *quasi*-judicial, the [prosecutor] enjoys absolute immunity. If the function was administrative or investigatory, the [prosecutor] enjoys only qualified immunity."¹²

On these facts Troy and Lacy were functioning as investigators rather than advocates for the state and are therefore not entitled to absolute immunity.

In the much publicized case of *Aaron Patterson v. Jon Burge, et al.*,¹³ although absolute prosecutorial immunity was invoked by two Cook County Assistant State's Attorneys, application of absolute immunity was rejected by the district court. In *Patterson*, a former convicted felon filed a civil rights action against the City of Chicago, the Cook County State's Attorney, two assistant state's attorneys, as well as various Chicago police officers, alleging that material evidence was suppressed and that he was tortured and abused into confessing to a murder he did not commit.

In *Patterson's* civil rights action, he claimed that the assistant state's attorney defendants participated in his abusive interrogation, fabricated statements and admissions for him to sign, and suppressed exculpatory evidence. Both assistant state's attorneys claimed absolute prosecutorial immunity, because other than the allegations that they took part in the physical abuse and coercive interrogation of *Patterson*, *Patterson* did not allege that either assistant state's attorneys acted outside of the scope of their employment or role as prosecutors.

Initially, the *Patterson* Court cited to the case of *Imbler v. Pachtman*¹⁴ for the general proposition that prosecutors enjoy absolute immunity; "[i]n initiating a prosecution and

presenting the state's case, the prosecutor is immune from civil suit for damages under § 1983."¹⁵

However, the *Patterson* Court rejected the assistant state's attorneys' claims of absolute immunity by declaring:

Generally, prosecutors who cause constitutional deprivations through their evaluation of evidence presented to them by police may invoke absolute immunity in a § 1983 suit, even if they know or suspect that the evidence was obtained through police misconduct [citation omitted]. But in this case *Patterson* accuses *Troy* and *Lacy* not only of conspiring to suppress the fact of and evidence obtained from Area 2 defendants' abusive interrogation, but also of actively participating with the Area 2 defendants in torturing him and fabricating his confession. Specifically, he claims that *Troy* 'physically attacked [him] in an attempt to coerce him into signing false statement' that both defendants were aware of his torture and physical abuse and of threats to inflict further abuse if he did not sign the fabricated confession, and that both participated in it by allowing the abuse to continue and failing to stop it or report it to police supervisors. These allegations suggest that *Troy* and *Lacy* were functioning as investigators rather than prosecutors and are therefore entitled only to the same qualified immunity as police officers performing similar tasks. *See Buckley*, 509 U.S. at 273, 113 S. Ct. 2606 ('When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other.')(quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)). *See also Pippin v. Daley*, No. 88 C 150, 1988 WL 56177 at 2 (N.D.Ill. May 23, 1988)(finding assistant state's attorney who participated in coercive interrogation not entitled to absolute immunity because those acts were the function of an investigator rather than an advocate).

On these facts *Troy* and *Lacy* were functioning as investigators rather than advocates for the state and are therefore not entitled to absolute immunity [citation omitted].¹⁶

Therefore, while absolute prosecutorial immunity deals a heavy blow to a § 1983 claim filed by a wrongly convicted

prisoner, its application by courts proves more difficult to achieve.

Another highly publicized case alleging various § 1983 violations is the Duke University lacrosse rape case, captioned *David Evans, Collin Finnerty, and Reade Seligmann v. City of Durham, North Carolina, Michael Nifong, Mark Gottlieb, et al.*, pending in the United States District Court for the Middle District of North Carolina, Docket No. 07-739. In this 2007 civil rights action, three lacrosse players who alleged they were wrongly accused of rape made broad sweeping claims of constitutional violations against several individuals and entities, including but not limited to: Michael Nifong, District Attorney for the Fourteenth Prosecutorial District in North Carolina; the City of Durham, for operating the Durham Police Department; and DNA Security, the state crime lab charged with performing forensic analysis services.¹⁷

In their 150-page federal complaint, the three lacrosse players contend various § 1983 violations, ranging from malicious prosecution, concealment of evidence and fabrication of evidence, to failure to supervise investigation, conspiracy and making false public statements.¹⁸

A civil suit was filed on behalf of the three wrongly accused Duke University lacrosse players because the City of Durham declined the plaintiffs' original settlement demand of \$30 million dollars. The plaintiffs' civil complaint states the following:

This is a civil action for damages and injunctive relief... arising from one of the most chilling episodes of premeditated police, prosecutorial, and scientific misconduct in modern American history, which resulted in charges brought and maintained against three innocent Duke University students and lacrosse players over a period of more than one year.¹⁹

The plaintiffs' complaint also alleges the following:

From March 15, 2006 to April 11, 2007, Defendants, individually and in concert, maliciously conspired to bring charges of rape, sexual assault, and kidnapping against three innocent students. Defendants knew that these charges were completely and utterly unsupported by probable cause, and a total fabrication by a mentally troubled, drug prone exotic dancer whose claims, time and again, were contradicted by the physical evidence, documentary evidence, other witnesses, and even the accuser herself. In their rush to accuse, Defendants willfully ignored and were

deliberately indifferent to overwhelming evidence of Plaintiffs' actual innocence.²⁰

Instead, Defendants used the accuser's inconsistent and demonstrably false allegations as the fuel for a media campaign to obtain indictments and win a hotly-contested election at the expense of the three innocent Duke lacrosse players. With a community and a nation thus inflamed and clamoring for indictments of Duke lacrosse players, but with no evidence that any players had actually committed a crime, Defendants set about to fabricate such evidence. And, when scientific testing threatened to expose the truth by reaffirming that the accuser was lying and that no crime had occurred, Defendants conspired to conceal this exculpatory evidence in order to charge and convict the Plaintiffs on "facts" they knew to be untrue. Defendants' actions evidenced a reckless and callous disregard for the deliberate indifference to Plaintiffs' constitutional rights and Defendants' responsibilities to the criminal justice system.²¹

On January 15, 2008, the City of Durham filed a motion to remove itself as a defendant, arguing that it was not responsible for District Attorney Michael Nifong's actions. This motion was subsequently denied. On the same day, the defendant Michael Nifong filed for bankruptcy, a choice thought by many to be an unspoken admission that he lacked the funds to defend himself.

On May 27, 2008, Judge William L. Stocks lifted the stay from District Attorney Michael Nifong's bankruptcy file and ruled that the plaintiffs' lawsuit could go forward against him.

Since filing their original civil action in 2007, the plaintiffs have filed a Second Amended Complaint. As recently as February 18, 2010, the defendant District Attorney Michael Nifong has filed a Motion to Dismiss, contending that absolute prosecutorial immunity shields him from liability.²²

In preparation for writing this article, this author had the opportunity to briefly speak with David Rudolf, one of the attorneys for plaintiff lacrosse player Reade Seligmann. Mr. Rudolf advised that despite this lawsuit having been filed nearly three years ago, this heavily litigated matter remains in the "pleadings stage," as numerous motions to dismiss have been filed on behalf of all defendants.

As of the date of the writing of this article, District Attorney Michael Nifong's Motion to Dismiss based upon ab-

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solute prosecutorial immunity has yet to be fully briefed and argued by the parties. However, based upon the number of party defendants to this action, coupled with the nature and breadth of the allegations pled in the plaintiffs' Second Amended Complaint, ruling on Michael Nifong's absolute prosecutorial immunity motion is not likely to take place in the near future.

Unlike a prosecutor's absolute immunity, police officers are entitled only to qualified immunity as a matter of public policy. However, even where a police officer's conduct is found to have violated another's constitutional rights, the Supreme Court has routinely held that government officials "performing discretionary functions [enjoy] qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."

Qualified Immunity

Another form of public official immunity is qualified immunity, which shields government officials from conduct which is "not violative of 'clearly established constitutional [or statutory] rights of which a reasonable person would have known.'"²³

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The Fifth Circuit Court of Appeals, in *Good v. Curtis*,²⁷ provides an instructive analysis of a qualified immunity defense that was raised unsuccessfully in a §1983 case, in which a police officer was alleged to have manipulated a photographic lineup in an effort to procure a false identification from a rape victim. In *Good*, the appellant police officer ("Curtis") took an interlocutory appeal to the Fifth Circuit after the district court denied his motion for summary judgment on the basis of qualified immunity. The only issue for resolution by the appellate court was "whether Curtis [was] entitled to qualified immunity with regard to the alleged violations of Good's Fourth and Fourteenth Amendment rights."²⁸

As background, on June 18, 1983, Good, the appellee, was arrested and charged with aggravated rape, aggravated robbery, and burglary of a home, for which he was wrongfully convicted and sentenced to life imprisonment. Good thereafter served approximately 13½ years in prison before he was finally exonerated by DNA evidence on December 22, 2004.²⁹

The crimes leading to Good's wrongful conviction were committed on June 9, 1983, when a man entered the Irving, Texas home of Jane Doe, bound her and her eight-year old daughter and forced Doe to the bedroom, where he raped her.³⁰ After the man left and Doe was able to free herself and call the police, the crime scene was subsequently processed for evidence. Doe was administered a rape kit in a hospital. When Doe later met with police officials, she described the assailant as "a white male in his twenties, six feet tall, about 190 pounds, clean shaven, with a medium to large build, blondish-brown hair, and dark tan skin tone."³¹

The events leading to Good's false identification and wrongful conviction for Doe's rape started on June 15, 1983, when Good was arrested in an unrelated incident involving a bond forfeiture on a prior DWI charge.³² Because Curtis suspected that Good was involved with various unsolved daytime burglaries in the Irving city limits, Curtis questioned Good about the burglaries when he was brought in on the

bond forfeiture arrest. When Good did not provide Curtis with any information regarding the unsolved burglaries, Curtis became angry and pulled out a composite sketch in the Doe rape case “and informed Good that he looked somewhat similar to the assailant and that, if Good did not think the picture looked like him, Curtis would ‘fix it’ to make sure that it did.”³³ As Good continued to refuse to provide any information, Curtis told Good he would have him charged with Doe’s rape and he then photographed Good for a lineup. Several pictures of Good were taken, and Curtis repeatedly altered the light settings with each picture in an effort to get the photographs to match the dark tan skin tone of the suspect in the police sketch. Good was thereafter identified by Doe as being the assailant in two separate lineups. As a result, Good was rearrested for Doe’s rape on June 18, 1983, and he was finally convicted of same in 1987.³⁴

In 2001, Good’s motion for post-conviction DNA testing of the biological evidence from the crime scene was granted by a separate criminal court.³⁵ The results of those tests proved that Good was not the assailant. As such, after his state habeas petition was granted and his sentence vacated, Good filed a § 1983 complaint in federal court against, among others, Curtis and the Irving Police Department, claiming violations of his various constitutional rights.³⁶ After the district court dismissed several of Good’s claims, but did not dismiss Good’s case in its entirety, Curtis filed his interlocutory appeal with regard to his qualified immunity defense in connection with Good’s Fourth and Fourteenth Amendment claims.³⁷ Specifically, Good’s remaining claims were that: “(1) [Curtis’] intentional effort to cultivate an irreparable misidentification constitutes a violation of due process, and (2) Curtis secured the subsequent charges leading to Good’s conviction without probable cause.”³⁸

A. Fourteenth Amendment Violation

The Fifth Circuit determined the first question it was required to address in reaching a conclusion was as follows:

[W]hether a concerted effort on the part of a police officer to “frame” a suspect by manipulating a photo for a photo lineup to produce a false identification from an eyewitness constitutes a violation of the due process rights secured by the Fourteenth Amendment and whether such a violation was clearly established at the time Curtis acted.³⁹

The Fifth Circuit concluded that “a police officer’s know-

ing efforts to secure a false identification by fabricating evidence or otherwise unlawfully influencing witnesses” would constitute a violation of the Fourteenth Amendment, and that any officer so acting would not be entitled to qualified immunity. In concluding as such, the Fifth Circuit relied on a number of cases, including the following:

- (1) *Geter v. Fortenberry*,⁴⁰ (allegations that officer solicited false identification, concealed exculpatory evidence, and gave false information to prosecutors were sufficient for purposes of precluding summary judgment on qualified immunity);
- (2) *Devereaux v. Abbey*,⁴¹ (“[W]e are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government”); and
- (3) *Brewster v. Shasta County*,⁴² (applying *Devereaux* where “the detectives used suggestive procedures with the intent of obtaining an identification of [the plaintiff], irrespective of whether he was in fact guilty”).

The Fifth Circuit further concluded that Curtis’ conduct was not a “discretionary function” that would still extend qualified immunity to him, because “Curtis [was] alleged to have intentionally secured a false identification that produced a wrongful conviction in retaliation for a suspect’s failure to cooperate in an unrelated matter—a ... ‘knowing violation of the law.’”⁴³

B. Fourth Amendment Violation

Under the Fourth Amendment, “[a]s applied to the qualified immunity inquiry, the plaintiff must show that the officers could not have reasonably believed that they had probable cause to arrest the plaintiff for any crime.”⁴⁴

In further concluding that Curtis affirmatively knew he manufactured probable cause as to Good’s second (bond forfeiture) arrest, because he had no evidence before him suggesting that Good was the attacker other than the false identification procured from Doe, the Fifth Circuit held that Curtis’ conduct also violated Good’s Fourth Amendment rights.⁴⁵ As a result, Curtis’ interlocutory appeal was dismissed in its entirety as to both his Fourth and Fourteenth Amendment claims.⁴⁶

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State Court Claims of Wrongful Conviction

Wrongful conviction claims are not limited to the federal courts and are often litigated as malicious prosecution claims at the state level.⁴⁷ This is despite the relatively well settled state policy that disfavors such actions.⁴⁸ In Illinois, a Malicious Prosecution claim requires a plaintiff to prove the following elements: (1) the defendant brought a criminal proceeding against the plaintiff; (2) the proceeding terminated in a manner indicative of innocence; (3) the defendant lacked probable cause to bring the proceeding; (4) the defendant acted out of malice; and (5) injury.⁴⁹ An absence of any of these elements bars recovery.

In the case of wrongful convictions, the first two elements of the action (that there was a criminal proceeding against the plaintiff, and there was a termination based on innocence), as well as the last (injury) are established by the mere fact that the wrongfully convicted have obtained an innocence pardon, a certificate of innocence,⁵⁰ or otherwise had their past conviction reversed. Thus generally all that is to be resolved by the fact finder is whether there was probable cause and whether the defendants acted out of malice.

Probable cause is generally defined as facts that would lead a person of “ordinary care and prudence” to believe that the accused committed the offense charged.⁵¹ The First District Appellate Court of Illinois has recently summarized probable cause in the context of malicious prosecution as follows:

It is the state of mind of the person commencing the prosecution that is at issue—not the actual facts of the case or the guilt or innocence of the accused. When there is an honest belief by the complainant that the accused is probably guilty of the offense, a mistake or error that is not grossly negligent will not affect the question of probable cause. A reasonable ground for belief of an accused’s guilt may be on information from other persons as well as on personal knowledge. The complainant is not required to verify the correctness of each item of information obtained; it is sufficient to act with reasonable prudence and caution.⁵² [citations omitted].

The element of malice does not refer to any spite, ill will or hatred of the accused, but rather whether the prosecution was performed with “improper motives.”⁵³ Malice may be inferred when the want of probable cause has been “clearly proved.”⁵⁴ However, there can be no malice where probable cause was present.⁵⁵ Thus in the context of wrongful conviction

claims, the dominant issue will be whether probable cause existed.

In *Sang Ken Kim*, the plaintiff had been accused of first degree murder, simple and aggravated criminal sexual assault, and aggravated battery.⁵⁶ The events surrounded an argument between the plaintiff and his then 22-week pregnant girlfriend, E.X.⁵⁷

E.X. alleged that the plaintiff pushed her to the floor and kicked her in the stomach, causing amniotic fluid to leak.⁵⁸ She was taken to the hospital, labor was induced, and the child died shortly after birth.⁵⁹

E.X. later reported to detectives that the plaintiff had kicked her “numerous times” in the stomach and lower abdomen, and that the leaking began discharging two to three hours thereafter.⁶⁰ After interviewing E.X., detectives spoke with her treating physician who was unable to provide an opinion as to the cause of the ruptured amniotic sac. Detectives next spoke with the individual who drove E.X. to the hospital, who indicated that she was told of the argument and of “pushing and shoves” but no punches or kicks.⁶¹ Detectives then prevented the hospital from cremating the remains of the child, and ordered an autopsy.⁶² The coroner ultimately found that the child died as a result of premature rupture of the membranes due to maternal blunt trauma, and listed the manner of death as homicide.⁶³

The plaintiff was interviewed and arrested, where he acknowledged that he “pushed her hand away” and that she “fell onto the floor.”⁶⁴ E.X. later informed the State’s Attorney that the plaintiff had shoved her to the floor, kicked her in the stomach, and forced her to have sex with him.⁶⁵

The State’s Attorney later approved charges against the plaintiff, and the grand jury indicted him.⁶⁶

While the plaintiff was in jail awaiting trial, over three years after being indicted, E.X. came forward and informed the State’s attorney that she had not been kicked in the stomach, and that her original story was “something that she and her dad cooked up.”⁶⁷ The prosecutor dismissed the case against the plaintiff.

The plaintiff brought a malicious prosecution claim arguing that there was no probable cause for his arrest and incarceration. This was based on a variety of alleged missteps by the investigating detectives, but can be summarized as: (1) relying on inconsistent and uncorroborated statements by the E.X., (2) failing to follow up or speak with witnesses that corroborated or supported the plaintiff’s innocence, and (3) relying on the medical examiner’s findings based on unsubstantiated information. The trial court granted summary judgment in favor of the defendants.

The First District Appellate Court held that, based on what was known to the defendants at the time of the arrest, there was an objectively reasonable belief that the plaintiff had committed murder.⁶⁸ In so holding, the First District addressed each of the primary contentions:

- (1) When the victim of the crime supplies the police with information which is the foundation of the probable cause, there is a presumption that the information is reliable.⁶⁹
- (2) It is “contrary to common sense” to require the police to follow up with all possible leads in order to establish probable cause and therefore no need to first speak with the ER physician who saw no evidence of trauma.⁷⁰
- (3) There is no duty to “second guess” the medical examiner’s expertise and analyze whether that opinion was sound.⁷¹

Sang Ken Kim highlights the important role that sources of probable cause play in a malicious prosecution case following a wrongful conviction. As discussed, *infra*, the facts disclosed in malicious prosecution cases filed by those wrongfully convicted can begin to blur the element of probable cause with the element of malice. Instructive are two recent, and relatively highly publicized cases, *Porter*⁷² and *Aguirre*.⁷³

In *Aguirre*, the plaintiffs consisted of three individuals who confessed, were charged, and were subsequently convicted of kidnapping and murder.⁷⁴ Years later, another individual claimed partial responsibility for the act to federal authorities, and identified additional perpetrators of the act—none of which included the *Aguirre* plaintiffs.⁷⁵ Following their releases from prison, the *Aguirre* plaintiffs brought malicious prosecution claims against the City of Chicago and various police officers involved in their investigation and interrogations claiming among other things that their respective confessions were coerced through improper means.

Aguirre demonstrates how wrongful conviction cases for malicious prosecution can work “backwards,” meaning that each of the *Aguirre* plaintiffs were allowed to use the confession of the true perpetrator several years later to attack the contemporaneous elements of probable cause and malice. The actual killer’s testimony years after the wrongful convictions, in principle, should be inadmissible to determine whether probable cause existed at the time of the wrongful conviction.⁷⁶ However, the *Aguirre* plaintiffs cleverly argued that the probative value of introducing such evidence for the ele-

ment of malice, outweighed any prejudicial effect that it could have towards the element of probable cause.

The argument was that the introduction of the actual killer’s testimony would help establish that the interrogating officers used coercive means to obtain the *Aguirre* plaintiffs’ confessions.⁷⁷ The trial court gave a limiting instruction to the jury, informing them that they were to consider only that information known at the time of the investigation, as a means of mitigating any prejudicial effect towards the probable cause element.⁷⁸ The practical effect, however, was that the jury was able to hear corroborated facts from the actual killer identifying how the murder occurred, and compare those facts with the allegedly coerced confessions of the *Aguirre* plaintiffs—confessions which were factually incorrect.

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Complicating matters, the defendants were not permitted to put evidence before the jury that each of the *Aguirre* plaintiffs had failed polygraph examinations.⁷⁹ Indeed, they were instructed to inform the jury that a polygraph answer which indicated deception must be presented to the jury thusly: “I wasn’t satisfied” with the answer and “I wanted to question him further.”⁸⁰

Unsurprisingly, the jury found in favor of the *Aguirre* plaintiffs.

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In contrast, the First District upheld a directed verdict for malicious prosecution defendants in *Porter* in which the actual killer's testimony was ruled inadmissible.⁸¹ In *Porter*, the plaintiff's theory was that the police targeted him as the perpetrator based on dubious witness accounts and, as in *Sang Ken Kim*, failed to follow up on other leads.⁸² The plaintiff argued that under the *Aguirre* standard, the actual killer must be allowed to testify in order to perfect his theory that "defendants' baseless belief in his guilt was so strong that it corrupted their investigation."⁸³ The appellate court disagreed, noting:

The only way to link [the actual killer's] guilt to Porter's theory of malice is with evidence that the police had reason to suspect [the actual killer] but only investigated Porter. There was no such evidence. ... Unlike the evidence of coerced confessions in *Aguirre*, there is no link between [the actual killer's] guilt and Porter's theory that the police investigation was corrupt.⁸⁴

It is not unfair to characterize the probable cause element of malicious prosecution claims as the most significant in building a defense to the claim. With the difficult facts posed by any wrongful conviction and malicious prosecution cause of action, it is the propriety of events leading up to the original criminal complaint that will be on trial.

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tion cause of action, it is the propriety of events leading up to the original criminal complaint that will be on trial.

Conclusion

Although it can be a daunting task to defend against such wrongful convictions claims, defenses exist which are worthy of exploration and invocation if applicable. Initially, absolute immunity from § 1983 claims can be asserted to shield prosecutors from charges that they wrongfully convicted an innocent person—even if they knew or suspected that the evidence was obtained through police misconduct, as long as the prosecutor's role was *quasi*-judicial in nature, as opposed to administrative or investigatory in function.

Similarly, law enforcement officers enjoy immunity from § 1983 actions as long as they were performing discretionary functions in their investigation and arrest of the individual. In fact, although legally termed "qualified immunity," the breadth and scope of this immunity is far reaching, as it typically shields all but the patently inept or those who willingly contravene established legal principles.

Finally, state court defendants accused of malicious prosecution will be relieved of liability if probable cause can be established or if a claim of malice is defeated. What is paramount in defending a state claim for malicious prosecution is the element of probable cause. In particular, what was known or unknown to the police officer at the time of the arrest, if objectively reasonable in determining that a crime had been committed, will typically satisfy the element of probable cause and defeat a claim of malicious prosecution. This rings true even if the original belief that a crime had been committed proves inaccurate or mistaken. In a malicious prosecution action, once probable cause has been established, the claim of malice necessarily fails and the cause of action is defeated.

(Endnotes)

- ¹ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).
- ² 42 U.S.C §1983.
- ³ *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct 2364 (1994).
- ⁴ *Heck*, 114 S. Ct. at 2372-73.
- ⁵ *Ienco v. City of Chicago*, 286 F.3d 994 (7th Cir. 2002).
- ⁶ *Ienco*, 286 F.3d 994, 998.
- ⁷ *Imbler v. Pachtman*, 424 U.S. 409, 417-19, 96 S. Ct. 984 (1976).
- ⁸ *Imbler*, 424 U.S. at 410.
- ⁹ *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606 (1993).
- ¹⁰ *Houston v. Partee*, 978 F.2d 362, 366 (7th Cir. 1992).
- ¹¹ *Buckley*, 509 U.S. at 269.
- ¹² *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986).
- ¹³ *Patterson v. Burge*, 328 F. Supp. 2d 878 (N.D. Ill. 2004).
- ¹⁴ *Imbler*, 424 U.S. 409, 431.
- ¹⁵ *Patterson*, 328 F. Supp. 2d 878, 892.
- ¹⁶ *Id.* at 891 – 893.
- ¹⁷ Complaint at 1-8, *Evans v. City of Durham*, No. 07-739 (M.D.N.C. filed Oct. 5, 2007).
- ¹⁸ Complaint at 97-127, *Evans v. City of Durham*, No. 07-739.
- ¹⁹ *Id.* at 1.
- ²⁰ *Id.*
- ²¹ *Id.* at 1-2.
- ²² Defendant Michael Nifong’s Motion to Dismiss, *Evans v. City of Durham*, No. 07-739 (M.D.N.C. filed Oct. 5, 2007).
- ²³ Telephone Interview with David Rudolf, Senior Partner, Rudolf, Widenhouse & Fialko (April 2010).
- ²⁴ *See Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986).
- ²⁵ *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034 (1987).
- ²⁶ *Good v. Curtis*, 601 F.3d 393, 400 (5th Cir. 2010) (quoting *Malley v. Briggs*, 475 U.S. at 341, 106 S. Ct. at 1096).
- ²⁷ *Good*, 601 F.3d 393.
- ²⁸ *Id.* at 395.
- ²⁹ *Id.* at 395-96.
- ³⁰ *Id.* at 396.
- ³¹ *Id.*
- ³² *Id.*
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.* at 397.
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ *Id.* at 398.
- ³⁹ *Id.*
- ⁴⁰ *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989).
- ⁴¹ *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc).
- ⁴² *Brewster v. Shasta County*, 27 F.App’x 908, 912-913 (9th Cir. 2001) (unpublished).
- ⁴³ *Good*, 601 F.3d at 400.
- ⁴⁴ *Good*, 601 F.3d at 401 (quoting *O’Dwyer v. Nelson*, 310 F.App’x 741, 745 (5th Cir. 2009) (citing *Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588 (2004))).
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ Although outside the purview of this article, Illinois also maintains a separate cause of action for wrongful conviction under the Court of Claims Act, 705 ILCS 505/8(c). This compensates a wrongfully convicted individual based on the number of years incarcerated up to a maximum amount of approximately \$200,000.
- ⁴⁸ *See Ross v. Mauro Chevrolet*, 369 Ill. App. 3d 794, 801 (1st Dist. 2006) (noting that “Illinois does not favor a suit for malicious prosecution due to the public policy interest in the exposure of crime.”)
- ⁴⁹ *Porter v. City of Chicago*, 393 Ill. App. 3d 855, 912 N.E.2d 1262 (1st Dist. 2009).
- ⁵⁰ Issued by a Circuit Court under 735 ILCS 5/2-702.
- ⁵¹ *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 642 (1st Dist. 1996).
- ⁵² *See Sang Ken Kim v. City of Chicago*, 368 Ill. App. 3d 648, 654-655 (1st Dist. 2006) (citing *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (1st Dist. 2003)).
- ⁵³ *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 937 (1st Dist. 1980).
- ⁵⁴ *Id.*

(Continued on next page)

- ⁵⁵ *Id.*
- ⁵⁶ *Sang Ken Kim*, 368 Ill. App. 3d at 652-653.
- ⁵⁷ *Id.* at 650.
- ⁵⁸ *Id.*
- ⁵⁹ *Id.*
- ⁶⁰ *Id.*
- ⁶¹ *Id.* at 651.
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.*
- ⁶⁵ *Id.* at 652.
- ⁶⁶ *Id.*
- ⁶⁷ *Id.* at 653.
- ⁶⁸ *Id.* at 656.
- ⁶⁹ *See People v. Turner*, 240 Ill. App. 3d 340, 357-58 (1st Dist. 1992).
- ⁷⁰ *Sang Ken Kim*, 368 Ill. App. 3d at 658.
- ⁷¹ *Id.* at 659.
- ⁷² *Porter*, 393 Ill. App. 3d 855 (1st Dist. 2009).
- ⁷³ *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 887 N.E.2d 656 (1st Dist. 2008).
- ⁷⁴ *Aguirre*, 382 Ill. App. 3d at 94-95 (noting that Defendant Gayol was convicted at bench trial, Aguirre was convicted after a jury trial, and Santos plead guilty).
- ⁷⁵ *Id.* at 95.
- ⁷⁶ *See Sang Ken Kim*, 368 Ill. App. 3d at 654-55 (noting that the actual guilt or innocence is irrelevant to determine probable cause).
- ⁷⁷ *Aguirre*, 382 Ill. App. 3d at 98-100.
- ⁷⁸ *Id.* at 100.
- ⁷⁹ *Id.* at 91.
- ⁸⁰ *Id.*
- ⁸¹ *Porter*, 393 Ill. App. 3d 855 (1st Dist. 2009).
- ⁸² *Id.* at 867-869.
- ⁸³ *Id.* at 867.
- ⁸⁴ *Id.*