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A Primer on Defenses in Section 1983 and Police Liability Civil Actions

Police misconduct and accusations of misconduct by officers have come to the forefront of the national media. The internet is replete with officers behaving badly, from the humorous "don't tase me bro" to the solemn "I can't breathe" movement.[1] As social media has expanded its influence, public perception of the police officer has increasingly moved towards a right or wrong perspective of the position. A brief overview of defenses for police liability cases is timely, and serves as a stark reminder that applying black and white rules in a landscape of gray is difficult, if not impossible.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[2]

Congressional authority to regulate state action arises primarily from the Fourteenth Amendment to the United States Constitution. Section 1983 has been enacted pursuant to that power. Essentially, Section 1983 has become the principal

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enforcement mechanism for the Fourteenth Amendment itself.[3] The Fourteenth Amendment specifically includes due process and equal protection guarantees. Further, most of the first eight amendments to the United States Constitution also apply to the states by virtue of the Fourteenth Amendment and the "incorporation" doctrine.[4] Therefore, any municipal action that improperly interferes with constitutionally protected rights may give rise to a Section 1983 action.

The Fourteenth Amendment prohibits the government from (a) depriving any person of "life, liberty, or property, without due process of law" (Due Process Clause) and (b) denying any person equal protection of the laws (Equal Protection Clause).[5] While most Section 1983 litigation directed against municipalities springs forth from these two clauses, a growing number involve the First Amendment (freedom of speech), the Fourth Amendment (freedom from unreasonable search and seizure), the Fifth Amendment (Takings Clause), and the Eighth Amendment (cruel and unusual punishment).[6]

Immunities

In order to shield public officials from personal liability for their official acts, the courts have recognized certain immunities. There are two types of official immunity under Section 1983: absolute immunity and qualified immunity. Absolute immunity is a form of legal immunity for government officials and employees that confers total immunity from civil liability so long as those individuals are acting within the scope of their duties. Qualified immunity protects public officials from liability for damages if his or her actions did not violate clearly established rights that a reasonable person would have known. Absolute immunity differs from qualified immunity in that it does not require additional circumstances to be met before shrouding the government official with immunity. Both types of immunities must be pled as affirmative defenses.[7]

Individuals who have been sued pursuant to Section 1983 may raise the defense of absolute or qualified immunity. Such immunities are limited to damages claims only and do not extend to Section 1983 actions for declaratory or injunctive relief.[8] However, immunity defenses may not be asserted by the municipality itself.[9] Rather, a municipality may be held liable under Section 1983 only if the deprivation of a constitutional right was the result of a municipal "custom or policy."[10] When a public official is sued in her official capacity only (*i.e.*, damages will be assessed against the municipality and not the official personally), immunity defenses are not available.[11]

Absolute Immunity

In general, absolute immunity covers judicial and prosecutorial actions.[12] However, a prosecutor is not entitled to absolute immunity for actions that are "investigative and unrelated to the preparation and initiation of judicial proceedings."[13]

Persons acting pursuant to judicial orders have absolute immunity.[14] Therefore, governmental witnesses are absolutely immune from damages liability based on their testimony.[15] The Court of Appeals for the Seventh Circuit even extends absolute immunity to allegedly perjurious testimony of governmental witnesses, such as police officers.[16]

Until recently there was a conflict in the circuits that had arisen out of two Supreme Court cases on the applicability of absolute immunity where police officers perjure themselves in a grand jury proceeding. In *Briscoe v. LaHue*,[17] the Court held that law enforcement officers enjoyed absolute witness immunity from civil liability for perjured testimony that they provided at trial. Alternatively, in *Malley v. Briggs*,[18] the Court held that law enforcement officials were not

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entitled to absolute immunity when they acted as complaining witnesses to initiate a criminal prosecution by submitting a legally invalid arrest warrant.

In *Rehberg v Paulk*,[19] the Supreme Court announced the bright line rule that a grand jury witness, such as a law enforcement officer, has absolute immunity from any Section 1983 claim based on the witness' testimony, even if perjurious.[20] *Rehberg* involved a Section 1983 case against an investigator who, as a complaining witness, testified falsely before three different grand juries each of which had indicted plaintiff on charges which were subsequently dismissed.[21] The *Rehberg* court expressly extended to grand jury witnesses, including police officers, the same immunity that had previously been enjoyed by witnesses at trial.[22] It reasoned that the justifications for granting absolute immunity in both situations are the same: a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence.[23]

Qualified Immunity

Qualified immunity is a defense available to any government official while performing discretionary functions of their public office. Even though it is not a traditional affirmative defense, it is by far the most commonly asserted and litigated defense by police officers in civil rights litigation.

Broadly defined, qualified immunity protects police officers from liability for actions thought to be reasonably lawful at the time such acts were performed. From a practitioner's point of view, the result is a two part test: (1) whether the facts show that the police officer violated a constitutional right of the plaintiff; (2) whether that constitutional right was clearly established at the time of the alleged violation.[24] This is a legal determination, with the Supreme Court of the United States stating that, should a case go to trial, qualified immunity defenses are effectively lost.[25] It should be noted, however, that circuit courts have found various mechanisms to allow juries to effectively determine qualified immunity. [26]

As an immunity, rather than a true affirmative defense, it is the plaintiff's burden to prove that the constitutional right was "clearly established" at the time of the alleged incident.[27] To do so, once qualified immunity is raised by a police officer defendant, the plaintiff must produce factual allegations to overcome the immunity.[28] Thus, the question of qualified immunity regularly turns into a battle of legal precedent and previously published fact patterns to determine whether a "clearly established" constitutional right was violated.[29]

For a police defendant, the first question to be answered is what constitutional right is alleged to have been violated. While the traditional fact pattern alleges a violation based upon the Fourth or Fourteenth Amendments of the Constitution of the United States (such as improper search and seizure or excessive force), plaintiffs are more frequently invoking actions sounding in violations of the First Amendment. For example, a recent incident in Texas, involving a woman who was allegedly pulled over for a traffic violation that later escalated into an arrest, illustrates the interplay between the First, Fourth, and Fourteenth Amendments.[30]

Sandra Bland, according to news accounts, was pulled over for failing to signal while changing lanes.[31] Once pulled over, Ms. Bland and a Texas trooper engaged in an increasingly hostile conversation over whether Ms. Bland would put out her cigarette. After Ms. Bland indicated that she would not extinguish the cigarette, the trooper ordered her out of the vehicle. Ms. Bland refused and repeatedly asked if she was under arrest.[32] The trooper, after warning Ms. Bland, attempted to pull her from the vehicle and ultimately pointed his Taser at Ms. Bland to get her to comply with his order.[33] Once out of the vehicle, the Trooper appeared to struggle with Ms. Bland while attempting to restrain her in handcuffs. Audio recordings of Ms. Bland's voice have her indicating that the Trooper "slammed" her face into the ground.[34]

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In this highly publicized incident, the first prong of qualified immunity is tested—were the constitutional rights of Ms. Bland violated? If so, which constitutional right? The law is well settled that an officer may order the driver[35] or passengers[36] out of a vehicle for almost any reason without any violations of the Fourth Amendment. But the First Amendment likely would prohibit the trooper from retaliating against Ms. Bland for her lawful refusal to extinguish her cigarette. Thus, while it is unlikely the trooper violated Ms. Bland's rights under the Fourth Amendment, a potential question could arise as to whether the Trooper's intent behind the order for Ms. Bland to step out of her car was retaliatory and thus a First Amendment violation.[37]

Assuming that a constitutional violation is properly alleged by a plaintiff, the court must then determine whether that right was "clearly established" at the time the officer committed the violation. Hindsight is precluded, and the determination must be made based upon what the officer should have known at the time. This of course begs the question—what does it mean to be "clearly established?" The Supreme Court has answered this somewhat cryptically, stating:

> "[C]learly established" for purposes of qualified immunity means "that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[38]

Practically speaking, this often translates into a question of why the officer was wrong. Reasonable mistakes as to law, or facts, are provided immunity under this defense.[39] A recent Illinois Supreme Court case depicts the dynamics of a mistake of law, although in a slightly different circumstance. In *People v. Gaytan*,[40] a police officer pulled over a vehicle due to it having a trailer hitch attached to the vehicle which minimally obscured the rear license plate. At that time, the Illinois Vehicle Code prohibited any materials which would "obstruct the visibility of the plate."[41] Upon approaching the vehicle the officer smelled marijuana, and ultimately discovered a diaper bag containing the illegal drug. Defendant Gaytan moved to suppress the evidence of the discovered drug under a theory that the traffic stop was an unconstitutional search and seizure under the Fourth Amendment.[42]

The Illinois Supreme Court agreed with defendant, finding that the officer stopping the vehicle for the trailer hitch was doing so outside the scope of the Illinois statute prohibiting any license plate obstruction. However, and although this was not a qualified immunity case, the court held that the mistake by the officer was a "reasonable mistake of law."[43] Interestingly, one of the issues our supreme court held as determinative was the issue whether any reported appellate court decisions had discussed the trailer hitch as a potential mechanism for the license plate obstruction provision of the motor vehicle code.[44] As there had been no previous opinion interpreting that fact scenario, it was objectively reasonable for the officer to believe the trailer hitch slightly obscuring a portion of the license plate violated the statute.[45]

Mistakes of fact also give rise to qualified immunity, as long as the mistake was reasonable. Although as with any qualified immunity case, the scenarios facing a police officer may be endless, one of the more common "mistake of fact" fact patterns involve partial or incorrect information used to issue a warrant. For instance, the case of *Aboufariss v. City of DeKalb*[46] illustrates how a mistake of fact can still give rise to the immunity.

In *Aboufariss*, the plaintiff was a father who was accused of abducting his own child by his former wife.[47] According to plaintiff, this trip was arranged with his ex-wife and he had followed all of the conditions for travelling with his daughter pursuant to the divorce decree. The plaintiff's former wife informed police that plaintiff did not let her know he

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was taking their daughter out of state, and that plaintiff may be taking her to the country of Morocco. During the initial investigation, police officers allegedly identified information contradicting the totality of the ex-wife's allegations. For example, although she indicated that she had no information as to where her ex-husband had taken their daughter, police found the address and phone number provided to her by the plaintiff.[48] Additionally, the investigating officer learned of plaintiff's scheduled return flight back to Chicago within the next several days. Notwithstanding this contradictory information, the officer called Boston-area police and indicated that he was working on an arrest warrant for the plaintiff under the child abduction statute. The officer then obtained an arrest warrant, with plaintiff alleging that complaint for arrest warrant left out all of the contradictory information identified in the investigation.[49] An arrest warrant was issued, and plaintiff was arrested at the Boston airport where he remained incarcerated for 10 days. Subsequently, a trial court would dismiss the criminal complaint against the plaintiff for lack of probable cause.[50] Plaintiff thereafter brought a Section 1983 suit for damages naming, among others, the investigating police officer. In the civil case that followed, the Illinois Appellate Court, Second District ruled that the officer was protected by qualified immunity, even if the investigating officer was mistaken in the facts used to obtain the warrant.[51] The court held that outside of a deliberate attempt to deceive the trial court any mistake in believing the ex-wife's version of the story was an objectively reasonable mistake.[52] Moreover, the subsequent investigation and finding of no probable cause was of no value in determining the objective reasonableness of the officer's actions at the time the arrest warrant was issued.[53]

Related to the mistake of fact prong of qualified immunity is the heavily litigated "arguable probable cause" standard which is typically associated with false arrest claims. An officer has probable cause when, at the moment the decision is made, the facts and circumstances within [the officer's] knowledge and of which [an officer] has reasonably trustworthy information would warrant a prudent person believing that the suspect had committed or was committing an offense.[54] The existence of probable cause is an absolute bar to recovery under Section 1983 for false arrest or false imprisonment.[55] However, even if a "prudent person" would not believe a suspect had committed or was committing an offense, the officer would have qualified immunity when "arguable probable cause" existed. For example, the Supreme Court of the United States held that secret service officers were entitled to qualified immunity when they arrested the author of a note which under one unfavorable interpretation threatened assassination of the president.[56] In doing so the Supreme Court noted:

> The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued.[57]

Few cases involving a police defendant do not involve qualified immunity. The protection the immunity affords officers is broad but is difficult to apply. From a litigator's view, the immunity is heavily fact dependent and based on the descriptions of events after any mistake may have occurred. Qualified immunity continues to resist the application of bright line rules, and provides a unique challenge for any defense attorney.

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Statute of Limitations

Section 1983 does not have its own statute of limitations and so is "deficient" within the meaning of 42 U.S. § 1988. Under that statute, where federal law is deficient, federal courts apply the relevant law of the forum state.

In *Wilson v. Garcia,*[58] the Supreme Court held that Section 1983 claims are most akin to personal injury actions. In the interest of uniformity and certainty with respect to the limitations period for Section 1983 claims, the Court held that the appropriate limitations period would be the same as for personal injury actions in the forum state. In Illinois, the two-year personal injury statute of limitations is applicable to Section 1983 claims.[59]

Federal law determines the date of accrual, *i.e.*, when all of the elements of the action are present.[60] The statute of limitations begins to run when the plaintiff knew or had reason to know of the injury.[61] In certain cases, for example where the plaintiff with a prior conviction which might be implicated by a successful Section 1983 damages action, accrual occurs when the conviction is overturned or vacated.[62]

DeShaney and "State-Created Danger" Doctrine

The Supreme Court has cautioned against an expansionist approach in the area of substantive due process. The Court has said that "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," and urged that courts must "exercise the utmost care whenever . . . asked to break new ground in this field."[63] Despite devastating facts at issue before it, the Supreme Court demonstrated such restraint when it declined to expand the boundaries of substantive due process law in the case of *DeShaney v. Winnebago County Department of Social Services*.[64] *DeShaney's* general proposition is well-known; the Constitution does not give rise to any obligations on the part of state and local governments to protect individuals, to rescue individuals, or to provide government services. The Supreme Court rejected the Section 1983 claim of a severely beaten boy who was not protected by a county's Department of Social Services when he was returned to and left with his abusive father, despite ongoing evidence of harm, stating, "[a]s a general matter, . . . we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" because the clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security.[65] However, *DeShaney* has been interpreted to have, perhaps indirectly, left the door open for what is known as the "state-created danger" doctrine.[66]

The *DeShaney* Court recognized an individual's substantive due process right to reasonable safety and security and also acknowledged a corresponding affirmative duty of the state to provide care and protection to particular individuals as follows:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. … The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[67]

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The *DeShaney* Court expounded that the Due Process Clause imposes this affirmative duty on the state only in limited contexts. That duty is triggered by the involuntary restraint against an individual's freedom to act on his own behalf, such as by "incarceration, institutionalization, or other similar restraint of personal liberty" and is not triggered by the "State's knowledge of the individual's predicament or from its expressions of intent to help him."[68] In finding the state and its employees could not be held liable on the facts of the case, the *DeShaney* Court explained the state had not, by its actions, placed the boy in a more dangerous position:

> While the State may have been aware of the dangers that [the boy] faced in the free world, **it played no part in their creation, nor did it do anything to render him any more vulnerable to them**. That the State once took temporary custody of [the boy] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.[69]

Some circuits have found that the "deprivation of liberty" creates a "special relationship" between the state and the individual such that it imposes on the state an affirmative duty under the Due Process Clause to protect those it has rendered defenseless, separate and apart from the state's duty not to inflict harm. However, the Seventh Circuit has found the two classes of cases to be "functionally the same" for "in both classes of case the victim is safe before the state intervenes and unsafe afterward."[70] To determine whether the plaintiff can complain under the Fourteenth Amendment of a failure to protect a plaintiff is required to show: (1) the state, by its affirmative acts, created or increases a danger faced by an individual; (2) that such failure on the part of the state to protect an individual from such a danger is the proximate cause of the injury to the individual; and (3) the state's failure to protect the individual must shock the conscience.[71]

The duty not to harm is illustrated by *White v. Rochford*[72] (a pre-*DeShaney* case), where police arrested a driver, but left his child passengers stranded in the driverless car, thus placing them in peril for the consequences of which the police were held liable under Section 1983.[73] In *Reed v. Gardner*,[74] the Court of Appeals for the Seventh Circuit held that police violate due process by arresting the driver of a car and leaving its keys in the hands of an intoxicated adult, who then endangers third parties.[75] In *Reed*, the drunk driver crossed the center line while speeding and plowed into another car, killing one of its occupants.[76]

The "key question" in determining whether or not the "affirmative conduct" requirement is satisfied is "what actions did the state actor affirmatively take, and what dangers would the victim otherwise have faced?"[77] "When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one, rather than that it just stood by and did nothing to prevent private violence."[78] The doctrine also protects individuals against placing someone who already faces danger in even greater peril.[79] In other words, a government official must effectively throw the private individual "into a snake pit."[80]

Mere negligence cannot support a claim alleging a violation of a plaintiff's substantive due process rights.[81] There is no "affirmative act" when a government official allows a dangerous situation to develop or continue without intervention—even if the official affirmatively chooses not to intervene.[82] For example, the police were not liable where an interventionist riot control plan was implemented one day, but then a passive plan was imposed the next day, allowing mass violence to continue in a contained area.[83] Dismissal was likewise proper where plaintiffs alleged that the city failed to prevent a co-worker's shooting spree, even after receiving a call from the plant manager reporting a threat of violence

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to plant employees.[84] Relatedly, some courts have found there is also no constitutional duty to warn of a known danger. For example, in *Saenz v. Heldenfels Brothers, Inc.*,[85] summary judgment was affirmed where the police officer knew a particular driver was intoxicated but refused to pull him over and ordered another officer not to pull him over.[86] Minutes later, the driver collided with another vehicle and killed its occupants. In *Pinder v. Johnson*,[87] denial of summary judgment was reversed where the police had actual knowledge of violent threats made by a former boyfriend against his former girlfriend. The police told her that they would lock him up, did not do so, and permitted the former boyfriend to burn down her house killing her children.[88]

While the examples are not numerous, it is possible for a plaintiff to adequately show a "state-created danger" yet lose on the basis of the "shocks the conscience" element. For example, in *Matican v. City of New York*,[89] the plaintiff participated in a police sting. Subsequently, the target of the sting confronted the plaintiff, said "you ratted me . . ."[90] and slashed his face. The plaintiff alleged that the police planned the sting in a manner that would lead the target to learn about the plaintiff's involvement. The court found that such conduct constituted a "state-created danger."[91] However, as the officers designing the sting had "two serious competing obligations" [plaintiff's] safety and their own" the officers' conduct did not shock the conscience, and the court affirmed summary judgment.[92]

Lawsuits Initiated By Prisoners

In Section 1983 cases brought by a prisoner confined in jail, prison or any correctional facility, the Prison Litigation Reform Act (PLRA) provides some additional protections for defendants–and some additional burdens for plaintiffs.[93] One of those additional burdens is the exhaustion of administrative remedies.[94] Exhaustion under the PLRA provides that no action shall be brought by a prisoner "until such administrative remedies as are available are exhausted.[95] The PLRA requires "proper exhaustion."[96] This means is that a prisoner must "complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court."[97]

To explore the exhaustion requirement, counsel must first determine what administrative remedies were available. Most prison systems will not have a money damages remedy available; but even if some type of "injunctive" relief is allowed under a general grievance procedure, then the administrative structure is satisfied from the prison's perspective.[98] However, some courts have recognized that exhaustion is not required where a grievance program is available but does not provide the type of remedy sought.[99] But first and foremost, one should look to a standard administrative grievance program adopted by the state or the prison system that sets forth a process and certain deadlines to reporting issues.[100]

Such a dismissal might occur on the court's own motion, or through the "merit review" process in *pro se*.[101] The PLRA provides that the "court shall on its own motion or on the motion of a party dismiss any action . . . [that] is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."[102] The order of events where there is a question regarding exhaustion of administrative remedies prior to a trial on the merits is generally as follows: (1) the district court conducts a hearing on exhaustion and permits discovery relating to the exhaustion as deemed appropriate; (2) if the judge determines that the prisoner did not exhaust his administrative remedies, then the judge must determine whether (a) the plaintiff has failed to exhaust available administrative remedies, and if so then he must go back and exhaust; or (b) although he has not unexhausted administrative remedies, the failure to exhaust was to no fault of his own (for instance where a prison official prevents a prisoner from exhausting his remedies), and so he must be given another chance to exhaust; or (c) the failure to exhaust was the prisoner's fault, in which event the case is over; finally, (3) if the court determines that the prisoner has properly

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exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by-or even informed of-any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.[103] Once a prisoner has been "'reliably informed by an administrator that no remedies are available'" then the prisoner is "not required to 'exhaust further levels of review.'"[104]

Additionally, if the prisoner had no opportunity to comply with the administrative remedy, then a failure to comply will not defeat a claim.[105] Even though exhaustion is clearly a defense that can be raised by motion early in the case, it should not be considered an affirmative defense which will be tried to a jury. The seventh circuit has reviewed whether "debatable factual issues relating to the defense of failure to exhaust administrative remedies" are entitled by the Seventh Amendment to resolution by a jury and determined that this issue should not go to the jury.[106] The court compared the factual issues presented in the affirmative defense of exhaustion of administrative remedies to other judge-made factual determinations such as those regarding subject-matter jurisdiction, personal jurisdiction, and venue, and reasoned that "not every factual issue that arises in the course of a litigation is triable to a jury as a matter or right ... within the meaning of the Seventh Amendment."[107] The court further stated, "[u]ntil the issue of exhaustion is resolved, the court cannot know whether it is to decide the case or the prison authorities are to."[108] However, there may be times where is it appropriate to raise exhaustion as an affirmative defense in the pleadings. Although the general rule is that this issue will be determined early on by the court, it may be that written or oral discovery develops favorably to the defense on this issue and it can be once again raised in a pretrial motion for summary judgment.

Preclusive Effect of Prior Court Decisions

Federal police misconduct lawsuits are often preceded by related criminal litigation in state or federal courts. These prior proceedings can trigger preclusive concepts of *res judicata* and collateral estoppel.[109] Where a Section 1983 case follows state court proceedings, 28 U.S.C. 1738 mandates that judicial proceedings of any court of any state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . .."[110] Consequently, state law applies to determine any preclusive impact of prior state proceedings.[111] For prior federal court litigation, federal preclusion principles control.[112]

Res judicata (claim preclusion) can be used to bar a plaintiff's entire claim where there is a prior final judgment between the same parties rendered on the merits, and based on an identical cause of action.[113] In such cases, *res judicata* may be invoked to bar the litigation of all matters which had been raised or could have been raised in the prior proceeding.[114] Further, state administrative proceedings also may have preclusive effects.[115] For example, the Supreme Court in *United States v. Utah Construction & Mining Co.* noted the following:

> [W]e hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," . . . federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts.[116]

Collateral estoppel (issue preclusion) prevents re-litigation of a particular issue of fact or law where the issue is identical to an issue decided in the prior litigation on the merits.[117] However, collateral estoppel will not prevent re-

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litigation of an issue in a Section 1983 case if there was not a full and fair opportunity to litigate that issue in the prior case.[118]

Also, the Supreme Court in *Heck v. Humphrey* held that there is no cause of action under Section 1983 for a claim which would call into question the validity of a prior criminal conviction, unless and until that conviction has been invalidated.[119] While the *Heck* doctrine will bar civil rights cases in some circumstances, it will toll the statute of limitations for the period of time that the plaintiff was under sentence of conviction for cases in which the cause of action did not accrue before the conviction. However, the Supreme Court in *Wallace v Kato*[120] found that merely pending charges were insufficient to bar a civil rights action. Thus, the statute of limitations that would otherwise accrue was not tolled during the pendency of charges, unless state law would require tolling.

Finally, it should be noted that in some jurisdictions, district attorneys agree to dismiss criminal charges in exchange for the complainant's promise not to sue the police. Some courts have refused to enforce such release agreements. *Town of Newton v. Rumery*[121] examined these agreements and rather than instituting a blanket prohibition, allowed courts to examine them on a case by case analysis of the voluntariness of the agreement, any evidence of prosecutorial misconduct and the public interest.[122]

Conclusion

Defending police officers, correctional officers and other governmental officials from civil liability is a constant reminder that demanding or expecting perfection in the execution of their duties can be the enemy of the good work that these officers and public officials do on a daily basis. No matter whether the incident or alleged harm originates from a traffic stop, as a result of a state mandated action, or where the alleged injured party was already in prison government officials are charged with executing and enforcing often murky laws with endless possibilities in terms of fact patterns. It is incumbent upon defense counsel to explore all of the possible defenses that can be asserted to protect or immunize these public officials, whether those defenses are asserted during the course of pre-trial proceedings or as a factual issue to be presented at trial to the jury. To this end, defense counsel must be dedicated to keeping abreast of the old and new precedents nationwide, and developing the skill to place those defenses before the court or the men and women of the jury.

(Endnotes)

1 *See* Monica Hesse, *Aiming to Agitate, Florida Student Got a Shock*, WASH. POST (SEP. 19, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091802115.html (last visited Aug. 30, 2015); *also see* Vivian Yee, *'I Can't Breathe' Is Echoed in Voices of Fury and Despair*, N.Y. TIMES (Dec. 3, 2014) http://www.nytimes.com/2014/12/04/nyregion/i-cant-breathe-is-re-echoed-in-voices-of-fury-and-despair.html (last visited Aug. 30, 2015).

2 42 U.S.C. § 1983 (1996).

3 *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

4 *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

5 U.S. CONST. amend. XIV, § 1.

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[6] *See Richter v. Village of Oak Brook*, No. 01 C 3842, 2003 WL 22169763, at *1 (N.D. Ill. Sept. 19, 2003) (plaintiff alleged that defendants violated 42 U.S.C. § 1983 based on deprivations of his First and Fourteenth Amendment rights.); *also see Farmer v. Brennan*, 511 U.S. 825 (1994) (an Eighth Amendment case involving a convicted prisoner). The Court of Appeal for the Seventh Circuit has held that the same standard applies in Fourteenth Amendment cases involving pretrial detainees. *Tesch v. Cnty. of Green Lake*, 157 F.3d 465, 473 (7th Cir. 1998); *also see Zarnes v. Rhodes*, 64 F.3d 285, 289-90 (7th Cir. 1995) (utilizing the "subjective recklessness test" in an excessive force case under the Eighth Amendment involving a convicted prisoner); *also see Velez v. Johnson*, 395 F.3d 732, 735 (7th Cir. 2005) (the prisoner "was a pretrial detainee at the time of the assault; therefore, his claim arises under the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment.").

[7] *See generally, Imbler v. Pachtman*, 424 U.S. 409 (1976); *Gomez v. Toledo*, 446 U.S. 635, 639-640 (1980);

[8] *Bolin v. Story*, 225 F.3d 1234, 1240 (11th Cir. 2000); *Powell v. Irving*, 684 F.2d 494, 498 (7th Cir. 1982).

[9] *Owen v. City of Independence, Mo.*, 445 U.S. 622, 653 (1980).

[10] *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818-819 (1985); *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 691 (1978).

[11] *Owen*, 445 U.S. at 652.

[12] *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (prosecutorial immunity); *Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (judicial immunity); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983) (mayor acting as liquor control commissioner).

[13] *Smith v. Power*, 346 F.3d 740, 742 (7th Cir. 2003).

[14] *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986).

[15] *Kalina v. Fletcher*, 522 U.S. 118, 133 (1997).

[16] *See Curtis v. Bembenek*, 48 F.3d 281 (7th Cir. 1995) (officer's testimony at preliminary hearing and hearing to quash arrest and suppress evidence absolutely immune).

[17] *Briscoe v. Lattue*, 460 U.S. 325 (1983).

[18] *Malley v. Briggs*, 475 U.S. 335 (1986).

[19] *Rehberg v Paulk*, 132 S. Ct. 1497 (2012).

[20] *Rehberg*, 132 S. Ct. at 1507.

[21] *Id*. at 1501.

[22] *Id*. at 1506-07.

[23] *Id*. at 1499.

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[24] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)

[25] *Pearson, 555 U.S. at 232.*

[26] *See for example*, *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996) (*rev'd* on other grounds)

[27] *Hannon v. Turnage*, 892 F.2d 653, 656 (7th Cir. 1990)

[28] *Clash v. Beatty*, 77 F.3d 1045, 1047 (7th Cir. 1996).

[29] *Clash*, 77 F.3d at 1047.

[30] David Montgomery, *Texas Trooper's Behavior Called 'Catalyst' in Sandra Bland's Death*, N.Y. TIMES, (July 30, 2015), http://www.nytimes.com/2015/07/31/us/texas-troopers-behavior-called-catalyst-in-sandra-blands-death.html?_r=0 (last visited Aug. 30, 2015).

[31] Montgomery, *Texas Trooper's Behavior*, *supra*, note 30.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)

[36] *Maryland v. Wilson*, 519 U.S. 408 (1997)

[37] *See for example*, *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013).

[38] *Wilson v. Layne*, 526 U.S. 603, 614-615 (1999)

[39] *Pearson v. Callahan*, 555 U.S. 223 (2009)

[40] *People v. Gaytan*, 2015 IL 116223.

[41] 625 ILCS 5/3-413(b) (2015).

[42] *Gaytan*, 2015 IL 116223, ¶ 2.

[43] *Id.*.52-42 ¶¶

[44] *Id.* ¶ 5.

[45] *Id.* ¶ 38.

[46] *Aboufariss v. City of DeKalb*, 305 Ill. App. 3d 1054 (2d Dist. 1999).

[47] *Aboufariss*, 305 Ill. App. 3d at 1056-1057.

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[48] *Id.* at 1056.

[49] *Id.* at 1057.

[50] *Id.*

[51] *Id.* at 1065-66.

[52] *Id.*

[53] *Id.*

[54] *Qian v. Kautz*, 168 F.3d 949, 953 (7th Cir. 1999).

[55] *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 713-14 (7th Cir. 2013).

[56] *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

[57] *Hunter*, 502 U.S. at 229.

[58] *Wilson v. Garcia,* 471 U.S. 261, 276 (1985).

[59] *Johnson v. Supreme Court of Illinois,* 165 F.3d 1140 (7th Cir. 1999); *Kalimara v. Illinois Dep't of Corrections,* 879 F.2d 276 (7th Cir. 1989); *Farrell v. McDonough,* 966 F.2d 279 (7th Cir. 1992).

[60] *Savory v. Lyons,* 469 F.3d 667 (7th Cir. 2006); *Hileman v. Maze*, 367 F.3d 694 (7th Cir. 2004).

[61] *United States v. Kubrick*, 444 U.S. 111 (1979)

[62] *Heck v. Humphrey*, 512 U.S. 477 (1994); *also see Wallace v. Kato*, 549 U.S. 384 (2007).

[63] *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

[64] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)

[65] *DeShaney*, 489 U.S. at 197.

[66] *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

[67] *DeShaney*, 489 U.S. at 199-200.

[68] *Id*. at 200.

[69] *Id*. at 201 (emphasis added).

[70] *Sandage v. Bd. of Comm'rs of Vanderburgh Cnty.*, 548 F.3d 595, 598 (7th Cir. 2008).

[71] *King v. East St. Louis Sch. Dist. 189*, 496 F.3d 812, 818 (7th Cir. 2007)

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[72] *White v. Rochford*, 592 F.2d 381 (7th Cir.1979).

[73] *White*, 592 F.2d at 382.

[74] *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

[75] *Reed*, 986 F.2d at 1125.

[76] *Id*. at 1123.

[77] *Brown v. Reyes*, 815 F. Supp. 2d 1018, 1022 (N.D. Ill. 2011) (citing *Windle v. City of Marion, Ind.*, 321 F.3d 658, 661 (7th Cir. 2003)).

[78] *Sandage*, 548 F.3d at 600.

[79] *Stevens v. Umsted*, 131 F.3d 697, 705 (7th Cir. 1997).

[80] *Reyes*, 815 F. Supp. 2d at 1022 (citing *Ellsworth v. Racine*, 774 F.2d 182, 185 (7th Cir. 1985)).

[81] *Reyes*, 815 F. Supp. 2d at 1024-1025.

[82] *Id*. at 1022-23.

[83] *Johnson v. City of Seattle*, 474 F.3d 634 (9th Cir. 2007).

[84] *Hernandez v. City of Goshen*, 324 F.3d 535 (7th Cir. 2003).

[85] *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389 (5th Cir. 1999).

[86] *Saenz*, 183 F.3d at 392.

[87] *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc).

[88] *Pinder*, 54 F.3d at 1181.

[89] *Matican v. City of New York*, 524 F.3d 151 (2d Cir. 2008).

[90] *Matican*, 524 F.3d at 154.

[91] *Id.* at 158 n. 7.

[92] *Id.* at 159.

[93] *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e).

[94] *Griffin*, 557 F. 3d at 1119.

[95] *Id*. at § 1997e(a).

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[96] *Woodford v. Ngo*, 548 U.S. 81, 93 (2006).

[97] *Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (quoting *Woodford*, 548 U.S. at 88).

[98] *Nyhuis v. Reno*, 204 F.3d 65, 71 (3d Cir. 2000); *also see Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 538 (7th Cir. 1999).

[99] *See Rumbles v. Hill,* 182 F.3d 1064, 1069 (9th Cir. 1999).

[100] For example, a failure to file a timely grievance within 15 days as required by the California prison code may constitute a failure to exhaust under the PLRA. *Harvey v. Jordan*, 605 F.3d 681, 685-686 (9th Cir. 2010) (citing Cal. Code Regs. Tit. 15 § 3084.1(a)).

[101] 28 U.S.C. § 1915A(a).

[102] 42 U.S.C. § 1997e(c)(1).

[103] *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008), *as amended on denial of reh'g and reh'g en banc,* (Sept. 12, 2008).

[104] *Harvey*, 605 F.3d at 683-684 (citing *Marella*, 568 F.3d at 1027 (quoting *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005))).

[105] *Marella*, 568 F.3d at 1027.

[106] *Pavey*, 544 F.3d at 742-743; *also see Hatch v. Cravens*, No. 3:06-CV-07 WDS, 2008 WL 2952355, at *1 (S.D. Ill. July 30, 2008).

[107] *Pavey, 544 F 3d* at 741.

[108] *Id*.

[109] *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

[110] 28 U.S.C. 1738 (1948).

[111] *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75, 83 (1984); *Gilbert v. Illinois State Bd. of Educ.*, 591 F.3d 896 (7th Cir. 2010).

[112] *See* Restatement (Second) of Judgments, § 28 (1982).

[113] *Bobby v. Bies*, 556 U.S. 825 (2009).

[114] *Migra*, 465 U.S. at 84-85.

[115] *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991); *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982); *Durgins v. City of East St. Louis*, 272 F.3d 841 (7th Cir. 2001).

[116] *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986), citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

[117] *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971).

[118] *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Best v. City of Portland*, 554 F.3d 698 (7th Cir. 2009) (trial court denial of suppression motion which was not appealable does not preclude a § 1983 claim where the criminal charges were dismissed before trial).

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[119] *Heck v. Humphrey*, 512 U.S. 477 (1994).

[120] *Wallace v Kato,* 549 U.S. 384, 397 (2007).

[121] *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

[122] *Town of Newton*, 480 U.S. at 397-398; *also see Gonzalez v. Kokot,* 314 F.3d 311 (7th Cir. 2002).

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