

## Municipal Law

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# Increasing Impact of the Certificate of Innocence (Or Non-Innocence) Litigation

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In 2008 the Illinois General Assembly created a new civil litigation proceeding, allowing a person whose criminal conviction was vacated or reversed to file a petition seeking a judgment certifying that the petitioner was innocent of the crime. 735 ILCS 5/2-702(a)-(j). The statute was enacted in response to a number of reversed convictions, as courts and prosecutors became aware of viable claims within the criminal justice system of convictions that may have been faulty in various ways. The General Assembly found that redress for such persons from traditional legal remedies was not always available, “due to a variety of substantive and technical obstacles in the law.” 735 ILCS 5/2-702(a). A certificate of innocence, once granted, then allowed the petitioner to file a claim in the Illinois Court of Claims for compensation from the State in an amount based on the number of years the petitioner was incarcerated before release. 705 ILCS 505/8(c).

The petitioner seeking a certificate of innocence must prove four elements by a preponderance of the evidence: 1) that the conviction was reversed or vacated; 2) if retried the petitioner was found not guilty or if not retried that the indictment or information was dismissed; 3) that “the petitioner is innocent of the offenses charged in the indictment or information or his acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor;” and 4) that the “petitioner did not by his or her own conduct voluntarily cause or bring about his or her conviction.” 735 ILCS 5/2-702(g). In deciding the petition, the court is directed by statute to “give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by” the petitioner. 735 ILCS 5/2-702(a). The statute allows the Attorney General and the State’s Attorney of the county where the conviction was procured and the petition filed to intervene.

Should a municipal attorney defending a petitioner’s civil rights or malicious prosecution lawsuit care about what happens in the petitioner’s proceeding seeking a certificate of innocence? After all, the successful petitioner wins compensation only from the State, not from any police agency or officer that played some role in the petitioner’s reversed or vacated conviction, and by statute has no preclusive effect on any other litigation. 735 ILCS 5/2702(j). The answer lies in how a court may treat the grant of a certificate of innocence.

An element of a malicious prosecution claim is that the criminal case was resolved in a manner indicative of innocence, and the Illinois Supreme Court has held that a malicious prosecution plaintiff whose criminal charges were dismissed must prove the dismissal was for reasons that indicated his or her innocence. *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996) (“Only when a plaintiff establishes that the *nolle prosequi* [dismissal of the criminal charges] was entered for reasons consistent with his innocence does the plaintiff meet his burden of proof.”)

What effect then does the issuance of a certificate of innocence have on that element of a malicious prosecution case, or on any civil rights litigation where the plaintiff’s actual innocence may be an issue? Several federal district courts struggled with the question of the admissibility of a certificate of innocence and what impact it could hold in a civil litigation. *E.g., Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1060 (N.D. Ill. 2015); *Kluppelberg v. Burge*, 84 F.

Supp. 3d 741, 745 (N.D. Ill. 2015). The question was addressed at a precedential level in *Patrick v. City of Chicago*, 974 F.3d 824 (7th Cir. 2020), where the Seventh Circuit reviewed a jury verdict in favor of the plaintiff whose 1995 murder conviction was vacated in 2014. The district court admitted the plaintiff's certificate of innocence and the jury delivered a verdict for the plaintiff on his civil rights and malicious prosecution claims. On review, the Seventh Circuit recognized the high risk of undue prejudice to the defendant police officers in the admission of that evidence and that stronger cautionary instructions should have been given, but upheld the verdict.

The Illinois Supreme Court has since held, in *Beaman v. Freesmeyer*, 2021 IL 125617, ¶111, that the issuance of the certificate of innocence (along with a pardon) showed that a triable fact question existed on whether the vacation of the plaintiff's conviction was indicative of innocence. The Court did not decide whether the certificate itself could satisfy the indicative of innocence element, or even whether it would be admissible at trial, but only that the issuance of the certificate, along with an executive pardon, established a fact question on that element. (As of this writing, a petition for rehearing of the Court's decision was pending).

Certainly, the State's many competent State's Attorneys and the Attorney General can and do adequately and vigorously defend certificate of innocence proceedings. However, local government defense attorneys should have concerns about the outcome of such petitions and the impact they can have on defense of lawsuits arising out of a reversed or vacated conviction. The Attorney General and State's Attorneys, with full dockets and big matters on their plates, may not always have interests coterminous with the police who ultimately could be held liable in a civil litigation, and be severely impacted by the issuance of a certificate of innocence, and for amounts potentially greater than what's at stake in the Court of Claims.

*Beaman* and *People v. Palmer*, 2021 IL 125621, are two illustrative examples. (In full disclosure, your authors represented the defendants sued in the civil lawsuits arising out of the vacated conviction in both cases.) In *Beaman*, for reasons not of record, the State's Attorney conceded the certificate of innocence petition where the civil defendants might not have done so. In *Palmer*, the State took a position in the innocence petition proceeding that police sued by Palmer would not have.

*Palmer* was convicted in 2000 of the gruesome murder of an attorney in Decatur, Illinois, who was bludgeoned to death with a hammer. After unsuccessful post-conviction litigation, the circuit court allowed *Palmer's* petition for additional DNA testing, and previously untested material from the victim's fingernails was found by a private forensic laboratory not to match *Palmer's* DNA. The prosecutors then agreed to the vacatur of the conviction, and dismissed the charges, but contested *Palmer's* certificate of innocence petition. The State took the position in opposition to the innocence petition that the plaintiff was not innocent, because he could have been guilty as an accomplice to someone else who actually swung the hammer, and could be guilty based on a theory of accountability under the Illinois Criminal Code (720 ILCS 5/5-2), a theory of guilt different from what *Palmer* was convicted on. The circuit court agreed with the State and denied the petition, affirmed by the appellate court. *People v. Palmer*, 2019 IL App (4th) 190148. The Supreme Court granted *Palmer's* leave to appeal, where the defendants in *Palmer's* civil lawsuit filed an amicus brief asserting arguments that the DNA results did not exonerate *Palmer* even on the theory of guilt on which he was convicted. 2021 IL 125621, ¶ 49. Nevertheless, the court found for *Palmer* and remanded for the issuance of a certificate of innocence. The Court found that "innocence" had to be determined based on the charged crime on which the conviction was entered, not on actual innocence.

What then can a municipal defendant do to assert its position in a proceeding under 735 ILCS 5/2-702? The statute only allows the Attorney General and State's Attorney to intervene. Can a municipality seek permissive intervention in the case? In *People v. Chatham*, 2016 IL App (1st) 152395, the victim/complaining witness of the petitioner's vacated conviction moved for permissive intervention in the certificate of innocence proceeding. One basis for the permissive



intervention request was that Chatham filed a lawsuit against the complaining witness, and the court noted Chatham’s “attorney forthrightly admitted that defendant [Chatham] is seeking to admit his Illinois certificate of innocence” in the civil lawsuit. *Id.*, at ¶ 4. Nevertheless, despite recognizing that the certificate could have potential impact in the civil litigation, the court upheld the trial court’s refusal to allow the permissive intervention.

The court in *Chatham* noted that the certificate of innocence statute did not prohibit, but also did not expressly allow, intervention by a party other than the State’s Attorney or Attorney General. The case was further complicated because intervention was sought to present a petition under 735 ILCS 5/2-1401 to set aside a certificate of innocence already granted. So, *People v. Chatham* may not be a death knell for a timely permissive intervention effort in a certificate of innocence proceeding. Municipal defense attorneys are increasingly impacted in civil litigation by what may happen in a certificate of innocence proceeding. The last thing municipalities need now is another theater of litigation over their overly-stressed police operations. Nevertheless, efforts are necessary to make their positions heard, either by appealing to a court’s discretion to allow permissive intervention, amicus briefs even in the trial courts, or other attempts to work jointly to assist the prosecutor’s defense of a petition.

### About the Authors

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