NPAP

National Police Accountability Project

Public Defenders & Police Accountability

Identifying & Preserving Civil Rights Claims

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NPAP

National Police Accountability Project

Public Defender Initiative

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Public defenders can join NPAP with a free three-month membership to access:

- PDF guide written for PDs on identifying and preserving civil rights claims
- National network of civil rights attorneys for consultations or referrals
- Strategy space sessions for police accountability in public defense work
- Free webinars and reduced CLE pricing
- National listserv of attorneys and legal workers

Dues discounted to $50/year for PDs after free three months.

Supporting Police Accountability

What is your role?

The Role of a PD in Police Accountability

- Support individual clients with claims to ensure their preservation for future litigation
  - Client interest in case/remedy
  - Cases help force systemic change ($$, case law)

- Track police misconduct in your jurisdiction for use in your cases
  - e.g. can use officer's history of past misconduct if involved in your case

- Public defenders are the eyes of the community in the criminal legal system
  - You can identify widespread violations earlier than most others

Roadmap

Criminal Charges to a Civil Rights Claim

Promptly identify civil rights issues.

Consult with a civil rights lawyer.

Check claim accrual and state notice timelines.

Document and save evidence.

Advise client on plea impacts on future civil rights claims.

If your client is going to trial, file related pretrial motions, develop the record at trial, and encourage a direct appeal or post-conviction relief.

Civil Rights Enforcement

The Basics

Section 1983 Basics
Civil Rights Enforcement

Civil rights actions against state and local* law enforcement officers are litigated under 42 U.S.C. § 1983.

- A claim has two elements:
  1. Person acting under ***color of state law***
  2. Violates a ***federal constitutional right***

* Claims against federal officers raise a whole host of different issues

Civil rights claims can also be brought under state law or other statutory causes of action, such as the ADA.

Section 1983 Basics
Relief

Civil rights claims in federal court can seek two forms of relief:

- Damages – money
- Injunctive relief – a court order to do/not do something
  - Claims for injunctive relief implicate multiple defenses – e.g., standing, class certification thresholds

Section 1983 Basics
Individual vs. Municipal Liability

Civil rights actions can be brought against:

- Individual officers who violate constitutional rights
- Municipal entities who cause constitutional violations under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978)
  - Identifying patterns of constitutional violations across a municipality may give rise to a *Monell* claim.

Qualified Immunity (QI)

- Protects individual government officials from suit unless they violate “clearly established” rights
  - *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

- Generally, if reasonable officials could disagree on the legality of conduct, QI will apply → no suit is possible against that official
  - High barrier, greatly expanded in recent decades
  - Inform clients that even egregious conduct by an officer will sometimes not be actionable in a civil rights suit.

- QI does not apply to entities, such as municipalities

Absolute Immunity

- Judges are immune for judicial acts unless they acted in absence of jurisdiction.
  - *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978)

- Legislators and certain executive officials have absolute immunity for official acts.
  - *Doe v. McMillan*, 412 U.S. 306 (1973); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)

Absolute Immunity

- Prosecutors have absolute immunity for actions in initiating and presenting cases, and only have qualified immunity for investigative or administrative tasks not related to decisions directly connected to trials.
  - *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009)
- If prosecutors sign a probable cause affidavit, they act as a fact witness for whom absolute immunity does not apply.
  - *Kalina v. Fletcher,* 522 U.S. 118 (1997)

Civil vs. Criminal

- Plaintiff has burden of proof
  - Generally, plaintiff will testify

- Lower burden of proof
  - Civil standard is preponderance of the evidence: 50.0001% of evidence weighs in favor of the plaintiff

- Broad discovery
  - The client can obtain broad discovery from the defendant, but will also have to disclose all relevant information – medical/mental health records, emails, text messages, etc.

Issue Spotting a Civil Rights Claim

What makes a good civil rights claim?

Common Civil Rights Claims Among PD Clients

Excessive Force

Unlawful Searches

Unlawful Arrests

Prison Restrictions on Speech, Association, Religion

Jail and Prison Conditions

Overdetention

Malicious Prosecution

Evidence Fabrication

Suppression of Favorable Evidence

First Amendment Retaliation

Excessive Force
Police/Pre-Detention

- Fourth Amendment applies to excessive force cases outside of the carceral context
- Standard: “objective reasonableness”
  - *Graham v. Connor*, 490 U.S. 386 (1989)
  - Force that’s unreasonable under the circumstances at the time
    - Consider:
      - Severity of alleged crime
      - Whether client posed immediate threat to LEOs/public
      - Whether client resisted/attempted to flee
    - Does NOT consider officer’s underlying intent/motivation

Excessive Force
Police/Pre-Detention

- Generally for non-incarcerated individuals, no significant force may be used without resistance or after compliance
  - Gunshots, taser use, dog bites after handcuffing are likely to be found excessive
  - Too-tight handcuffs can be actionable
  - Gun pointing = force
  - Deadly force generally requires a warning when feasible, only to be used when PC to believe suspect poses a threat of death or serious physical harm to officer/public
    - *Tennessee v. Garner*, 471 U.S. 1 (1985)

Excessive Force
In Prison

- Eighth Amendment applies to excessive force cases in prison post-conviction
- Standard: force that is malicious/sadistic
  - *Whitley v. Albers*, 475 U.S. 312, 318 (1986)
  - "unnecessary and wanton infliction of pain" constitutes excessive force
  - Subjective component: knowledge and disregard of harm/likely harm
  - Nature of force and justification for it determine excessiveness (not extent of injury)

Excessive Force
In Pretrial Detention

- Fourteenth Amendment applies to excessive force cases in pretrial detention
- Standard: objective due process
  - Officer must have intended to use amount of force used, but need not intend for it to be excessive
  - Courts can consider:
    - Need for force
    - Amount of force used
    - Extent of client’s injury
    - Severity of security problem addressed by force
    - Whether client was actively resisting

Unlawful Searches

- Challenges can be brought for warrantless searches that do not meet a recognized exception and for use of illegally obtained evidence
  - Low damages → may be difficult to find an attorney
  - If the client is convicted based on the illegally obtained evidence, a *Heck* bar may apply
- Searches conducted solely to harass the subject of the search may create officer liability
  - See *Hudson v. Palmer*, 468 U.S. 517 (1984)
- Even if PC exists, search must be conducted reasonably given its objective

Unlawful Arrests/Imprisonment

- Fourth Amendment: arrest without probable cause
  - Note there are significant statute of limitations problems under *Wallace v. Kato*, 549 U.S. 384 (2007)
- Courts look to totality of circumstances in deciding if PC existed
  - PC: facts within officer's knowledge at time of detention/arrest sufficient to warrant prudent person in believing that client committed an offense
    - **Objective** standard

Prison Restrictions on Speech, Association, Religion

First Amendment claims are available to incarcerated clients who face restrictions on speech, association, or religion

- "In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court announced four factors relevant to determining whether a prison regulation that restricts constitutional rights is permissible:
  - (1) **whether there is a valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it;**
  - (2) whether there are alternative means of exercising the right;
  - (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates; and
  - (4) whether the absence of ready alternatives is evidence of the reasonableness of a prison regulation.
- *Morgan v. Quarterman*, 570 F.3d 663, 666 (5th Cir. 2009) (quotations omitted)

Jail and Prison Conditions

Prison Conditions

- Eighth Amendment violations occur when prison officials are **deliberately indifferent** to a **substantial risk of harm** or fail to provide humane conditions.
  - *Farmer v. Brennan*, 511 U.S. 825 (1994)
  - Requires more than mere negligence but not intent to harm

Jail Conditions

- Fourteenth Amendment violations occur when pretrial detainees are subject to **conditions that amount to punishment** and are **unrelated to a legitimate governmental objective**.
  - *Bell v. Wolfish*, 441 U.S. 520 (1979)

Examples:

Denial or delay of medical care (including mental health care for in-custody suicide context); lack of proper ventilation, nutrition, or shelter; solitary confinement without justification; inadequate sanitation; severe overcrowding

Overdetention

- **Holding an incarcerated person after a court has ordered their release**, or past when the legal authority to hold him no longer exists, is an actionable violation under the 8^{th} and/or 14^{th} Amendments.

Malicious Prosecution

- Requires proof that the state initiated criminal proceedings without probable cause
- A favorable termination of the criminal case in favor of the client is required, but an affirmative indication of innocence is not required
  - *Thompson v. Clark*, 596 U.S. 36 (2022)
  - i.e. prosecution must have terminated without a conviction; it need not have proceeded to trial on the merits
    - Acquittal, dismissal, vacatur or reversal of conviction without a retrial, grand jury refusal to indict, sometimes dismissals on technical grounds

Evidence Fabrication

- Fabrication of evidence by police or prosecutors violates the Fourteenth Amendment.
  - Coerced or false confessions and planted contraband may all be actionable.
  - Mere failure to advise a suspect of Miranda rights is not actionable under § 1983, even if subsequent statements are introduced against them at trial.
- Any criminal proceeding that uses the fabricated evidence must have a favorable termination to avoid the *Heck* bar.
- Widespread patterns of fabrication of evidence may also produce a viable *Monell* claim of municipal liability.

Suppression of Favorable Evidence

- Brady violations are actionable as a civil rights claim
  - Any criminal proceeding in which evidence was withheld must have a favorable termination to avoid the *Heck* bar
- The standard for showing a *Brady* claim is different for a civil claim than criminal: the client must show that evidence was withheld from the prosecutor (absolute immunity)
  - The plaintiff also must show that the withholding of exculpatory evidence from the prosecutor by an officer was more than negligent
- Widespread patterns of *Brady* violations, even by prosecutors, may produce a viable *Monell* claim of municipal liability

First Amendment Retaliation

- Claim may exist if the client engaged in protected First Amendment activity (speech, petitioning, press, or religion), and because of that a state actor caused the client to suffer an injury that would deter a person of ordinary firmness from pursuing the activity
  - e.g. if an officer arrests a client primarily because of their protected speech and there is no other probable cause, or if an incarcerated person is retaliated against by a prison or jail official for filing a grievance, it may qualify as actionable retaliation

Issue Spotting Actionable Conduct

Starting point: Damages or injunctive relief

- The misconduct – must be enough to get past qualified immunity (violation of clearly established law)
  - Prior misconduct by officer(s)?
  - Pattern or practice?

- The damages
  - Long periods of lost liberty
  - Serious or permanent physical injury or death
  - Provable lost wages

Preserving a Civil Rights Claim

What do you need to know as a public defender?

Statute of Limitations

"Because no specified federal statute of limitations exists for § 1983 suits, federal courts borrow the forum state's general or residual personal-injury limitations period, see *Owens v. Okure*, 488 U.S. 235, 249-50 (1989), which in Mississippi is three years, Miss. Code Ann. § 15-1-49 (2011)."

Edmonds v. Oktibbeha Cty., 675 F.3d 911, 916 (5th Cir. 2012)

Tolling

- State tolling rules govern when a statute of limitations has been tolled in a § 1983 case.
  - *Hardin v. Straub*, 490 U.S. 536 (1989)
- Generally, the cause of action accrues at the time the plaintiff knows or should know that they have been injured by unconstitutional conduct (not when the plaintiff realizes that the conduct was unconstitutional)

The *Heck* Bar
Preclusion by Conviction

Heck v. Humphrey, 512 U.S. 477 (1994)

- A **civil suit cannot be brought** if a judgment in the plaintiff's favor would **challenge the basis of a criminal conviction**
- Would a successful civil suit <u>necessarily imply the invalidity of a conviction</u> that has not been reversed/invalidated?
  - If yes → courts will not hear the claim (stay or dismissal)

Heck Bar
Client Impact

Your advice on plea deals may implicate whether a future civil rights claim will be available to your client, even if the claim is otherwise valid. **No contest pleas can give rise to the *Heck* bar.**

Note that stipulating to the facts of the police report may also hamper future civil rights claims for your client. Stipulating to these facts may also trigger the *Heck* bar depending on the context.

Heck Bar
Client Impact

Example

- Client = a victim of excessive force by an officer, charged with resisting arrest
- Under some state laws, that charge requires that the officer have been in the act of discharging a lawful duty
  - If excessive force is a defense to the charge of resisting arrest, a no contest plea would likely bar an excessive force claim for the client (it would necessarily imply the invalidity of the resisting arrest conviction)
  - Further, pleading to resisting arrest establishes probable cause for the arrest, so future false arrest claims would also be barred.

Heck Bar
Preserving Claims in Plea Deals

There may be ways to craft pleas that preserve claims against the *Heck* bar.

- In the prior example, a no contest plea to resisting arrest could potentially be accompanied by a stipulation that excessive force was used after the client resisted arrest.
  - This may allow a claim for excessive force, but not false arrest, to escape the *Heck* bar.

Consult with a civil rights practitioner to understand how to craft the plea to maximize the client's interest in future civil rights claims.

- It has been recommended to state on the record that the client admits no wrongdoing regardless of the plea, so a lawyer for subsequent civil rights claims can order the minutes to have a record of the stipulation.

Release-Dismissal Agreements

A prosecutor may try to protect police by including terms in the plea deal by which your client promises not to pursue a future civil suit against law enforcement, even for claims that are otherwise valid or valuable.

- These are often called **release-dismissal** or **claim waiver agreements** and may be enforceable.
- In some jurisdictions, release-dismissal agreements are considered unethical under local rules of professional responsibility.

Release-Dismissal Agreements
Enforceability

- Are they enforceable? Generally, yes.
  - May be enforced if the client attempts to bring civil suit after agreeing that they would not do so.
  - However, courts often look closely at whether the agreement was entered into truly voluntarily.
    - If the police or prosecutor threaten more severe penalties for refusing to sign, it may be an improper agreement.
  - Courts may also strike down agreements where they stem from prosecutorial misconduct.

Release-Dismissal Agreements
Balancing Client Interests

- Consider both your client's immediate interest in resolving the case and the potential value to them of a future civil suit.
  - If the client's civil claim is weak, they do not want to deal with prolonged litigation, or the collateral consequences of a conviction are their absolute priority, it may be in their interest to enter into such an agreement.
  - If the harm the client suffered was particularly egregious, they are interested in pursuing accountability on principle, or potential damages in a civil suit are high, the client may wish to avoid such agreements to preserve civil claims.
- Consult with a civil rights attorney about the client's potential case to help understand how to properly weigh these considerations.

Prison Litigation Reform Act (PLRA)
Litigating a Claim for an Incarcerated Client

- PLRA sets limits on remedies available to people who are incarcerated (prison, pretrial detention) at the time of filing a suit
- Requires exhaustion of any and all available administrative remedy processes (ARPs) prior to a suit challenging conditions of confinement
  - ARPs vary by jurisdiction/facility
  - Typically short deadlines
  - **Non-exhaustion will preclude suit!**

Preserving Evidence

- Get client in touch with a civil rights attorney promptly
  - Attorney can make a preservation demand of putative defendants
- Provide relevant discovery to client and potential lawyers
  - Help explain why there is a potential case
- Make discovery demands, issue business records subpoenas, and ask questions at hearings
  - If misconduct is relevant in your case

Connecting with a Civil Rights Practitioner

Finding a Lawyer

National Police Accountability Project

- Network of over 500 attorneys across the country
- Free trial membership for PDs
- Access network and listserv
- Additional resources for PDs

National Police Accountability Project

Working with a Civil Rights Attorney

- Set clear client expectations
  - Inform of any impacts of civil case on criminal case and that your duty is to advise for best outcome in criminal case
  - Civil case may take many years
  - Investigation, discovery, and motions may potentially retraumatize client
  - Will require regular meetings with civil rights attorney
  - No guaranteed outcome of civil case, despite how egregious violation may be

- Transcripts and evidence may be helpful across the civil/criminal case divide
  - Cooperate to ensure evidence preservation
  - Check local ethics rules/office rules before sharing case files

Working with a Civil Rights Attorney

- Anything revealed in civil discovery could be used against client in criminal matter
  - Ideal to wait to file civil case until criminal case is concluded, if possible
  - Invoking the Fifth Amendment may be wise, but *can* be used against someone in a civil case

- Coordinate strategies with civil lawyer to avoid any harm to criminal case

- Be mindful of exposing privileged or protected materials/communications between each lawyer and client

Q&A

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Questions?

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2025 Fall OSPD & MPDA Public Defender Conference

Session One:
National Police Accountability Project

Wednesday, October 22, 2025
1:00- 2:00 p.m.

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