20-1099

In the
United States Court of Appeals
For the Second Circuit

ANDREW SMALLS,

Plaintiff-Appellant,

v.

POLICE OFFICER RICHARD COLLINS and
POLICE OFFICER DAVID TETA,

Defendants-Appellees,

- and -

CITY OF NEW YORK, POLICE OFFICER ERIC CABRERA,
POLICE OFFICER JESSICA ALVARADO, SERGEANT BRIAN STAMM
and POLICE OFFICER ALVAREZ,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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Plaintiff-Appellant,

- against -

Police Officer Richard Collins and Police Officer David Teta,

Defendants-Appellees,

The City of New York, Police Officer Eric Cabrera, Police Officer Alvarez, Police Officer Jessica Alvarado, and Sergeant Brian Stamm,

Defendants.

No. 20-1099

BRIEF FOR PLAINTIFF-APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Amon, J.), entered on March 17, 2020, setting aside a jury's verdict in Plaintiff Andrew Smalls's favor. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action involves civil rights claims for damages that arose under the Constitution. This Court has jurisdiction to hear this appeal from the district court's final judgment under 28 U.S.C. § 1291. Plaintiff filed a timely notice of appeal, as required by Federal Rule of

Appellate Procedure 4(a)(1)(A), on March 27, 2020, within 30 days of the March 17, 2020 entry of the final judgment appealed from.

PRELIMINARY STATEMENT

To allow police officers "to fabricate false [evidence] at will[] would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). In this case, a civil jury found that officers fabricated evidence and that such fabricated evidence caused Plaintiff-Appellant Andrew Smalls to be convicted at his criminal trial and to spend two years in prison. However, notwithstanding the jury's verdict, the district court, misreading the Supreme Court's recent decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), dismissed Smalls's civil case. The court held that the dismissal of Smalls's underlying criminal prosecution somehow was not a "favorable termination" within the meaning of *McDonough*'s rule and thus that Smalls was not entitled to sue. Because this decision conflicts with *McDonough* and this Circuit's precedent, the jury's verdict in Smalls's favor should be reinstated.

Smalls's civil case is based upon his conviction in state court of two counts of criminal possession of a weapon. The conviction was reversed on appeal on the basis of an unlawful search and seizure and the gun counts were dismissed. On remand, the trial court then dismissed the only remaining count, a misdemeanor trespass charge. Smalls had spent more than two years in prison due to his gun-possession conviction.

Smalls sued police officers Richard Collins and David Teta under 42 U.S.C. § 1983 for fabricating evidence in support of their claim that he possessed a gun. Consistent with the law of this Circuit, the district court instructed the civil jury that it need find only that the defendants forwarded to prosecutors fabricated evidence likely to convince a jury to convict Smalls of gun possession and that a deprivation of liberty resulted; it did not instruct the jury that it must find that the criminal case ended in a manner indicating Smalls's innocence. The jury found for Smalls and awarded him $60,000 in damages for his imprisonment following his gun-possession conviction.

The district court, however, threw out the jury's verdict and entered judgment as a matter of law for the defendants. It did so based solely upon *McDonough*, which the Supreme Court decided a month after the verdict. The court held that *McDonough* requires plaintiffs alleging evidence fabrication to show that their criminal case ended in a manner affirmatively indicating their innocence—as required for malicious-prosecution claims in this Circuit. On this basis, it concluded that the suppression of the gun in Smalls's criminal case, though it led to the dismissal of his charges, was not a resolution that indicated his innocence, and thus it dismissed Smalls's civil case.

The lower court's decision was wrong. This Circuit, beginning with *Ricciuti*, has permitted plaintiffs to sue for evidence fabrication and other types of fair-trial claims regardless of whether there was independent probable cause of guilt and without requiring any showing of innocence, recognizing that "even [a] guilty man is entitled

to a fair trial." *Poventud v. City of New York*, 750 F.3d 121, 137 (2d Cir. 2014) (en banc) (internal quotation marks and citation omitted). It has done so to punish and deter the intolerable behavior of evidence fabrication, which threatens the basic integrity of, and public confidence in, our criminal justice system. *See, e.g.*, *Ricciuti*, 124 F.3d at 130.

McDonough did not change this law. In deciding when § 1983 evidence-fabrication claims accrue, the Court disclaimed any intention of altering the elements of such claims in the Second Circuit. 139 S. Ct. at 2155. Further, the Court neither explicitly nor implicitly engrafted malicious prosecution's favorable-termination element onto evidence-fabrication claims. The Court's concern in *McDonough* was the same as its concern in the seminal decision *Heck* v. *Humphrey*, 512 U.S. 477 (1994), upon which *McDonough* is based: avoiding parallel civil and criminal litigation and limiting the avenues of collateral attack on criminal convictions.

In accordance with these goals, the Court in *McDonough* held only that a § 1983 evidence-fabrication claim does not accrue until "the criminal proceeding has ended in the defendant's favor, *or* a resulting conviction has been invalidated within the meaning of *Heck*." *McDonough*, 139 S. Ct. at 2158 (emphasis added). "[I]nvalidated within the meaning of *Heck*" does *not* require that the conviction has been overturned in a manner indicative of the plaintiff's innocence, but just that it has been overturned, period. Similarly, a dismissal for any reason is an ending of a criminal proceeding "in the defendant's favor." A plaintiff thus satisfies both *Heck* and *McDonough* by showing, as in Smalls's case, that his conviction was "reversed on direct

appeal," *Heck*, 512 U.S. at 487, or by showing, which Smalls also can do, that the underlying proceeding was dismissed. Each result satisfies the Court's policy concerns with avoiding parallel litigation, preventing inconsistent results, and limiting avenues for collateral attack. While *McDonough* did state that an evidence-fabrication claim does not accrue until a favorable termination of the proceedings, 139 S. Ct. at 2156, 2159, by this it meant only a result that satisfies *Heck*'s favorable-termination requirement.

Since *McDonough* neither overrules nor conflicts with this Circuit's caselaw, under which innocence is not an element of an evidence-fabrication claim, the district court was not permitted to impose such a requirement. Indeed, not only is the district court's decision inconsistent with this Circuit's binding caselaw; it also *conflicts* with *McDonough*, the very case upon which it purports to rely. Under *McDonough*'s holding, Smalls's criminal case *was* "invalidated within the meaning of *Heck*": the gun-possession conviction that was obtained using fabricated evidence and that caused Smalls's damages was reversed on direct appeal and the weapons-possession counts dismissed. (On top of that, the remaining minor trespass charge was fully dismissed on remand.) No more is required under *Heck*, *McDonough*, or the law of this Circuit, to maintain an evidence-fabrication claim. The district court's judgment should be vacated, the jury's verdict reinstated, and the case remanded for further proceedings.

STATEMENT OF THE ISSUE PRESENTED

In *McDonough v. Smith*, the Supreme Court held that a plaintiff alleging evidence fabrication under § 1983 cannot sue until his criminal prosecution has ended in his

favor, *or* his conviction has been invalidated within the meaning of *Heck v. Humphrey*. In this case, the plaintiff contends he was damaged by a conviction for gun possession that resulted from the use of fabricated evidence. He succeeded on direct appeal in overturning his conviction and obtaining dismissal of the charges that had caused his damages, but not on a basis indicating his innocence. The question presented is whether *McDonough* requires the dismissal of his civil suit for evidence fabrication because his criminal prosecution did not end in a manner affirmatively indicating his innocence, as this Circuit would require for a malicious-prosecution claim, or rather, does it simply require—in accordance with *Heck* and this Circuit's fair-trial precedents—that his civil suit not impugn any existing conviction or prosecution?

STATEMENT OF THE CASE

A. Andrew Smalls is convicted of gun possession and trespass.

Plaintiff-Appellant Andrew Smalls was indicted in Supreme Court, Queens County, for criminal possession of a weapon and trespass after the defendant police officers chased and arrested him. *People v. Smalls*, 83 A.D.3d 1103, 1103–04 (2d Dep't 2011), JA 23–24. After a jury trial, he was convicted of two felony counts of weapons possession and a misdemeanor trespass count and sentenced to a total of 12 years' imprisonment on the gun counts. *People v. Smalls*, Slip Op. at *2 (Sup. Ct. Queens Cty. Oct. 5, 2012), JA 26. He was sentenced to time served on the trespass count. *Id.*

B. Smalls's gun-possession charge is dismissed on direct appeal and the remaining charge, for trespass, is dismissed on remand.

On direct appeal, the Appellate Division, Second Department, reversed Smalls's conviction. 83 A.D.3d at 1103. It held that the trial court had erred in denying Smalls's motion to suppress physical evidence—the gun—because "the police lacked reasonable suspicion when they pursued the four males [including Smalls] after they fled." *Id.* at 1104.[1] The court further found that "there is no evidence that, during the pursuit, the police had any basis for believing that the defendant . . . did not in fact live in the public housing complex." *Id.* Accordingly, the Appellate Division dismissed the two indictment counts charging criminal possession of a weapon and ordered a new trial on the count of criminal trespass. *Id.* at 1103.

On remand, the trial court dismissed the remaining count. After re-opening the suppression hearing, the court concluded "that the observations made by the officers regarding the defendants' entry into and presence inside the subject public housing building, which were made during the illegal chase, are the fruits of an impermissible seizure." *Smalls*, Slip Op. at *12, JA 36. Because the court suppressed the police officers' purported observations, and this was the only evidence of trespass, the court dismissed the trespass charge—and with it the indictment. *Id.* at *14–15, JA 38–39.

[1] Under New York law (unlike federal law), the police must have reasonable suspicion to pursue someone. *People v. Holmes*, 81 N.Y.2d 1056, 1057 (1993).

Smalls served more than two years in custody "as a result of being charged with criminal possession of a gun." Stipulation at 1, JA 55; *see also* May 16, 2019 Trial Tr. 87, JA 242. This period did not include any time spent in pretrial incarceration, but solely time he was imprisoned between his sentencing date, after his trial conviction, and the reversal of his conviction and sentence on appeal. *See* Feb. 14, 2019 Pretrial Conf. Tr. 14–21, JA 44–46.[2]

C. Smalls files suit under § 1983 and prevails at trial.

After the dismissal of all criminal charges, Smalls filed suit in the United States District Court for the Eastern District of New York under 42 U.S.C. § 1983, claiming malicious prosecution and evidence fabrication against several individual police officers and municipal liability against the City of New York. *See* Compl., ECF No. 1.

The district court (Vitaliano, J.) granted in part and denied in part the defendants' Rule 12(b)(6) motion to dismiss, leaving only the § 1983 malicious-prosecution claim against Officer Collins and the § 1983 evidence-fabrication claim against Officers Collins and Teta. *See Smalls v. City of New York*, 181 F. Supp. 3d 178, 185–86, 188, 190 (E.D.N.Y. 2016). The case was subsequently transferred to the

[2] Smalls was detained before trial on this case, as well as for a period following his conviction, in connection with another case that ultimately was dismissed. The parties thus stipulated in the civil case that his damages would be based upon the portion of his post-sentencing imprisonment that was attributable exclusively to the gun-possession conviction. Because, as noted above, he was sentenced to time served on the misdemeanor count of criminal trespass, which referred to pre-conviction incarceration, none of the damages claimed in his lawsuit are attributable to his trespass conviction.

Honorable Carol Bagley Amon. June 20, 2018 Order, JA 10. Before trial, the plaintiff voluntarily dismissed his § 1983 malicious-prosecution claim in light of *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), which held that favorable termination "indicative of innocence" is an element of such a claim. *See* Pl.'s Mem. of Law in Opp. to Defs.' Second Mot. in Limine at 6 n.2, ECF No. 89.

The parties went to trial on a single claim: "that Officer Collins and Teta deprived Smalls of his right to a fair trial by fabricating evidence against him suggesting that he possessed a firearm." Mem. & Order at 2–3, JA 277–78.

The police officers' version of events was simple: on the evening of May 19, 2006, they pursued four men, including Smalls and his brothers Ronney and Cedric, into 81-05 Rockaway Beach Boulevard after they heard a gunshot. May 14, 2019 Trial Tr. 88–93, JA 104–05. Officer Collins claimed he saw Smalls hand a gun to Ronney as the two were running up the stairs of this building. *Id.* at 98–99, JA 106–07. Collins then arrested Smalls and Ronney on the roof, where Collins also found a gun. *Id.* at 102–11, JA 107–110. Collins said Smalls was wearing a black jacket. *Id.* at 90, 145, JA 104, 118. Teta agreed that Smalls was wearing a black jacket and said that if Smalls wasn't wearing a black jacket then he wasn't on the roof. *Id.* at 242, JA 142.

Smalls, on the other hand, testified that he was not even present when the police were chasing his brothers and supposedly saw him holding a gun. He was playing cards in the apartment of a friend, Lindsey Johnson, when their friend Bill Davis knocked on the door and told Smalls that his brothers Ronney and Cedric were

being arrested. May 15, 2019 Trial Tr. 149, JA 182. Smalls went downstairs, where he saw his brothers being put in a police car. *Id.* at 151, JA 183. He then got into a verbal altercation with police officers, which ended with him being slammed against a wall, causing a cut above his eye, and handcuffed. *Id.* at 151, 152, 155, JA 183, 184. He was confused and shocked when he later learned he was being charged with gun possession. *Id.* at 167, JA 187. Smalls was wearing a grey hooded sweatshirt (or "hoodie"), but no jacket because it was too warm to wear a jacket. *Id.* at 150, JA 183.

Several witnesses corroborated Smalls's testimony. Lindsey Johnson testified he was hanging out with Smalls all day, playing cards, and that someone came to his door and told Smalls that his brothers were being arrested downstairs. May 14, 2019 Trial Tr. 159–60, JA 122. William Davis testified that he knocked on Lindsey Johnson's door in search of Smalls and told Smalls, who was wearing a grey hoodie, that his brothers were being arrested. May 15, 2019 Trial Tr. 45, 48, JA 156, 157. Jerome Nelson testified that he heard a gunshot, then saw Ronney and Cedric (but not Smalls) running from the police. *Id.* at 92, JA 168. Nelson later saw Smalls come down to the lobby after Ronney and Cedric had already been arrested; when Smalls asked the police why they were arresting his brothers, they slammed his head against the wall and arrested him. *Id.* at 99–100, JA 170. Sabrina Davis heard that Smalls was being arrested and came out of her apartment to see him being led out of the lobby in handcuffs; his brothers Ronney and Cedric were already in a police car. *Id.* at 136, JA

179. Smalls's face was bloody and he was wearing a grey hoodie that she had bought for her brother—her brother had let Smalls borrow it. *Id.* at 137, JA 179.

At trial, Plaintiff's counsel also elicited various facts that undercut the police officers' story. For instance, Teta admitted that he first put over the radio that there was a guy on the roof, then said there were two men on the roof, then said they had one man stopped on the sixth floor and one man armed on the roof; he first mentioned "four" men only when he later said they had four under arrest. May 14, 2019 Trial Tr. 61–62, JA 97. The prisoner pedigree cards for Ronney and Cedric said they were apprehended on the roof, while Smalls's card listed the arrest location only as 81-05 Rockaway Beach Boulevard—Collins added the word "roof" later. *Id.* at 29–32, JA 89–90; Pl.'s Ex. 24, JA 251. Smalls's card also indicated that he was wearing a grey hoodie, although Collins later crossed this out and wrote in "black jacket." May 14, 2019 Trial Tr. 31, 145, JA 90, 118; Pl.'s Ex. 24, JA 251. There were several photos taken of Smalls the night of this incident; in each photo, he was wearing a grey hoodie and not a black jacket. May 14, 2019 Trial Tr. 242–43, JA 142–43. The top charge on his arrest photo was resisting arrest, not criminal possession of a weapon. *Id.* at 33–34, JA 90; Pl.'s Ex. 37, JA 252.

The jury found for Smalls and awarded him $60,000 in compensatory damages. Verdict Sheet, JA 259–60. In so finding, the jury necessarily determined by a preponderance of the evidence, in accordance with the court's charge, "first, that defendants fabricated evidence; second, that the evidence was likely to influence a

jury's verdict; third, that the defendants forwarded the evidence to prosecutors and/or a grand jury; and, fourth, the [plaintiff] suffered a deprivation of liberty as a result." May 16, 2019 Trial Tr. 83, JA 241. The district court did not charge the jurors on any element relating to favorable termination of the underlying criminal charge. *See id.*[3]

D. The district court vacates the jury's verdict and enters judgment for the defendants.

Smalls filed a post-trial motion for a new trial on damages (but not liability), arguing that $60,000 was "grossly inadequate" to compensate him for two years of incarceration. *See* Mem. of Law in Supp. of Pl's Mot. for a New Trial, ECF No. 134.

Then, 30 days after the entry of judgment, the defendants moved under Federal Rules of Civil Procedure 50, 54, and 60 "for an order vacating the judgment in this case and granting judgment in favor of the defendants as a matter of law." Notice of Mot., ECF No. 135. They contended they were entitled to this relief because, they claimed, the Supreme Court had held in its intervening decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), that § 1983 fair-trial claims have a "favorable-termination"

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[3] At the civil trial, the defendants tried to impeach Smalls by eliciting that his criminal trial attorney had filed a suppression motion that implicitly accepted that Smalls possessed (and then discarded) the gun. May 15, 2019 Trial Tr. 186–88, JA 192; Defs.' Trial Ex. J, JA 256–57. This attorney, however, testified that this part of his affirmation was based on the felony complaint and intended to establish standing for a suppression hearing, and that Smalls never told him that he had possessed a gun. May 16, 2019 Trial Tr. 17–23, JA 214–16. Smalls's appellate attorney similarly testified that the suppression point of the appellate brief was based solely on the record of the suppression hearing where Officer Collins was the only one to testify. *Id.* at 6–9, JA 212. Smalls, for his part, testified that he had never admitted to possessing the gun or fleeing from the police. May 15, 2019 Trial Tr. 188–91, JA 192–93. The jury, by its verdict, apparently accepted Smalls's, and his attorneys', testimony.

requirement and that this requirement means that evidence-fabrication plaintiffs must now show that "the underlying proceeding ended in a manner that affirmatively indicates [their] innocence," as in malicious-prosecution cases. Defs.' Mem. of Law. in Supp. of Mot. to Vacate the Jury Verdict at 2, ECF No. 135-1 (quoting *Lanning*, 908 F.3d at 22). Smalls responded, in part, by claiming that *McDonough*'s use of the term "favorable termination" referred only to *Heck v. Humphrey*'s requirement that the plaintiff's § 1983 lawsuit not impugn any existing conviction. Pl.'s Mem. of Law in Opp. to Def's Mot. at 6–7, ECF No. 138. Accordingly, "the 'favorable termination' mentioned in *McDonough* is . . . different than the 'favorable termination' element of a malicious-prosecution claim." *Id.* at 7. And in any event, Smalls argued, the reversal of his conviction on direct appeal "constitutes a 'favorable termination.'" *Id.* at 7–10.

After oral argument, the district court held that the Supreme Court in *McDonough* had "implicit[ly]" adopted a favorable-termination requirement for evidence-fabrication claims. Mem. & Order at 8, JA 283. The court further held that this requirement "in the context of a fair-trial [evidence-fabrication] claim is the same as that for a malicious-prosecution claim"—*i.e.*, "the plaintiff must demonstrate that the underlying criminal proceeding ended in a manner that affirmatively indicates plaintiff's innocence." *Id.* at 11, JA 286 (cleaned up); *see also id.* at 5–13, JA 280–88. The court concluded that Smalls could not meet this requirement because the reversal of his gun-possession conviction based on the suppression of evidence was not indicative of innocence. *Id.* at 13–16, JA 288–91. Accordingly, the court "grant[ed]

Defendants' motion, vacate[d] the jury's verdict, and enter[ed] judgment as a matter of law in favor of Defendants." *Id.* at 16–17, JA 291–92. Smalls's motion for a new trial on damages was consequently denied as moot. *Id.* at 17, JA 292. The district court's decision is unpublished but was reported on Westlaw as *Smalls v. Collins*, No. 14-cv-2326 (CBA) (RML), 2020 WL 2563393 (E.D.N.Y. Mar. 16, 2020).

The district court entered judgment for the defendants on March 17, 2020. JA 293. Smalls timely filed a notice of appeal on March 27, 2020. JA 294.

SUMMARY OF THE ARGUMENT

A. The elements of a § 1983 evidence-fabrication claim are well established in this Circuit: a criminal defendant is deprived of his constitutional "right to a fair trial" when "an (1) investigating official (2) fabricates information (3) that is likely to influence a jury's verdict, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of life, liberty, or property as a result." *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016). This Court has never required a fair-trial plaintiff to present evidence that his or her conviction was overturned on a ground indicative of innocence, as it does for a plaintiff bringing a § 1983 malicious-prosecution claim. In fact, it has rejected such a requirement, recognizing that "even [a] guilty man is entitled to a fair trial." *Poventud v. City of New York*, 750 F.3d 121, 137 (2d Cir. 2014) (en banc) (internal quotation marks and citation omitted) (permitting a fair-trial § 1983 claim to proceed even though, after his initial conviction was overturned for a *Brady* violation, the plaintiff had pleaded guilty

to a lesser offense). This conclusion follows logically from the very different constitutional concerns underpinning a fair-trial trial claim, which focuses on the constitutionality of the process used, and a malicious-prosecution claim, which focuses on whether the initiation of the prosecution was justified in the first place.

B. *McDonough v. Smith*, 139 S. Ct. 2149 (2019), did not change what is required in this Circuit to establish an evidence-fabrication claim. *McDonough* explicitly disclaimed any intention to alter the elements of such a claim as set out by this Circuit, having granted certiorari only to determine when such claims accrue. *See id.* at 2155. The district court's holding—that a plaintiff bringing such a claim now must show that the resolution of the criminal case affirmatively indicates innocence—therefore conflicts with binding Circuit precedent that *McDonough* expressly left undisturbed.

The district court's decision also is inconsistent with *McDonough*'s plain text and reasoning. The plaintiff in *McDonough* was indicted based on fabricated evidence but then acquitted at trial. *Id.* at 2153–54. The question before the Court was whether McDonough's ensuing § 1983 fabrication claim accrued, for statute of limitations purposes, when he learned, before his acquittal, that his prosecution was based upon fabricated evidence, or instead only upon the later occasion of his acquittal. *Id.* at 2155. The Court held that McDonough's evidence-fabrication claim (in contrast to false-arrest claims) did not accrue until his acquittal, *id.* at 2153, a conclusion that flowed from the Court's earlier decision in *Heck v. Humphrey*.

Heck involved a plaintiff who brought a § 1983 fair-trial claim after he had already been convicted. Concerned with avoiding parallel criminal and civil proceedings and inconsistent results, the Court held that a plaintiff may not sue under § 1983 if winning the action "would necessarily imply the invalidity of his conviction or sentence." 512 U.S. 477, 487 (1994). If, however, success in the action would "not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." *Id.* Nowhere in *Heck* did the Court require a showing that the conviction was invalidated in a manner indicating innocence. On the contrary, *Heck* lists four ways that a conviction can be overturned or vacated to allow suit, *id.* at 486–87; none of them requires an affirmative indication of innocence.

The Court in *McDonough* reaffirmed *Heck*'s holding concerning when an action would be permitted to proceed following a conviction, while also extending it to a case that ended in an acquittal. *McDonough* held that a § 1983 evidence-fabrication plaintiff may bring suit once "the criminal proceeding has ended in the defendant's favor, *or* the resulting conviction has been invalidated within the meaning of *Heck*." 139 S. Ct. at 2158 (emphasis added). This disjunctive formulation covers those cases in which the plaintiff never was convicted, as in McDonough's case, while reaffirming the traditional case contemplated in *Heck* in which the fabrication led to a conviction that was later invalidated. Thus, for a plaintiff like Smalls—who claims damages based upon a conviction that already has been invalidated—the decades-old rule of *Heck* still

applies: proof that his conviction has been invalidated, however that happened, suffices by itself to lift the *Heck* bar. *McDonough* requires nothing more.

C. The district court erred in holding that, because *McDonough* analogized evidence-fabrication claims to common-law malicious-prosecution claims, an evidence-fabrication plaintiff must now prove the underlying criminal proceeding ended "in a manner that affirmatively indicates his innocence." Mem. & Order at 11–13, JA 286–88 (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018)). The Court in *McDonough*, as in *Heck*, used common-law malicious prosecution as an analogy illustrating why civil claims that challenge the basis for a criminal prosecution or conviction should await the resolution of such matter in the criminal defendant's favor. The reasons, as with common law malicious-prosecution claims, are to avoid parallel litigation and inconsistent results. Had the Court also intended to require the criminal matter be resolved in a manner indicating factual innocence—something it never said—it would not have held in *Heck*, and reaffirmed in *McDonough*, that the mere reversal or vacatur of a conviction is a "favorable" result. Indeed, *McDonough* explicitly cautioned that its analogy to the common law did not mean that common-law tort elements must be incorporated into § 1983 claims. 139 S. Ct. at 2156.

Significantly, the two other circuits to have considered whether *McDonough* requires a showing of affirmative indications of innocence for evidence-fabrication claims have squarely rejected the argument. *See Roberts v. City of Fairbanks*, 947 F.3d 1191, 1201 (9th Cir. 2020) ("*Heck*'s favorable-termination requirement is distinct from

the favorable-termination element of a malicious-prosecution claim."); *Savory v. Cannon*, 947 F.3d 409, 429 (7th Cir. 2020) (en banc) (holding that neither *Heck* nor *McDonough* "require an affirmative finding of innocence").

D. The district court's holding would cause intolerable results. It would largely eliminate accountability for government officials who fabricate evidence by narrowly limiting the pool of potential plaintiffs to victims of such misconduct who have been acquitted at trial or whom prosecutors admit are innocent, a rare event indeed. It would pressure criminal defendants to forego pretrial motions and appeals which, if successful, would not establish their absolute innocence, and incentivize prosecutors to insist on petty convictions to thwart meritorious fabrication claims. District courts, in every case, would have to analyze the thorny issue of why the dismissal took place, diverting attention from the real issue under § 1983 of whether a government official committed wrongdoing that caused the plaintiff injury.

Smalls, following the command of *Heck*, obtained the reversal of his gun conviction before claiming under § 1983 that the defendants' fabrication of evidence caused his loss of liberty following that conviction. Under *McDonough*, *Heck*, and the undisturbed law of this Circuit, Smalls is entitled to recover damages if he proves these allegations. A civil jury, after a complete trial, found that he did. The district court's decision overturning that verdict should be vacated.

STANDARD OF REVIEW

Although the district court entertained the defendants' post-trial motion as a motion for reconsideration under Rule 54, it treated it like a motion for judgment as a matter of law notwithstanding the jury verdict. This Court "review[s] de novo the district court's decision on a motion for judgment as a matter of law," applying "the same standard that is required of the district court." *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007). This Court therefore must "consider the evidence in the light most favorable to the party against whom the motion was made and give that party the benefit of all reasonable inferences the jury might have drawn in his favor." *Id.* (citation omitted). If the motion is instead considered as a motion to reconsider the denial of the motion to dismiss, this Court's review of the district court's decision remains de novo. *See Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019).

ARGUMENT

Under *McDonough v. Smith*, *Heck v. Humphrey*, and this Court's precedents governing the elements of § 1983 evidence-fabrication claims, which *McDonough* expressly left unchanged, Smalls's lawsuit was properly brought.

A. Second Circuit law does not require a § 1983 evidence-fabrication plaintiff to show that his criminal prosecution was resolved in a manner indicating his innocence.

It is well established in this Circuit that a criminal defendant is deprived of his constitutional "right to a fair trial" when "an (1) investigating official (2) fabricates information (3) that is likely to influence a jury's verdict, (4) forwards that information

to prosecutors, and (5) the plaintiff suffers a deprivation of life, liberty, or property as a result." *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)).[4]

This Court has never imposed a sixth element requiring a plaintiff to present evidence that his case was resolved in a manner indicating his innocence. On the contrary, "[s]ection 1983 liability attaches for knowingly falsifying evidence even where there simultaneously exists a lawful basis for a deprivation of liberty." *Victory v. Pataki*, 814 F.3d 47, 64 (2d Cir. 2016). The same is true of other types of § 1983 fair-trial claims, such as those alleging the withholding of exculpatory or impeachment material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Poventud v. City of New York*, 750 F.3d 121, 124 (2d Cir. 2014) (en banc) (holding that a *Brady* plaintiff need not "demonstrate that he would or even probably would prevail at trial if the evidence were disclosed, much less that he is in fact innocent" (cleaned up)).

Section 1983 fair-trial claims are fundamentally different from § 1983 malicious-prosecution claims. The two types of claims "arise of out different constitutional rights, protect against different constitutional injuries, and implicate different constitutional concerns." *Simon v. City of New York*, No. 16-CV-1017, 2020 WL 1323114, at *6 (E.D.N.Y. Mar. 19, 2020) (Garaufis, J.).

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[4] The Second Circuit has not decided whether this fair-trial right "is rooted in the Sixth Amendment or the Fifth or Fourteenth Amendments, or both." *Garnett*, 838 F.3d at 278 n.6. The Supreme Court, noting that a right may originate under more than one amendment, has declined to rule on this question. *See McDonough*, 139 S. Ct. at 2155 & n.2.

Malicious-prosecution claims are rooted in the Fourth Amendment's prohibition on "unreasonable seizure[s]." *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018). "The essence" of such claims "is the alleged groundless prosecution." *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980). Because the government's mere "failure to proceed does not necessarily 'impl[y] a lack of reasonable grounds for the prosecution,'" *Lanning*, 908 F.3d at 28 (quoting *Conway v. Village of Mount Kisco*, 750 F.2d 205, 215 (2d Cir. 1984)), a plaintiff bringing a § 1983 malicious-prosecution claim must show "that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence," *id.* at 22.

On the other hand, "fair trial claims cover kinds of police misconduct not addressed by . . . malicious prosecution claims." *Garnett*, 838 F.3d at 278. A fair-trial claim, unlike a claim for malicious prosecution, may proceed despite the existence of probable cause. *Id.* at 277–78; *Bermudez v. City of New York*, 790 F.3d 368, 374–77 (2d Cir. 2015). That is because fair-trial claims address a different evil: the corruption of due process by government misconduct, including the withholding of favorable evidence under *Brady* and the related evil of fabricating evidence. "No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence." *Ricciuti*, 124 F.3d at 130. Evidence fabrication is "definitionally unreasonable," regardless of how the prosecution ends. *Simon*, 2020 WL 1323114, at *6. Accordingly, this Court does not apply malicious prosecution's strict affirmative-indication-of-innocence requirement

to evidence-fabrication claims, *see Garnett*, 838 F.3d at 279, or to other subspecies of fair-trial claims, such as violations of *Brady*, *see Poventud*, 750 F.3d at 133–35.[5] Indeed, in *Poventud*, the en banc court allowed a plaintiff's § 1983 claim for a *Brady* violation to proceed even though, after the challenged conviction had been overturned due to the *Brady* violation, he had pleaded guilty to a lesser offense—a termination that certainly did not affirmatively indicate his innocence. *See id.* at 130–34 (explaining that a *Brady* claim could go forward even though a malicious-prosecution claim would be barred).

B. *McDonough*, an accrual case applying *Heck*'s narrow exception to § 1983 liability, did not change the elements of a fabricated-evidence claim in this Circuit under which there is no requirement that the resolution of the criminal case affirmatively indicate the plaintiff's innocence.

Contrary to the holding of the district court, *McDonough* did not graft onto § 1983 evidence-fabrication claims the element of a malicious-prosecution claim requiring the plaintiff to show his criminal proceeding ended in a manner affirmatively

[5] Evidence-fabrication claims and *Brady* claims are closely related. This Court's foundational evidence-fabrication case drew directly from the Supreme Court's *Brady* jurisprudence in stating that "a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.'" *Ricciuti*, 124 F.3d at 130 (citing *United States v. Agurs*, 427 U.S. 97, 104 (1976); and *Giglio v. United States*, 405 U.S. 150, 153 (1972)). Both types of claims are rooted in "the right to have one's case tried based on an accurate evidentiary record that has not been manipulated by the prosecution [or police]." *Dufort v. City of New York*, 874 F.3d 338, 355 (2d Cir. 2017) (citing both *Brady* and *Garnett*). Indeed, a *Brady* violation is "tantamount to fabricating false evidence," for it "deceive[s] the jury into thinking that evidence of guilt [i]s stronger than it [i]s." *Poventud*, 750 F.3d at 140 (Lynch, J., concurring).

indicating his innocence. Such an interpretation of *McDonough* misreads its actual holding and ignores the doctrinal and policy concerns underpinning it.

Preliminarily, it is important to note that the Court in *McDonough* explicitly disclaimed any intention of changing the elements of § 1983 evidence-fabrication claims in this Circuit. In *McDonough*, "[t]he question [wa]s when the statute of limitations began to run" on the plaintiff's claimed violation of his "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." 139 S. Ct. at 2155 (internal quotation marks omitted). In determining the appropriate "accrual rule" for evidence-fabrication claims, *id.* at 2159, the Court "assum[ed] without deciding that *the Second Circuit's articulations of the right at issue and its contours are sound*, having not granted certiorari to resolve those separate questions," *id.* at 2155 (emphasis added). Since the Court assumed the soundness of evidence-fabrication claims under Second Circuit law, under which there has never been a requirement of a final result that is indicative of innocence, it makes no sense to conclude that the Court, *sub silentio*, meant to impose such a new element. It makes even less sense to conclude that the Court intended to add an element that is fundamentally inconsistent with the constitutional tort's purpose of deterring fabrication of evidence *regardless* of whether the accused ultimately is determined to be fully innocent.

In not changing the elements of an evidence-fabrication claim, but rather deciding the distinct issue of when such a claim *accrues*, the Court in *McDonough*

followed the same approach it took in the decision upon which it heavily relies, *Heck v. Humphrey*, and numerous subsequent decisions applying *Heck*.

Heck involved a § 1983 plaintiff who sought damages for evidence destruction while he was still in prison on the underlying conviction. 512 U.S. at 479. The Court worried that such a lawsuit violated "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal convictions," conflicted with the Court's "concerns for finality and consistency," and made an end-run around Congress's choice that habeas corpus, with its strict procedural rules, be the sole basis for challenging the constitutional validity of an existing state criminal conviction. *Id.* at 484–87. Based on these concerns, the Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . 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.

Id. at 486–87 (emphasis added). Put differently, a § 1983 action whose success "would *necessarily imply the invalidity of [a] conviction or sentence*" cannot proceed "unless . . . the conviction or sentence has already been invalidated." *Id.* at 487 (emphasis added). But if success in the § 1983 action "will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." *Id.*

Heck made clear that there was no problem at all unless the success of the § 1983 action "would necessarily imply the invalidity of [a] conviction or sentence." *Id.* Where that was the case, the *Heck* favorable-termination requirement would be

satisfied when the inconsistent judgment was invalidated. There was no requirement that it be overturned on a ground indicative of innocence.[6]

Heck and related cases are an "exception from § 1983's otherwise broad scope." *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005)). "Over time, this implicit exception has been carefully circumscribed." *Id.* at 101 (citing *Dotson*, 544 U.S. at 79). In subsequent cases, the Court's narrow focus continued to be, not innocence, but rather whether a claim, if successful, would necessarily impugn an existing state judgment or decision. Thus, where a claim did not call into question the result of a judgment or decision that was still in place, there was no *Heck* problem. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 525, 534 (2011) (holding that *Heck* does not preclude a prisoner from suing under § 1983 to seek DNA testing because the test results would not "necessarily" imply the invalidity of a conviction or sentence); *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (holding that *Heck* does not bar "a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence"); *Edwards v. Balisok*, 520 U.S. 641, 645–49 (1997) (holding that *Heck* permits a procedural claim that does not imply that the underlying conviction is invalid). Indeed, in *Skinner*, it was precisely because of the possibility the DNA results would show the defendant was *guilty*, not innocent, and thus would not

[6] Although *Heck* itself did not use the term "favorable termination" to describe its holding, both the Supreme Court and this Court have since referred to *Heck*'s "favorable-termination" rule. *See McDonough*, 139 S. Ct. at 2157; *Muhammad v. Close*, 540 U.S. 749, 754 (2004); *see also, e.g.*, *Peralta v. Vasquez*, 467 F.3d 98, 103 (2d Cir. 2006).

necessarily impugn his conviction, that there was no *Heck* bar. *See* 562 U.S. at 534. Applying this framework (and relying on *Poventud*), the Ninth Circuit has held that *Heck* does not bar a § 1983 plaintiff from bringing suit for damages caused by a *Miranda* violation at his initial murder trial, even though he subsequently was convicted of the *same offense* at a retrial without the use of the improperly-obtained statement, because a judgment in the plaintiff's favor would not imply the invalidity of the second conviction. *Jackson v. Barnes*, 749 F.3d 755, 760–61 (9th Cir. 2014).

McDonough did not broaden the Court's approach to the accrual rule announced in *Heck*; rather, it merely extended the rule to situations where the plaintiff suffered a deprivation of liberty during a pending prosecution that ended without a conviction. *See McDonough*, 139 S. Ct. at 2157 (noting that the facts "differ[] from *Heck* because the plaintiff in *Heck* had been convicted, while McDonough was acquitted"). The Court reasoned that McDonough's § 1983 claims "challenge[d] the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction." *Id.* at 2158. It made sense to delay accrual—until the prosecution had ended in the plaintiff's favor as opposed to the overturning of the conviction required by *Heck*—in order to avoid undesirable "parallel criminal and civil litigation" as well as possible "conflicting civil and criminal judgments." *Id.* at 2157–58 (citing *Heck*, 512 U.S. at 484). Accordingly, the Court held that a § 1983 evidence-fabrication claim does not accrue unless the plaintiff can show that the underlying "criminal proceeding has ended in [his] favor, *or* a resulting

conviction has been invalidated within the meaning of *Heck*." *Id.* at 2158 (emphasis added). In either scenario, in the plaintiff's "favor," or "favorable termination," does not mean a showing of innocence—such a substantive requirement would be a radical break with the *Heck* line of cases upon which *McDonough* is based—but only that the lawsuit does not necessarily impugn an existing prosecution or conviction.

Smalls's case fits easily into the second of the two alternative prongs of the *McDonough* Court's disjunctive rule. Unlike the plaintiff in *McDonough*, but just like the plaintiff in *Heck*, Smalls's claim, as it was presented at trial, challenges his conviction for gun possession and the damages it caused, not the underlying proceeding.[7] Smalls's claim accrued when his gun-possession conviction was "invalidated within the meaning of *Heck*." 139 S. Ct. at 2158. His gun-possession conviction was "invalidated within the meaning of *Heck*" when the Appellate Division reversed it on direct appeal and dismissed the gun counts. *See Heck*, 512 U.S. at 487 (holding that a plaintiff can bring a § 1983 suit once his conviction has been "reversed on direct appeal"). At that point, there no longer was any possibility that Smalls's claim would

[7] As the Statement of the Case shows, *see* pp. 6–12 & n.2, *supra*, Smalls's civil claim, and the jury's verdict, were based solely on the manufacturing of the evidence used at trial to convict him of the gun-possession charges, which resulted in his sentence of imprisonment. While a trespass charge remained after the gun conviction was reversed and the gun charges were dismissed, this did not affect the accrual of Smalls's claim, since success on his claim that the gun-possession evidence was fabricated would not necessarily impugn the basis for the trespass prosecution. However, even if this were not the case and his civil claim did not fully accrue until the criminal trespass charge was finally resolved, it was resolved in his "favor" when it was dismissed. Any way this case is analyzed under *McDonough*'s two-pronged holding, Smalls was—and is—entitled to pursue his claim and to recover damages.

impugn an existing conviction or the basis for an ongoing prosecution. Neither *Heck* nor *McDonough* requires anything more.

This case does not require this Court to determine how it would resolve a case, such as in *McDonough*, where the claim is for a deprivation of liberty that resulted from the prosecution itself. Nevertheless, it is clear that the "favorable-termination" concept, whether the claim is for damages caused by a conviction or the underlying prosecution itself, is the same. In both *Heck* and *McDonough*, the Court was concerned with avoiding parallel litigation, inconsistent results, and an end-run around habeas. A result that avoids these evils is a "favorable" termination for these purposes and thus allows the former criminal defendant to sue. Under the *Heck* rule, a former criminal defendant may bring a lawsuit challenging the fairness of his conviction upon flawed evidence where such conviction has been overturned for any reason. It would make no sense to impose an additional element relating to innocence merely because the plaintiff's claim, rather than for damages caused by a conviction, is for damages caused by the underlying prosecution itself. [8]

[8] It is possible that a claim of evidence fabrication would impugn a re-prosecution, following the reversal of a conviction, and thus a termination of the re-prosecution in the plaintiff's favor also would be required. *See Bradford v. Scherschligt*, 803 F.3d 382, 388–89 (9th Cir. 2015) (holding that § 1983 evidence-fabrication claim did not accrue when plaintiff's initial conviction was vacated but instead only upon his acquittal at the retrial). However, where, as here, an appellate court not only has reversed the conviction but also has dismissed the underlying charges that gave rise to the plaintiff's civil claim, such claim unquestionably has accrued under *McDonough*.

C. The district court erred in reasoning that the Supreme Court's mere analogy in *McDonough* to malicious prosecution's favorable-termination requirement makes a resolution of the criminal case indicative of innocence a requisite element of an evidence-fabrication claim.

The district court reasoned that, because the Supreme Court in *McDonough* "analogize[d] extensively to common-law malicious prosecution[] in its analysis of McDonough's fair-trial claims," it follows that "post-*McDonough*, the standard for favorable termination in the context of a fair-trial claim is the same as that for a malicious-prosecution claim." Mem. & Order at 11-13, JA 286–88. After *McDonough*, an evidence-fabrication "plaintiff must demonstrate that 'the underlying criminal proceeding ended in a manner that affirmatively indicates [plaintiff's] innocence.'" *Id.* at 11, JA 286 (quoting *Lanning*, 908 F.3d at 22).

However, the Supreme Court's reliance on an analogy to malicious prosecution did not overturn Second Circuit law concerning the elements of an evidence-fabrication claim. The Court simply relied on this analogy as part of its reasoning for why a federal court should not entertain a civil rights lawsuit that would impugn a state prosecution or conviction. In doing so, it eschewed any intention to review or alter the contours of such a claim in this Circuit. *See* 139 S. Ct. at 2155. A lower court "should follow the case which directly controls, leaving to [the higher] court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). Here, existing Second Circuit law defining the elements of evidence fabrication still controls. Meanwhile, this Court's published decisions also

bind "future panels 'unless and until [they are] overruled by the Court en banc or by the Supreme Court.'" *Deem v. DiMella-Deem*, 941 F.3d 618, 623 (2d Cir. 2019) (quoting *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995)).

Moreover, the district court's reasoning is incorrect. *McDonough* does not incorporate into evidence-fabrication claims the favorable-termination-indicative-of-innocence requirement from malicious prosecution simply because the Court, as the district judge wrote, "analogize[d] extensively to common-law malicious prosecution." In analogizing to malicious prosecution, the *McDonough* Court followed the same approach and adopted the same reasoning that the Court did in *Heck*. *See* 139 S. Ct. at 2156–57. But *Heck*'s reliance on the same analogy did not graft malicious prosecution's favorable-termination element onto the claims of § 1983 plaintiffs asserting that they were damaged by unfair trials.

The Court in *Heck*, as a starting point for determining the "prerequisites" for recovering damages under § 1983, followed its usual practice of "look[ing] first to the common law of torts" for guidance. 512 U.S. at 483. It concluded that "malicious prosecution provides the closest analogy" to Heck's claims because both "permit[] damages for confinement imposed pursuant to legal process." *Id.* at 484. It focused in particular on the element of malicious prosecution requiring "termination of the prior criminal proceeding in favor of the accused," because this element embodied the judicial policies that *Heck* was most concerned with—the avoidance of "parallel litigation" and "conflicting resolutions." *Id.* (internal quotation marks omitted).

In "rel[ying] on malicious prosecution's favorable termination requirement as *illustrative of* the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions," *id.* at 486 n.4 (emphasis added), *Heck* never adopted wholesale malicious prosecution's favorable-termination requirement for all § 1983 lawsuits challenging convictions. Instead, it crafted an accrual rule designed to avoid inconsistent results and new avenues of collateral attack, requiring only that § 1983 plaintiffs establish, before bringing suit, that their civil actions would "not necessarily imply the invalidity" of any existing conviction. *See Poventud*, 750 F.3d at 127. As Justice Scalia, the author of *Heck*, later explained, *Heck* analogized to the favorable-termination requirement for malicious prosecution merely to make the point that "civil tort actions are not appropriate vehicles for challenging the validity of *outstanding* criminal judgments." *Wallace v. Keto*, 549 U.S. 384, 392 (2007) (emphasis added) (quoting *Heck*, 512 U.S. at 486).

In *McDonough*, the Court continued to understand the limited nature of the *Heck* accrual rule as requiring a plaintiff only to "prove that his conviction ha[s] been invalidated *in some way*" before he may sue. 139 S. Ct. at 2157 (emphasis added). In reaffirming the narrowness of *Heck*'s rule before extending it to a case not involving a conviction, the *McDonough* Court no more required an affirmative indication of innocence than *Heck* did.

In holding otherwise, the district court failed to heed the Supreme Court's repeated cautions, including in *McDonough*, against collapsing elements of common-

law torts into § 1983 claims. However useful common-law *analogies* may be, they are "'meant to guide rather than to control the definition of § 1983 claims,' such that the common law serves 'more as a source of inspired examples than of prefabricated components.'" *McDonough*, 139 S. Ct. at 2156 (quoting *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017)). "[T]wo constitutional claims may differ yet still both resemble malicious prosecution more than any other common-law tort; comparing constitutional and common-law torts is not a one-to-one matching exercise." *Id.* at 2156 n.5; *see also, e.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (noting that § 1983 is not "a federalized amalgamation of pre-existing common-law claims").

Further, "[i]n applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921. As discussed above, the constitutional torts of evidence fabrication and malicious prosecution "arise of out different constitutional rights, protect against different constitutional injuries, and implicate different constitutional concerns." *Simon*, 2020 WL 1323114, at *6. It therefore does not make sense to impose the same common-law rules on both types of claims.

The *McDonough* Court adhered to these principles when it disclaimed any intention of changing the elements of evidence-fabrication claims and repeatedly recognized that malicious prosecution and evidence fabrication are "not identical" and have distinct elements. 139 S. Ct. at 2160; *see also id.* at 2159 (noting that "a fabricated-evidence claim in the Second Circuit (unlike a malicious-prosecution claim) can exist

even if there is probable cause"); *id.* at 2156 n.3 (declining "to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim").

That *McDonough* did not intend a result indicative of innocence to be required for evidence-fabrication claims is also made clear by footnote three of the opinion. There, the Court noted that, in *Manuel*, it left open whether a Fourth Amendment claim for pretrial detention, known loosely as a "malicious prosecution" claim, has a favorable-termination element at all, unlike its common-law analogue. *McDonough*, 139 S. Ct. at 2156 n.3 (citing *Manuel*, 137 S. Ct. at 921-22). Having noted that it had declined to reach the question of whether a favorable termination indicative of innocence is an element of a § 1983 claim for malicious prosecution when the issue was directly raised in *Manuel*, the Court surely did not intend to *sub silentio* adopt or imply such a requirement for evidence-fabrication claims in *McDonough*.[9]

The two other circuits to have addressed this issue since *McDonough* was decided both agree that *McDonough*'s analogy to malicious prosecution, and its requirement of an outcome in "favor" of the criminal defendant, does not require that

[9] On remand from the Supreme Court's decision in *Manuel*, the Seventh Circuit held that there is no favorable-termination requirement for malicious prosecution–type § 1983 claims beyond the need to show, in accordance with *Heck*, that one's conviction or imprisonment has previously been invalidated. *See Manuel v. City of Joliet,* 903 F.3d 667, 670 (7th Cir. 2018). Of course, the rule in this Circuit is different. *See Lanning*, 908 F.3d at 22. Whichever view is correct, the point is that the Supreme Court surely did not intend *McDonough* to resolve the issue it had expressly left open in *Manuel*.

such outcome affirmatively indicate innocence. In *Roberts v. City of Fairbanks*, the State of Alaska offered to vacate four men's murder convictions if they would enter into a "settlement agreement" stating that "the original . . . judgments of conviction were properly and validly entered." 947 F.3d 1191, 1195 (9th Cir. 2020). The men agreed, the convictions were vacated, and all charges were dismissed. *Id.* The district court dismissed their subsequent § 1983 lawsuit on *Heck* grounds, "holding that vacatur of convictions pursuant to a settlement agreement was insufficient to render the convictions invalid." *Id.* at 1196.

The Ninth Circuit reversed. It held that "the plain language of *Heck*" permitted the lawsuit to proceed "[b]ecause all convictions here were vacated and underlying indictments ordered dismissed, [and] there remains no outstanding criminal judgment," thus "render[ing] the *Heck* bar inapplicable." *Id.* at 1198. While one judge dissented, the majority held that the dissent had mischaracterized *McDonough* as holding "that *Heck* establishes an exact replica of the favorable-termination rule from the malicious-prosecution context." *Id.* at 1201 n.11. *McDonough* "holds no such thing," the majority reasoned, emphasizing that such a reading "contravenes the plain language of *Heck*." *Id.* at 1201 & n.11. In sum, wrote the court: "*Heck*'s favorable-termination requirement is distinct from the favorable-termination element of a malicious-prosecution claim." *Id.* at 1201.

The en banc Seventh Circuit took the same view in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020), *petition for cert. on other grounds filed*, *Cannon v. Savory*, No. 19-1360

(June 5, 2020). *Savory* involved a plaintiff who spent 30 years in prison for murder before the governor pardoned him. *See* 947 F.3d at 411-12. When Savory then brought a § 1983 suit alleging evidence fabrication, *id.* at 412, the defendants claimed, among other things, that *Heck* barred the suit because the governor's "general pardon" was not "based on innocence," *id.* at 429. The en banc court held that there was "no support in *Heck*" for this view. *Id. Heck* "offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding of innocence." *Id.* "If the [*Heck*] Court had wanted to specify that [a favorable termination] must be based on innocence, it certainly could have done so, but it did not." *Id.* Nor did *McDonough* change this rule, said the Seventh Circuit; on the contrary, *McDonough* held "that acquittal is a favorable termination under *Heck* . . . , *another resolution that does not necessarily imply innocence*." *Id.* (emphasis added).

Several district courts in this Circuit have issued similarly persuasive decisions adopting this view. In *Ross v. City of New York*, Judge Chen explained that "because fair trial jurisprudence, starting with *Heck* and continuing through *McDonough*, is primarily concerned with the potential for invalidating criminal convictions, the favorable termination requirement for fair trial claims (assuming there is one) is necessarily different and more expansive than the one for malicious prosecution claims." No. 17-CV-3505, 2019 WL 4805147, at *8 (E.D.N.Y. Sept. 30, 2019). In *Simon v. City of New York*, Judge Garaufis reached the same conclusion, holding that "*McDonough* does not alter the enduring distinction between malicious prosecution and fair trial claims."

2020 WL 1323114, at *6. Other district courts have agreed. *See Colon v. City of Rochester*, 419 F. Supp. 3d 586, 608 n.7 (W.D.N.Y. 2019) (Larimer, J.) (adopting the reasoning and holding of *Ross*); *see also Wellner v. City of New York*, 393 F. Supp. 3d 388, 397 (S.D.N.Y. 2019) (Koeltl, J.) (holding that § 1983 evidence-fabrication claim was not barred by *McDonough* where plaintiff accepted a compromise outcome and pleaded guilty to the lesser offense of disorderly conduct because, consistent with *Heck*, her claim that evidence pertaining to her misdemeanor charges was fabricated "in no way calls into question her conviction for the [lesser] offense of disorderly conduct").

The district court here cited three lower-court decisions to support its holding, but these cases are either inapposite or unpersuasive. In *Hincapie v. City of New York*, No. 18-cv-3432, 2020 WL 362705 (S.D.N.Y. Jan. 22, 2020) (Crotty, J.), and *Breton v. City of New York*, 404 F. Supp. 3d 799 (S.D.N.Y. 2019) (Koeltl, J.), the courts found that the plaintiffs had shown "favorable termination for purposes of [their] malicious-prosecution claim[s]" and thus, *a fortiori*, "had 'sufficiently alleged [favorable termination]' for purposes of [their] fair-trial claim[s], as well." Mem. & Order at 12, JA 287 (quoting *Breton*). But such reasoning is consistent with the favorable-termination requirement for malicious-prosecution claims being more demanding than the favorable-termination rule for fair-trial claims. Contrary to the district court's erroneous understanding, these decisions did not hold that the favorable-termination requirements for the two claims are "the same." *Id.* at 13, JA 288.

In the third decision the district court relied on, *Goldring v. Donawa*, the court dismissed a *pro se* plaintiff's fair-trial claim after discussing *McDonough* only briefly and employing the same flawed reasoning as the district court here: Since *McDonough* "noted that [a] fabricated-evidence claim [i]s analogous to a malicious prosecution claim," the two must have the same favorable-termination requirement. No. 16-CV-5651, 2019 WL 4535507, at *4 (E.D.N.Y. Sept. 19, 2019) (Matsumoto, J.). We have explained above why *McDonough* and *Heck* do not support such a holding.[10]

D. Imposing malicious prosecution's requirement of a termination indicative of innocence on fair-trial claims would lead to intolerable practical outcomes.

Evidence fabrication by government officials is "a serious, systemic problem." Amicus Br. of Crim. Def. Orgs., Civil Rights Orgs., and the Cato Inst. in *McDonough v. Smith*, 2019 WL 1057913 (U.S.), at 19. To take just one common variety of evidence fabrication, false police testimony, a recent *New York Times* investigation revealed more than 25 instances between January 2015 and March 2018 in which judges or prosecutors found "a key aspect of a New York City police officer's testimony was probably untrue." *Id.* (quoting Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, N.Y. Times, Mar. 18, 2018, *available at* http://perma.cc/KUC9-XCMU).

[10] Other lower-court decisions that adopted similar holdings have relied on similarly flawed reasoning. *See, e.g.*, *Gondola v. City of New York*, No. 16-CV-369, 2020 WL 1433874, at *3–5 (E.D.N.Y. Mar. 24, 2020) (Donnelly, J.); *Daniels v. Taylor*, ___ F. Supp. 3d ___, No. 18-CV-3717, 2020 WL 1165836, at *3–6 (S.D.N.Y. Mar. 11, 2020) (Abrams, J.); *Miller v. Terrillion*, 436 F. Supp. 3d 598, 601-06 (E.D.N.Y. 2020) (Vitaliano, J.).

Another "paradigmatic type of fabricated evidence," false confessions, occurred in "102 of the first 362 DNA exonerations documented by The Innocence Project," or 28 percent of them. *Id.* at 21 (citing Innocence Project, *DNA Exonerations in the United States*, *available at* https://perma.cc/2BZ2-VUGJ (website archived on Nov. 6, 2018)). A recent formal report of the Brooklyn District Attorney on the causes of wrongful convictions similarly stressed the influence of false or unreliable evidence produced by police misconduct in "heighten[ing] the likelihood of a wrongful conviction." Kings County District Attorney's Office, *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York* 57 (July 2020), *available at* http://brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf.

The district court's holding would defeat one of § 1983's primary purposes: "deterrence of future abuses of power by persons acting under color of state law," such as evidence fabrication. *Restivo v. Hessemann*, 846 F.3d 547, 585 (2d Cir. 2017) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981)). Emboldened by the lack of legal consequences, police officers and prosecutors would be more likely to manufacture false evidence or knowingly rely upon it to shore up weak or marginal cases.[11] *See* Amicus Br. of Ctr. on the Admin. of Crim. Law at NYU School of Law et

[11] Although prosecutors are absolutely immune from liability for "[a]ctions taken as an advocate," they enjoy only qualified immunity for "actions taken as an investigator." *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000). A prosecutor's "fabrication of evidence" is likely to be considered investigatory. *See Fields v. Wharrie*, 740 F.3d 1107, 1113 (7th Cir. 2014) (Posner, J.) (holding that a prosecutor could be sued under § 1983 when he, "acting pre-prosecution as an investigator, fabricate[d] evidence and introduce[d] the fabricated evidence at trial").

al. in *McDonough v. Smith*, 2019 WL 1077303 (U.S.), at 10. "Section 1983 suits are necessary to deter prosecutors from fabricating evidence." *Id.* (collecting studies). While theoretically there is a risk of criminal prosecution or bar discipline for prosecutors who knowingly rely on fabricated evidence, the threat "is too remote to affect their behavior." *Id.* at 10-11.

Requiring evidence-fabrication plaintiffs to show that the resolution of the criminal case affirmatively indicates their innocence also would pressure criminal defendants in Smalls's position—*i.e.*, those who know the police have fabricated evidence against them and have strong grounds for a potentially case-dispositive suppression motion—to forego the motion and risk a trial to preserve any ability to later seek damages through a civil rights lawsuit. Any defendant hoping to obtain compensation for the horror of imprisonment based upon an unconstitutionally-obtained conviction, no matter how innocent he might be, would have to think twice about appealing on any ground that, if successful, would not establish that innocence. Indeed, the only qualifying grounds that come to mind under New York law would be a claim that the evidence was legally insufficient or that the verdict was against the weight of the evidence; a claim citing prosecutorial or judicial misconduct, a *Brady* or discovery violation, an erroneous evidentiary ruling, or any other procedural defect, would not suffice. Yet the Supreme Court has long held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). Criminal defendants should not be required

to forfeit their Fourth Amendment right against illegal search or seizure—or their panoply of other procedural and evidentiary rights under the Fifth, Sixth, and Fourteenth Amendments—to preserve § 1983 claims for evidence fabrication.[12]

We finish this brief where we began. Adopting *Lanning*'s favorable-termination rule in evidence-fabrication cases would collapse the distinction between the constitutional torts of malicious prosecution and evidence fabrication, notwithstanding two decades of this Court's caselaw *insisting* on this distinction. Allowing government officials to fabricate evidence without facing civil consequences "would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Ricciuti*, 124 F.3d at 130.

CONCLUSION

The district court's decision importing malicious prosecution's narrow definition of favorable termination into evidence-fabrication claims contradicts this Circuit's settled precedent. *McDonough*, the sole basis for the district court's holding, did not overrule or cast doubt on these precedents. Indeed, the district court's

[12] This case does not involve another scenario envisioned by the *McDonough* Court: that prosecutors, who have "broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped," 139 S. Ct. at 2160 n.10, would be able to insulate government officials (and their municipal employers) from civil liability by insisting that the accused plead guilty to a lesser offense as the price for dismissal of more serious charges premised on fabricated evidence. Whether there should be an exception to the *Heck* bar to § 1983 liability where a prosecutor misuses her power in this fashion to extort a guilty plea on a minor charge, as the footnote cited above suggests, is not presented in this case, where all charges were dismissed.

decision *conflicts* with the holdings of both *McDonough* and *Heck* and the underlying rationales for these decisions. Moreover, if affirmed, the district court's ruling would defeat the deterrent and remedial purposes of § 1983 evidence-fabrication actions and encourage the "mockery . . . of due process of the law and fundamental justice" that this Court sought to curtail in *Ricciuti*. Accordingly, the jury's verdict for Plaintiff-Appellant Andrew Smalls should be reinstated and the case remanded for the district court to decide Smalls's motion for a new trial on damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I certify that this brief was prepared using Microsoft Word 2016, using 14-point Garamond font. According to that software, this brief contains 11,043 words, not including the cover, table of contents, table of authorities, caption, signature block, or this certificate.

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