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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

INTRODUCTION

McDonough v. Smith holds that a § 1983 lawsuit may proceed "once the [pending] criminal proceeding has ended in the defendant's favor, *or a resulting conviction has been invalidated within the meaning of* Heck [v. Humphrey, 512 U.S. 477 (1994)]." *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019) (emphasis added). A conviction is "invalidated within the meaning of *Heck*" when it 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." *Heck*, 512 U.S. at 487. The defendants barely mention this decisive language from *McDonough*, let alone meaningfully address it. The defendants can stick their heads in the sand but, under *McDonough*, Andrew Smalls was entitled to bring his lawsuit—and collect the damages a federal jury then awarded him—after his conviction was reversed on direct appeal and all charges dismissed.

The defendants urge this Court to hold that a § 1983 evidence-fabrication claim will lie only where there has been a favorable termination of the underlying criminal proceeding indicative of innocence or, at the very least, not indicative of guilt. They contend that this requirement follows from *McDonough*'s comparison of evidence-fabrication claims to malicious-prosecution claims, the latter of which, in this Circuit, require a "favorable termination" indicative of innocence. They are wrong.

The Supreme Court in *McDonough* was careful to explain that it was merely *analogizing* to the common-law tort of malicious prosecution, not incorporating its elements into the federal constitutional tort of evidence fabrication. Repeatedly distinguishing between these two different types of claims, the Court explicitly stated that it was not reviewing or altering Second Circuit precedent, under which there is no favorable termination requirement for § 1983 evidence-fabrication claims. Indeed, the Court made clear that, just as in *Heck*, its concern was with preventing a state criminal defendant from using § 1983 instead of habeas corpus to challenge an existing prosecution or conviction and with avoiding parallel litigation and inconsistent civil and criminal results.

The Supreme Court's concerns underlying *McDonough* (and *Heck*) are satisfied in Smalls's case. He succeeded in invalidating his state conviction and obtained a full dismissal before bringing his federal lawsuit. Thus, his lawsuit is not parallel to, and does not impugn, any existing prosecution or conviction, nor does it improperly attempt to use § 1983 in place of state appellate remedies or federal habeas corpus.

The defendants' brief boils down to a claim that Smalls should not have been allowed into federal court because, in their view, the state proceedings make him look guilty. They cite a state jury's verdict, but it *has been set aside*. They cite Smalls's state attorney's concession of gun possession for the limited purpose of establishing standing to challenge an illegal search, but omit that the attorney has testified his concession was based solely upon the state's own allegations, not any admission by Smalls. Worse, they omit that a federal jury *credited* the testimony of the attorney and of Smalls that Smalls has *always* denied guilt, and that the same federal jury explicitly found that *Smalls was framed*. Smalls's criminal case was dismissed and a federal jury found that police officers framed him, yet the defendants, through twisted logic and distortions of Supreme Court precedent, would deny him any remedy.

Underlying the defendants' argument is hostility to 42 U.S.C. § 1983, which Congress intended as a broad remedy for individuals who are victimized by local government officials' abuse of their awesome powers. The defendants would have this Court dramatically narrow § 1983, despite its broad language, based upon a policy preference that has no basis in existing law. The defendants, to protect police officers

who frame innocent citizens, would have this Court overrule a line of its own cases that refuse to tolerate police fabrication of evidence—a principle this Court established in *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123 (2d Cir. 1997), and most recently reaffirmed in *Frost v. New York City Police Department*, ___ F.3d ___, No. 19-1163, 2020 WL 6603609 (2d Cir. Nov. 12, 2020). These cases provide a remedy for evidence fabrication in vindication of the due-process and fair-trial rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments, without regard to whether a claim of malicious prosecution also is made out.

We have just witnessed a decade in which dozens of wrongful criminal convictions were thrown out in New York State alone because of police fabrication of evidence and other perversions of criminal process. The result the defendants seek would embolden police to continue such misconduct and victimize countless others, contrary to Congress's deterrent purpose underlying § 1983.

ARGUMENT

The federal jury verdict in Smalls's favor was proper under *McDonough* and should be reinstated.

A. Contrary to the defendants' argument, *McDonough* reaffirms that where a conviction, like Smalls's, has been 'invalidated within the meaning of *Heck*'—that is, for any reason—a claim for evidence fabrication accrues under § 1983.

The Supreme Court held in *McDonough* that a § 1983 evidence-fabrication claim accrues "once 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) (citing *Heck*, 512 U.S. at 486–87). As explained in the portion of *Heck* that *McDonough* cited, a conviction is "invalidated within the meaning of *Heck*" if, *inter alia*, it was "reversed on direct appeal," because in that case "the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Heck*, 512 U.S. at 487. That is what happened here. Smalls's conviction was reversed on direct appeal and all charges were dismissed. When a federal jury then found that the defendant police officers had fabricated the allegation that Smalls possessed a gun, this verdict did not demonstrate the invalidity of any outstanding criminal judgment because *there was no such judgment*. Smalls satisfied *Heck* and therefore *McDonough*. This appeal should end there.

The defendants ignore *McDonough*'s clear language. Instead, they ask this Court to read *McDonough* to require a § 1983 evidence-fabrication plaintiff to show that his criminal proceeding ended in manner affirmatively indicating his innocence, as in a malicious-prosecution case, or "that his criminal proceedings did not . . . terminate in a manner that includes affirmative indications of guilt." Defs.' Br. 15. Both rules are completely at odds with *McDonough*'s text, its reasoning, and the values upon which it and its predecessor cases are based.[1]

[1] The defendants argued below only for the rule mirroring malicious prosecution's favorable-termination requirement; they did not argue for a standard requiring a plaintiff to show that his criminal prosecution did not end in a manner affirmatively indicating his guilt. This Court should therefore reject that argument out of hand. *See Spinelli v. Nat'l Football League*, 903 F.3d 185, 198 (2d Cir. 2018) ("The 'well-established general rule [is] that an

The starting point for understanding *McDonough* is *Heck*. The Court in *Heck* was concerned that § 1983 lawsuits would displace habeas corpus as the exclusive avenue for collaterally attacking existing convictions and could result in conflicting civil and criminal judgments. *See Heck*, 512 U.S. at 480–81. To meet these concerns, *Heck* announced a new rule: a plaintiff cannot sue under § 1983 if success in his lawsuit "would necessarily imply the invalidity of [a] conviction or sentence" that had not "already been invalidated." *Id.* at 487. If "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." *Id.* (emphasis in original). *Heck* never said anything about requiring a showing of innocence.

The *Heck* Court did not refer to its rule as a "favorable termination" rule. However, this Court has recognized that "the *Heck* rule has come to be known as the 'favorable termination' requirement." *McKithen v. Brown*, 481 F.3d 89, 101 n.13 (2d Cir. 2007) (citing *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006)). So has the Supreme Court, *see Muhammad v. Close,* 540 U.S. 749, 754 (2004), and every other circuit.[2] Long before

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appellate court will not consider an issue raised for the first time on appeal.'" (quoting *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 615 (2d Cir. 2016))).

[2] *See Limone v. Condon*, 372 F.3d 39, 42 (1st Cir. 2004); *Bronowicz v. Allegheny Cty.*, 804 F.3d 338, 344 (3d Cir. 2015); *Wilson v. Johnson*, 535 F.3d 262, 263 (4th Cir. 2008); *Ballard v. Burton*, 444 F.3d 391, 396 (5th Cir. 2007); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 599 (6th Cir. 2007); *Morgan v. Schott*, 914 F.3d 1115, 1119 (7th Cir. 2019); *Newmy v. Johnson*, 758 F.3d 1008, 1010 (8th Cir. 2014); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005); *Cohen v. Longshore*, 621 F.3d 1311, 1315 (10th Cir. 2010); *Henley v. Payne*, 945 F.3d 1320, 1326, 1327 (11th Cir. 2019); *Taylor v. U.S. Probation Office*, 409 F.3d 426, 430 (D.C. Cir. 2005).

McDonough, courts used "favorable termination" as a short-hand to refer to *Heck*'s rule requiring that success in one's lawsuit would not invalidate an existing conviction. *McDonough* is no different.

McDonough left the *Heck* rule intact while extending it to a factual scenario not covered by *Heck*: that of a § 1983 plaintiff who was acquitted without ever being convicted. The *McDonough* Court concluded that the *Heck* rule—which it, too, called *Heck*'s "favorable-termination requirement," *McDonough*, 139 S. Ct. at 2157—should apply in such situations, because § 1983 lawsuits brought during *pending* prosecutions encroach upon "the domain of habeas corpus," and threaten inconsistent civil and criminal judgments, just as much as "those [lawsuits] that challenge convictions" do. *Id.* at 2158. "The principles and reasoning of *Heck* thus point[ed] toward a corollary result" in *McDonough*: a plaintiff may not sue under § 1983 unless and until he can establish either that "the criminal proceeding has ended in the defendant's favor [the new *McDonough* scenario], or a resulting conviction has been invalidated within the meaning of *Heck* [the traditional *Heck* scenario]." *Id. McDonough* used "favorable termination" to refer to *Heck*'s rule, not any newfound requirement that evidence-fabrication plaintiffs show their innocence.

B. The defendants misapprehend *McDonough*'s holding and policy rationales and their application to the facts of this case.

The defendants contend that only if a § 1983 plaintiff is required to show his innocence "is there no risk that a civil judgment for the criminal defendant will

impugn the criminal proceedings." Defs.' Br. 14. But this is directly contrary to *Heck*, which held that concerns about civil lawsuits impugning criminal proceedings were satisfied by requiring the plaintiff to show simply that his civil claim would not imply the invalidity of any outstanding conviction. The defendants claim that Smalls, by reading *McDonough* to have reaffirmed and extended *Heck*, merely "pays lip service to the concerns" underlying *McDonough*. Defs.' Br. 18. But *McDonough*'s concerns with collateral attacks and inconsistent civil and criminal judgments *are* the concerns of *Heck*. The defendants' argument is the equivalent of accusing Justice Scalia, the author of *Heck*, of paying "lip service" to the very principles upon which he based his opinion.

The defendants' argument also ignores that the *Heck* rule—and thus, by extension, *McDonough*'s holding—goes only so far as is strictly necessary to address the Court's concerns with collateral attacks and inconsistent judgments, since the *Heck* rule is a judicially-created limitation on the broad remedy that § 1983 provides. "A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '*any* rights, privileges, or immunities secured by the Constitution and laws,'" *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (emphasis in *Dennis*) (quoting 42 U.S.C. § 1983), and also by the "legislative history," which "stresses that as a remedial statute, [§ 1983] should be liberally and beneficently construed," *id.* (internal quotation marks omitted). *Heck* recognized an "implicit exception from § 1983's otherwise broad scope" when it precluded "those 'actions that lie within the core of habeas

corpus.'" *McKithen*, 481 F.3d at 99 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005)). But, in recognition of § 1983's broad remedial scope, this exception has been "carefully circumscribed." *Id.* at 101. Smalls's action does not lie "within the core of habeas corpus" because his conviction already has been invalidated, so his case falls outside the carefully circumscribed exception to § 1983.

The defendants' proposed rule would blow wide open the narrow exception to § 1983 established by *Heck* and its progeny. Instead of barring only those suits that would truly implicate the concerns discussed in *Heck*—because their success would *necessarily* imply the invalidity of an *actual* conviction or *actual* pending criminal proceedings—the defendants' rule would bar any claim, regardless of its elements, whose success would be in tension with a judgment *that already has been vacated*. The *McDonough* Court, in affirming that a conviction that has been "invalidated within the meaning of *Heck*" is no bar to a § 1983 evidence-fabrication lawsuit, did not mean to depart so dramatically from *Heck* and from longstanding § 1983 doctrine.

Further proof that *McDonough* merely extended the *Heck* rule, rather than requiring evidence of innocence, is that the Court in *McDonough* explicitly said it was "assum[ing] without deciding that the Second Circuit's articulations of the right at issue and its contours are sound." 139 S. Ct. at 2155; *see also id.* at 2160 n.9 (same). The Second Circuit has never required a § 1983 evidence-fabrication plaintiff to show innocence, and indeed has reaffirmed this rule since *McDonough* was decided: in this Circuit, "probable cause is not a defense to a fair trial claim based on the fabrication

of evidence," so the possible existence of independent inculpatory evidence is "irrelevant." *Frost*, 2020 WL 6603609, at *10. This is because it is axiomatic 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 omitted). A simple extension of the *Heck* rule is perfectly consistent with this principle; a requirement that an evidence-fabrication plaintiff show innocence is not.

Notwithstanding *McDonough*'s reiteration of *Heck*'s rule that any invalidation of a conviction allows a fair-trial claim to accrue, the defendants contend that the federal civil verdict in Smalls's favor cannot stand because it is "irreconcilabl[e]" with the state jury's verdict that Smalls possessed a gun. Def. Br. 17. But the state jury's verdict was vacated! It is a legal nullity. There is nothing to be reconciled. The defendants cite no legal authority under which a once-existing but since-vacated judgment will be given preclusive effect in a later legal proceeding. That is not how the law works.

The defendants also contend that Smalls should be stripped of the damages that a federal jury awarded him under § 1983 because, during his criminal proceedings, he, "through his [trial] attorney, claimed he had standing to request a suppression hearing because he possessed the gun police recovered." Defs.' Br. 26 (citing JA 256–57). But the federal jury heard this very argument and rejected it. Smalls's trial lawyer testified that Smalls was not the source of the statements that the lawyer wrote in the motion, May 16, 2019 Trial Tr. 20, JA 215, and Smalls "never admitted to [the lawyer that] he possessed the gun," May 16, 2019 Trial Tr. 22, JA 216. Rather, the lawyer was

"being artful . . . to get the hearing," May 16, 2019 Trial Tr. 20, JA 215, by relying on the factual allegations in the criminal complaint, May 16, 2019 Trial Tr. 18, JA 215. Smalls, for his part, testified that he "was never in possession of a weapon," May 15, 2019 Trial Tr. 188, JA 192, and denied ever telling his lawyer otherwise, May 15, 2019 Trial Tr. 190–91, JA 193. The federal jury, in finding that the officers' allegations were fabricated, necessarily accepted this testimony.[3]

The defendants' argument not only rejects the federal jury's verdict, which must be credited on appeal; it also disregards well-established Supreme Court precedent limiting the use of a criminal defendant's pretrial statements made to secure a suppression hearing. In *Simmons v. United States*, the Court recognized the tension between, on the one hand, requiring the accused to assert a possessory interest in property whose seizure he wishes to challenge, and on the other hand, honoring the right against self-incrimination. 390 U.S. 377, 390–94 (1968). Because it is "intolerable that one constitutional right should have to be surrendered in order to assert another," the Court held that the prosecution may not, in its case in chief, use the accused's statements made in support of a motion to suppress. *Id.* at 394. The defendants' rule is contrary to this principle. It would force victims of evidence

[3] The lawyer's testimony did not, as the defendants misleadingly imply, *see* Defs.' Br. 3 n.1, contradict the lawyer's statement in his motion that the motion was based in part on "conversations had with the defendant," JA 253. That language was part of a preface to the entire pretrial omnibus motion, appearing three pages before his suppression arguments. *See* JA 253, 256–57. The lawyer never wrote that Smalls told him he possessed the gun; as noted above, the lawyer testified that Smalls never told him this.

fabrication, like Smalls, to choose between their Fourth Amendment (or analogous state constitutional) rights and due process rights: if they wish to preserve their right to seek a remedy for police fabrication of evidence, they would have to forego their right to seek exclusion of evidence which, under the police officers' own account, was found illegally. Nothing in *McDonough*, or any case the defendants cite, requires criminal defendants to make such an unjust choice.

The defendants further contend that the Appellate Division, in vacating Smalls's conviction and dismissing the gun count, "assum[ed] it to be true that Smalls actually did have a gun and rul[ed] only that the police should not have been in a position to see him with that gun." Defs.' Br. 16 (citing JA 23). This is misleading. The Appellate Division never expressed any view on the veracity of the officer's account; it simply held that, *assuming* that the officer's testimony was true, the gun should have been suppressed. And once it overturned the hearing court's suppression order and the state jury's trial verdict, there no longer existed any finding that Smalls possessed a gun. Indeed, at the federal trial, the district court instructed the federal jury that the Appellate Division's decision "did not resolve or even address the issues which you will be called upon to decide"—*i.e.*, whether Smalls possessed a gun. May 15, 2019 Trial Tr. 173, JA 188.

C. The rest of the defendants' textual analysis of *McDonough* is wrong at every turn.

In the first sentence of their argument, the defendants wrongly contend that *McDonough* "altered the showing" required for an evidence-fabrication claim "seeking damages for *post-trial* detention," like Smalls's claim. Defs.' Br. 10 (emphasis added). But *McDonough* wasn't about post-trial damages at all; the plaintiff was acquitted, so he sought damages for his *pretrial* detention. *See McDonough*, 139 S. Ct. at 2154, 2156 & n.4. With respect to damages for post-trial—*i.e.*, post-conviction—detention, *McDonough* simply reaffirmed that, so long as the conviction has been "invalidated within the meaning of *Heck*," there is no bar to a § 1983 evidence-fabrication lawsuit.

The defendants contend that, because "*Heck* never described its rule as a requirement of 'favorable termination,'" while *McDonough* "described its own rule" that way, it follows that *McDonough* directly adopted malicious prosecution's favorable-termination element. Defs.' Br. 19. But, as noted above, *McDonough* itself referred to *Heck*'s rule as a "favorable-termination requirement," just like the Supreme Court and the circuit courts have done for years. Thus, if anything, *McDonough*'s use of the term "favorable termination" only reinforces our argument that it meant *Heck*'s rule, not the distinct favorable-termination element of the malicious prosecution tort.

The defendants argue that *McDonough* relies on "an extended analogy to malicious prosecution claims" and thus, to address its concerns about collateral attacks and conflicting judgments, must have adopted malicious prosecution's

favorable-termination element. Defs.' Br. 13. We discussed in our opening brief why this argument is meritless: *McDonough*'s reasoning by analogy was precisely the same reasoning by analogy the Court conducted in *Heck*, yet *Heck*'s rule of accrual for a fair-trial claim has never been understood to be the same as the predicate for a common-law malicious-prosecution claim. The difference in the two types of claims is precisely why the Court *analogized* only, both in *Heck* and *McDonough*. If *Heck* did not adopt the favorable-termination element of malicious prosecution, then *McDonough*, which precisely reprised *Heck*'s reasoning and reiterated its holding, did not do so either.

The defendants' argument is completely at odds with the Supreme Court's cautions that common-law analogies are "meant to guide rather than to control the definition of § 1983 claims"; that the common law is not a source of "prefabricated components," *McDonough*, 139 S. Ct. at 2156 (quoting *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017)); and that, in looking to common-law analogies, "courts must closely attend to the values and purposes of the constitutional right at issue," *Manuel*, 137 S. Ct. at 921. We explained in our opening brief how the values and purposes of the evidence-fabrication and malicious-prosecution torts differ—and thus why it makes sense for evidence-fabrication and malicious-prosecution claims to have different elements. *See* Pl.'s Br. 20–22. Indeed, this Court has just reaffirmed that evidence-fabrication claims "'cover kinds of police misconduct not addressed by false arrest or malicious prosecution claims' and that therefore 'probable cause [i.e., evidence of guilt] should not be used to immunize a police officer who violates an arrestee's non–

Fourth Amendment constitutional rights.'" *Frost*, 2020 WL 6603609, at *12 (quoting *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016)). The defendants do not address any of these points.

Nor do they explain how *McDonough* could have intended to collapse into one the constitutional torts of evidence fabrication and malicious prosecution, while at the same time upholding the plaintiff's evidence-fabrication claim after his malicious-prosecution claim had already been dismissed. *See McDonough*, 139 S. Ct. at 2154. Such an outcome would be nonsensical. Indeed, the Court repeatedly recognized the distinction between the two types of claims. *See id.* at 2156 n.5 ("the Second Circuit treats malicious prosecution claims and fabricated-evidence claims as distinct"); *id.* at 2159 ("a fabricated-evidence claim in the Second Circuit (unlike a malicious prosecution claim) can exist even if there is probable cause").[4]

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[4] In a footnote, the defendants incorrectly assert that the Supreme Court categorically precluded due-process evidence-fabrication claims for *pretrial* damages in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017). Defs.' Br. 10 n.4. But this Court has explicitly rejected that reading of *Manuel*. *See Frost*, 2020 WL 6603609, at *13 n.14 (upholding evidence-fabrication claim of plaintiff who was acquitted at his criminal trial). Indeed, *Manuel* discussed only claims of "pretrial detention *unsupported by probable cause*," not evidence-fabrication claims, which require no showing related to probable cause. 137 S. Ct. at 919 (emphasis added). Had *Manuel* ruled out such due-process claims, *McDonough* would not have assumed the correctness of the Second Circuit's caselaw holding that an evidence-fabrication claim for pretrial damages may arise under the Due Process Clause. *See McDonough*, 139 S. Ct. at 2155.

Nor did this Court hold in *Dufort v. City of New York* that evidence-fabrication claims for pretrial damages are "'coextensive with' malicious prosecution claims." Defs.' Br. 10 n.4 (quoting *Dufort*, 874 F.3d 338, 355 n.7 (2d Cir. 2017)). *Dufort* merely said, in a footnote, that the plaintiff's self-styled "'substantive due process' claim, *based on his constitutional right not to be arrested or detained without probable cause*," was really just a false-arrest or malicious-prosecution claim. *Dufort*, 874 F.3d at 355 n.7 (emphasis added). Thus, this Court held in *Frost* that *Dufort*

The defendants appear to argue that, in footnote 10 of *McDonough*, the Court left open entirely the question of what (other than an acquittal) counts as a favorable termination for purposes of an evidence-fabrication claim—and the defendants encourage this Court to reach the issue. *See* Defs.' Br. 13, 21. But that's not what the Supreme Court was saying when it wrote that it had "no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused." *McDonough*, 139 S. Ct. at 2160 n.10.

Footnote 10 concerned evidence-fabrication claims in cases, like McDonough's, involving pretrial damages where there was no conviction, not a case, like Heck's and Smalls's, where damages are sought based upon an invalidated conviction. The Court explained that it was responding to the argument, made by the civil defendants, that an accrual rule that required the favorable termination of a pending criminal prosecution would incentivize prosecutors to coerce criminal defendants into accepting plea bargains or force them to go to trial rather than outright dismiss wrongful prosecutions. *See id.* at 2160. Recognizing that "the potential incentive effects that Smith identifies could be valid," *id.*, and thus, that it was possible that "the law in this area should take account of prosecutors' broad discretion over such matters as the terms on which pleas will be offered or whether charges will be

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does not foreclose an evidence-fabrication claim for pretrial damages based on the Due Process Clause. *See Frost*, 2020 WL 6603609, at *12–13.

dropped," the Court noted that "[s]uch considerations might call for a context-specific and more capacious understanding of what constitutes 'favorable' termination for purposes of a § 1983 false-evidence claim," *id.* at 2160 n.10. Smalls's prosecution ended not with a coerced guilty plea, however, but rather with the invalidation of his conviction and a complete dismissal. Footnote 10 has nothing to do with a case like Smalls's, involving the traditional *Heck*-style factual scenario of an invalidated conviction.

Defendants fail to meaningfully distinguish the two circuit court decisions that favor our position. In *Roberts v. City of Fairbanks*, the Ninth Circuit rejected the defendants' argument that *McDonough* held "that *Heck* establishes an exact replica of the favorable-termination rule from the malicious-prosecution context." 947 F.3d 1191, 1201 n.11 (9th Cir. 2020). The defendants contend this reading of *McDonough* carries no weight because it is "not quite true" in this Circuit, as it is in the Ninth Circuit, that "*Heck*'s favorable-termination requirement is distinct from the favorable-termination element of a malicious-prosecution claim." Defs.' Br. 22 (quoting *Roberts*, 947 F.3d at 1201, and citing *Poventud*, 750 F.3d at 131, 136). But the defendants misread *Poventud*.

The issue in *Poventud* was whether a § 1983 plaintiff could recover damages for a fair-trial claim (there, a *Brady* violation) where his trial conviction, which caused his damages, had been overturned but he ultimately was forced to plead guilty to a lesser charge to secure his release from prison (ironically, the type of scenario envisioned by

the *McDonough* Court in footnote 10). Consistent with the Ninth Circuit's analysis in *Roberts,* the Second Circuit, sitting en banc, *distinguished* between malicious-prosecution and fair-trial claims for purposes of determining whether Poventud could sue. In a malicious-prosecution case, the Court recognized, *Heck* operates "coextensive[ly]" with malicious prosecution's favorable-termination-indicative-of-innocence element. *Poventud*, 750 F.3d at 131–32. This is because malicious prosecution has as an element favorable termination of the underlying proceeding. *Id.* However, the Court pointed out, there is no such element for a *Brady* claim. Such a claim, which seeks damages caused by an unfair trial, as opposed to the initiation of a prosecution for which there was never probable cause, does not necessarily impugn a subsequent guilty plea. On the contrary, the Court reasoned, Poventud's *Brady* claim satisfied *Heck* even though a malicious prosecution "would have been barred." *Id.* at 136. *Poventud* thus accords with the Ninth Circuit's view in *Roberts*, and the Supreme Court's holdings in *Heck* and *McDonough*, that *Heck*'s favorable-termination rule is distinct from malicious prosecution's favorable-termination element. The other circuit decision, *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020), *cert. denied*, No. 19-1360, 2020 WL 5882305 (U.S. Oct. 5, 2020), does too.[5]

[5] The defendants' claim that "the bulk of district courts in this Circuit" have sided with them, Defs.' Br. at 14, is also exaggerated; the split is six to five. The decisions that support our position are *Colon v. City of Rochester*, 419 F. Supp. 3d 586, 608 n.7 (W.D.N.Y. 2019) (Larimer, J.); *Wellner v. City of New York*, 393 F. Supp. 3d 388, 397 (S.D.N.Y. 2019) (Koeltl, J.); *Bobbit v. Marzan*, No. 16-CV-2042, 2020 WL 5633000, at *6 n.4 (S.D.N.Y. Sept. 21, 2020) (Torres, J.); *Simon v. City of New York*, No. 16-CV-1017, 2020 WL 1323114, at *6 (E.D.N.Y.

CONCLUSION

The district court's decision interpreting *McDonough* to require § 1983 evidence-fabrication plaintiffs to establish favorable termination indicative of innocence, as in a malicious prosecution case, was erroneous. *McDonough* instead requires such plaintiffs to establish favorable termination "within the meaning of *Heck*," and no more. Plaintiff-Appellant Andrew Smalls did just that when he succeeded in winning his state appeal, his conviction was reversed, and his indictment for gun possession was dismissed. He did what he was required to do to eliminate any possibility of simultaneous criminal and civil litigation, inconsistent results, and bypass of collateral-review procedures. The federal jury verdict in his favor should be reinstated and the case remanded for the district court to decide his motion for a new trial on damages.

Mar. 19, 2020) (Garaufis, J.); and *Ross v. City of New York*, No. 17-CV-3505, 2019 WL 4805147, at *6–*8 (E.D.N.Y. Sept. 30, 2019) (Chen, J.).

The decisions that support the defendants' position are *Daniels v. Taylor*, 443 F. Supp. 3d 471, 478–80 (S.D.N.Y. 2020) (Abrams, J.); *Miller v. Terrillion*, 436 F. Supp. 3d 598, 601–04 (E.D.N.Y. 2020) (Vitaliano, J.); *Maradiaga v. City of New York*, No. 16-CV-8325, 2020 WL 5849465, at *6 (S.D.N.Y. Oct. 1, 2020) (Daniels, J.); *Jamison v. Cavada*, No. 17-CV-1764, 2020 WL 3073234, at *2 (S.D.N.Y. June 10, 2020) (Swain, J.); *Corso v. Calle-Palomeque*, No. 17-CV-6096, 2020 WL 2731969, at *7–*8 (S.D.N.Y. May 26, 2020) (Buchwald, J.); and *Gondola v. City of New York*, No. 16-CV-369, 2020 WL 1433874, at *5 (E.D.N.Y. Mar. 24, 2020) (Donnelly, J.).

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I certify that this brief was prepared using Microsoft Word 2016, using 14-point Garamond font. According to that software, this brief contains 5,075 words, not including the cover, table of contents, table of authorities, caption, signature block, or this certificate.

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