No. 20-1331

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Deshawn Daniels,
Plaintiff-Appellant,

v.

Detective Brian Taylor, Detective Neil Magliano,
Detective James Cleary, and Sergeant Wesley Fradera,
Defendants-Appellees,

City of New York, John and Jane Does, 1-5, and Neil C. Magliano,
Defendants.

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

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, BRONX DEFENDERS, CATO INSTITUTE, CENTER FOR APPELLATE LITIGATION, CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NEW YORK UNIVERSITY SCHOOL OF LAW, LEGAL AID SOCIETY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL POLICE ACCOUNTABILITY PROJECT, NEW YORK CIVIL LIBERTIES UNION, NEW YORK STATE CHIEF DEFENDERS ASSOCIATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND OFFICE OF THE APPELLATE DEFENDER SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

No *amicus curiae* is owned by a parent corporation, and no publicly held corporation owns more than ten percent of stock in any *amicus*.

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INTRODUCTION AND STATEMENT OF INTEREST

Amici curiae are leading civil rights advocacy groups, criminal defense bar associations, indigent defense offices, and police accountability organizations.[1] *Amici*'s interest in this case stems from their dedication to defending the civil and constitutional rights of people who encounter law enforcement and the criminal justice system.

Amici urge this Court to hold that civil rights plaintiffs need not show, as a prerequisite to bringing constitutional tort claims for fabrication of evidence by police, that their underlying criminal case terminated in a manner affirmatively indicative of factual innocence.

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[1] *Amici curiae* are the American Civil Liberties Union, Bronx Defenders, Cato Institute, Center for Appellate Litigation, Center on the Administration of Criminal Law at New York University School of Law, Legal Aid Society, National Association of Criminal Defense Lawyers, National Police Accountability Project, New York Civil Liberties Union, New York State Chief Defenders Association, New York State Association of Criminal Defense Lawyers, and Office of the Appellate Defender. No party or its counsel authored this brief in whole or part. Neither a party or its counsel nor any other person contributed money to fund its preparation or submission. This brief is submitted on the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2). Substantively identical copies of this brief are being filed in *Smalls v. City of New York*, No. 20-1099, and *Daniels v. City of New York*, No. 20-1331. No part of this brief purports to represent the views of New York University School of Law, or New York University, if any.

The contrary rule adopted by the district courts in *Smalls* and *Daniels* has no grounding in practical reality, and it is unfair and unworkable as a result. Based on an overreading of *McDonough v. Smith*, 139 S. Ct. 2149 (2019), the district courts required Appellants Daniels and Smalls to prove—as an element of their civil claims against the police for fabricating evidence—that the criminal proceedings against them reached a "favorable termination" affirmatively indicating their innocence. According to the district courts, the dismissal of Appellants' criminal cases was not enough. This Court has never embraced such a requirement, which would collapse the important distinction between Fourth Amendment claims concerning arrest or prosecution without probable cause and Fourteenth Amendment claims concerning the denial of a fair trial. A long line of this Court's precedent, unaffected by *McDonough*, has upheld fabrication of evidence claims in cases without affirmative indications of innocence.

The district courts' rule would create a perverse incentive for prosecutors to aggressively pursue cases tainted by police misconduct, and would penalize criminal defendants who invoke prophylactic constitutional remedies and prevail before trial. The decisions below—if affirmed here—will also require federal judges in most police misconduct cases to perform

the impossible task of "looking behind" the proceedings in the criminal case to determine whether the outcome was indicative of factual innocence.

But our criminal justice system is simply not designed to reach conclusions about innocence. Claims of intentional misconduct by criminal defendants generally challenge the fairness of the criminal *process*. When required to prove prejudice or materiality, criminal defendants must generally do so with reference to the standard of guilt beyond a reasonable doubt, not innocence. Inquiries into whether criminal proceedings were compromised by intentional misconduct virtually never ask whether the defendant was factually innocent. Requiring an "affirmative indication of innocence" as a prerequisite to civil recovery for deliberate misconduct would therefore require a victim to make a cruel choice between liberty and justice. He can gain his freedom in a manner that does not establish his "innocence" and cuts off his path to compensation, or he can wait, likely in vain, for an elusive "indication" of innocence that our system is not equipped to provide.

The district courts' rule would insulate police officers who knowingly fabricate evidence for use in criminal investigations and prosecutions from civil liability, as long as other non-fabricated evidence is (arguably) sufficient to establish a basis for arrest or prosecution. But "[n]o arrest, no

matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (holding that probable cause to arrest does not vitiate civil rights claims for fabrication of evidence). Neither the accused's inability to obtain an adjudication of "innocence" nor their decision to accept a disposition of criminal charges short of total exoneration should preclude a remedy for police misconduct.

As a matter of fairness to criminal defendants—including innocent victims of police misconduct—and to avoid downstream effects that could warp the functioning of the criminal justice system, this Court should reverse.

ARGUMENT

This brief proceeds in two parts.

Part I offers observations, based on *amici*'s experience, about how the criminal justice system functions in everyday reality. In considering whether to subject victims of intentional police misconduct to a new "affirmative indication of innocence" requirement, the Court should take account of the disturbing prevalence and devastating consequences of such misconduct, as well the structural inability of the criminal justice system to produce findings of "innocence."

Against this backdrop, Part II argues that the district courts' rule threatens unacceptable consequences. It would cut off remedies for victims of grave injustice, subject criminal defendants to still more arbitrary exercises of prosecutorial power, and lead to unfair results in federal civil rights cases.

I. EVIDENCE FABRICATION IS A SERIOUS AND PERVASIVE PROBLEM, AND ITS INNOCENT VICTIMS OFTEN DO NOT OBTAIN AN "INDICATION OF INNOCENCE"

In evaluating whether a civil plaintiff should be required to prove that his or her criminal case terminated in a manner indicating innocence as an element of a fabrication claim against the police, the Court should keep in mind two important practical realities. First, evidence fabrication and similar misconduct are discouragingly prevalent, are extremely serious, and can have devastating consequences. Second, the criminal proceedings against innocent victims of such misconduct often resolve in a range of dispositions short of outright dismissal on the merits or acquittal.

A. Evidence Fabrication Is an Extremely Serious and Distressingly Pervasive Problem

As the law has long recognized, the intentional fabrication of evidence by police officers "make[s] 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; *see Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Knowingly falsifying evidence against a suspect or an accused person is among the most serious misconduct a government official can commit.

Evidence fabrication is disturbingly common.[2] *See generally* Joseph Goldstein, *"Testlying" By Police: A Stubborn Problem*, N.Y. Times, Mar. 18, 2018, *available at* http://perma.cc/KUC9-XCMU. Individual police officers who have a practice of fabricating evidence can singlehandedly poison dozens, if not hundreds, of cases. *See,* Larry Yellen, *Nineteenth Inmate Exonerated in Case of Notorious Chicago Police Detective*, Fox 32, Jan. 16, 2019 (describing 19 exonerations to date arising from 51 murder convictions obtained by Chicago detective Reynaldo Guevara), *available at* https://tinyurl.com/y897dqfj; Alan Feuer, *Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed*, N.Y. Times, Jan. 11, 2018 (at

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[2] Given the opacity and ineffectiveness of police discipline, and the lack of national misconduct databases, high-quality official data on the prevalence of evidence fabrication is difficult to find. It is notable, however, that just-released data from the New York Civilian Complaint Review Board indicates that more than 10 percent of active New York City police officers have a substantiated finding of misconduct of some kind. *See* Christopher Robbins et al., *Newly Released Data Shows 1 Out of Every 9 NYPD Officers Has a Confirmed Record of Misconduct*, Gothamist, https://gothamist.com/news/nypd-police-ccrb-database-shows-confirmed-record-misconduct (last visited July 29, 2020).

least fourteen wrongful convictions linked to Brooklyn homicide detective Lou Scarcella), *available at* http://perma.cc/85SN-HZYN.

Indeed, evidence fabrication is a leading cause of wrongful convictions. For example, many false confessions arise from deliberate evidence fabrication by interrogating officers, who may claim that a suspect volunteered information that was actually supplied by investigators or coerce a suspect to sign a fabricated confession authored by the police. Of the first 367 known DNA exonerations in the United States—in which DNA conclusively proving that the convicted person was not the perpetrator—*28 percent* of wrongfully convicted persons had falsely confessed.[3] More than half of exonerations documented in the National Registry of Exonerations involve official misconduct.[4]

In fashioning remedies for such misconduct, this Court should recognize that civil liability is an important source of deterrence and redress for widespread unlawful police practices that persist in law enforcement agencies across the United States.

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[3] Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states (last visited July 22, 2020).

[4] Univ. of Mich. Sch. of Law, *National Registry of Exonerations*, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited July 22, 2020).

B. Innocent Victims of Evidence Fabrication Often Accept Outcomes Short of Dismissal or Outright Acquittal

Even innocent people who are the victims of police fabrication frequently, for rational and overpowering reasons, accept dispositions that do not exonerate them or indicate their innocence. Dispositions that provide true affirmative indications of innocence are rare.

The dismissal of a criminal case, whether before or during trial or after a vacated conviction, can happen for a variety of reasons that may be contested or unclear on the face of the record. The prosecution may become convinced that the defendant is factually innocent, but may not say so explicitly. A complaining witness may choose not to cooperate, making it impossible for the prosecution to prove its case. Inculpatory evidence may be suppressed because the police obtained it in a manner that violated a defendant's constitutional rights. The prosecution may decide that it is not a prudent use of public resources to proceed. Or some combination of the above may occur. The tribunal itself is usually silent on the "real" reasons for dismissal.

Moreover, criminal proceedings against factually innocent people who have been victimized by police misconduct often resolve in a manner other than dismissal or acquittal. In New York, likely the most common negotiated disposition accepted by factually innocent people is an

adjournment in contemplation of dismissal ("ACD") under Criminal Procedure Law ("CPL") §§ 170.55 or 210.47.[5] From the accused's perspective, an ACD accomplishes exactly the same thing as an acquittal or an immediate dismissal: no record, no jail time, and no collateral consequences. The arrest, criminal proceedings, and all associated records are all sealed under CPL § 160.50, as with any other dismissal. If offered an ACD, a criminal defendant who is factually innocent will often accept it rather than wait for a trial—and with good reason. It spares the need to make repeated court appearances, potentially over the course of years, that can mean missing paychecks or losing a job. And legally speaking, it is as if the arrest and prosecution never happened.

For reasons similar to those that might prompt reluctant acceptance of an ACD, factually innocent people often plead guilty because the additional consequences they would face if found guilty at trial simply

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[5] An ACD "is an adjournment of the action without date," ordered by the court on the consent of the parties, "with a view to ultimate dismissal of the accusatory instrument in furtherance of justice." CPL § 170.55(2). An ACD "shall *not* be deemed to be a conviction or an admission of guilt." *Id.* § 170.55(8) (emphasis added). Assuming that the person satisfies any conditions of the adjournment and that the accusatory instrument is ultimately dismissed as contemplated, "the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution." *Id.*

present an intolerable risk.[6] As the Supreme Court has recognized, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Less than three percent of state and federal criminal cases now resolve in jury trials.[7] Sentencing exposure is among the most important reasons why trials have disappeared. For example, the NACDL has documented based upon publicly available data provided by the U.S. Sentencing Commission that the average federal sentence at trial is *more than three times* the length of the average federal sentence after a plea. The average federal drug distribution sentence is 5.2 years after a plea, and 14.5 years after trial; for firearms, it is 5.8 years for a plea and 17.6 for a trial.[8]

This "trial penalty"—the overwhelming increase in sentencing exposure that results from exercising one's Sixth Amendment rights—can coerce even innocent people into pleading guilty. Scholars have estimated

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[6] This Court has repeatedly recognized as much. *See, e.g.*, *Friedman v. Rahal*, 618 F.3d 142, 158 (2d Cir. 2010) ("[E]ven if innocent, petitioner may well have pled guilty . . . ."); *Poventud v. City of New York*, 750 F.3d 121, 144-45 (2d Cir. 2014) (Lynch, C.J., concurring) ("The choice of freedom in exchange for an admission would be easy for a guilty man, but even an innocent one would be hard pressed to decline the prosecution's offer.").

[7] *See* NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It 5 (2018).

[8] *See id.* at 20-21.

that anywhere between 1.6 and 27 percent of the people who plead guilty are factually innocent.[9] The National Registry of Exonerations includes 540 known exonerations of persons who pleaded guilty.[10] According to data compiled by the Innocence Project, more than ten percent of known DNA exonerations—41 of 367—involve defendants who pleaded guilty to a crime they did not commit.[11]

The trial penalty can distort plea bargaining even *after* a wrongful conviction has been vacated. When a wrongful conviction has been vacated by a court or on consent of the prosecution, it is not uncommon for the prosecution to demand a guilty plea to some offense in exchange for not retrying the defendant. The pressure for an innocent person to plead guilty to finally secure the freedom long denied him can be overwhelming. The rule proposed by Appellants would not foreclose civil remedies in such

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[9] *See* Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 Utah L. Rev. 51, 85.

[10] *See* Univ. of Mich. Sch. of Law, *National Registry of Exonerations*, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P (last visited July 22, 2020) (registry filtered for pleas of guilty).

[11] Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states (last visited July 22, 2020).

circumstances, because a § 1983 evidence fabrication suit brought after vacatur of a conviction "would not render invalid any subsequent, plea-based judgment" against the plaintiff. *Poventud*, 750 F.3d at 136.

In this Circuit, Plaintiffs have brought successful civil evidence fabrication claims in all of these scenarios—dismissals for complex reasons whose relationship to innocence is unclear, ACDs, and guilty pleas to lesser offenses where evidence fabrication caused an additional protracted deprivation of liberty. Within the past year, district courts applying *McDonough* in these scenarios, including in Appellants' cases, have reached divergent and confusing results.[12]

We now explain why *McDonough* does not and should not displace this Court's existing law on the elements of a fabrication claim. For reasons of fairness, predictability, and accountability, this Court should not recognize a new "affirmative indication of innocence" element of a civil claim for fabrication of evidence.

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[12] *Compare, e.g.*, *Smalls v. Collins*, No. 14 Civ. 02326, 2020 WL 2563393, at *6-*7 (E.D.N.Y. Mar. 16, 2020) (dismissal after successful appeal of denial of motion to suppress was insufficiently indicative of innocence), *and Daniels v. Taylor*, --- F. Supp. 3d ----, 2020 WL 1165836, at *5-6 (S.D.N.Y. Mar. 11, 2020) (dismissing evidence fabrication claim where plaintiff accepted an ACD), *with Ross v. City of New York*, 2019 WL 4805147, at *8 (E.D.N.Y. Sept. 30, 2019) (plaintiff who accepted ACD could recover for evidence fabrication).

II. REQUIRING INDICIA OF INNOCENCE FOR CIVIL RIGHTS CLAIMS OF EVIDENCE FABRICATION IS UNFAIR AND UNWORKABLE

The longstanding doctrinal difference between malicious prosecution claims, which concern prosecution without basis, and fabrication of evidence claims, which concern corruption of the judicial process, is unaffected by the Supreme Court's decision in *McDonough*. The district courts' rule would unjustifiably limit accountability and compensation for serious wrongdoing, warp the criminal justice process by giving prosecutors unfair incentives, and burden district courts with the incoherent task of determining when a state criminal justice system has indicated innocence.

A. *McDonough* Does Not Affect the Substantive Difference Between Malicious Prosecution Claims and Fabrication Claims, Which Address Corruption of the Criminal Process Regardless of Probable Cause

Since *Ricciuti*, this Court has recognized that § 1983 must afford a remedy to criminal defendants who suffer deprivations of liberty because of evidence fabrication, *regardless* of what other evidence against them may exist. "To hold that police officers, having lawfully arrested a suspect, are then free 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*, 124 F.3d at 130. Accordingly, a fabrication plaintiff need only show a causal nexus between the fabrication and some

liberty deprivation. *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 277 (2d Cir. 2016).

This rule "is entirely sound," because evidence fabrication claims redress corruptions of the truth-seeking process that affect protected liberty interests irrespective of other evidence against the accused. *Id.* (noting that fabricated evidence may affect the setting of bail and the exercise of prosecutorial charging discretion even where other evidence is sufficient to supply probable cause). By contrast, constitutional malicious prosecution claims—which *do* require "that the underlying criminal proceeding ended in a manner that affirmatively indicates [the plaintiff's] innocence," *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018)—serve a different purpose. The "essence" of such claims "is the alleged groundless prosecution, without which there would not be any basis for the claim." *Singleton v. City of New York*, 632 F.2d 185 195 (2d Cir. 1980). Thus, "absent an affirmative indication that the person is innocent of the offense charged, the government's failure to proceed does not necessarily imply a lack of reasonable grounds for the prosecution." *Lanning*, 909 F.3d at 28 (internal quotation marks and alteration omitted).

Requiring this showing may make sense in malicious prosecution cases arising under the Fourth Amendment, where the gravamen of the

plaintiff's claim is that he was prosecuted without a good faith basis to believe him guilty. But it is out of place in the evidence fabrication context, where the existence of other, non-fabricated evidence is irrelevant to the constitutional violation at issue. *Garnett*, 838 F.3d at 278 (observing that "probable cause . . . should not be used to immunize a police officer who violates an arrestee's non-Fourth Amendment constitutional rights"). Police fabrication of evidence corrupts decision-making by prosecutors, judges, and juries even where probable cause exists. The rule embraced by the district courts below thus has no place in the jurisprudence of evidence fabrication claims arising under the Fourteenth Amendment under Section 1983.

Nothing about *McDonough* changes this analysis. There, the Supreme Court simply extended the delayed accrual rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), to evidence fabrication claims that would impugn a pending criminal prosecution. *Heck* bars civil rights claims from proceeding so long as a conviction exists whose validity could be called into question by the civil litigation. *Wallace v. Kato*, 549 U.S. 384, 393 (2007). *McDonough* extended this rule to delay the accrual of "a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing." 139 S. Ct. at 2158.

By applying *Heck*'s accrual rule to evidence fabrication claims, *McDonough* did not implicitly require civil rights plaintiffs to show that the disposition of their criminal case was affirmatively indicative of innocence. Under *Heck*, a civil claim under § 1983 that would imply the invalidity of a criminal conviction does not accrue "unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Heck*, 512 U.S. at 489. There is no requirement of any affirmative indication of innocence—only that the conviction no longer exists. Analogously, under *McDonough*, the accrual of an evidence fabrication claim that would impugn pending criminal proceedings is delayed "while those criminal proceedings are ongoing." *McDonough*, 139 S. Ct. at 2158. So long as there is no outstanding conviction or pending criminal proceeding, the *Heck*/*McDonough* accrual inquiry is at its end, and *McDonough* has nothing more to say about the viability of particular claims. *See Spak v. Phillips*, 857 F.3d 458, 462 (2d Cir. 2017) ("While the same phrase—'favorable termination'—is used in both the accrual analysis and the merits analysis of a Section 1983 suit, it is analyzed under a different legal standard in each context."). As the Seventh Circuit recognized recently in *Savory v. Cannon*, the potential criminal dispositions outlined in *Heck* that trigger delayed accrual of federal civil

claims rarely, if ever, involve an adjudication of the criminal defendant's innocence. 947 F.3d 409, 429 (7th Cir. 2020) (en banc). The same is true of the acquittal that triggered claim accrual in *McDonough*—"another resolution that does not necessarily imply innocence." *Id.*

B. The District Courts' Rule Would Be Unjust and Unworkable

Adopting the district courts' new rule risks perverse consequences. It threatens to foreclose accountability and compensation for extremely serious injustice. It would give prosecutors still more power over criminal defendants, including wrongfully convicted ones, in potentially harmful ways. And it would require district courts to look behind state criminal procedure to determine whether a disposition indicated innocence—a fundamentally unanswerable question that will lead to arbitrary and unprincipled results.

1. The District Courts' Rule Undermines the Core Accountability Function of § 1983

"[T]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). The district courts' misguided rule jeopardizes this core aim by threatening to foreclose some of the most important civil rights

claims that federal courts hear—often brought by Black and Hispanic men who have been deprived of the prime of their adult lives.[13]

For example, Devon Ayers, Michael Cosme, and Carlos Perez were wrongfully convicted of the 1995 murders of Denise Raymond and Baithe Diop. The prosecution contended that these two separate incidents of murder were part of a single gang conspiracy, a theory supported by two supposed witnesses whose testimony the defendants insisted was fabricated by the police.[14] In 2013, the real perpetrators of the Diop murder confessed and exonerated the defendants. As a result, the Bronx District Attorney's Office consented to vacatur of the defendants' convictions for this murder, but insisted it might somehow retry them for the Raymond murder—despite having imprisoned them for 18 years on the theory that both crimes were committed by the same people. *See* Tr. of Jan. 23, 2013 Hr'g in People v. Ayers, ECF No. 87-6, *Field v. City of New York*, No. 14 Civ. 01378

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[13] More than 63 percent of the exonerations in the National Registry of Exonerations are of non-white persons. *See Exonerations By Race and Crime*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx (last visited July 22, 2020).

[14] *See* Colin Moynihan, *Set Free in 1995 Killings, 3 Bronx Men File Suits Alleging Police Misconduct*, N.Y. Times (Mar. 11, 2014), *available at* https://www.nytimes.com/2014/03/12/nyregion/set-free-in-killings-3-bronx-men-file-suits-alleging-police-misconduct.html.

(S.D.N.Y. Mar. 31, 2016). When the prosecution was finally forced to concede that there was no basis for a retrial and agreed to dismiss the indictment, the judge apologized to the defendants in open court for their suffering, telling them: "You are all exonerated, and I do hope that you can move on with your lives as in the fashion that you would all deserve." Tr. of Sept. 20, 2013 Hr'g in People v. Ayers at 15-16, ECF No. 87-7, *Field v. City of New York*, No. 14 Civ. 01378 (S.D.N.Y. Mar. 31, 2016). In response, the prosecutor objected that "[w]e have not made a decision, or conclusion, regarding exoneration of these defendants," insisting that while they could not be retried based on available evidence, the People had not "come to any conclusions regarding the guilt of these defendants." *Id.* at 16.

After their criminal cases were dismissed, Ayers, Cosme, and Perez sued two police detectives for fabrication of evidence, and each ultimately obtained an $8 million settlement.[15] But because they were never adjudicated innocent in criminal court—indeed, the prosecution implausibly insisted that the dismissal had nothing to do with any determination that their original convictions were erroneous—the district

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[15] *See* Benjamin Weiser, *New York City to Settle with 5 Over Wrongful Conviction Claims*, N.Y. Times (Apr. 21, 2016), *available at* https://www.nytimes.com/2016/04/22/nyregion/new-york-city-settling-with-5-over-wrongful-murder-convictions-in-bronx.html.

courts' rule could conceivably have foreclosed these civil claims. That result would be a gross miscarriage of justice.

The district courts' rule threatens civil recovery and accountability in more quotidian but no less important cases as well, as the experience of Appellant Deshawn Daniels illustrates. According to his federal civil rights complaint, Daniels was arrested during a traffic stop and brought to a police precinct, where NYPD officers handcuffed him, forced him to strip to his underwear in public, forcibly probed his anus, and assaulted him when he tried to resist. *Daniels*, 2020 WL 1165836, at *1. Daniels was then charged with criminal possession of a weapon on the basis of a knife officers claimed they found in his jacket, but which Daniels maintains never existed. *Id.* at *3. His criminal case was resolved through an ACD, and the charges were dismissed. *Id.* The district court in *Daniels* dismissed his evidence fabrication claim based on a malicious prosecution-type "favorable termination" requirement ostensibly derived from *McDonough*. *Id.* at *5-*6. As a result, Daniels—who has never been convicted of anything and has always maintained his innocence, and whose case prosecutors declined to present to a fact-finder—has been deprived of any civil remedy, notwithstanding that his entire criminal prosecution allegedly resulted from evidence that was made up out of whole cloth by the police.

Despite the features that make it functionally indistinguishable from an immediate dismissal, *see supra* Part I(B), this Court has held that an ACD "leaves open the question of the accused's guilt" and generally does not qualify as a favorable termination indicative of innocence. *Singleton*, 632 F.2d at 193. But while an ACD thus generally bars a malicious prosecution claim, it does *not* implicate the *Heck* bar, which applies only to criminal *convictions* that might be impugned by civil proceedings. *Zarro v. Spitzer*, 274 F. App'x 31, 35 (2d Cir. 2008). Because Daniels has no conviction and no pending criminal case, *McDonough*'s extension of the *Heck* rule to evidence fabrication suits should not bar his claim.

Finally, in addition to its obvious importance to victims who suffer wrongful deprivations of liberty, the existence of civil remedies for such misconduct is important for society at large. In pursuing § 1983 claims, a victim of police misconduct acts not only for himself, "but also as a 'private attorney general," vindicating a "policy that Congress considered of the highest priority." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). Particularly given the rarity of robust internal discipline or criminal

penalties for police misconduct, § 1983 represents one of the most viable avenues for deterrence and accountability.[16]

2. The District Courts' Rule Would Harmfully Exacerbate the Existing Power Imbalance Against Criminal Defendants

The possibility that civil recovery might be cut off by any termination of criminal proceedings that does not affirmatively indicate innocence would put criminal defendants—especially wrongfully convicted ones—in an impossible bind, and would give prosecutors perverse incentives to prolong wrongful deprivations of liberty.

The district courts' rule would force criminal defendants into an impossible choice between liberty (ending the criminal proceedings) and justice (preserving civil remedies). Under the district courts' rule, any defendant who defeats the charges against him on grounds not directly related to factual innocence—such as by winning a motion to suppress evidence that was unlawfully seized, challenging the use of statements

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[16] *See, e.g.*, Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 641, 661-62 (2012) (using law enforcement data to show that civil lawsuits play an important role in deterring police misconduct); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. Rev. 1443, 1487 (damages have stronger deterrent effect than the exclusionary rule).

obtained in violation of his right to counsel or his privilege against self-incrimination, or asserting his right to a speedy trial—risks foreclosing his own future civil rights case. Yet the same defendant would retain the right to sue for evidence fabrication if he forwent the pretrial motion, subjected himself to a trial, and won an acquittal. The district courts' rule would incentivize a criminal defendant who believes the police have fabricated evidence against him *not* to assert prophylactic constitutional remedies and to instead roll the dice at trial.

A rule allowing the government to avoid a lawsuit by achieving some non-acquittal outcome in criminal cases where evidence fabrication is suspected or alleged would therefore perversely incentivize prosecutors to pursue such cases *more* aggressively. If the prosecutor can pressure the defendant to accept some outcome other than an acquittal—perhaps by overcharging him and offering an adjournment in contemplation of dismissal or a plea bargain on a less serious offense—she can foreclose a future damages case that might expose officers to liability or uncover further misconduct in discovery. Given the interdependent police-prosecutor relationship—in which prosecutors rely on police for leads and testimony—prosecutors are already unduly incentivized to make these deals

to protect their joint venture from court scrutiny.[17] The district courts' rule would only make matters worse.

Indeed, the *respondent* in *McDonough* raised this very concern before the Supreme Court, arguing that "adopting a rule whereby [law enforcement officers] can be sued only upon favorable termination offers those actors a powerful incentive to ensure that the proceedings do not terminate favorably," raising the concern that "abusive government actors" could be encouraged to double down on misconduct in order to take advantage of an overly restrictive favorable termination requirement. *See* Brief of Respondent, *McDonough v. Smith*, No. 18-485, 2018 WL 7890209 (U.S. Mar. 27, 2018). To address this possibility, the Supreme Court suggested that the realities of "prosecutors' broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped" might require a "more capacious understanding of what constitutes 'favorable' termination for purposes of a § 1983 false-evidence claim." *McDonough*, 139 S. Ct. at 2160 n.10. The district courts' rule, which strictly construes what termination is "favorable" and gives

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[17] Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct* (Apr. 27, 2020). 100 B.U.L.REV. 895 (2020), available at SSRN: https://ssrn.com/abstract=3586770.

prosecutors both motive and opportunity to forestall future civil rights claims, flies in the face of this admonition.

The concern that prosecutors might unjustifiably prolong a deprivation of liberty to foreclose a criminal defendant's civil claims is not theoretical. It is particularly acute in the context of post-exoneration proceedings, where the threat of a retrial gives the state enormous leverage. To take an egregious example, in *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020), four Alaskan Native and Native American men were wrongfully convicted of a homicide to which another man confessed—a confession corroborated by 11 other witnesses. *Id.* at 1194. The Alaska Attorney General office had received a memorandum from a former Fairbanks prosecutor warning that the "convictions were likely to be vacated and that a retrial would be 'virtually unwinnable,'" and that the lead investigator of the murder had coerced confessions and deceptively recorded interviews to omit exculpatory evidence. *Id.* The memo warned of tens of millions of dollars in civil liability for the City of Fairbanks. *See id.* Despite overwhelming evidence of the four men's innocence—including the confession corroborated by 11 witnesses—the Alaska Attorney General's office insisted upon a "release-dismissal" agreement to vacate the convictions and demanded that the men waive all civil claims against the

City of Fairbanks and its employees to be released from prison. *See id.* at 1195.

The Ninth Circuit held that, notwithstanding that the convictions had been vacated pursuant to an agreement between prosecutors and the defendants, *Heck* did not bar the men's civil rights claims. *See id.* at 1201-03. But under the district courts' rule, a claim analogous to those in *Roberts* might well be dismissed. *See Rothstein v. Carriere*, 373 F.3d 275, 286 (2d Cir. 2004) (observing that a termination is not favorable for purposes of malicious prosecution "if the charge is withdrawn or the prosecution abandoned pursuant to a compromise with the accused").

Augmenting prosecutors' discretion to control a defendant's access to civil remedies exacerbates an already harmful imbalance of power.

C. The District Courts' Rule Is Not Administrable and Will Yield Arbitrary Results

To determine whether an evidence fabrication plaintiff's underlying criminal case terminated under circumstances affirmatively indicating innocence, federal courts will be forced to search for hidden meaning behind state-court criminal procedures that those processes are not intended or equipped to convey. For instance, federal judges will be required to assess—as the district court purported to do in *Smalls*—whether a criminal defendant's assertion of constitutional or procedural rights was

really the righteous act of an innocent person, or the exploitation of a "technicality" by a guilty one.

A district judge tasked with this undertaking is unlikely to find clear guidance in this Court's decisions on related subjects. *Compare, e.g.*, *Murphy v. Lynn*, 118 F.3d 938, 949 (2d Cir. 1997) (holding that a dismissal "brought about by the accused's assertion of a constitutional or other privilege . . ., such as the right to a speedy trial" is generally favorable to the accused for purposes of malicious prosecution), *with*, *e.g.*, *Black v. Petitinato*, 761 F. App'x 18, 23 (2d Cir. 2019) (holding that dismissal of an indictment for facial insufficiency is not a favorable termination), *and Gonzalez v. City of Schenectady*, 728 F.3d 149, 162 (2d Cir. 2013) (holding that dismissal due to suppression of evidence obtained from an unconstitutional body cavity search was not favorable because the suppressed evidence demonstrated plaintiff's guilt).

The district courts' rule would also arbitrarily condition federal civil rights remedies on the procedural history of state criminal cases. Appellant Smalls's case provides an example. Smalls has always maintained that he never possessed the gun he was convicted of having—and a federal jury agreed. Yet the district court held that the dismissal of criminal charges against him, which followed an appellate ruling suppressing evidence, did

not affirmatively indicate his innocence. In reaching this conclusion, the district court observed that the Appellate Division's decision did not "undermine" the jury's factual finding of Smalls's guilt[18]—an issue that was not before it. *Smalls*, 2020 WL 2563393, at *8.

But suppose the trial court in Smalls's criminal case had suppressed the evidence in the first instance—as the Appellate Division decision makes clear it should have—and Smalls had then been acquitted by a jury that was never improperly exposed to the suppressed evidence. Would a district judge in a subsequent evidence fabrication suit be required to look behind that acquittal to determine whether "the circumstances of the suppression of evidence, which led to the termination of [his] underlying prosecution, did not 'affirmatively indicate his innocence'?" *Id.* Surely not, for an acquittal is the paradigmatic "favorable termination"—but a principled basis for this distinction is elusive. Why is it more "favorable" for the prosecution to *try and fail* to prove its case beyond a reasonable doubt after evidence is suppressed than to be *unable to even try* to prove its case after evidence is suppressed? A dismissal, which signals that the prosecution cannot proceed to trial, is arguably *more* favorable than an acquittal.

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[18] Of course, every wrongful conviction plaintiff has perforce been convicted by a state court jury

Taken to its logical conclusion, the district courts' rule would require federal judges in every civil rights case alleging fabrication of evidence to perform the impossible task of "looking behind" the criminal proceeding to determine whether any given outcome is indicative of factual innocence. Did the prosecutor offer an adjournment in contemplation of dismissal or a plea bargain for a lesser offense as an act of leniency toward a guilty defendant, out of concern that a weak case would not hold up at trial, or for some other eason? Was the district attorney's abandonment of a case in the face of impending speedy trial deadlines a function of resource allocation prerogatives unrelated to the merits, or an implicit concession that there was insufficient cause to proceed? Does evidence suppressed due to a Fourth Amendment or *Miranda* violation nonetheless justify a civil court's confidence in the accused's guilt, or does the very nature of the unlawful conduct that led to its suppression render such evidence unreliable?

Even in theory, state criminal proceedings are simply not equipped to render "affirmative indications of innocence." They are designed to test the government's ability to prove its case beyond a reasonable doubt, not the accused's ability to prove his innocence. In the practical reality in which "plea bargaining . . . *is* the criminal justice system," *Missouri v. Frye*, 566

U.S. 134, 144 (2012), the system often fails to achieve even this basic purpose.

Even when a criminal defendant has powerful evidence of innocence, it is rare that innocence is adjudicated in the course of criminal proceedings. For example, a claim regarding suppression or fabrication of evidence might result in the reversal of a conviction on direct appeal or the grant of post-conviction relief, but the court granting that relief does so based on a finding that due process was violated, not a finding that the defendant is innocent. The same is true when the claim is that a confession was coerced in violation of the right to be free of compelled self-incrimination. Often, criminal defendants who insist they have been wrongfully convicted pursue multiple claims for relief in post-conviction proceedings, one of which is a claim that their criminal defense counsel was constitutionally ineffective. Ineffective assistance of counsel is among the most common bases for granting post-conviction relief, but it rarely comes with an adjudication of innocence. Nor do executive pardons, appellate reversals based on insufficiency of the evidence at trial, or numerous other processes through which a criminal conviction may be overturned.

Criminal cases and prosecutions come to an end in the overwhelming majority of cases without any opportunity for the defendant to obtain an

adjudication of innocence. It is an intentional feature of our constitutional system, and yet another reason that the district courts' rule is untenable.

Any attempt to retrospectively draw conclusions about innocence from the particular procedural route that led to a non-conviction outcome will be futile at best and arbitrary and discriminatory at worst. Whatever the role of such considerations in malicious prosecution cases, which call upon federal courts to adjudicate whether a state prosecution was unreasonably groundless, they have no place in the evidence fabrication context—as a matter of both practicality and basic fairness. As this Court has repeatedly recognized, "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," regardless of how the criminal proceeding ultimately came to an end.[19] *Ricciuti*, 124 F.3d at 130.

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[19] To the extent any concern exists about recovery by victims of evidence fabrication who were guilty of the crimes charged and would have been charged and/or convicted in the same manner even without the fabrication, a favorable termination requirement is entirely unnecessary to address it. Even without a favorable termination requirement, a plaintiff must, of course, prove a causal nexus between the fabrication and his injuries. A civil defendant will have a strong argument that a guilty plaintiff's *own conduct*, not police fabrication of evidence, caused his loss of liberty. Put another way, a guilty person who would have been deprived of liberty to the same extent absent the fabrication likely has no damages. The question before the Court is whether these issues will be resolved in the context of a federal civil rights action under traditional principles of causation and damages, or whether prosecutors and state criminal

Predicating important civil rights remedies on the niceties of state criminal procedure is a recipe for confusion and injustice. A bright-line delayed accrual rule that looks only to the existence of a conviction or the pendency of a criminal proceeding is fairer and more administrable.

CONCLUSION

Heck, which bars civil rights claims that would impugn a valid criminal judgment, already provides district courts with a gatekeeping tool sufficient to ensure that federal courts are not inundated with evidence fabrication claims that undermine the finality of state criminal proceedings. These comity concerns animated the Supreme Court's decision in *McDonough* to delay the accrual of evidence fabrication claims while the underlying criminal proceeding remains pending. *See* 139 S. Ct. at 2157 (observing that delayed accrual of evidence fabrication claims "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments"). Requiring civil rights plaintiffs whose claims already clear these hurdles to satisfy an additional substantive requirement that

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tribunals will be empowered to cut off any further inquiry through the procedural vehicle they choose to dispose of criminal proceedings.

their criminal case terminated in a manner affirmatively indicating innocence would do nothing to further those principles. Such a rule would instead contravene the long-recognized purposes of fair trial claims under § 1983, needlessly excuse egregious law enforcement abuses, and introduce perverse incentives that could undermine the proper functioning of state criminal courts.

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