No. ___

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

JARRETT FROST,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

GEORGIA M. PESTANA
Acting Corporation Counsel of the City of New York
RICHARD DEARING*
SCOTT SHORR
JESSE A. TOWNSEND
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

* Counsel of Record

Counsel for Petitioners

June 21, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), this Court recognized that the Fourth Amendment, not the Due Process Clause, governs claims challenging pretrial detentions based on allegations of evidence fabrication. Here, however, despite rejecting a § 1983 plaintiff's Fourth Amendment challenge to his pretrial detention because it was supported by probable cause, independent of the disputed evidence, a split panel of the U.S. Court of Appeals for the Second Circuit permitted him to pursue a due process-based claim challenging the same lawfully supported detention. The question presented is:

Where a § 1983 plaintiff alleges that his pretrial detention was influenced by fabricated evidence, and the existence of probable cause independent of the challenged evidence defeats his Fourth Amendment claim, may he still pursue a due process-based claim based on alleged use of the same challenged evidence in securing the same pretrial detention?

PARTIES TO THE PROCEEDING

Petitioners—The City of New York, Detective Michael Lopuzzo, Detective Richard Spennicchia, and Detective Joseph O'Neil—were defendants-appellees in the court of appeals.

Respondent Jarrett Frost was the plaintiff-appellant in the court of appeals.

Detectives John Doe #1-4, Correction Officers John Doe #1-5, and Correction Officer Thomas were defendants in the district court and were not appellants or appellees in the court of appeals. The following parties were defendants-appellees in the court of appeals, but have no interest in the question presented here: New York City Police Department, New York City Department of Correction, District Attorney Robert T. Johnson, District Attorney Robert Hertz, Correction Officer Torres, Correction Officer Soria, Correction Officer Carty, Correction Officer Souffrant, Correction Officer Tatulli, Correction Officer Captain McDuffie, Correction Officer Previllon, Correction Officer Gonzalez, Correction Officer Captain Ryan, Correction Officer Young, Correction Officer McLaughlin, Correction Officer Barksdale, Correction Officer Corker, Correction Officer Sanchez, Correction Officer Hill, Correction Officer Captain Clayton Jemmott, and Correction Officer Jaye Joye.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Frost v. City of New York, No. 15-cv-4843 (Mar. 28, 2019) (judgment)

United States Court of Appeals (2d Cir.):

Frost v. New York City Police Department, 19-1163 (Nov. 12, 2020) (judgment); (Jan. 21, 2021) (order denying petition for rehearing and rehearing en banc)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS	iii
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	4
I. THE MURDER OF MAVON CHAPMAN, FOR WHICH FROST WAS CHARGED AND ACQUITTED.	4
II. THIS § 1983 LAWSUIT	6
A. The district court's grant of summary judgment	6
B. The court of appeals' partial reversal of the district court	8
REASONS TO GRANT THE PETITION	12
I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS.	12
A. The two-judge majority misinterpreted *Manuel v. City of Joliet*.	12
B. The decision below ignores this Court's admonitions about expanding the scope of the Due Process Clause…	13

TABLE OF CONTENTS—Continued

Page

II. AFTER *MANUEL*, THE CIRCUITS REMAIN DEEPLY SPLIT OVER WHETHER THE DUE PROCESS CLAUSE GOVERNS PRETRIAL DETENTIONS. 17

A. Four circuits now reject, in at least some circumstances, due process challenges to the pretrial use of allegedly fabricated evidence. 17

B. Another five circuits have recognized due process challenges to the pretrial use of fabricated evidence. 20

III. THIS CASE IS AN IDEAL VEHICLE FOR CONSIDERING THE DIVISION OF LABOR BETWEEN THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE. 23

IV. THE QUESTION PRESENTED IS IMPORTANT. 24

CONCLUSION 30

TABLE OF CONTENTS—Continued

APPENDIX Page

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit, Filed November 12, 2020 .... 1a

APPENDIX B: Opinion of the United States District Court for the Southern District of New York, Filed March 27, 2019 .... 58a

APPENDIX C: Order of the United States Court of Appeals for the Second Circuit, Filed January 21, 2021 .... 88a

TABLE OF AUTHORITIES

CASES Page(s)

Albright v. Oliver,
510 U.S. 266 (1994).............................. 15, 16, 26

Appling v. City of New York,
No. 18-cv-5486, 2021 U.S. Dist. LEXIS
34060 (E.D.N.Y. Feb. 23, 2021)................ 26

Ashley v. City of New York,
992 F.3d 128 (2d Cir. 2021)....................... 25, 26

Black v. Montgomery County,
835 F.3d 358 (3d Cir. 2016)....................... 17, 18

Buari v. City of New York,
No. 18-cv-12299, 2021 U.S. Dist. LEXIS
61273 (S.D.N.Y. Mar. 30, 2021)................ 26

Cole v. Carson,
802 F.3d 752 (5th Cir. 2015)..................... 17, 21

Cole v. Carson,
935 F.3d 444 (5th Cir. 2019)..................... 21

County of Sacramento v. Lewis,
523 U.S. 833 (1998)................................... 10

Delade v. Cargan,
972 F.3d 207 (3d Cir. 2020)...................... 20

Devereaux v. Abbey,
263 F.3d 1070 (9th Cir. 2001)................... 22

Dufort v. City of New York,
874 F.3d 338 (2d Cir. 2017)...................... 9

Evans v. Chalmers,
703 F.3d 636 (4th Cir. 2012)..................... 18

TABLE OF AUTHORITIES—Continued

Page(s)

Franks v. Delaware,
438 U.S. 154 (1978)................................... 28

Frost v. City of New York,
980 F.3d 231 (2020) ....*passim*

Frost v. City of New York,
No. 15-cv-4843,
2019 U.S. Dist. LEXIS 52207
(S.D.N.Y. Mar. 27, 2019) 3, 6, 7, 8

Garnett v. Undercover Officer C0039,
838 F.3d 265 (2d Cir. 2016) 9, 14, 26

Gerstein v. Pugh,
420 U.S. 103 (1975)................................... 14, 16

Graham v. Connor,
490 U.S. 386 (1989)....................... 10, 14, 15, 16

Gutierrez v. City of New York,
No. 18-cv-3621, 2021 U.S. Dist. LEXIS
33013 (E.D.N.Y. Feb. 22, 2021)................ 26

Hartman v. Moore,
547 U.S. 250 (2006)................................... 28

Johnson v. McCarver,
942 F.3d 405 (8th Cir. 2019)..................... 19, 20

Jordan v. Town of Waldoboro,
943 F.3d 532 (1st Cir. 2019) 28

Klen v. City of Loveland,
661 F.3d 498 (10th Cir. 2011)................... 22

Lewis v. City of Chicago,
914 F.3d 472 (7th Cir. 2019)..................... 18, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Manganiello v. City of New York,
612 F.3d 149 (2d Cir. 2010) 8

Manuel v. City of Joliet,
137 S. Ct. 911 (2017)................................*passim*

Massey v. Ojaniit,
759 F.3d 343 (4th Cir. 2014)..................... 18

McIntosh v. City of New York,
722 F. App'x 42 (2d Cir. 2018).................. 14

Medina v. City of New York,
No. 20-cv-0797, 2021 U.S. Dist. LEXIS
82339 (S.D.N.Y. Apr. 29, 2021) 26

Moran v. Clarke,
296 F.3d 638 (8th Cir. 2002)............... 18, 19, 20

Nieves v. Bartlett,
139 S. Ct. 1715 (2019).............................. 28

Norales v. Acevedo,
No. 20-cv-2044, 2021 U.S. Dist. LEXIS
34361 (S.D.N.Y. Feb. 24, 2021) 26

Ricciuti v. New York City Transit Auth.,
124 F.3d 123 (2d Cir. 1997) 9, 21, 26

Shimomura v. Carlson,
811 F.3d 349 (10th Cir. 2015)................... 22

Spencer v. Peters,
857 F.3d 789 (9th Cir. 2017)..................... 22

United States v. Lanier,
520 U.S. 259 (1997)................................... 10, 13

Page(s)

Walsh v. City of New York, No. 19-cv-9238, 2021 U.S. Dist. LEXIS 62982 (S.D.N.Y. Mar. 31, 2021)................ 26

Weiland v. Palm Beach County Sheriff's Office, 792 F.3d 1313 (11th Cir. 2015)..... 22-23

Whitlock v. Brueggemann, 682 F.3d 567 (7th Cir. 2012)..................... 18, 29

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000)...................... 14

CONSTITUTION

U.S. Const. amend. IV................................*passim*

U.S. Const. amend. XIV, § 1 ....*passim*

STATUTES

28 U.S.C. § 1254(1)...................................... 3

42 U.S.C. § 1983 ....*passim*

N.Y. Penal Law § 195.00............................. 29

N.Y. Penal Law § 210.45............................. 29

INTRODUCTION

While investigating a murder, New York City police officers obtained a statement from a witness who identified respondent Jarrett Frost as the person who shot the victim. This identification was just one item in a constellation of evidence linking Frost to the crimes for which he was later charged. Without ever hearing the identification testimony, a criminal jury acquitted Frost. He later brought this § 1983 action against the defendant police officers and the City of New York, alleging that his pretrial detention was illegal because the police had extracted a false identification from the witness.

Frost asserted two different constitutional claims against the police officers for the same alleged conduct and injury, arguing that his pretrial detention violated both the Fourth Amendment and the Due Process Clause due to alleged fabrication of evidence. On appeal from a district court order granting summary judgment to the defendants, the Second Circuit held that there was probable cause for Frost's detention even without the challenged identification, and so his Fourth Amendment claim could not go forward. But, over a dissent, the panel majority held that Frost could pursue a due process claim based on the identical facts.

In allowing the due process claim to proceed, the majority showed little regard for *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), where this Court recognized that the Fourth Amendment, not the Due Process Clause, governs a claim that a pretrial detention was based on fabricated evidence. At the same time, the majority disregarded this Court's repeated admonitions about substantive due process: it should not be invoked where a more specific constitutional provision, such as the Fourth Amendment, applies.

Not only did the panel majority brush aside this Court's precedent, it also cemented a circuit split on this exact issue. Even before *Manuel*, the circuits were split on whether the Due Process Clause or the Fourth Amendment (or both) governs fabrication-of-evidence claims in the pretrial context. Since *Manuel*, several circuits have come to recognize that plaintiffs may assert such claims only under the Fourth Amendment. In contrast, the Second Circuit's decision below joins a post-*Manuel* decision from the en banc Fifth Circuit in adhering to the view that plaintiffs may pursue such claims under the Due Process Clause. In doing so, neither court persuasively explained how its decision was consistent with *Manuel*.

Practically, the decision below not only furthers a division among the circuits, but deepens the ongoing uncertainty about which standards govern the work of investigatory officials. And even where a pretrial detention is unquestionably supported by probable cause, the Second Circuit's approach permits thinly supported claims of fabricated evidence to proceed to trial against those officials.

The Second Circuit's decision ignores *Manuel*. It ignores this Court's warning against undue expansions of the Due Process Clause. It also furthers an ongoing circuit split. And on a more practical level, it casts aside the Fourth Amendment's objective standard of probable cause in favor of inquiries into how a particular piece of evidence influenced a criminal prosecution and how it might have influenced a criminal jury that never actually heard it. At the same time, this case offers an excellent vehicle for the Court's review: Frost no longer has a Fourth Amendment claim, so his case against the officers (and, derivatively, the City) hinges on the viability of his due process claim.

For all of these reasons, this Court should grant the petition.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-57a) are reported at 980 F.3d 231. The opinion of the district court (Pet. App. 58a-87a) is not reported in the Federal Supplement, but is available at 2019 U.S. Dist. LEXIS 52207.

JURISDICTION

The court of appeals entered its opinion and order on November 12, 2020, and denied rehearing and rehearing en banc on January 21, 2021 (*see* Pet. App. 88a-89a). On March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari to June 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT

I. THE MURDER OF MAVON CHAPMAN, FOR WHICH FROST WAS CHARGED AND ACQUITTED

Early one summer morning in 2010, Mavon Chapman was shot and killed in New York City (Joint Appendix ("JA") 1236). The day before, several members of a group standing near Chapman had assaulted Frost and a friend, sending the friend to the hospital with a broken jaw (JA1236-38). Surveillance footage confirms that Frost and another man were present at the scene for the next day's shooting. Immediately after the shooting, the footage shows, Frost and the other man ran away from the area in Frost's building from where shots had been fired (JA1240-41).

Three NYPD detectives, all defendants here, investigated the homicide (JA1237-38). The officers interviewed several eyewitnesses who were with Chapman when he was shot, including non-party Leon Vega, but

none admitted seeing who shot Chapman (JA1238-40). Another officer recognized Frost in the surveillance footage (JA1241-42). The officers interviewed Frost, who admitted being in the area at the time of the shooting but identified another man, John McLaurin, as being present and holding a gun (JA1243-46). The officers could not locate McLaurin at the time (JA1246).

Six months after the shooting, Vega was arrested on an unrelated matter (JA1247). To help himself in his criminal case, Vega reached out to the prosecutors investigating Chapman's murder to offer additional information about it (JA1602). In the presence of his criminal defense attorney, Vega revealed to a prosecutor from the Bronx District Attorney's office that he saw Frost and McLaurin together at the time of the shooting, and that he saw Frost shoot Chapman. Vega also identified Frost and McLaurin in photo arrays (JA1247-48).

A few days later, a detective located McLaurin (JA1248). McLaurin admitted that during the shooting he was with Frost, whom he identified in a photograph (JA1248-52). McLaurin reported that he saw Frost looking out of a stairwell door that was cracked open, heard gunshots, and then saw Frost putting a silver gun in his pants or pocket (JA1250-51). When McLaurin asked Frost why he had done "that," Frost responded that it was because "they" had put his friend in the hospital the previous night (JA1251).

Given the surveillance footage of Frost running from the area where the shots were fired, his admission to being at the scene, two identifications of Frost as the shooter, and Frost's motive of revenge, the Bronx's DA's office authorized Frost's arrest (JA1252). He was arraigned and remanded and shortly after was

indicted by a grand jury for murder and other charges (JA1002, 1836). Vega and McLaurin testified before the grand jury (JA1428).

At Frost's criminal trial, McLaurin identified him as the shooter, but Vega did not (JA1008-17).[1] The criminal jury acquitted Frost (JA1001).

II. THIS § 1983 LAWSUIT

A. The district court's grant of summary judgment

After his acquittal, Frost filed a civil suit under 42 U.S.C. § 1983 against the City of New York, two of its agencies, various City employees, and two prosecutors. In his amended complaint, Frost alleged malicious prosecution by the NYPD detectives, several municipal liability claims, and a substantive due process claim against all individual defendants (JA68-117).[2]

Frost's substantive due process claim evolved as the litigation progressed. Initially, Frost merely alleged that the defendants engaged in unspecified conduct that "shocked the conscience" (JA91-94). Later, in opposition to defendants' motion for summary judgment, Frost asserted that the police had

[1] The district court explained that Vega took the stand at Frost's criminal trial and claimed to have no memory of the shooting or of Frost (Pet. App. 75a-76a).

[2] Frost also alleged that he suffered several incidents of excessive force at the hands of correctional officers during his time in detention (JA99-100). The district court dismissed all of the excessive force claims on summary judgment (Pet. App. 78a-84a). The court of appeals unanimously affirmed as to one incident, but reversed as to two others (Pet. App. 32a-44a). Petitioners do not seek review of the court's excessive force holdings.

fabricated evidence. He submitted a barebones declaration from Vega, stating for the first time that after he reached out to offer information about Chapman's murder, the NYPD detectives, in the presence of his own defense attorney and a prosecutor, coerced him into falsely identifying Frost (JA1601-03). According to Vega, the detectives pointed to a photograph of Frost, said "this is the guy," and "made it clear" that he needed to identify Frost in order to get a plea bargain (JA1602-03). Vega claimed he did not testify against Frost at Frost's criminal trial because he did not want to continue to lie (JA1603). He did not address why he had taken the stand and professed to have forgotten all about the shooting (*see* Pet. App. 75a-76a).

Armed with Vega's declaration, Frost repackaged his due process claim as one for pretrial detention due to the NYPD officers' alleged fabrication of Vega's identification, which the Second Circuit categorizes as a "denial of fair trial" claim. Neither Frost's complaint nor the summary judgment record identified any evidence about the impact that Vega's identification, specifically, had on the prosecutor's decision to pursue charges against Frost and seek a pretrial remand, on the criminal court's decision to order a pretrial remand, or on the grand jury's decision to indict Frost.

The district court found Vega's declaration incredible as a matter of law (Pet. App. 75a-76a). Additionally, the court held that the undisputed facts, absent Vega's statement, furnished probable cause for Frost's arrest and disposed of the malicious prosecution claim (Pet. App. 77a-78a). And the court dismissed Frost's substantive due process claim because it had granted summary judgment on his other claims based on standards less demanding to the plaintiff than the

"conscience-shocking" substantive due process standard (Pet. App. 84a-85a). Frost appealed.

B. The court of appeals' partial reversal of the district court

A panel of the Court of Appeals for the Second Circuit affirmed in part and reversed in part. Although the panel disagreed with the district court's determination that Vega's declaration was incredible as a matter of law, it affirmed the dismissal of Frost's Fourth Amendment-based malicious prosecution claim on an alternative ground (Pet. App. 14a). The panel unanimously held that even without Vega's eyewitness identification, the defendants had probable cause to arrest and charge Frost, based on the undisputed facts that Frost had a motive to retaliate against Chapman, was present when Chapman was shot, and had been identified by McLaurin as the shooter (Pet. App. 15a-18a). The existence of probable cause thus disposed of Frost's malicious prosecution claim (Pet. App. 18a). *See Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010).

But the panel split on the issue presented here: whether Frost could pursue a claim concerning his pretrial detention on due process grounds, despite the existence of probable cause. Over one judge's dissent (*see* Pet. App. 46a-57a (Kearse, J., dissenting)), the majority held that Frost's substantive due process claim could proceed against the NYPD detectives (Pet. App. 25a-32a (Katzmann, J., majority)).

The majority's starting point was the Second Circuit's prior case law on the due process-based "right to a fair trial" claim (Pet. App. 18a). The two-judge majority emphasized that under Second Circuit precedent, the "perhaps imprecisely named" fair trial claim

protects against a *pretrial* deprivation of liberty that "results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*" (Pet. App. 30a). *See Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016). Moreover, under the court's precedent, a fair trial claim concerning a pretrial deprivation of liberty is actionable even if the defendants had probable cause independent of the allegedly fabricated evidence (Pet. App. 25a-26a). *Garnett*, 838 F.3d at 277-78; *see also Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 129-30 (2d Cir. 1997).

Under this precedent, the majority reasoned, Frost could pursue a fair trial claim in which a civil jury would need to answer a counterfactual question: if it had been presented during Frost's murder trial, would Vega's identification have influenced the jury? (Pet. App. 30a). If so, the panel majority continued, then Vega's identification could have "critically influenced" the prosecutor's decision to charge Frost, and thus could have caused his pretrial deprivation of liberty (Pet. App. 26a).

Still focused on its fair-trial precedent, the two-judge majority distinguished Frost's case from a prior decision, *Dufort v. City of New York*, 874 F.3d 338, 354-55 (2d Cir. 2017), where the Second Circuit had held that a due process-based fabricated evidence claim was not viable because the alleged fabrication did not impact the plaintiff's criminal trial (Pet. App. 31a-32a). The majority argued that the key difference was that Frost's fabricated evidence claim focused on his pretrial detention, not the conduct of his criminal trial, while Dufort had brought claims concerning both (*id.*).

The panel majority rejected the idea that under this Court's decision in *Manuel*, 137 S. Ct. 911, the Fourth Amendment provides the exclusive constitutional basis for a claim that fabricated evidence resulted in a pretrial detention (Pet. App. 32a). While acknowledging this Court's holding that the Fourth Amendment's protections survive the initiation of legal process, the majority reiterated that under the Second Circuit's precedent, a due process-based fabrication claim may accrue before a trial takes place (*id.*).

Based in part on its holding that Frost had presented a triable issue on his due process claim, the majority also vacated the dismissal of Frost's derivative § 1983 claim against the City (Pet. App. 44a-45a). The court remanded that claim for further consideration in light of its opinion.

Judge Kearse dissented from the panel's holding that Frost could pursue a substantive due process claim. The dissent would have affirmed the dismissal of Frost's due process claim and limited fair trial claims to situations where the allegedly fabricated evidence actually impacted the criminal trial (Pet. App. 46a).

In criticizing the majority's holding that Frost's due process claim for his pretrial detention was cognizable, the dissent noted this Court's repeated holdings that substantive due process is an inappropriate rubric for analysis if a claim is covered by a specific constitutional provision (Pet. App. 48a). *See County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *Graham v. Connor*, 490 U.S. 386, 395 (1989). And the dissent emphasized that under this Court's decision in *Manuel*, the Fourth Amendment, rather than the Due Process Clause, governs a § 1983 claim

that the use of allegedly fabricated evidence caused a pretrial detention (Pet. App. 48a-60a). *See Manuel*, 137 S. Ct. at 919-20 & n.8. The dissent concluded that under this Court's precedent, the Second Circuit should have analyzed Frost's fabricated evidence claim only under the Fourth Amendment (Pet. App. 50a, 54a).

The dissent closed by highlighting the curious implications of the majority's decision permitting Frost to pursue a due process claim. On the one hand, the panel held that based on the undisputed facts (i.e., the facts excluding Vega's allegedly fabricated identification), probable cause existed for Frost's detention and prosecution because "a reasonably prudent person would have been led to believe that Frost was guilty of shooting Chapman" (Pet. App. 56a (emphasis omitted)). But on the other hand, Frost would be able to argue, while pursuing his due process claim, that the allegedly fabricated evidence "critically influenced" the decision to charge him (*id*. (emphasis omitted)). The dissent also criticized the fact that even though the jury in Frost's criminal case never heard Vega's allegedly fabricated identification, a civil jury would be called upon to speculate about what would have happened if the criminal jury *had* heard it (Pet. App. 57a).

Defendants petitioned for rehearing or rehearing en banc on the majority's decision to permit Frost to pursue a due process claim (*see* ECF No. 94-1). The Second Circuit denied the petition without opinion (Pet. App. 88a-89a).

REASONS TO GRANT THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS.

A. The two-judge majority misinterpreted *Manuel v. City of Joliet*.

a. As the dissent below observed, the majority's decision below is incompatible with this Court's 2017 decision in *Manuel*. In *Manuel*, the Court considered a § 1983 plaintiff's claim that he had been held in pretrial detention, in violation of the Fourth Amendment, because a judge relied upon fabricated evidence at a probable cause hearing. 137 S. Ct. at 915. The Seventh Circuit had upheld the dismissal of the plaintiff's Fourth Amendment claim. Under that court's precedent, a plaintiff detained pursuant to legal process could assert only a due process claim, not a Fourth Amendment claim. *Id*. at 916.

This Court reversed, holding that the Fourth Amendment—including its probable cause standard—"governs a claim for unlawful pretrial detention even beyond the start of legal process." *Id*. at 920. The Court noted that the commencement of legal process, such as an arraignment or grand jury indictment, does not eliminate a plaintiff's Fourth Amendment claim or "somehow . . . convert that claim into one founded on the Due Process Clause." *Id*. at 919-20 & n.8. There is instead a "constitutional division of labor" between the Fourth Amendment, which governs claims challenging pretrial deprivations of liberty, and the Fourteenth Amendment's Due Process Clause, which governs claims that the evidence presented during a criminal trial was insufficient to support a conviction and incarceration. *Id*. at 920 n.8.

b. The panel majority below disrupted the division of labor between the Fourth Amendment and the Due Process Clause framed in *Manuel*. As the two-judge majority conceded, Frost's due process claim addressed only his pretrial detention, because the alleged fabrication had no impact on his criminal trial (Pet. App. 31a). *Manuel* makes clear that the Fourth Amendment governs such claims. 137 S. Ct. at 919-20 & n.8. But the majority below allowed Frost to pursue a due process claim, on the theory that *Manuel* leaves § 1983 plaintiffs free to pursue a claim concerning pretrial detention under *either* the Fourth Amendment or the Due Process Clause, even where the two claims would lead to different results (Pet. App. 32a). That reading of *Manuel* ignores this Court's analytical line-drawing: the Fourth Amendment governs pretrial detention claims; the Due Process Clause doesn't kick in until a trial has occurred. *Manuel*, 137 S. Ct. at 920 n.8. After all, *Manuel* referenced a "constitutional *division* of labor," not a duplication of it. *Id*. (emphasis added).

B. The decision below ignores this Court's admonitions about expanding the scope of the Due Process Clause.

a. The decision below is doubly inconsistent with the Court's precedent because it considered Frost's claim under the Due Process Clause's so-called "substantive" component. Time and again, this Court has warned that litigants and courts should not invoke substantive due process when a more specific provision of the Constitution, such as the Fourth Amendment, already regulates the challenged government action. *See, e.g., United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

This Court has not hesitated to apply the more-specific-provision rule to protect the Fourth Amendment's territory from encroachment by the Due Process Clause. Relying on the basic principle behind this rule in *Gerstein v. Pugh*, 420 U.S. 103, 125-26 (1975), this Court held that the Fourth Amendment requires a probable cause determination by a neutral magistrate as a condition of significant pretrial detention, but declined to flesh out the rights of pretrial detainees by reference to due process jurisprudence. *Id*. at 125 n.27. This Court hewed to the Fourth Amendment because that constitutional provision "was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *Id*.

b. This point is especially applicable in this case, where both Frost and the court below considered the fabricated evidence claim to be a vindication of a *substantive* due process right (Pet. App. 18a; JA91-94).[3] In *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court rejected the application of substantive due process standards to a claim that officers used excessive force during an investigatory stop. The Court held that because "the Fourth Amendment provides

---

[3] The Second Circuit has not consistently described which component of the Due Process Clause protects the "fair trial" right in the pretrial setting. *Compare Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000) (suggesting procedural due process), *with McIntosh v. City of New York*, 722 F. App'x 42, 45 & n.2 (2d Cir. 2018) (suggesting substantive due process); *see also Garnett v. Undercover Officer C0039*, 838 F.3d 265, 276 n.6 (2d Cir. 2016) (declining to decide the right's source).

an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id*.

This Court's more-specific-provision precedent supports the line *Manuel* drew between the Fourth Amendment, which governs pretrial detention claims, and the Due Process Clause, which governs post-trial detention claims. *Manuel*, 137 S. Ct. at 920 n.8. Because *Manuel* makes clear that the Fourth Amendment covers claims of pretrial detention based on allegedly fabricated evidence, the more-specific-provision rule should prevent litigants from challenging the same alleged conduct and injury as a violation of substantive due process.

c. Without explicitly invoking the more-specific-provision rule, *Manuel* endorsed the plurality decision in *Albright v. Oliver*, 510 U.S. 266 (1994), which held that the Fourth Amendment, not substantive due process, governs claims concerning pretrial detentions accompanying criminal process. *See Manuel*, 137 S. Ct. at 918. The plurality started with the observation that "the Court has always been reluctant to expand the concept of substantive due process" beyond matters such as "marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 271-72. Next, the plurality repeated *Graham*'s more-specific-provision rule: if a specific amendment applies to the conduct at issue, that amendment, rather than substantive due process, governs a claim challenging that behavior. *Id*. at 273. And finally, the plurality noted that the "Framers considered the matter of pretrial deprivations of liberty and

drafted the Fourth Amendment to address it." *Id*. at 274.

Based on the preceding points, the *Albright* plurality concluded that a plaintiff's claim that he was deprived of liberty pretrial without probable cause must be judged under the standards of the Fourth Amendment, rather than substantive due process. *Id*. at 271, 274-75. An opinion concurring in judgment also directed plaintiffs to the Fourth Amendment, rather than substantive due process, at least barring some "exceptional case[]." *See id*. at 286-91 (Souter, J., concurring in judgment).

d. The *Albright* plurality's analysis reinforces the point that Frost's fabricated evidence claim implicates the Fourth Amendment, not substantive due process. By nevertheless invoking substantive due process, the majority below took that concept, usually reserved for matters relating to bodily autonomy and procreation, deep into issues of criminal procedure. And it did so even though the Fourth Amendment was specifically drafted to address pretrial deprivations of liberty like the one Frost challenges in this lawsuit, and even though the Fourth Amendment itself defines the process due to criminal suspects. *Gerstein*, 420 U.S. at 125 n.27. Because the text of the Fourth Amendment sets the standards for pretrial detention, courts may not reach to the "scarce and open-ended" guideposts of substantive due process instead. *Albright*, 510 U.S. at 272 (plurality) (quotation marks omitted). In defiance of *Albright* and *Graham*, the majority below did exactly that (Pet. App. 18a, 26a-30a).

II. AFTER *MANUEL*, THE CIRCUITS REMAIN DEEPLY SPLIT OVER WHETHER THE DUE PROCESS CLAUSE GOVERNS PRETRIAL DETENTIONS.

The circuits have long wrestled with the question of whether a plaintiff may sue under the Due Process Clause for the use of fabricated evidence in support of a pretrial detention. And they remain intractably split today, even after *Manuel*.

Before *Manuel*, the split was lopsided in favor of the rule that plaintiffs may pursue such a claim as a violation of due process. *See Black v. Montgomery County*, 835 F.3d 358, 371 (3d Cir. 2016) (collecting cases); *Cole v. Carson*, 802 F.3d 752, 768-73 (5th Cir. 2015) (same). *Manuel* sparked a realignment: now four circuits have rejected such claims, in some or all circumstances. Another five, including the Second Circuit, recognize such claims. Two of those circuits—the Second and the Fifth—have expressly adhered to their view after *Manuel*, with the former court denying en banc review and the latter one issuing its decision en banc. Thus, only a grant of certiorari can resolve the sharp split in circuit-level authority.

A. Four circuits now reject, in at least some circumstances, due process challenges to the pretrial use of allegedly fabricated evidence.

At least four circuits have rejected due process-based fabrication claims in some or all pretrial contexts. While one had done so before *Manuel*, another three have revisited their prior decisions in light of *Manuel* and concluded that the Fourth Amendment is the appropriate basis for such claims.

a. Even before *Manuel*, the Fourth Circuit had held that under this Court's more-specific-provision precedent, the use of fabricated evidence pretrial, such as in securing an indictment, gave rise to a claim under the Fourth Amendment, not the Due Process Clause. *Evans v. Chalmers*, 703 F.3d 636, 646 n.2 (4th Cir. 2012). The Fourth Circuit recognizes a due process right to not be deprived of liberty as the result of fabricated evidence, but the relevant loss of liberty is "conviction and subsequent incarceration"—that is, plaintiffs must show that they have been tried and convicted because of fabricated evidence. *Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014). Because the Fourth Circuit's pre-*Manuel* precedent is consistent with *Manuel*, there is no need for the Fourth Circuit to reconsider its holdings that fabricated-evidence challenges to pretrial detention are grounded in the Fourth Amendment, not the Due Process Clause.

b. Before *Manuel*, the Third, Seventh, and Eighth Circuits—among others—had permitted due process-based challenges to the use of fabricated evidence pretrial. *See*, *e.g.*, *Black*, 835 F.3d at 371; *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012); *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002). Each of those three circuits changed course after *Manuel*.

In *Lewis v. City of Chicago*, 914 F.3d 472, 475 (7th Cir. 2019), a post-*Manuel* case much like this one, the Seventh Circuit held that under *Manuel*, the plaintiff could challenge the evidentiary basis for his pretrial detention only under the Fourth Amendment. The plaintiff alleged that he had spent years in pretrial detention based on allegedly fabricated evidence presented in probable cause hearings. After the charges against him were dropped, the plaintiff sued, asserting

claims under both the Fourth Amendment and the Due Process Clause. *Id*. The Seventh Circuit held that only the Fourth Amendment claim was viable, since *Manuel* made it "clear that a § 1983 claim for unlawful pretrial detention rests *exclusively* on the Fourth Amendment," even if the claim arises after the initiation of legal process. *Id*. at 478. In addition, the Seventh Circuit overruled prior case law to the extent it suggested that claims of wrongful pretrial detention could be remedied under the Due Process Clause. *Id*. at 479. While so doing, it noted that claims for wrongful conviction based on fabricated evidence remain viable under the rubric of due process. *Id*.

Before *Manuel*, the Eighth Circuit had recognized a free-standing fabrication of evidence claim under the Due Process Clause because, as it understood the law, the Fourth Amendment did not protect against the use of fabricated evidence to manufacture the probable cause necessary to initiate a criminal prosecution. *Moran*, 296 F.3d at 647. That turned out to be inconsistent with *Manuel*, where this Court categorized similar claims as arising under the Fourth Amendment, rather than the Due Process Clause. 137 S. Ct. at 919-20.

After *Manuel*, the Eighth Circuit rejected its prior approach. *See Johnson v. McCarver*, 942 F.3d 405, 410-11 (8th Cir. 2019). The court reasoned that under *Manuel*, "[a]ny deprivation of [plaintiff's] liberty before his criminal trial . . . is governed by the Fourth Amendment." *Id*. And because the plaintiff had been acquitted at trial, he had not suffered a post-trial deprivation of liberty either. *Id*. at 411. In reaching its holding, the court recognized that *Manuel* had abrogated its earlier precedent recognizing a free-standing

fabrication-of-evidence claim under the Due Process Clause. *Id*. at 411 (citing *Moran*, 296 F.3d 638).

Finally, in the post-*Manuel* case *Delade v. Cargan*, 972 F.3d 207, 213 (3d Cir. 2020), the Third Circuit held that a plaintiff could not bring a due process-based claim for the alleged use of fabricated evidence to arrest and detain him pending an initial criminal appearance. Although the plaintiff had also alleged a Fourth Amendment claim based on the same arrest and detention, that claim had been dismissed based on the presence of probable cause. *Id*. at 209. The court held that under *Manuel* and this Court's more-specific-provision jurisprudence, only the Fourth Amendment governs claims of "unlawful arrest and pretrial restraint." *Id*. at 210-12. Although the Third Circuit reserved decision on whether a plaintiff could bring a due process-based claim for alleged fabrication of evidence resulting in a pretrial detention past the initial appearance before the criminal court, *id.* at 212 n.4, it did not identify any reason why this Court's precedent would yield a different result in that situation.

B. Another five circuits have recognized due process challenges to the pretrial use of fabricated evidence.

Disagreeing with the cases discussed above, other circuits have suggested that plaintiffs may challenge the pretrial use of allegedly fabricated evidence under the Fourteenth Amendment. At least five circuits have done so, including two that have reaffirmed their positions after *Manuel*.

a. Before *Manuel*, the Second and Fifth Circuits were among the circuits that had recognized a due process claim concerning the use of fabricated evi-

dence to support a pretrial deprivation of liberty. *See Cole v. Carson*, 802 F.3d 752, 768-73 (5th Cir. 2015); *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). Neither circuit has read *Manuel* as requiring a course correction. The Second Circuit reached that decision in the majority opinion below. And in a later iteration of its *Cole v. Carson* matter, the en banc Fifth Circuit adhered to its prior holding that the plaintiff could bring a due process-based claim that allegedly fabricated evidence led to a pretrial deprivation of liberty, even while a Fourth Amendment claim based on the same allegations failed due to the existence of probable cause. 935 F.3d 444, 451 (5th Cir. 2019). The court rejected the argument that *Manuel* required such claims to be brought under the Fourth Amendment, interpreting it as leaving open the possibility of due process claims concerning pretrial deprivations of liberty based on the alleged use of fabricated evidence. *Id*. at 451 n.25.

The deep split in circuit authority will not go away on its own: the Second Circuit denied en banc review in this case, and the Fifth Circuit's decision in *Cole* was issued en banc. Neither decision persuasively addressed this Court's observation, in *Manuel*, that the initiation of legal process does not "convert [a Fourth Amendment] claim into one founded on the Due Process Clause." 137 S. Ct. at 919. And neither decision wrestled with this Court's long-standing rules against expanding the ambit of the Due Process Clause where a more specific provision of the Constitution governs the conduct at issue—which, under *Manuel*, the Fourth Amendment does here. As the Third, Seventh, and Eighth Circuits have recognized, *Manuel* and the more-specific-provision rule leave the Fourth Amendment as the only constitutional

provision governing the use of fabricated evidence to justify a pretrial detention.

b. Although they have not addressed the issue since this Court decided *Manuel*, the Ninth, Tenth, and Eleventh Circuits have also suggested that pretrial use of allegedly fabricated evidence is actionable under the Due Process Clause. These circuits thus line up with the Second and Fifth Circuit's position on this issue, against the Third, Fourth, Seventh, and Eighth Circuits.

For example, the Ninth Circuit has held that "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001); *see also Spencer v. Peters*, 857 F.3d 789, 798-800 (9th Cir. 2017). And the Tenth Circuit appears to have endorsed a similar position, holding that it would violate due process for municipal officials to submit fabricated evidence in opposition to a motion to dismiss criminal charges, at least where the denial of the motion caused the plaintiff to plead no contest rather than face trial. *Klen v. City of Loveland*, 661 F.3d 498, 515-17 (10th Cir. 2011). *But see Shimomura v. Carlson*, 811 F.3d 349, 361-62 (10th Cir. 2015) (rejecting due process claim where plaintiff alleged evidence fabrication at the arrest stage deprived him of physical liberty). Finally, the Eleventh Circuit identified both the Fourth Amendment and the Due Process Clause as underlying a single claim that the use of allegedly fabricated evidence led to a pretrial detention. *Weiland v. Palm*

Beach County Sheriff's Office, 792 F.3d 1313, 1328 (11th Cir. 2015).[4]

By granting certiorari, and determining whether the Fourth Amendment alone governs claims that the use of fabricated evidence caused a pretrial detention, this Court will settle a circuit split that *Manuel* has altered, but far from resolved.

III. THIS CASE IS AN IDEAL VEHICLE FOR CONSIDERING THE DIVISION OF LABOR BETWEEN THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE.

This case is an excellent vehicle for building on *Manuel* to resolve the lingering circuit split as to whether the Fourth Amendment is the exclusive basis for a § 1983 claim that officials used fabricated evidence to support a pretrial detention. The question presented is squarely raised by the decision below, and this case exemplifies how the choice of constitutional provision may determine whether a fabricated evidence claim is dismissed on probable cause grounds, on the one hand, or goes to trial, on the other.

The dismissal of Frost's Fourth Amendment claim, which the Second Circuit upheld on appeal (Pet. App. 14a), crystallizes the issue. The dispositive question in the case against the arresting officers is now whether Frost may also challenge the same pretrial detention, and the same officer conduct, under a different standard supplied by the Due Process Clause.

[4] Based on our research, the First, Sixth, and D.C. Circuits have not yet addressed whether a plaintiff may seek compensation for a pretrial detention under the Due Process Clause, as opposed to the Fourth Amendment.

This case further distills the question presented because Frost can challenge the use of allegedly fabricated evidence only in connection with his *pretrial* detention. During Frost's criminal trial, the jury never heard the allegedly false identification evidence, so for purposes of the question presented, it is as if the charges against Frost had been dismissed pretrial. The only question here is the viability of a due process claim for the use of allegedly fabricated evidence in detaining someone before trial.

IV. THE QUESTION PRESENTED IS IMPORTANT.

Under the Second Circuit's misreading of *Manuel*, § 1983 plaintiffs who attribute their pretrial detentions to fabricated evidence get two bites at the apple. If probable cause supports the pretrial detention even without the allegedly fabricated evidence, the plaintiff can just pivot from the Fourth Amendment to the Due Process Clause. This creates a "heads I win, tails you lose" scenario against police officers and municipalities, who may win the summary judgment dismissal of a Fourth Amendment claim by demonstrating probable cause as a matter of law, only to face trial for the same alleged conduct, repackaged as a due process claim. And it means that the Fourth Amendment does not exclusively define rights and obligations of either suspects or officers, because whatever the outcome under the Fourth Amendment, another standard would also apply and potentially trigger liability.

Indeed, the approach of the majority below threatens to displace the Fourth Amendment and its probable cause standard whenever § 1983 plaintiffs allege that their pretrial detentions were the product of fabricated evidence, as they often do. To see why, consider the outcome below. The three-judge panel

unanimously agreed that Frost's claim cannot succeed under the Fourth Amendment's probable cause standard. Considering only the unchallenged evidence, the panel concluded that "a reasonably prudent person would have been led to believe that Frost was guilty of shooting" the victim (Pet. App. 15a-16a). But the police officers' compliance with the Fourth Amendment didn't help them here, because the majority permitted Frost to challenge the same alleged fabrication and the same injury under the Due Process Clause. In other words, the panel majority "convert[ed]" a Fourth Amendment claim "into one founded on the Due Process Clause"—in clear disregard of *Manuel*. 137 S. Ct. at 919-20 & n.8.

When § 1983 plaintiffs claim that the use of fabricated evidence caused a pretrial detention, it is not uncommon for the Second Circuit to dismiss a Fourth Amendment claim on probable cause grounds, while permitting the plaintiff to pursue a due process-based "denial of fair trial" claim. *See*, *e.g*., *Ashley v. City of New York*, 992 F.3d 128, 132 (2d Cir. 2021). The Second Circuit's approach renders the Fourth Amendment essentially superfluous: it is unclear why litigants or courts should bother analyzing pretrial fabricated-evidence claims under the Fourth Amendment at all, if the real issue is whether the plaintiff has sufficiently pleaded, or submitted sufficient evidence to support, a due process-based claim for the same behavior and injury. At least in the Second Circuit, canny plaintiffs will always try to avoid summary judgment by pleading a due process

claim in conjunction with—or instead of—a Fourth Amendment one.[5]

As Justice Souter recognized, the jurisprudence of the Fourth Amendment is "well-established," while the contours of "novel due process right[s]" are often "ill-defined." *Albright v. Oliver*, 510 U.S. 266, 288 (1994) (Souter, J., concurring in judgment). And there are pragmatic concerns with "subjecting government actors to two (potentially inconsistent) standards for the same conduct." *Id.* at 287-88. The decision below ignores that concern, applying two inconsistent standards to the same conduct by the same governmental officials. It complicates the well-established standards of the Fourth Amendment with an ill-defined (and ill-named) "fair trial" claim brought under the rubric of due process.

No one would deny that police falsification of evidence is reprehensible and should not occur in the pretrial context or any other. At the same time, post-

[5] The Second Circuit has repeatedly addressed Fourth Amendment and due process claims for the same or overlapping allegations. *See Ashley*, 992 F.3d at 132; *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 273-74 (2d Cir. 2016); *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 132 (2d Cir. 1997). And examples abound of cases where plaintiffs have presented both claims in the district courts within the Second Circuit. *See, e.g.*, *Medina v. City of New York*, No. 20-cv-0797, 2021 U.S. Dist. LEXIS 82339 (S.D.N.Y. Apr. 29, 2021); *Walsh v. City of New York*, No. 19-cv-9238, 2021 U.S. Dist. LEXIS 62982 (S.D.N.Y. Mar. 31, 2021); *Buari v. City of New York*, No. 18-cv-12299, 2021 U.S. Dist. LEXIS 61273 (S.D.N.Y. Mar. 30, 2021); *Norales v. Acevedo*, No. 20-cv-2044, 2021 U.S. Dist. LEXIS 34361 (S.D.N.Y. Feb. 24, 2021); *Appling v. City of New York*, No. 18-cv-5486, 2021 U.S. Dist. LEXIS 34060 (E.D.N.Y. Feb. 23, 2021); *Gutierrez v. City of New York*, No. 18-cv-3621, 2021 U.S. Dist. LEXIS 33013 (E.D.N.Y. Feb. 22, 2021).

hoc claims of fabrication and falsification are easy to allege in civil litigation, yet difficult to disprove. Investigations of serious crimes frequently present conflicting accounts or uncertainties about what occurred and arguable gaps or inconsistencies in the investigatory record. A plaintiff seeking to convert such matters into a "fair trial" claim need only append an allegation that such uncertainties or gaps reflect deliberate falsification by police.

This point is illustrated by the threadbare and implausible theory advanced by Frost here—and sustained by the majority below as sufficient to require a trial. Frost's entire challenge to his prosecution now rests on two sentences in Vega's two-page declaration. There, Vega claimed, for the very first time, that when he came forward to provide information about Chapman's murder, one detective "pointed to the photo of Jarrett Frost and said 'this is the guy,'" and "the detectives" somehow "made it clear to [him] that if [he] wanted a deal, [he] would identify Frost as the shooter" (JA1602-03). Vega asserted this even though *he* was the one who initiated contact with authorities to provide additional information about the shooting, and even though his defense counsel and an assistant district attorney were present throughout his discussions with police. For the majority below, that was enough to warrant a trial on the alleged coercion of Vega's identification (Pet. App. 25a-26a).

That slim reed of a factual issue, in turn, now requires a civil jury to inquire into whether Vega's identification would have been material to the criminal jury, imagining a counterfactual situation where, unlike what actually happened, the criminal jury heard it (Pet. App. 30a). And because Frost challenges his pretrial detention, the jury will also

have to figure out whether Vega's identification caused Frost's detention—that is, whether this particular piece of evidence critically affected the decision of the prosecutors to seek remand and the criminal court's decision to order it, where the remaining evidence would have led a reasonable person to believe that Frost was guilty of Chapman's murder (Pet. App. 18a, 25a-26a).

The upshot of *Manuel* was to recognize that the Fourth Amendment provides a clear metric for judging the constitutionality of pretrial detentions. For a Fourth Amendment claim to succeed, a plaintiff challenging pretrial detention must show an absence of objective probable cause, even where the claim is based on the use of allegedly fabricated evidence. This claim would thus join numerous others under § 1983 that are governed by an objective standard of probable cause. Those include not just false arrest claims under the Fourth Amendment, but also, for example, claims alleging retaliatory prosecution or retaliatory arrest under the First Amendment. *See*, *e.g.*, *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006) (retaliatory prosecution); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724-27 (2019) (retaliatory arrest). Similarly, if Frost were alleging that a search or arrest warrant contained a false statement, the issue would be whether, under *Franks v. Delaware*, 438 U.S. 154 (1978), objective probable cause existed for the search or arrest without the allegedly false information. *See*, *e.g.*, *Jordan v. Town of Waldoboro*, 943 F.3d 532, 540-41 (1st Cir. 2019). Reversing the decision below would confirm that the same well-established, objective standard of probable cause controls in cases like this one, too.

Finally, there is no need to treat otherwise rock-solid evidence of probable cause as indelibly tainted by

one piece of allegedly fabricated evidence. Applying the Fourth Amendment to fabricated evidence claims like Frost's does not mean that police officers' use of fabricated evidence would go unrecognized or unpunished. Of course, if probable cause for pretrial detention is lacking absent fabricated evidence, then a litigant may have a valid Fourth Amendment claim, as this Court recognized in *Manuel*. And if fabricated evidence leads to a faulty conviction, both habeas petitions and § 1983 suits may provide remedies. *See*, *e.g*., *Whitlock v. Brueggemann*, 682 F.3d 567, 573 (7th Cir. 2012). Law enforcement officers who fabricate evidence are also subject to criminal prosecution, civil claims under state law, and professional discipline. *See*, *e.g*., N.Y. Penal Law §§ 195.00; 210.45. (Consol. 2021).

This case presents the ideal vehicle to resolve the lingering circuit split over the viability of due process claims alleging that fabricated evidence was used to support a pretrial detention. A grant of certiorari would provide an opportunity for this Court to clarify that under *Manuel*, such claims are governed exclusively by the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGIA M. PESTANA
Acting Corporation Counsel of the City of New York
RICHARD DEARING*
SCOTT SHORR
JESSE A. TOWNSEND
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

* Counsel of Record *Counsel for Petitioners*

June 21, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-1163

JARRETT FROST,

Plaintiff-Appellant,

v.

NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY DEPARTMENT OF CORRECTION, THE CITY OF NEW YORK, DISTRICT ATTORNEY ROBERT T. JOHNSON, DISTRICT ATTORNEY ROBERT HERTZ, DETECTIVE MICHAEL LOPUZZO, DETECTIVE RICHARD SPENNICCHIA, DETECTIVE JOSEPH O'NEIL, CORRECTION OFFICER TORRES, CORRECTION OFFICER SORIA, CORRECTION OFFICER CARTY, CORRECTION OFFICER SOUFFRANT, CORRECTION OFFICER TATULLI, CORRECTION OFFICER CAPTAIN MCDUFFIE, CORRECTION OFFICER PREVILLON, CORRECTION OFFICER GONZALEZ, CORRECTION OFFICER CAPTAIN RYAN, CORRECTION OFFICER YOUNG, CORRECTION OFFICER MCLAUGHLIN, CORRECTION OFFICER BARKSDALE, CORRECTION OFFICER CORKER, CORRECTION OFFICER SANCHEZ, CORRECTION OFFICER HILL, CORRECTION OFFICER CAPTAIN CLAYTON JEMMOTT, CORRECTION OFFICER JAY JOYE,

Defendants-Appellees,

DETECTIVES JOHN DOE #1–4, Individually and in Their Official Capacity as New York City Police Officers, CORRECTION OFFICERS JOHN DOE #1–5, Individually and in Their Official Capacity as

New York City Correction Officers,
CORRECTION OFFICER THOMAS,
Defendants.[1]

AUGUST TERM, 2019
Argued: February 20, 2020
Decided: November 12, 2020

Before: KEARSE, KATZMANN, and BIANCO, *Circuit Judges*.

Plaintiff-appellant Jarrett Frost was arrested and charged with murder in January 2011. He was then detained at Rikers Island until a jury acquitted him of all charges in June 2014. After his release, Frost filed a civil rights action against several groups of defendants, including New York City Police Department detectives, New York City Department of Correction officers, and the City of New York. As relevant here, Frost brought claims in the United States District Court for the Southern District of New York for malicious prosecution, due process violations, the use of excessive force, and municipal liability. The district court (Buchwald, *J.*) granted summary judgment in favor of defendants and dismissed Frost's complaint in its entirety.

On appeal, we conclude that the district court correctly dismissed Frost's malicious prosecution claim and one of his excessive force claims, but the district court erred in dismissing Frost's due process claim and two of his excessive force claims. We also conclude that the district court should address the

---

[1] The Clerk of Court is directed to amend the caption as set forth above.

merits of Frost's municipal liability claim in the first instance. Accordingly, the district court's judgment is AFFIRMED in part, REVERSED in part, and VACATED in part, and the case is REMANDED for further proceedings consistent with this opinion.

Judge Kearse dissents in part in a separate opinion.

JONATHAN I. EDELSTEIN (Ellie A. Silverman, *on the brief*), Edelstein & Grossman, New York, NY, *for Plaintiff-Appellant*.

CLAIBOURNE HENRY (Richard Dearing, Scott Shorr, *on the brief*), Assistant Corporation Counsel, *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY, *for Defendants-Appellees*.

KATZMANN, *Circuit Judge*:

This case arises out of the detention and prosecution of plaintiff-appellant Jarrett Frost. In January 2011, Frost was arrested and charged with the murder of an individual named Mavon Chapman. Frost was then detained at Rikers Island until June 2014, when a jury acquitted him of all charges. After his release, Frost filed a civil rights action in the United States District Court for the Southern District of New York against several groups of defendants, including New York City Police Department ("NYPD") detectives, New York City Department of Correction ("DOC") officers, and the City of New York. As relevant here, Frost brought malicious prosecution and due process claims against the NYPD detectives, excessive force claims against the DOC officers, and municipal liability claims against the City.

After a lengthy discovery period, defendants filed a motion for summary judgment, which the district court granted in a Memorandum and Order dated March 27, 2019. *See Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323 (S.D.N.Y. Mar. 27, 2019). With respect to the malicious prosecution, due process, and excessive force claims, the district court (Buchwald, *J.*) held that Frost had failed to create a triable issue regarding any individual defendant's liability. *Id.* at *8–12. And because no individual defendant could be held liable, the district court concluded, Frost's municipal liability claims against the City failed as well. *Id.* at *12.

On appeal, we hold that the district court correctly dismissed Frost's malicious prosecution claim and one of his excessive force claims, but the district court erred in dismissing Frost's due process claim and two of his excessive force claims.[2] We also conclude that the district court should address the substance of Frost's municipal liability claims in the first instance, as certain individual defendants now face potential liability. Accordingly, the district court's judgment is AFFIRMED in part, REVERSED in part, and VACATED in part, and the case is REMANDED for further proceedings consistent with this opinion.

BACKGROUND

I. The Murder of Mavon Chapman

Mavon Chapman was shot and killed in the early morning hours of July 6, 2010. The shooting took place

---

[2] As discussed below, the district court correctly dismissed the excessive force claim arising out of the January 16, 2013 incident, but it erred in dismissing the claims arising out of the October 9, 2012 and July 16, 2013 incidents.

at the corner of East 149th Street and Morris Avenue in the Bronx, one block from the apartment building where Frost lived. Approximately 24 hours prior to the shooting, Frost had been assaulted in the same area by members of a neighborhood gang, some of whom were friends of Chapman's.

Shortly after Chapman was killed, defendants Detectives Michael Lopuzzo, Richard Spennicchia, and Joseph O'Neil were assigned to investigate the murder. They interviewed several witnesses to the shooting, including non-party Leon Vega, who was one of the gang members who assaulted Frost the day before. None of the witnesses could identify the shooter, but they told the detectives that the shots had come from the direction of the apartment complex where Frost lived. Vega was interviewed twice on the day of Chapman's murder, and during his first interview he told detectives that he did not know who had shot Chapman or where the shots had come from. During his second interview, however, Vega said that the shots had come from a doorway leading to a stairwell in Frost's apartment complex and that a black male wearing a white t-shirt had been standing in the doorway at the time of the shooting.

In the hours following Chapman's murder, O'Neil and Spennicchia visited the crime scene and recovered surveillance footage from the stairwell described by Vega. The footage showed two black males walking down the stairs and then running back up immediately after Chapman was shot. One of the men, later identified as non-party John McLaurin, was wearing a white tank top and jeans. The other, later identified as Frost, was wearing a green t-shirt and tan shorts.

The next day, July 7, O'Neil and Spennicchia picked Frost up at school to question him. At the time, the

detectives considered Frost to be a witness. Frost admitted that he had been in the stairwell with McLaurin when Chapman was shot, but he told the detectives that McLaurin had fired the gun. The detectives did not arrest Frost, and they chose instead to look for McLaurin, whom they were unable to locate.

Six months passed without any major developments regarding Frost. Then, on January 6, 2011, O'Neil and Spennicchia learned that Vega had been arrested for an unrelated crime and wanted to enter into a cooperation agreement in exchange for information about Chapman's murder. The detectives went to observe an interview with Vega at the Bronx District Attorney's Office and to show Vega photo arrays. The detectives, Vega, and an assistant district attorney were present at the interview, as was Vega's defense counsel.

During the interview, Vega identified Frost from one of the photo arrays as the individual who shot Chapman. Three days later, in an apparent coincidence, Spennicchia saw McLaurin on the street, and the detectives brought him in for an interview. Like Vega, McLaurin told the detectives that Frost was responsible for the shooting. And according to McLaurin, Frost admitted that he had killed Chapman in retaliation for the previous day's assault.

On January 13, 2011—one week after Vega's interview—Frost was arrested on charges of murder in the second degree, manslaughter with intent to cause physical injury, and criminal possession of a weapon in the second degree. The following day, Frost was arraigned and remanded to Rikers Island, and he was indicted shortly thereafter. Frost remained incarcerated at Rikers until a jury acquitted him of all charges on June 24, 2014.

II. Frost's Detention at Rikers Island

During his nearly three-and-a-half-year detention at Rikers, Frost received numerous disciplinary infractions, and he was involved in multiple physical altercations with correction officers and inmates. Indeed, Frost's transgressions earned him a "Red ID" classification, which is given to inmates who are violent or are caught with weapons. Although the record below describes Frost's misbehavior in considerable detail, only the following three incidents are relevant to the instant appeal.

The first incident took place on October 9, 2012, when Frost was brought to Bronx Supreme Court for an attorney visit. While there, Frost was escorted by defendant Correction Officer Captain Clayton Jemmott, and defendant Correction Officer Jay Joye was also present. According to Jemmott, Frost became combative and said, "I should spit in your fuckin' face." J.A. 609:16–17. In response, Jemmott took Frost to the ground and either Jemmott or Joye kicked Frost in the ribs. Jemmott and Joye then dragged Frost on the ground by his leg shackles. Later that day, Frost was taken to a medical clinic, where he was diagnosed with a ruptured eardrum and bruising on his forehead and cheek.

The second incident took place on January 16, 2013, while Frost was housed in the Central Punitive Segregation Unit ("CPSU"). As Frost was returning to the CPSU from court, he was strip searched by defendant Correction Officer Hill. After Frost removed his clothing, Hill observed a bag of contraband cheese on the floor, and Hill also reported seeing a small object wrapped in black plastic. Frost turned over the cheese, but he did not relinquish the small object, which Hill reportedly saw Frost secrete in his anal cavity. Hill

informed his supervisor of these events, and defendant Correction Officer Captain Ryan was assigned to lead an extraction team to recover the secreted object. Ryan assembled a team that included defendants Correction Officers Young, McLaughlin, Barksdale, Corker, and Sanchez.

When Ryan's team went to begin the extraction, Ryan first spoke with Frost for 10 to 15 minutes and ordered Frost to return the contraband. After Frost refused to turn anything over, Ryan's extraction team entered the intake search area where Frost was located. Video footage of the extraction shows that Frost resisted the officers and tried to prevent them from entering the area by holding the door shut. Officers then struggled to restrain Frost for several minutes. After being restrained, Frost was taken to a cell where he was ordered to squat, after which a blade wrapped in electrical tape was recovered from the floor. Frost sustained bruises from the extraction. He later pled guilty to promoting prison contraband in the second degree in connection with the incident. As part of his plea allocution, Frost specifically admitted to possessing the blade.

The third and final incident relevant to this appeal took place on July 16, 2013, when Frost and eighteen other inmates refused to leave the CPSU recreation yard and return to their cells. Defendant Correction Officer Captain McDuffie and other correction officers spent seven hours trying to convince Frost and his fellow inmates to come back inside, but the inmates refused. Eventually McDuffie was authorized to extract Frost from the recreation yard, and he formed an extraction team that included defendants Correction Officers Soria, Previllon, Souffrant, Carty, Tatulli, and Gonzalez.

Video footage shows that when the extraction team arrived at Frost's pen in the recreation yard, Frost was positioned in a charging stance and had ripped his clothing to make elbow pads and a mouth guard. When the extraction team opened the door to the pen, Frost charged the officers and ended up on top of one of them. An extended struggle ensued, with the officers eventually restraining Frost. After Frost was restrained, the video footage appears to show one of the members of the extraction team repeatedly moving his knee toward Frost's head. At this time, other inmates can be heard in the background yelling for the officer to stop kicking Frost in the head. As a result of the episode, Frost sustained a black eye, as well as cuts and scrapes to his forehead, wrists, and hand.

III. Procedural History

Frost remained incarcerated at Rikers until a jury acquitted him of all charges in June 2014. Frost then commenced the underlying action on June 22, 2015, and the operative complaint was filed on February 5, 2016. As relevant here, Frost brought the following claims under 42 U.S.C. § 1983: (1) malicious prosecution against the City and Detectives Spennicchia, O'Neil, and Lopuzzo; (2) excessive force against all DOC officers except Correction Officer Gonzalez; (3) substantive due process against all individual defendants; and (4) municipal liability against the City. *See Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *1 (S.D.N.Y. Mar. 27, 2019). Frost also brought several state law claims against different combinations of defendants. *Id.*

On July 10, 2018, defendants moved for summary judgment. Frost opposed the motion, and he submitted a declaration from Leon Vega dated September 13, 2018. As noted above, Vega had failed to identify

Chapman's killer when he was first questioned by detectives on July 6, 2010, but he later pinned the shooting on Frost during his January 6, 2011 interview at the Bronx District Attorney's Office. According to his 2018 declaration, Vega falsely identified Frost in 2011 because he was facing a felony charge, and Detectives Spennicchia and O'Neil made clear to Vega that he would need to identify Frost as the shooter in order to get a deal. The truth, Vega stated, was that he had seen Frost standing in the stairwell from which Chapman was shot, but Frost had not pulled the trigger. Instead, the shooter was a second individual who was wearing a white shirt, but whom Vega was unable to identify. Vega explained that he "would never have identified Frost as the shooter if the detectives hadn't told [him] to do so," and he asserted that "when Frost came to trial, [Vega] refused to testify against him because [he] did not want to continue a lie." J.A. 1603 ¶¶ 19–20.

Notwithstanding Vega's declaration, the district court granted defendants' motion for summary judgment and dismissed Frost's complaint in its entirety. *See Frost*, 2019 WL 1382323, at *12. Beginning with the malicious prosecution claim, the district court rejected Frost's argument that the NYPD detectives had commenced a criminal proceeding against him by coercing Vega's identification. In the district court's view, Vega's declaration was "'so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit' his allegation," *id.* at *8 (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 551 (2d Cir. 2005)),[3]

---

[3] Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

and prosecutors from the Bronx District Attorney's Office had been present at all relevant interviews and had made an independent decision to initiate proceedings against Frost, *id.* at *9. Furthermore, the district court reasoned, even if the detectives had commenced a criminal proceeding against Frost by coercing Vega's identification, there was probable cause to prosecute Frost based on his undisputed presence in the stairwell from which Chapman was shot, McLaurin's testimony identifying Frost as the shooter, and Frost's motive to retaliate for the previous day's assault. *Id.*[4]

Moving to Frost's excessive force claims, the district court held that Frost did not raise a triable issue with respect to the three incidents discussed above. Regarding the October 9 incident, the district court reasoned that Frost had established himself as a violent inmate and that Jemmott and Joye responded reasonably to Frost's threat to spit on Jemmott. *Id.* at *10. As to the January 16 incident, the district court held that video footage of the extraction showed that the DOC officers used reasonable force and inflicted only de minimis injuries. *Id.* at *11. Likewise, for the July 16 incident, the district court held that video footage showed as a matter of law that the force used to extract Frost from the recreation yard and the minor injuries that he sustained were not excessive. *Id.*[5]

---

[4] Because the district court found that there was probable cause to prosecute Frost, it also found that there was no triable issue as to whether defendants acted with malice. *Frost*, 2019 WL 1382323, at *9 n.27.

[5] The district court also held that Frost failed to create a triable issue with respect to an incident that took place on July 25, 2012. *Id.* at *9–10. Frost does not challenge that decision on appeal.

Finally, the district court held that Frost failed to create a genuine dispute regarding his substantive due process claim because he failed, inter alia, to show that the NYPD detectives "provide[d] false information likely to influence a jury's decision and forward[ed] that information to prosecutors." *Id.* at *12. The district court also held that Frost's municipal liability claims against the City failed because his underlying claims against individual defendants failed. *Id.* And because the district court dismissed Frost's federal claims, it declined to exercise supplemental jurisdiction over his remaining state law claims and accordingly dismissed those claims without prejudice. *Id.*

The district court entered judgment on March 28, 2019, and Frost timely appealed.

DISCUSSION

I. Standard of Review

"We review orders granting summary judgment de novo and focus on whether the district court correctly concluded that there was no genuine dispute as to any material fact and that the moving party was entitled to judgment as a matter of law." *Chunn v. Amtrak*, 916 F.3d 204, 207 (2d Cir. 2019). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law." *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir. 2009). "The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, and in assessing the record to determine whether there is a genuine issue as to a material fact, the court is required to resolve all ambiguities and draw all

permissible factual inferences in favor of the party against whom summary judgment is sought." *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004). "In applying this standard, the court should not weigh evidence or assess the credibility of witnesses. These determinations are within the sole province of the jury." *Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996).

II. Malicious Prosecution

"In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment and must establish the elements of a malicious prosecution claim under state law." *Manganiello v. City of New York*, 612 F.3d 149, 160–61 (2d Cir. 2010). "To establish a malicious prosecution claim under New York law, a plaintiff must prove (1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Id.* at 161.

The district court dismissed Frost's malicious prosecution claim after concluding that defendants did not initiate a criminal proceeding against Frost and that, in the alternative, Frost's prosecution was supported by probable cause. *See Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *8–9 (S.D.N.Y. Mar. 27, 2019). While acknowledging that police officers can initiate criminal proceedings by "creat[ing] false information and forward[ing] it to prosecutors," *id.* at *8; *see Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997), the district court held that no reasonable juror would credit the

allegations in Vega's declaration that defendants had coerced him into identifying Frost, *Frost*, 2019 WL 1382323, at *8. The district court also reasoned that prosecutors from the Bronx District Attorney's Office made an independent decision to initiate proceedings against Frost, thus absolving defendants of liability. *Id.* at *9. And with respect to probable cause, the district court concluded that Frost's prosecution was justified by his undisputed presence at the scene of the crime, McLaurin's identification of Frost as the shooter, and the fact that Frost had a motive to retaliate for the previous day's assault. *Id.*[6]

For the reasons discussed below in the context of Frost's due process claim, we hold that the district court erred in discrediting Vega's declaration at the summary judgment stage. We nevertheless agree with the district court that there was probable cause to prosecute Frost, even without Vega's identification. And because "the existence of probable cause is a complete defense to a claim of malicious prosecution," *Stansbury v. Wertman*, 721 F.3d 84, 94–95 (2d Cir. 2013), we conclude that the district court was correct to dismiss Frost's claim.[7]

"Probable cause, in the context of malicious prosecution, has . . . been described as such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty." *Boyd v. City of*

---

[6] The district court also held that Frost failed to raise a triable issue as to malice because there was probable cause to prosecute him. *Frost*, 2019 WL 1382323, at *9 n.27.

[7] Because the existence of probable cause is dispositive of Frost's malicious prosecution claim, we need not decide whether prosecutors made an independent decision to initiate proceedings against Frost, thereby absolving defendants of liability. We also need not decide whether Frost raised a triable issue as to malice.

New York, 336 F.3d 72, 76 (2d Cir. 2003).[8] We have recognized that, in general, "[p]robable cause is a mixed question of law and fact." *Dufort v. City of New York*, 874 F.3d 338, 348 (2d Cir. 2017). In a case such as this one, however, "where there is no dispute as to what facts were relied on to demonstrate probable cause, the existence of probable cause is a question of law for the court." *Walczyk v. Rio*, 496 F.3d 139, 157 (2d Cir. 2007).

As the district court explained, the following facts are undisputed: First, defendants recovered surveillance footage showing Frost and McLaurin walking down and then running up the stairwell from which Chapman was shot, immediately after Chapman was shot. Second, Frost admitted to defendants that he was in the stairwell with McLaurin when Chapman was shot, and McLaurin identified Frost as the shooter. And third, defendants were aware that Frost had a motive to retaliate against Chapman because Frost had been assaulted by Chapman's friends the night before. Given these undisputed facts, we conclude as a matter of law that a reasonably prudent

---

[8] "Even in the absence of probable cause, a police officer is entitled to qualified immunity where (1) her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or (2) it was objectively reasonable for her to believe that her actions were lawful at the time of the challenged act." *Betts v. Shearman*, 751 F.3d 78, 82–83 (2d Cir. 2014). However, "the defense of qualified immunity can . . . be forfeited," *Fabrikant v. French*, 691 F.3d 193, 211–12 (2d Cir. 2012), and defendants have failed to raise it before this Court in the context of Frost's malicious prosecution claim.

person would have been led to believe that Frost was guilty of shooting Chapman. *See Boyd*, 336 F.3d at 76.[9]

Frost resists this conclusion, and he cites our decision in *Dufort v. City of New York*, 874 F.3d 338 (2d Cir. 2017), for the proposition that an individual's presence at the scene of a crime and his identification by a fellow suspect are insufficient to establish probable cause. But *Dufort* is inapposite. As relevant here, *Dufort* involved an attack by multiple assailants, and the plaintiff was arrested "based on little more than a witness's statement that he" was one of several people present who wore a similar shirt to one of the attackers. 874 F.3d at 350. The plaintiff was also identified by a co-defendant who was facing a possible prison sentence of fifty years to life, and who testified only equivocally that he thought the plaintiff participated in the attack. *Id.* at 351. In the instant case, by contrast, surveillance footage unambiguously places Frost in the stairwell from which the shots were fired. Furthermore, McLaurin—who was not arrested in connection with Chapman's murder—unequivocally identified Frost as the shooter.

Frost's position is further undermined by analogous cases in which we have held that an individual's presence in the location from which shots are fired can support a finding of probable cause. In *Thomas v. City of New York*, 562 F. App'x 58 (2d Cir. 2014), we held that there was probable cause to arrest the plaintiff where "the facts available . . . at the time of the arrest included (1) evidence that [the victim] was shot at

[9] Because the undisputed facts support a finding of probable cause, we need not address whether Frost's indictment created a presumption of probable cause. *See Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003).

close range; (2) [the victim's] photo array identification of [the plaintiff] as the individual who walked by him on an otherwise empty street moments before he was shot; and (3) [the victim's] statement that, after he was shot, he turned and saw [the plaintiff] standing on the sidewalk in the direction of the continued gunfire." *Id.* at 59–60. We explained that probable cause existed even though the victim did not see whether the plaintiff was holding a gun. *Id.* at 60. Likewise, in *Husbands ex rel. Forde v. City of New York*, 335 F. App'x 124 (2d Cir. 2009), we held that there was probable cause to arrest the plaintiff "[g]iven the undisputed facts . . . that shots were suddenly fired, that [an officer] saw [the plaintiff] when he looked in the direction from which the shots had been fired, that [the plaintiff] was standing alone, and that [the plaintiff] promptly turned around and proceeded" in the direction from which the shots came. *Id.* at 127. Again, we made clear that probable cause did not depend on "whether or not [the officer] actually saw a gun." *Id.*

Here, there is no dispute that Frost was present in the location from which Chapman was shot, at the time that Chapman was shot. Viewed in light of *Thomas* and *Husbands*, these facts alone tend to weigh in favor of a finding of probable cause. And although the plaintiffs in *Thomas* and *Husbands* were by themselves, whereas Frost was with McLaurin, we conclude that McLaurin's identification of Frost and Frost's retaliatory motive compensate for any reduction in probable cause that this distinction introduces. With respect to this latter point in particular, Frost offers no reason to discount the significance of his motive. Instead, he makes only the conclusory assertion that his "alleged motive . . . is . . . insufficient" to support a finding of probable cause. Appellant's Br. 32.

Because we believe that Frost's motive is significant, and because the undisputed facts, taken together, would have led a reasonably prudent person to believe that Frost shot Chapman, we conclude that Frost's prosecution was supported by probable cause. The district court was therefore correct to dismiss his malicious prosecution claim.

III. Due Process

The Due Process Clause guarantees a criminal defendant's "right to a fair trial." *Ramchair v. Conway*, 601 F.3d 66, 73 (2d Cir. 2010). This right is violated "[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). Such violations are "redressable in an action for damages under 42 U.S.C. § 1983." *Id.* And unlike a malicious prosecution claim, "a Section 1983 claim for the denial of a right to a fair trial based on an officer's provision of false information to prosecutors can stand even if the officer had probable cause to arrest the Section 1983 plaintiff." *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 277–78 (2d Cir. 2016).

In the proceedings below, Frost alleged substantive due process violations against all individual defendants. *See Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *1 (S.D.N.Y. Mar. 27, 2019). The only violations relevant to the instant appeal, however, are those alleged against the NYPD detectives. Specifically, Frost argues that the detectives deprived him of due process by coercing Vega into identifying him as the shooter and by giving this evidence to prosecutors, who used it to seek Frost's

detention at Bikers Island and to bring him to trial on the underlying charges.[10]

Although the district court did not discuss Frost's due process argument in detail, it suggested that the claim failed because there was no evidence that the NYPD detectives "provide[d] false information likely to influence a jury's decision and forward[ed] that information to prosecutors." *Id.* at *12. This suggestion followed from the district court's earlier conclusion, in the context of Frost's malicious prosecution claim, that there was no genuine dispute as to whether defendants coerced Vega into falsely identifying Frost because Vega's declaration was "'so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit' his allegation." *Id.* at *8 (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 551 (2d Cir. 2005)). On appeal, Frost argues that the district court erred both in discrediting Vega's declaration at the summary judgment stage and in dismissing Frost's due process claim as a result. For the reasons below, we agree.

It is a bedrock rule of civil procedure that "a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). In *Jeffreys v. City of New York*, however, we recognized a narrow exception "in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and

---

[10] Frost also argues that the detectives deprived him of due process by failing to forward exculpatory evidence to prosecutors. Because we reverse the dismissal of Frost's due process claim on other grounds, and because the district court did not address Frost's exculpatory evidence argument below, we leave this argument for the district court to resolve in the first instance.

incomplete." 426 F.3d at 554. In such an extraordinary case, we said, "it will be impossible for a district court to determine whether the jury could reasonably find for the plaintiff, and thus whether there are any genuine issues of material fact, without making some assessment of the plaintiff's account." *Id.*

Relying on our decision in *Jeffreys*, the district court concluded that multiple aspects of Vega's declaration rendered his allegations incredible. First, the district court observed that "[t]he scant, three-page declaration . . . was signed more than three years after plaintiff and his counsel filed this instant action, six months after the discovery period concluded, and two months after defendants filed their summary judgment motion." *Frost*, 2019 WL 1382323, at *8. More significantly, the district court noted that Vega's declaration "omits the undisputed and determinative fact that Vega's attorney and an ADA were present at his interview with the detectives." *Id.* The district court emphasized with respect to this latter point that "Vega's assertion, if true, would mean that the two attorneys present during the interview, in violation of their ethical and legal obligations, condoned, countenanced and permitted the detectives to coerce Vega into testifying falsely." *Id.*

On appeal, Frost argues that the district court erred in applying *Jeffreys* beyond its scope. Frost contends that Vega's declaration was "consistent and uncomplicated," Appellant's Br. 21 (quoting *Bellamy v. City of New York*, 914 F.3d 727, 746 (2d Cir. 2019)), unlike the plaintiff's self-serving testimony in *Jeffreys*. Frost also asserts that Vega's declaration is corroborated by his initial inability to identify Chapman's shooter when detectives first questioned him on July 6, 2010. And while Frost acknowledges that Vega's "declaration

implies that Vega's attorney and the ADAs acted unethically," he notes that "it is hardly unheard-of for prosecutors to act overzealously in pursuit of a conviction or for a witness' counsel to go along with such overzealousness if it benefits his client." *Id.* at 23.

In response, defendants offer several reasons why they believe the district court correctly disregarded Vega's "eleventh-hour declaration." Appellees' Br. 24. As relevant here, defendants argue that the declaration is inconsistent with Vega's initial police interviews, which did not clearly exculpate Frost or inculpate the individual (presumably McLaurin) who was wearing the white shirt. Defendants also contend that there is an internal inconsistency between Vega's acknowledgement, on the one hand, that he initiated contact with the Bronx District Attorney's Office in January 2011, and his allegation, on the other, that he was coerced into identifying Frost at the ensuing interview. Likewise, defendants assert that Vega's statement in his declaration that "he 'refused to testify against [Frost] because [he] did not want to continue a lie'" is unsupported by the record given that Vega "made no effort on the witness stand to recant his original identification of Frost as the shooter." *Id.* at 27 (quoting J.A. 1603 ¶ 20) (alterations in original). And finally, defendants reiterate the district court's concern that Vega's declaration alleges ethical and legal violations by the attorneys present at his January 2011 interview.

Although we are sympathetic to some of defendants' criticisms, we nevertheless agree with Frost that the district court extended *Jeffreys* too far. As we have said, the *Jeffreys* exception is narrow, and it applies only "in the rare circumstance where" a witness's testimony is so problematic that no reasonable juror could

credit it. *Jeffreys*, 426 F.3d at 554. Where, by contrast, "there is a plausible explanation for discrepancies in a [witness's] testimony, the court considering a summary judgment motion should not disregard the later testimony because of an earlier account that was ambiguous, confusing, or simply incomplete." *Id.* at 555 n.2. And "[i]n the ordinary case where a district court is asked to consider the contradictory deposition testimony [or declaration] of a fact witness, or where the contradictions presented are not real, unequivocal, and inescapable, the general rule remains that a district court may not discredit a witness's deposition testimony [or declaration] on a motion for summary judgment, because the assessment of a witness's credibility is a function reserved for the jury." *In re Fosamax Prod. Liab. Litig.*, 707 F.3d 189, 194 n.4 (2d Cir. 2013) (per curiam).

Here, Vega's declaration presents us with an "ordinary case," not a "rare circumstance." It is true that the document was introduced late in the proceedings below and that the substance of Vega's allegations is somewhat meager. These deficiencies, however, are not serious enough to render the declaration incredible as a matter of law. Defendants cite prior decisions from this Court for the proposition that "witnesses are not permitted to raise a sham issue of fact by submitting a blatantly manufactured affidavit that contradicted a prior statement." Appellees' Br. 29 (citing *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)); *see Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996). But even assuming that the "sham issue of fact" doctrine applies where the witness's prior statements are unsworn, years-old police interviews, Vega's declaration is not sufficiently "manufactured" or contradictory to bring it within the doctrine's ambit.

Contrary to defendants' characterization, there is a plausible explanation for any discrepancies between Vega's 2018 declaration and his earlier interviews with law enforcement. Take Vega's statement in 2018 that Frost did not kill Chapman. Obviously, this is inconsistent with Vega's identification of Frost as the shooter during his January 2011 interview at the Bronx District Attorney's Office. But the inconsistency between Vega's earlier and later positions does not make them irreconcilable. Instead, Vega's declaration offers a plausible account of his evolving story: in 2011, he was facing a felony charge and wanted to make a deal with prosecutors, and by 2018 he had changed his mind and decided that he wanted to tell the truth. To conclude, as we do, that the explanations are plausible is not to say that we make any judgment as to whether they will carry the day; we determine only that this issue cannot be resolved at the summary judgment stage.

We are conscious of the concerns raised by defendants and the district court that Vega's declaration, if true, describes ethical and legal violations by his defense counsel and the assistant district attorney who interviewed him. And we certainly have no reason to think that such violations are anything but rare. But we cannot conclude as a matter of law that allegations of attorney misconduct are too implausible to create a genuine dispute of material fact. Indeed, if we were to adopt such a conclusion, entire categories of lawsuits would be precluded from making it past summary judgment.

Nor is Vega's declaration irreconcilable with the two initial interviews that he had with law enforcement on the day of Chapman's murder. As noted above, Vega first told detectives that he did not know who shot

Chapman or where the shots came from, and he later said that the shots came from Frost's apartment building and that a man wearing a white shirt was standing in the doorway from which the shots came. Defendants argue that these statements contradict Vega's more definitive assertion in his declaration that the man in the white shirt was the shooter. But we see no necessary contradiction—let alone a contradiction that is "real, unequivocal, and inescapable," *Fosamax*, 707 F.3d at 194 n.4—between Vega's statement in 2018 that the man in the white shirt was the shooter and his statement in 2010 that the man in the white shirt was standing in the building doorway from which the shots were fired. And while there may be inconsistencies between Vega's first and second interviews in the hours immediately following Chapman's murder, these discrepancies at most raise garden variety credibility issues regarding Vega's initial account. They do not provide grounds for the district court to disregard Vega's later declaration on a motion for summary judgment. *See Jeffreys*, 426 F.3d at 555 n.2.

Finally, we are not persuaded by defendants' argument that Vega's declaration was properly discredited based on its internal inconsistencies and lack of support in the record. Defendants suggest that Vega would not have initiated contact with the Bronx District Attorney's Office in January 2011 if he had not already intended to identify Frost. And they imply that Vega would have recanted his false identification at Frost's trial if he had really been motivated by a desire to tell the truth. But these assumptions, while plausible, are not self-evident, and they certainly are not fatal to the credibility of Vega's declaration. There are any number of benign or malign explanations for the purported deficiencies raised by defendants, and it

is not the role of the district court to choose among them at the summary judgment stage. Instead, as even Frost acknowledges, the most appropriate use for defendants' criticisms is as "fodder for cross-examination of Vega at trial." Reply Br. 6.

We conclude, therefore, that Vega's declaration does not present the kind of "rare circumstance" contemplated by *Jeffreys*, and that the district court erred in discrediting it.[11] Defendants nevertheless argue that we should affirm the district court's dismissal of Frost's due process claim because, even assuming that Vega's identification was coerced, Frost has failed to raise a triable issue as to whether the identification resulted in a deprivation of his liberty. Specifically, defendants contend that "there was sufficient evidence to prosecute Frost without Vega's identification" and that Frost "has never argued that, but for Vega's identification, he would not have been indicted and incarcerated during the course of his trial." Appellees' Br. 40.

Defendants' argument falls short for two reasons.[12] First, as noted above, probable cause is not a defense

---

[11] In our analysis, we have assumed without deciding that *Jeffreys* applies to the testimony of non-party fact witnesses. Because we conclude that it was error to discredit Vega's declaration even under the *Jeffreys* standard, we need not address Frost's broader contention that district courts may never discredit non-party fact witness testimony at the summary judgment stage.

[12] As with Frost's malicious prosecution claim, defendants do not raise a qualified immunity defense. Even if they did, however, such a defense would fail, as "there is a clearly established constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity." *Garnett*, 838 F.3d at 276.

to a fair trial claim based on the fabrication of evidence. *See Garnett*, 838 F.3d at 277–78. Instead, even if "a privileged arrest accounted for at least some portion of the deprivation of [a § 1983 plaintiff's] liberty," the plaintiff may still "suffer[] a deprivation of liberty as a result of [an] officer's fabrication." *Id.* at 277. It is therefore irrelevant that "there was sufficient evidence to prosecute Frost without Vega's identification." Appellees' Br. 40.

Second, defendants miss the mark in their assessment that Frost has not raised a triable issue regarding causation. As we have explained, a "prosecutor's decision to pursue charges rather than to dismiss [a] complaint without further action[] may depend on the prosecutor's . . . assessment[] of the strength of the case, which in turn may be critically influenced by fabricated evidence." *Garnett*, 838 F.3d at 277. Here, a reasonable jury could have found that Vega's identification "critically influenced" the decision to prosecute Frost. *See id.* It is undisputed that defendants knew the day after Chapman's shooting that Frost was standing with McLaurin in the stairwell from which the shots were fired and that Frost had been assaulted the night before by Chapman's friends. For six months, however, defendants took no action, and it was only after Vega identified Frost as the shooter that Frost was arrested and prosecuted. This sudden change suggests that Vega's identification was influential. And while it is true that McLaurin also identified Frost between the time of Vega's interview and Frost's arrest, a reasonable jury could have found that the decision to prosecute Frost would have been different if McLaurin, who was Frost's fellow suspect, was the only person to identify him. This is all that is necessary to sustain Frost's due process claim.

The dissent would hold otherwise on this point. The dissent notes, as we do, that independent evidence was sufficient to create probable cause for Frost's pretrial detention. The dissent also finds great significance in the fact that Vega's purportedly coerced identification did not taint Frost's trial itself, because Vega refused to testify that Frost was the shooter. The dissent thus argues that Frost's "fair trial" claim under the Due Process Clause fails as a matter of law.

We respectfully think our precedents are to the contrary. Notwithstanding the nomenclature, a criminal defendant's right to a fair trial protects more than the fairness of the trial itself. Indeed, a criminal defendant can bring a fair trial claim even when no trial occurs at all. Our decision in *Ricciuti* is illustrative in this respect. One of the plaintiffs there, Alfred Ricciuti, was arrested and charged with second-degree assault after a post-Yankees-game altercation. 124 F.3d at 125–26. Ricciuti alleged that one of the defendant police officers, Lt. Robert Wheeler, fabricated a confession statement and forwarded it to the Bronx district attorney, who subsequently added a charge against Ricciuti for second-degree aggravated harassment. *Id.* at 126.

Although all charges against Ricciuti were dismissed before trial, *id.* at 127, we held that there was a genuine issue of fact as to whether Lt. Wheeler and other defendant officers had knowingly fabricated and forwarded a false confession to prosecutors, *id.* at 129–30. As noted above, we explained that "[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action

for damages under 42 U.S.C. § 1983." *Id.* at 130. And we concluded that "a reasonable jury could find, based on the evidence, that defendants . . . violated [Ricciuti's] clearly established constitutional rights by conspiring to fabricate and forward to prosecutors a known false confession almost certain to influence a jury's verdict." *Id.*

The dissent nevertheless argues that, because the charges against Ricciuti were dismissed before trial, his claim is more accurately described as a malicious prosecution claim under the Fourth Amendment, rather than a fair trial claim under the Due Process Clause. *Post* at 4–5. According to the dissent, the real constitutional claim in *Ricciuti* was that, although there was probable cause to believe an assault had occurred, there was no probable cause "for magnifying the charge to a crime of bias, which was the only basis for keeping plaintiffs detained." *Id.* at 5. However, this interpretation is hard to square with our decision in *Ricciuti* itself, which analyzed the question of probable cause at length in the context of Ricciuti's *other* claims, *see* 124 F.3d at 127–29, 130–31, but did not so much as mention it in the context of his fair trial claim, *id.* at 129–30. We cannot conclude that the *Ricciuti* decision "mislabel[ed] the claim it was upholding." *Post* at 5. Rather, the court employed an entirely different mode of analysis than the malicious-prosecution framing that the dissent now urges.

We respectfully believe that the dissent's interpretation of our fair trial precedent is also foreclosed by *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000), where the court again recognized a fair trial claim in a similar circumstance. The plaintiff there, Zaher Zahrey, was prosecuted for conspiracy to commit robberies, among other counts, and was detained without bail for

eight months. *Id.* at 346. In his § 1983 suit against various police officers and prosecutors, Zahrey alleged that the defendants had deprived him of liberty by coercing two witnesses, Lisa Rivera and Sidney Quick, to testify falsely against Zahrey before a grand jury, thereby resulting in his pretrial detention. *Id.* at 345–46.

On these facts, we held that Zahrey had adequately stated a claim under § 1983 for, inter alia, denial of his "right to a fair trial under the Fifth, Sixth and Fourteenth Amendments." *Id.* at 346. Unlike the plaintiff in *Ricciuti*, Zahrey eventually proceeded to trial before a jury in the Eastern District of New York, whereupon he was acquitted on all counts. *Id.* But our analysis of Zahrey's Due Process claim focused not on the events at his trial, but on the deprivation of liberty resulting from the purportedly coerced grand jury testimony. *See id.* at 348–49.

Finally, in *Garnett*, the court expressly rejected the dissent's argument, *post* at 4–7, that a challenge to the use of fabricated evidence pre-trial "is only cognizable as a claim for malicious prosecution or for false arrest under the Fourth Amendment, and not as an independent fair trial claim." 838 F.3d at 278. Rather, we explained that "fair trial claims cover kinds of police misconduct not addressed by false arrest or malicious prosecution claims," and that therefore "probable cause, which is a Fourth Amendment concept, should not be used to immunize a police officer who violates an arrestee's non-Fourth Amendment constitutional rights." *Id*.[13]

---

[13] To be sure, in *Garnett* itself, the defendant stood trial. 838 F.3d at 270. But we never suggested that fair trial claims are limited to such cases; to the contrary, we repeatedly emphasized

Taken together, then, *Garnett*, *Zahrey*, and *Ricciuti* establish that the (perhaps imprecisely named) fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*. *See Zahrey*, 221 F.3d at 355 ("It is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer."). And we have expressly distinguished this right from the separate, although related, right not to be convicted based on the use of false evidence *at trial*. *See id.* ("It has also long been established that a prosecutor who knowingly uses false evidence at trial to obtain a conviction acts unconstitutionally.").

In the instant case, Frost raises a genuine dispute of material fact as to whether he was thus deprived of his liberty. As explained above, there is a triable question as to whether Vega's identification of Frost was coerced. Similarly, there is a triable question as to whether Vega's identification would likely have influenced the jury at Frost's criminal trial given that Vega, unlike McLaurin, was not Frost's fellow suspect. These two facts, in turn, create a genuine dispute as to whether Vega's identification "critically influenced" the decision to prosecute Frost, *Garnett*, 838 F.3d at 277, thereby resulting in a deprivation of his liberty.

---

that the elements of a fair trial claim are only that the officer fabricated information that would be likely to influence a jury's verdict, forwarded the information to prosecutors, and thereby deprived the defendant of liberty. *Id.* at 279. And we based this rule largely on *Ricciuti*, *id.* at 277, 279–80, which, as already discussed, did not involve the presentation of false evidence at trial.

Dufort v. City of New York does not compel a different result. The plaintiff's contention there was that the defendants "misrepresented or withheld key evidence *at his criminal trial*." 874 F.3d 338, 354 (2d Cir. 2017) (emphasis added). The court construed the plaintiff's claim as a "due process claim [that] rests [on] the right to have one's case tried based on an accurate evidentiary record that has not been manipulated by the prosecution." *Id.* at 355. Accordingly, we held that the plaintiff's claim failed as a matter of law because the defendants' attempts to distort the record at his criminal trial had failed. *Id.* Concededly, it is undisputed here that Vega's allegedly coerced identification of Frost could not have "distort[ed] the record" at Frost's trial, *id.*, because Vega did not repeat this identification in his trial testimony. But Frost, unlike the plaintiff in *Dufort*, does not ground his due process claim in allegations that the defendants attempted to distort the record at his criminal trial; instead, he grounds his claim in allegations that the defendants fabricated evidence much earlier in the process and forwarded that evidence to prosecutors, thereby depriving Frost of his liberty. *Dufort* did not question the validity of such claims; to the contrary, it recognized, as did *Zahrey*, that the right "not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity" is distinct from the right not to be tried based on "a distorted evidentiary record being presented to the jury." *Id.* at 354–55.

It is true that *Dufort* states that "[m]ere attempts to withhold or falsify evidence cannot form the basis for a § 1983 claim for a violation of the right to due process when those attempts have no impact on the conduct of a criminal trial." *Id* at 355. But this characterization must be read in light of the claim presented in that

case, which, again, was directed exclusively to the presentation of evidence at trial. We do not think *Dufort* can be read to hold that *no* due process claim based on the falsification of evidence can be maintained unless the evidence affects the ultimate criminal trial. Such a holding would be inconsistent with *Zahrey*—a case on which *Dufort* relies, *id.* at 354–55—as well as with *Ricciuti*.[14]

Because we conclude that there is a triable issue as to whether defendants coerced Vega into falsely identifying Frost, and as to whether Vega's identification resulted in Frost's prosecution, Frost's due process claim should not have been dismissed.[15] To be clear, we offer no view as to the ultimate outcome. We conclude only that there are triable issues of fact such that resolution at summary judgment is not appropriate.

IV. Excessive Force

Along with safeguarding a criminal defendant's right to a fair trial, "the Due Process Clause protects a

[14] The Supreme Court's holding in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), relied upon by the dissent, *post* at 6–8, does not compel a different result. In *Manuel*, the Supreme Court held that a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause. 137 S. Ct. at 914–15. But just as a Fourth Amendment claim survives the initiation of "legal process," *id.* at 914, our precedents establish that a fair trial claim under the Due Process Clause may accrue before the trial itself. Accordingly, the holding of *Manuel* does not preclude Frost's fair trial claim.

[15] As noted above, the district court on remand should address Frost's argument that defendants also deprived him of due process by failing to forward exculpatory evidence to prosecutors. In addition, the district court may wish to clarify which defendants remain implicated, at this stage in the litigation, by Frost's due process claim.

pretrial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). An officer's actions can amount to punishment if they are taken with "an expressed intent to punish." *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). But even "in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not rationally related to a legitimate nonpunitive governmental purpose or that the actions appear excessive in relation to that purpose." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

To determine whether an officer used excessive force, the factfinder must apply an "objective reasonableness" standard that "turns on the facts and circumstances of each particular case." *Id.* This standard should be applied "from the perspective and with the knowledge of the defendant officer," *id.* at 2474, and it should account for such factors as "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting," *id.* at 2473. The factfinder must also "take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate." *Id.* at 2474.

"Additionally, an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a clearly established right, such that it would have been clear to a reasonable officer that his conduct

was unlawful in the situation he confronted." *Id.*[16] "Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus . . . officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam). "Precedent involving similar facts can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful." *Id.*

The district court dismissed Frost's excessive force claims arising out of the incidents that occurred on October 9, 2012, January 16, 2013, and July 16, 2013. *Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *10–11 (S.D.N.Y. Mar. 27, 2019).[17] Frost challenges each of these decisions on appeal. For the reasons below, we agree with Frost that the district court erred in dismissing the claims arising out of the October 9 and July 16 incidents, but we conclude that dismissal of the claim arising out of the January 16 incident was warranted.

A. October 9, 2012 Incident

Beginning with the first incident, the following facts are undisputed. On October 9, 2012, Frost was brought to Bronx Supreme Court for an attorney visit, and while there he was escorted by correction officers

---

[16] In contrast with Frost's malicious prosecution and due process claims, defendants have raised a qualified immunity defense to Frost's excessive force claims.

[17] The district court also held that Frost failed to create a triable issue with respect to an incident that took place on July 25, 2012, *see Frost*, 2019 WL 1382323, at *9–10, but Frost does not appeal that ruling.

Jemmott and Joye. At some point, Frost said to Jemmott, "I should spit in your fuckin' face." J.A. 609:16–17.[18] Jemmott then took Frost to the ground, and either Jemmott or Joye kicked Frost in the ribs. Jemmott and Joye also dragged Frost on the ground by his leg shackles, and Frost was later taken to a medical clinic, where he was diagnosed with a ruptured eardrum and bruising on his forehead and cheek.

In dismissing Frost's claim, the district court explained that Frost "had established himself as a violent inmate whose threats against DOC officers needed to be taken seriously." *Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *10 (S.D.N.Y. Mar. 27, 2019). And the district court approvingly cited other decisions in which district courts had dismissed excessive force claims brought by inmates who had spit or attempted to spit on correction officers. *Id.* (citing *Coleman v. Hatfield*, No. 13-CV-6519-FPG, 2016 WL 2733522 (W.D.N.Y. May 10, 2016); *Smolen v. Dildine*, No. 11-CV-6434-CJS, 2014 WL 3385209 (W.D.N.Y. July 9, 2014); *Bonet v. Shaw*, 669 F. Supp. 2d 300 (W.D.N.Y. 2009)). The district court stated, moreover, that Frost had "suffered relatively minor injuries in the course of his struggle with" Jemmott and Joye. *Id.* at *10 n.28. For these reasons, the district court concluded, Jemmott

---

[18] When asked during his deposition whether he had said that he should spit in Jemmott's face, Frost responded, "I don't—I don't recall saying that, but—I never spit in his face, but if I was mad, I possibly did." J.A. 1552:23–24. On appeal, Frost argues that this equivocal response creates a genuine dispute as to whether he made the comment to Jemmott. We disagree, but for the reasons discussed in the main text, we nevertheless conclude that Frost has created a genuine dispute as to whether Jemmott and Joye used excessive force during the October 9 incident.

and Joye "used objectively reasonable force to protect themselves from plaintiff's threat." *Id.* at *10.

After reviewing the record below, we respectfully disagree with the district court's reasoning in several respects. First, we think it is at least questionable at this stage whether Frost's statement can be characterized as a "threat." Notably, Jemmott testified only that Frost said that he "should" spit on Jemmott. J.A. 609:16. Although it is possible that this statement would have been interpreted as a threat—that Frost was planning to spit on Jemmott—it is also possible that it would have been interpreted as an insult or an expression of disdain—that Frost wanted to spit on Jemmott, or that he believed he would be justified in spitting on Jemmott. Because we are "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought," *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004), we must assume at this stage in the litigation that a reasonable officer in Jemmott's position would have adopted the latter interpretation.

For similar reasons, we find the instant case distinguishable from those cited by the district court in which inmates spat or attempted to spit on correction officers.[19] During his deposition, Frost categorically

---

[19] The instant case is also distinguishable from *Berman v. Williams*, No. 17cv2757 (JGK), 2019 WL 4450810 (S.D.N.Y. Sept. 17, 2019). Defendants cite *Berman* for the proposition that summary judgment is appropriate where officers use force in response to an inmate's threat to spit. But the court in *Berman* did not address the merits of the excessive force claim at issue, and it granted summary judgment in favor of defendants only because they were not alleged to have been personally involved in the spitting incident. *Id.* at *3–5.

denied attempting to spit on Jemmott. And while defendants argue that "it is undisputed that . . . Frost had 'bec[o]me combative' and 'turned his body towards [Jemmott],'" Appellees' Br. 45 (quoting J.A. 609:15–16) (alterations in original), Frost testified to the contrary that any resistance to Jemmott was caused by physical restraints that limited Frost's mobility.[20] Even assuming, then, that the cases cited by the district court were correctly decided, there is a genuine dispute here as to whether Frost either spat or attempted to spit on Jemmott.

Finally, we differ with the district court's suggestion that Frost's injuries were minor. As noted above, Frost was diagnosed not only with multiple facial bruises following the October 9 incident, but also with a ruptured eardrum. Defendants argue that Frost had previously been diagnosed with a ruptured eardrum the year prior and that he therefore failed to show that Jemmott and Joye caused him a new injury. But this is pure speculation, and absent undisputed medical evidence to the contrary—which defendants have not offered—a reasonable jury could find that Jemmott and Joye were responsible for causing a new rupture.

---

[20] Defendants argue that Frost is estopped from denying that he threatened Jemmott because Frost pled guilty to creating a disturbance during the October 9 incident. But defendants have put forth no evidence that Frost represented, in connection with his plea, that he had threatened Jemmott. Instead, defendants cite to a portion of Frost's deposition in which Frost said he believed he had pled guilty to creating a disturbance or refusing a direct order. Notably, Frost also said that he believed he had not pled guilty to assaulting a staff member. And on appeal, Frost points to documents in the record that suggest that he never entered a plea at all in connection with the October 9 incident, but that he was instead found guilty after failing to attend his disciplinary hearing, and that even this finding was later expunged.

We are left, then, with the following question: assuming that a reasonable officer would have interpreted Frost's spitting statement as an insult rather than a threat, and assuming that Frost was not actively resisting Jemmott and Joye, was it excessive for the officers to tackle, kick, and drag Frost, thereby bruising his face and rupturing his eardrum? We conclude that it was.[21] Indeed, while we are mindful to view the incident with "deference to [the] policies and practices needed to maintain order and institutional security," *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015), our caselaw makes clear that it is unconstitutional for officers to strike an individual who is compliant and does not pose an imminent risk of harm to others, *see, e.g.*, *Rogoz v. City of Hartford*, 796 F.3d 236, 247–48 (2d Cir. 2015) (plaintiff created triable issue regarding excessive force based on evidence that defendant jumped on his back while plaintiff was compliant and lying prone on the ground); *Sims v. Artuz*, 230 F.3d 14, 22 (2d Cir. 2000) (plaintiff stated claim for excessive force where he alleged, inter alia, that defendants punched him in the face while plaintiff's arms were shackled); *Bellows v. Dainack*, 555 F.2d 1105, 1106 & n.1 (2d Cir. 1977) (plaintiff stated claim for excessive force where he alleged that defendant punched him in the ribs while plaintiff was seated

[21] In addition to raising the points above, defendants resist this conclusion by arguing that Frost did not sustain significant injuries from being kicked in the ribs or dragged across the floor. But even assuming this is true, the extent of an inmate's injuries, while relevant to the excessive force inquiry, is not dispositive. *Cf. Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (recognizing, in the Eighth Amendment context, that "[a]n inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury").

in the back of a police car). This is true even where an excessive force plaintiff has a history of aggressive behavior,[22] as an alternative rule would place few restrictions on officers' treatment of individuals with extensive disciplinary records.

In reaching this conclusion, we of course take no position on the ultimate issue whether Jemmott and Joye used excessive force in subduing Frost. We hold only that the undisputed facts are insufficient at this stage in the litigation to support a ruling in favor of defendants. Moreover, as just noted, it was clearly established at the time of the incident that an officer could not strike an individual who was compliant and did not pose an imminent risk of harm to others. Because a reasonable jury could find that Frost was neither threatening nor resisting Jemmott and Joye at the time of the incident, summary judgment on defendants' qualified immunity defense is also unwarranted. *See Hemphill v. Schott*, 141 F.3d 412, 418 (2d Cir. 1998) ("[S]ummary judgment based either on the merits or on qualified immunity requires that no dispute about material factual issues remain . . . .").[23]

---

[22] It is unclear from the record whether Jemmott and Joye were aware of Frost's disciplinary history. Although there is evidence that Red ID inmates like Frost sometimes wore identifying restraints, there appears to be no indication as to whether Frost was wearing such restraints on October 9. Jemmott testified during his deposition, moreover, that he did not recall any previous encounters with Frost.

[23] Because we hold that there is a triable issue as to whether Jemmott and Joye used excessive force during the October 9 incident, we do not address the relevance, if any, of Frost's arguments regarding non-party Correction Officer Williams.

B. January 16, 2013 Incident

Although we conclude that triable issues prevent summary judgment on Frost's excessive force claim arising out of the October 9 incident, we agree with the district court's decision to dismiss the claim arising out of the January 16 incident. As noted above, Frost alleges that defendants used excessive force to extract him after he allegedly secreted a weapon in his anal cavity. The district court granted summary judgment in favor of defendants after deciding that video footage of the incident showed that defendants used only reasonable force. *See Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *11 (S.D.N.Y. Mar. 27, 2019). The district court explained, moreover, that Frost suffered de minimis injuries during the extraction. *Id.*

On appeal, Frost argues that the district court erred in its assessment of the record. As a preliminary matter, Frost asserts that there is a dispute as to whether he secreted a weapon in his anal cavity, or whether instead the weapon was planted on him by defendants. Even assuming he did secrete the weapon, Frost contends, defendants used excessive force by continuing to kick and punch him after he had been subdued.

We disagree with both of these arguments. First, as defendants note, Frost is judicially estopped from denying that he secreted the weapon. "Judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by that party in a prior legal proceeding." *Robinson v. Concentra Health Servs., Inc.*, 781 F.3d 42, 45 (2d Cir. 2015). Here, Frost was indicted in connection with the January 16 incident, and he pled guilty to promoting prison contraband in

the second degree. As part of his allocution, Frost specifically admitted to possessing the weapon, and the court adopted that position in accepting his guilty plea. *See Kuar v. Mawn*, No. 08-CV-4401 (JFB) (ETB), 2011 WL 838911, at *6 (E.D.N.Y. Mar. 4, 2011) ("[U]nder the doctrine of judicial estoppel, the Court will preclude plaintiff from taking factual positions in this case which are directly contrary to statements that he made in connection with his plea and that were adopted by the court which accepted his plea."). As a result, Frost cannot now maintain that the weapon was planted on him by defendants.

Furthermore, we disagree with Frost's contention that defendants used excessive force during the extraction. As video footage of the incident makes clear, Frost resisted the officers and tried to prevent them from entering the area where he was located by holding the door shut with his arm. Frost then struggled with the officers as they tried to restrain him. Given "the severity of the security problem at issue; the threat reasonably perceived by the officer[s]; and [the fact that Frost] was actively resisting," *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015), defendants were justified in using nontrivial amounts of force. And although perhaps the struggle between Frost and the officers could have been gentler, the video footage does not suggest that the officers' actions could reasonably be viewed as excessive. *See Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a [detainee]'s constitutional rights."). Accordingly, we conclude that the district court was correct to dismiss Frost's claim arising out of the January 16 incident.

C. July 16, 2013 Incident

Finally, we consider Frost's excessive force claim arising out of the July 16 incident, during which Frost was extracted from the CPSU recreation yard after he and eighteen other inmates refused to come inside. As with the January 16 incident, the district court granted summary judgment in favor of defendants based on its assessment that Frost's injuries were minor and that the video footage showed as a matter of law that defendants used reasonable force to extract him. *Frost v. City of New York*, No. 15 Civ. 4843 (NRB), 2019 WL 1382323, at *11 (S.D.N.Y. Mar. 27, 2019). After reviewing the footage, we agree with the district court that defendants acted reasonably in restraining Frost initially, but we hold that a triable issue remains as to whether members of the extraction team used excessive force after Frost was subdued.

We reject at the outset Frost's argument that it was inappropriate for defendants to extract him from the recreation yard because he and his fellow inmates were trying to secure a meeting with a senior prison official. It is undisputed that the inmates refused to leave the recreation yard after their allotted hour of recreation time was over. It is also undisputed that the correctional facility is not secure if inmates do not return from the yard. And it is further undisputed that correction officers spent hours trying to convince the inmates to come inside before assembling an extraction team. Given that we "must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate," *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015), we con-

clude that Frost has not created a genuine dispute as to whether extraction was appropriate.

Furthermore, even if extraction were inappropriate, Frost's actions justified defendants in using a considerable amount of responsive force. As noted above, video footage of the incident shows that Frost prepared for the extraction team's arrival by positioning himself in a charging stance and using his ripped clothing as elbow pads and a mouth guard. When the extraction team opened the door to his pen, Frost charged the officers immediately and ended up on top of one of them. And although the officers managed to restrain Frost, they did so only after a vigorous struggle. As with the January 16 incident, this struggle was violent, but we agree with the district court's assessment that no reasonable jury could find that defendants' initial use of force was excessive. *Frost*, 2019 WL 1382323, at *11.

We are less sure, however, about the propriety of defendants' conduct after Frost was subdued. As noted above, it was clearly established at the time of the incident that an officer cannot strike an individual who is compliant and does not pose an imminent risk of harm to others. *Cf. Rogoz v. City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015) ("[S]ummary judgment has been found inappropriate in a case involving the use of gratuitous force beyond what was necessary to subdue."). Frost argues on appeal that "he was pummeled and kicked after the extraction team subdued him and restrained his legs." Appellant's Br. 47. And although defendants deny these allegations, video footage of the July 16 incident appears to show one of the members of the extraction team repeatedly moving his knee toward Frost's head after Frost was restrained. Moreover, other inmates can be heard in

the background yelling for the officer to stop kicking Frost in the head. Based on this footage, we believe that there is a triable issue both as to whether the officer used excessive force and as to whether qualified immunity is warranted. We therefore conclude that the district court erred in dismissing Frost's claim arising out of the July 16 incident.[24]

V. Municipal Liability

Under the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), local governments may be held liable in § 1983 actions. "To establish liability under *Monell*, a plaintiff must show that he suffered the denial of a constitutional right that was caused by an official municipal policy or custom." *Bellamy v. City of New York*, 914 F.3d 727, 756 (2d Cir. 2019). "*Monell* does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006).

The district court dismissed Frost's municipal liability claims because it concluded that he had failed to show the existence of any independent constitutional violations. *Frost v. City of New York*, No. 15 Civ.

---

[24] On remand, the district court may be unable to ascertain the identity of the officer in question, or of any other individual defendants who can be held liable in connection with the July 16 incident. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) ("It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983."). The district court may nevertheless consider evidence regarding the July 16 incident in connection with Frost's municipal liability claims.

4843 (NRB), 2019 WL 1382323, at *12 (S.D.N.Y. Mar. 27, 2019). As discussed above, however, we hold that Frost has created a triable issue regarding his due process claim and two of his excessive force claims. Because the district court is best suited to address the merits of Frost's municipal liability claims in the first instance, we vacate the dismissal of those claims and remand for further consideration in light of this opinion. *See Darnell v. Pineiro*, 849 F.3d 17, 39 (2d Cir. 2017).

CONCLUSION

For the reasons above, we AFFIRM the district court's dismissal of Frost's malicious prosecution claim and his excessive force claim arising out of the January 16 incident; we REVERSE the district court's dismissal of Frost's due process claim and his excessive force claims arising out of the October 9 and July 16 incidents; we VACATE the district court's dismissal of Frost's municipal liability claims; and we REMAND the case for further proceedings consistent with this opinion.

KEARSE, *Circuit Judge*, dissenting in part:

I respectfully dissent from so much of the majority opinion as holds that the district court erred in dismissing the claims of plaintiff Jarrett Frost against defendants Richard Spennicchia and Joseph O'Neil (the "Officers") for the alleged denial of his "substantive due process" "right to a fair trial." Majority Opinion *ante* at 22 (internal quotation marks omitted). While I agree that the district court could not properly grant summary judgment based on its assessment of Leon Vega's credibility, we are free to affirm a judgment "on any ground which finds support in the record, regardless of the ground upon which the trial court relied," *Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir.), *cert. denied*, 496 U.S. 929 (1990); and I do not see any genuine issue of material fact to be tried as to the claim that the Officers denied Frost a fair trial. There is of course a "constitutional right . . . to have one's case tried based on an accurate evidentiary record that has not been manipulated by the prosecution." *Dufort v. City of New York*, 874 F.3d 338, 355 (2d Cir. 2017) ("*Dufort*"). But while Frost claims that the Officers coerced Vega in 2011 to identify Frost as the person who had shot Vega's friend Mavon Chapman and thereby fabricated evidence against Frost, that alleged fabrication, if it occurred, could not have denied Frost a fair trial because in 2014, "when [Frost] was put *on trial*, *Vega did not identify him*" (Frost's brief on appeal at 22 (emphasis added)). As we have squarely held, where the allegedly fabricated evidence has not been replicated at trial, a due process claim of denial of a fair trial "fail[s] as a matter of law." *Dufort*, 874 F.3d at 355.

In *Dufort*, the due process claimant asserted that police officers had denied him a fair criminal trial "by

fabricating inculpatory evidence through an inappropriately suggestive lineup," *id*. at 347; at his criminal trial, however, the lineup witness stated the true, limited nature of her identification, and we affirmed the district court's dismissal of the fair-trial claim "as a matter of law" because the plaintiff had "not proved that the evidentiary record at his criminal trial was unfairly distorted," *id*. "Mere attempts to withhold or falsify evidence cannot form the basis for a § 1983 claim for a violation of the right to due process when those attempts have no impact on the conduct of a criminal trial." *Id*. at 355 (citing *Zahrey v. Coffey*, 221 F.3d 342, 348-50 (2d Cir. 2000) ("*Zahrey*")).

In the present case, the majority expressly "[c]oncede[s]" that

> it is undisputed . . . that Vega's allegedly coerced identification of Frost *could not have 'distort[ed] the record' at Frost's trial*, [*Dufort*, 874 F.3d at 355], because Vega did not repeat this identification in his trial testimony."

Majority Opinion *ante* at 39 (emphasis mine). However, it seeks to distinguish *Dufort* by pointing out that "Frost . . . does not ground his due process claim in allegations that the defendants attempted to distort the record *at his criminal trial*," *id*. (emphasis mine). The majority acknowledges that Frost

> instead . . . grounds his claim in allegations that the defendants fabricated evidence much earlier in the process and forwarded that evidence to prosecutors, thereby depriving Frost of his liberty.

Id. But this recognition of the actual pretrial focus of Frost's claimed deprivation of liberty highlights my

doctrinal difficulty with the majority's reinstatement of Frost's so-called fair-trial claim.

"'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged,'" *Graham v. Connor*, 490 U.S. 386, 394 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 140 (1979)). "'[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)); *see*, *e.g.*, *Graham v. Connor*, 490 U.S. at 395. Where a claim is "'covered by' the Fourth Amendment," "[s]ubstantive due process analysis is . . . inappropriate." *County of Sacramento v. Lewis*, 523 U.S. at 843.

Most recently, in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), the Supreme Court confirmed that an accused alleging the fabrication of evidence against him "may challenge his pretrial detention on the ground that it violated the Fourth Amendment," *id*. at 914, and held that lower court decisions that the petitioner should instead have "challenge[d] his pretrial confinement via the Due Process Clause," *id*. at 916, were error, *see id*. at 919. The Supreme Court noted that the petitioner, following a hearing to determine whether there was probable cause for his postarrest detention, *see id*. at 915, had been

> held in jail for some seven weeks after a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime. The primary question in this case is whether Manuel may bring a claim based on

> the Fourth Amendment to contest the legality of his pretrial confinement. *Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes "the standards and procedures" governing pretrial detention. See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

Manuel, 137 S. Ct. at 914 (emphasis mine).

There is no suggestion, of course, that the existence of probable cause in compliance with the Fourth Amendment would be a defense against the use of fabricated evidence at trial.

> [O]nce a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause . . . .

Manuel, 137 S. Ct. at 920 n.8. But the "[Fourth] Amendment, standing alone, guarantee[s] *a fair and reliable determination of probable cause* as a condition for any significant *pretrial* restraint," *Manuel*, 137 S. Ct. at 917-18 (internal quotation marks omitted) (emphases mine); *see id*. at 918-19 ("The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. . . . That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. *But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements*. *Then*, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done

nothing to satisfy the Fourth Amendment's probable-cause requirement." (emphases added)).

The majority in the present case, in concluding that summary judgment dismissing Frost's substantive due process fair-trial claims was error, relies principally on two cases, *Zahrey* and *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997) ("*Ricciuti*"). I disagree with the majority's view that the claim upheld in *Zahrey* was one for denial of a fair trial; and while I do not disagree with *Ricciuti*'s conclusion that the plaintiffs there had asserted a viable constitutional claim for unwarranted prolonged pretrial detention, I view its conclusion that the plaintiffs had a viable due process claim for denial of their right to a fair trial—in a case in which the charges against them were dismissed without a trial—as contrary to the Supreme Court's instruction that claims of pretrial deprivations should be analyzed under the Fourth Amendment.

Zahrey:

In *Zahrey*, in which the plaintiff had been acquitted after trial, we concluded that the plaintiff adequately pleaded a claim for deprivation of his liberty prior to trial, not a claim for denial of a fair trial. Although the majority states that "Zahrey alleged that the defendants had deprived him of liberty by coercing two witnesses . . . to testify falsely against [him] before a grand jury, thereby *resulting in his pretrial detention*," and states that "[o]n these facts, we held that Zahrey had adequately stated a claim under § 1983 for . . . denial of his '*right to a fair trial*,'" Majority Opinion *ante* at 36 (quoting *Zahrey*, 221 F.3d at 346 (emphases mine)), we did not find that he had stated a claim for denial a fair trial. The above *Zahrey* language quoted by the majority was part of our quotation of Zahrey's

own characterizations of his claims. And rather than adopting his characterizations, we proceeded to "consider first *the existence of the right Zahrey contends was violated* and the related issue of whether his deprivation of liberty was *a legally cognizable result* of [the prosecutor's] alleged misconduct." *Zahrey*, 221 F.3d at 348 (emphases added); *see*, *e.g.*, *Graham v. Connor*, 490 U.S. at 394.

In the ensuing section titled "Identifying the Right," *Zahrey*, 221 F.3d at 348-49, we concluded that Zahrey alleged a deprivation of liberty, and that his "liberty deprivation [wa]s the eight months he was confined, from his bail revocation (after his arrest) to his acquittal," *id*.; *see also id*. at 349 ("*the right at issue in this case is appropriately identified as the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity*. *Understood this way*, we conclude that the right at issue is a constitutional right, *provided that the deprivation of liberty of which Zahrey complains can be shown to be the result of [the prosecutor's] fabrication of evidence*." (emphasis added)).

We did not say that Zahrey had adequately pleaded a claim for denial of a fair trial. Indeed, focusing on the absence of any right to recover for misconduct that has not caused injury, we suggested that no claim for denial of a fair trial would be cognizable where—as in *Zahrey*—the criminal trial ended in an acquittal. *See*, *e.g.*, *id*. at 350 ("If, for example, a prosecutor places in evidence testimony known to be perjured . . . , *no deprivation of liberty occurs unless and until the jury convicts and the defendant is sentenced*." (emphasis added)); *id*. at 348 (the constitutional right at issue is not simply the "right not to have a prosecutor manufacture false evidence. . . . *The manufacture of*

false evidence, *in and of itself*, . . . *does not impair anyone's liberty*, and therefore does not impair anyone's constitutional right." (internal quotation marks omitted) (emphases mine)).

Thus, we noted that "Justice Scalia foreshadowed Zahrey's claim when he observed: 'I am aware of[ ] *no authority* for the proposition that *the mere preparation* of false evidence, *as opposed to its use* in a fashion *that deprives someone* of a fair trial *or otherwise harms him*, violates the Constitution,'" *Zahrey*, 221 F.3d at 356 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, *J*., concurring) (last emphasis in *Zahrey*; other emphases mine)). And we noted that "Zahrey's contention is that" by the prosecutor's misconduct "he ha[d] been '*otherwise* harm[ed].'" *Zahrey*, 221 F.3d at 356 (emphasis mine). The fabricated evidence had been "used by introducing it in evidence before the grand jury," following which "an indictment was . . . returned and Zahrey was later arrested," *id*.; and it was further used in opposition to Zahrey's motion for bail, *see id*. at 347. Accordingly, Zahrey's "liberty deprivation *[wa]s the eight months he was confined*, from his bail revocation (after his arrest) to his acquittal . . . ." *Id*. at 348 (emphasis added).

Ricciuti:

In *Ricciuti*, the plaintiffs, who had been arrested for assault, claimed that police officers fabricated a confession that indicated racial animus on the part of one of the plaintiffs. Our opinion stated that

> [l]ike a prosecutor's knowing use of false evidence to obtain a tainted conviction, 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,"

124 F.3d at 130 (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976); and citing *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)), and we added that

> [w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he *violates the accused's constitutional right to a fair trial*, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983,

Ricciuti, 124 F.3d at 130 (emphasis added).

But *Agurs*, *Giglio*, and *Mooney* were all cases that had been decided after trial. In *Ricciuti*, the criminal charges had in fact been dismissed without a trial because the officer who reported the allegedly fabricated confession repeatedly failed to comply with a pretrial discovery order. *See Ricciuti*, 124 F.3d at 127. The trial process was not corrupted; there was no trial.

The real nature of the *Ricciuti* plaintiffs' complaints—and what gave them a cognizable constitutional claim—was apparently that as a result of the allegedly fabricated confession, their assault charges were reclassified as bias-related: "Because of the seriousness of the charges against them, plaintiffs were ineligible for release on desk appearance tickets, and were forced to remain in jail for more than 30 hours from April 30 until near midnight on May 1, 1989 when they were released on their own recognizance." *Id*. at 126.

Thus, in *Ricciuti*, there was probable cause for the plaintiffs' arrests for assault. But if the confession was fabricated, there was not probable cause for the increase of the charges to the aggravated crimes of bias, the aggravated crimes being the apparent basis for keeping the plaintiffs detained for 30 hours rather than releasing them as would otherwise have occurred. Accordingly, the allegedly fabricated confession resulted in the deprivation of the plaintiffs' liberty for 30 hours.

I think it clear in light of *Manuel*—which was based on settled Supreme Court precedent, some of which preceded *Ricciuti*—that *Ricciuti* should have addressed the claim it was upholding not as a due process claim for denial of a fair trial, but rather as a Fourth Amendment claim for unduly prolonged deprivation of the plaintiffs' pretrial liberty. The source of plaintiffs' right was the Fourth Amendment since only their pretrial liberty had been curtailed, not their right to fairness in a trial that was not held.

The *Ricciuti* panel's "entirely different mode of analysis" to approve of a due process fair-trial claim in a case in which there was no trial at all, Majority Opinion *ante* at 36, did not comply with the requirement that our "first inquiry in any § 1983 suit" be to identify "the precise constitutional violation with which [the defendant] is charged," *Graham v. Connor*, 490 U.S. at 394 (internal quotation marks omitted), or with the principle reaffirmed in *Manuel* that claims of deprivation of liberty prior to trial are to be analyzed under the Fourth Amendment rather than under general principles of substantive due process.

Dufort:

As noted above, the majority overturns the district court's grant of summary judgment dismissing Frost's claim for denial of a fair trial in which the evidence he alleges was fabricated was not presented, despite our holding in *Dufort* that such a claim should be dismissed as a matter of law. The majority states that *Dufort* is distinguishable because Frost's claim is that he was deprived of liberty "much earlier" than at trial because the Officers allegedly coerced Vega to identify Frost as Chapman's shooter and sent that information to the prosecutor. Majority Opinion *ante* at 39. But that claim is one that should simply be analyzed under the Fourth Amendment. Such analysis, however, reveals one aspect in which *Dufort* is distinguishable, *i.e.*, the quality of the evidence leading to the respective prosecutions of Dufort and Frost, for a pretrial detention following the fabrication of evidence violates the Fourth Amendment only if without the "fabricated evidence . . . probable cause is lacking," *Manuel*, 137 S. Ct. at 920 n.8.

In *Dufort*, the summary dismissals of Dufort's claims of false arrest and malicious prosecution were vacated, *see Dufort*, 874 F.3d at 343, 349-51, and those claims were remanded for further proceedings because there existed genuine issues of material fact. We held that "the undisputed evidence . . . was" neither "sufficient to establish probable cause to arrest as a matter of law," *id*. at 349, nor "sufficient to establish probable cause for a criminal prosecution," *id*. at 351.

In the present case, in contrast, we affirm (unanimously) the district court's grant of summary judgment dismissing Frost's malicious prosecution claims in light of three undisputed facts: (1) that "Frost had a motive to retaliate against Chapman" for an assault

on Frost "by Chapman's friends the night before," (2) that Frost and John McLaurin were in "the stairwell from which Chapman was shot, immediately after Chapman was shot," and (3) that "McLaurin identified Frost as the shooter," Majority Opinion *ante* at 19. We all agree "as a matter of law" based on "*these* undisputed facts"—which contain no reference whatsoever to any statement by Vega—that "*a reasonably prudent person would have been led to believe that Frost was guilty of shooting Chapman*," Majority Opinion *ante* at 19 (emphases added). That was more than ample probable cause for Frost's arrest, detention, and prosecution.

In reversing the dismissal of the fair-trial claim, the majority posits that "a reasonable jury could have found *that Vega's identification critically influenced the decision to prosecute* Frost," Majority Opinion *ante* at 33 (internal quotation marks omitted (emphasis mine)), or that "a reasonable jury could have found *that the decision to prosecute Frost would have been different if McLaurin*, who was Frost's fellow suspect, *was the only person to identify him*," *id*. (emphases mine). In light of the record, I do not see that any reasonable juror could answer either question in the affirmative, or even that these questions could properly be submitted to a jury, given the majority's own recounting of the three undisputed facts quoted above—in which the only identification of Frost as the shooter was that by McLaurin and there was no consideration of any statement by Vega—that support our unanimous conclusion that Frost's malicious prosecution claims were properly dismissed because "as a matter of law . . . a reasonably prudent person would have been led to believe that Frost was guilty of shooting Chapman," Majority Opinion *ante* at 19.

And while the majority also states that "there is a triable question as to *whether Vega's identification would likely have influenced the jury at Frost's criminal trial*," Majority Opinion *ante* at 38 (emphasis added), posing such a question would be entirely speculative, if not mind-boggling, because its premise is negated by the actual events: Vega did not identify Frost at the trial.

In sum, even if it were proven that the Officers fabricated Vega's 2011 identification of Frost as the shooter as alleged, the undisputed evidence without reference to the Vega identification forecloses any claim by Frost for deprivation of his liberty prior to trial. And we are in agreement that

> it is undisputed here that *Vega's allegedly coerced identification of Frost could not have "distort[ed] the record" at Frost's trial*, [*Dufort*, 874 F.3d at 355], *because Vega did not repeat this identification in his trial testimony*,

Majority Opinion *ante* at 39 (emphases mine). In my view the majority's reinstatement of Frost's claim that he was denied a fair trial is thus without legal or factual foundation.

This case is not meaningfully distinguishable from *Dufort*, and I would affirm the grant of summary judgment dismissing the due process claims of denial of a fair trial.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed March 27, 2019]

---

15 Civ. 4843 (NRB)

JARRETT FROST

Plaintiff,

- against -

THE CITY OF NEW YORK, *et al*.

Defendants.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

MEMORANDUM AND ORDER

Plaintiff Jarrett Frost brings this action pursuant to 42 U.S.C. § 1983 and New York common law after a jury acquitted him of all charges in connection with the murder of Mavon Chapman. After dismissing all claims under three causes of action and against one named defendant,[1] plaintiff now asserts thirteen

[1] *See* Stipulation of Partial Dismissal and Withdrawal with Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) ("Stipulation"), ECF No. 76. Plaintiff dismissed with prejudice claims under his first, sixth, and tenth causes of action. Plaintiff also dismissed with prejudice all claims against defendants Correctional Officer Thomas, Detectives John Doe #1-2, and Correction Officers John Does #1-5. *Id*. ¶¶ 1-3, 7, 9.

causes of action against the City of New York ("NYC"), three members of the New York Police Department ("NYPD officers"),[2] and 17 officers of the Department of Correction ("DOC officers")[3] based on (1) alleged malicious prosecution by NYPD officers and (2) alleged use of excessive force by DOC officers while Frost was incarcerated.

Since plaintiff asserts each cause of action against different combinations of defendants, we list below each cause of action and defendants against whom the cause of action is asserted in order to avoid any confusion:

> Count 2: Deprivation of rights under the U.S. Constitution and 42 U.S.C. § 1983 against Lopuzzo, McDuffie, Ryan and Jemmott;[4]
>
> Count 3: Use of excessive force by DOC Officers with respect to Municipal Liability against NYC;[5]
>
> Count 4: Violation of substantive due process rights against all individual defendants;[6]

---

[2] The three NYPD officers are defendants Spennicchia, O'Neil and Lopuzzo.

[3] The 17 DOC officers are defendants McDuffie, Ryan, Jemmott, Torres, Soria, Carty, Souffrant, Tatulli, Previllon, Gonzales, Young, McLaughlin, Barksdale, Corker, Sanchez, Hill, and Joye.

[4] Plaintiff dismissed Count 2 as against NYC, Spennicchia, O'Neil, Torres, Soria, Carty, Souffrant, Tatulli, Previllion, Gonzalez, Young, McLaughlin, Barksdale, Corker, Sanchez, Hill, and Joye. Stipulation ¶ 4.

[5] Plaintiff dismissed Count 3 as against all individual defendants. *Id*. ¶ 5.

[6] Plaintiff dismissed Count 4 as against NYC. *Id*. ¶ 6.

Count 5: Malicious prosecution against NYC, Spennicchia, O'Neil, and Lopuzzo;

Count 7: Battery against NYC, McDuffie, Soria, Carty, Souffrant, Tatulli, and Previllon;[7]

Count 8: Assault against NYC, McDuffie, Soria, Carty, Souffrant, Tatulli, and Previllon;[8]

Count 9: Excessive force against all DOC officers except for Gonzalez;

Count 11: Dereliction of duty, depraved indifference, and failure to intercede against all DOC officers;[9]

Count 12: Negligence against all defendants;

Count 13: Negligent hiring against defendant NYC;

Count 14: Negligent infliction of emotional harm against all defendants;

Count 15: Intentional infliction of emotional harm against all defendants; and

Count 16: Monell liability against NYC.

Defendants move for summary judgment against all of plaintiff's claims. Since plaintiff cannot maintain any cause of action against NYC without establishing an underlying claim based an individual defendant's action, we assess the state of the record "to determine whether there is a genuine issue to be tried" as to claims asserted against individual defendants.

[7] Plaintiff dismissed Count 7 as against Gonzalez. *Id*. ¶ 8.

[8] Plaintiff does not explicitly dismiss Count 8 as against Gonzales but does not list Gonzales as a defendant for Count 8. *Id*. ¶ 11(f).

[9] Plaintiff dismissed Count 11 as against NYC. *Id*. ¶ 10.

Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 101 (2d Cir. 2010). For the reasons stated below, we find that plaintiff has failed to establish his federal claims against any individual defendant and grant defendants' motion for summary judgment.

BACKGROUND[10]

We begin with undisputed facts related to plaintiff's initial arrest and prosecution before turning to undisputed facts related to four incidents of alleged use of excessive force by DOC officers while plaintiff was incarcerated in Rikers Island.

I. Alleged Malicious Prosecution by NYPD Officers

Mavon Chapman was shot and killed on July 6, 2010, at or around 3:55 a.m. on the corner of Morris Avenue and East 149th Street in the Bronx. Defs.' 56.1 Stmt. ¶ 3, ECF No. 80.[11] On the day of the murder, Frost was residing in an apartment complex at 225 East 149th Street in the Bronx ("apartment complex"), which is located one block from where Chapman was shot. *Id.* ¶¶ 4-6. The day before the murder, Frost and his friend were assaulted by a neighborhood gang in front of the apartment complex. *Id.* ¶ 7. The gang included non-parties Leon Vega and Tjon Macall. *Id.* ¶ 8. Frost was interviewed by non-party Detective

[10] The following facts are taken from the parties' Local Rule 56.1 Statements, declarations, and exhibits. Our citations to the 56.1 statements also incorporate by reference the documents and testimony cited therein.

[11] Plaintiff's counsel failed to comply with the Court's Individual Rules of Practice by not reproducing each entry of defendants' 56.1 Statement in the counter-statement. Consequently, we provide parallel citations to both parties' 56.1 Statements only if the statement is disputed by the parties.

Burgos about the assault within a day of the assault. *Id*. ¶¶ 12-13.

Detectives Spennicchia and O'Neil interviewed six witnesses, including Vega and Macall, who were within the vicinity of Morris Avenue and East 149th Street at the time of the murder. *Id*. ¶ 21. Based on the interviews and two .380 caliber shell casings found under the passageway of the apartment complex, the detectives came to believe that the shots that had killed Chapman came from a doorway leading to the apartment complex's stairwell. *Id*. ¶¶ 24-31. The detectives reviewed surveillance video from cameras located inside the lobby and the stairwell of the apartment complex, which showed two individuals coming down and then running back up the stairwell at the time of the murder. *Id*. ¶¶ 33-39. Detective Burgos identified one of the individuals as Frost. *Id*. ¶ 40. On July 7, 2017, Detectives Spennicchia and O'Neil interviewed Frost, who admitted that he was in the stairwell with non-party John McLaurin. *Id*. ¶¶ 44-49, 59. Frost also informed the detectives and an Assistant District Attorney ("ADA") that, while he was with McLaurin in the staircase, he saw McLaurin with a gun after he heard gunshots.[12] *Id*. ¶ 61-62; Pl.'s 56.1 Counter-Stmt. ¶ 62, ECF No. 113.

On January 6, 2011, Vega, who had been arrested for an unrelated crime, wanted to enter into a cooperation agreement with the Bronx District Attorney's Office in exchange for information he had about

[12] After initially saying that he first saw McLaurin with a gun after the shots, Frost then clarified that he saw McLaurin "make a motion" into his left pocket as if he were "reaching for something." Pl.'s 56.1 Counter-Stmt. ¶ 62.

Chapman's murder.[13] Defs.' 56.1 Stmt. ¶ 72. Accompanied by his criminal defense attorney, Vega was interviewed by an ADA at the District Attorney's Office and identified Frost as the shooter from a photo array.[14] *Id.* ¶ 74-76; Pl.'s 56.1 Counter-Stmt. ¶ 75-76. Vega also identified McLaurin from a photo array as the individual who was with Frost at the time of the murder. Defs.' 56.1 Stmt. ¶ 78. On January 9, 2011, Detectives Spennicchia and O'Neil interviewed McLaurin after advising him of his Miranda rights. *Id.* ¶¶ 79-81. During the interview, McLaurin stated that he was with Frost in the staircase and identified Frost as the shooter. *Id.* ¶¶ 84-94; Pl.'s 56.1 Counter-Stmt. ¶¶ 84-95. McLaurin also provided an audio statement to an ADA. Defs.' 56.1 Stmt. ¶ 95.

Based on Vega's and McLaurin's statements, the Bronx District Attorney's Office authorized the arrest of Frost. *Id.* ¶¶ 96-97; Pl.'s 56.1 Counter-Stmt. ¶¶ 96-97. On January 13, 2011, Frost was arrested on charges of: (1) Murder in the Second Degree, N.Y.P.L. § 125.25(1); (2) Manslaughter with Intent to Cause Physical Injury, N.Y.P.L. § 125.20(1); (3) Criminal Possession of a Weapon in the Second Degree: Loaded Firearm, N.Y.P.L. § 265.03(1); and (4) Criminal Procession of a Weapon in the Second Degree: Loaded Firearm, N.Y.P.L. § 265.03(3). Defs.' 56.1 Stmt. ¶ 98.

---

[13] During his initial interview with the police on July 6, 2010, Vega stated that he did not see or know who shot Chapman. Defs.' 56.1 Stmt. ¶ 23.

[14] In a declaration dated September 12, 2018, Vega states for the first time that he falsely identified Frost as the shooter under duress from Detectives Spennicchia and O'Neil. *See* Decl. of Leon Vega, ECF No. 111-1, ¶¶ 13-18. As discussed *infra*, we find that Vega's eleventh hour declaration does not create a genuine issue of fact.

On February 1, 2011, Frost was indicted by a grand jury on the four charges. *Id*. ¶ 100. The New York Supreme Court, Bronx County, found that the evidence before the grand jury was legally sufficient in all respects. *People v. Frost*, Indictment No. 00473-2011, Feb. 3, 2012 Decision & Order (N.Y. Sup. Ct. 2012). On June 24, 2014, Frost was found not guilty of all charges after a jury trial.[15] Defs.' 56.1 Stmt. ¶ 102.

II. Alleged Use of Excessive Force by DOC Officers

Plaintiff alleges four specific incidents during which he asserts that DOC officers used excessive force.[16] We recite the undisputed facts related to each incident in chronological order.

A. July 25, 2012 Incident

On July 25, 2012, plaintiff was scheduled to appear in the Manhattan Criminal Court. *Id*. ¶ 128. Plaintiff, who had been designated as a RED ID inmate,[17] was

---

[15] There is no allegation that the delay between plaintiff's arrest and trial is attributable to any defendant.

[16] Plaintiff's amended complaint recites seven incidents. However, plaintiff does not assert any claim premised on the first three incidents that allegedly took place on (1) May 16, 2011, (2) November 10, 2011, and (3) February 15, 2012, apparently recognizing that the three-year statute of limitations for a § 1983 action had expired for the three incidents by the time plaintiff filed his complaint on June 22, 2015. *See Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993) ("The statute of limitations for actions under § 1983 is the statute of limitations applicable to personal injuries occurring in the state in which the appropriate federal court sits. . . . In New York State, the applicable statute of limitations for personal injuries is three years.") (internal citations omitted). Plaintiff's pleading is inconsistent in recognizing the time bar of the first three incidents.

[17] A RED ID classification is given to inmates who have engaged in assaultive behavior. *See* Defs.' 56.1 Stmt. ¶ 125; Pl.'s

waiting for his scheduled court appearance in a cell on the 12th floor of the courthouse, *id*. ¶ 127, when he got into a physical fight with another inmate, Jason Skinner, *id*. ¶ 132. Defendant Officer Torres, who was assigned to work at the 12th floor RED ID cell on the day of the incident, *id*. ¶ 123, and his partner, Officer Thomas, both told plaintiff and Skinner to stop fighting and entered the cell. *Id*. ¶ 135-36. Plaintiff and Skinner stopped fighting, and Officers Torres and Thomas separated them. *Id*. ¶¶ 136, 138. Officer Thomas noticed that Skinner was bleeding from lacerations on his face and thigh. *Id*. ¶ 140; *see also* Defs.' Ex. U, ECF No. 78-21, Bates No. DEF 1564. In light of Skinner's injuries, Officers Torres and Thomas searched plaintiff and the cell for a shank, but the officers did not discover any weapon. *Id*. ¶¶ 141, 144.

During the fight, plaintiff's prescription glasses fell off.[18] *Id*. ¶¶ 152-53. After the fight, plaintiff asked Officer Torres for his glasses. *Id*. ¶ 154. Officer Torres located the glasses on the floor and noticed that they were damaged. *Id*. ¶ 155-56; Pl.'s 56.1 Counter-Stmt. ¶156.[19] Officer Torres handed the glasses back to

---

56.1 Counter-Stmt. ¶ 125. RED ID inmates wear RED ID restraints and handcuffs. *See* Defs.' 56.1 Stmt. ¶ 126. Plaintiff was given RED ID status after he "was involved in a use of force" with several non-party corrections officers and non-party inmates on February 15, 2012. *Id*. ¶¶ 118, 120. Plaintiff was later found guilty of six counts of obstructing governmental administration related to that incident, but was acquitted of assault charges. *Id*. ¶ 122; Pl.'s 56.1 Counter-Stmt. ¶ 122.

[18] Plaintiff was given prescription glasses by a Department of Corrections optometrist about a month earlier on June 22, 2012. Defs.' 56.1 Stmt. ¶ 152.

[19] Officer Torres stated that, when he picked up the glasses, the right lens was broken and the frame was cracked at the bottom of the lens on the right side. Defs.' 56.1 Stmt. ¶ 156; Defs.'

plaintiff but intentionally further broke the glasses in the middle of the frame. Defs.' 56.1 Stmt. ¶ 157-58.

Plaintiff received medical attention after the incident but did not request new glasses at that time. *Id*. ¶ 159. Plaintiff requested new glasses on August 16, 2012 and received them on September 22, 2012. *Id*. ¶¶ 160-61.

B. October 9, 2012 Incident

On October 9, 2012, plaintiff was brought to the Bronx Supreme Court for an attorney visit. *Id*. ¶ 164. Defendant Captain Jemmott was assigned as Search Captain and was tasked with searching inmates and transporting them back to their respective facilities after their court appearances. *Id*. ¶ 163. Defendant Officer Joye was also present at the courthouse. *Id*. ¶ 170. Plaintiff complained to an unidentified officer that it was difficult to breathe in the booth area, and he was subsequently brought towards an empty pen in the intake area by Captain Jemmott. *Id*. ¶¶ 165-66. While in transit, plaintiff told Captain Jemmott that

---

Ex. H (Torres Deposition), ECF No. 78-8, Tr. 69:12-20. Plaintiff disputes this statement and cites several pages of the transcript from plaintiff's deposition. *See* Pl.'s 56.1 Counter-Stmt. ¶ 156. However, plaintiff stated during his deposition: "So when I looked at my glasses . . . I realized they had been broken and damaged." Pl.'s Ex. A ("Frost Deposition"), ECF No. 110, Tr. 186:6-8. Although plaintiff did not describe the extent of the damage, his statement does not contradict Officer Torres's statement that the glasses were damaged during plaintiff's altercation with Skinner. Since plaintiff does not "point to any evidence in the record that may create a genuine issue of material fact," plaintiff's 56.1 statement "will be deemed [an] admission[] of the stated fact." *Senno v. Elmsford Union Free Sch. Dist*., 812 F. Supp. 2d 454, 458 n.1 (S.D.N.Y. 2011).

he would spit on Jemmott's face.[20] *Id*. ¶ 171; Pl.'s 56.1 Counter-Stmt. ¶ 171. Captain Jemmott then took plaintiff to the ground and held his face. *Id*. ¶ 172. Officer Joye used his knee to keep plaintiff's legs down, and one of the two officers kicked plaintiff in the ribs. *Id*. ¶¶ 173-74. Plaintiff was dragged across the ground by Captain Jemmott and Officer Joye. *Id*. ¶ 175.

Plaintiff was taken to the medical clinic on the same day, and he complained of mild hearing loss in his right ear. *Id*. ¶¶ 177-79. The next day, plaintiff was diagnosed with bruises on the right side of his forehead and right cheekbone, as well as a ruptured right eardrum. *Id*. ¶ 181. Plaintiff was given Motrin for these injuries. *Id*. ¶ 184.

C. January 16, 2013 Incident

On January 16, 2013, plaintiff was housed on the first floor of the Central Punitive Segregation Unit ("CPSU"). Defs.' 56.1 Stmt. ¶ 189. Defendant Captain Ryan was assigned to the CPSU as the supervisor of the fourth floor, defendant Officer McLaughlin was assigned to the CPSU as a second floor escort, and defendant Officer Hill was assigned to the CPSU Intake 3-point search area. *Id*. ¶ 186-193. Defendant Officer Hill initiated a strip search of plaintiff after plaintiff returned from court. *Id*. ¶¶ 196-98.

The parties' accounts of what followed diverge. Defendants' version is as follows. Defendant Officer Hill was notified by his supervisor, Deputy Warden

[20] Regarding his alleged threat, plaintiff stated: "I don't recall saying that, but – I never spit in his face, but if I was mad, I possibly did." Frost Deposition, Tr. 265:23-24. This type of response does not function as a denial "and will be deemed [an] admission[] of the stated fact." *Senno*, 812 F. Supp. 2d at 458 n.1.

Ramos, that plaintiff was secreting an object in his anal cavity. *Id*. ¶ 203. Plaintiff turned over a contraband bag of cheese to defendant Officer Hill but refused to turn over a second contraband object despite several direct orders that he do so. *Id*. ¶¶ 200-201. Defendant Captain Ryan was tasked with conducting an extraction of the second object from plaintiff's anal cavity. *Id*. ¶ 204. Captain Ryan assembled an extraction team that consisted of himself, Officers Young, McLaughlin, Barksdale, Corker, Sanchez, and non-party Officer Stowers. *Id*. ¶ 207. In preparation for the extraction, Captain Ryan obtained plaintiff's profile from the security office *Id*. ¶ 208. Plaintiff's profile revealed he was a RED ID inmate, was designated as an "Intended Contraband Recipient," had enhanced restraint status, was a member of the Bloods gang, had a record of assaulting staff, was previously caught with a weapon, and had either one or two infractions for fighting with inmates. *Id*. ¶ 209. Defendants Ryan and Hill tried to convince plaintiff to turn over the remaining contraband, but they were unsuccessful. *Id*. ¶¶ 215-16. Plaintiff was subsequently moved from the CPSU intake search area. *Id*. ¶ 222; *see also* Def's Ex. V, ECF No. 78-22, Bates No. DEF 1725 (Handheld Video of Jan. 3, 2013 Incident) ("Video of the Extraction Incident"). Immediately prior to the extraction, plaintiff kept his left hand in the cuffing port to prevent Captain Ryan from opening the door, spit on him, and attempted to grab pepper spray from him. *Id*. ¶¶ 223-225. Immediately prior to the extraction, Captain Ryan pepper sprayed plaintiff twice, ordered plaintiff to remove the contraband and release his arm from the cell, and ordered defendant Officer McLaughlin to remove plaintiff's arm from the cuffing port. *Id*. ¶¶ 227, 229, 231. Plaintiff's arm was removed from the

cuffing port, and two members of the extraction team entered the search area. *Id.* ¶¶ 232, 234.

Plaintiff threw punches at the officers as they entered the search area while plaintiff attempted to exit the search area. *Id.* ¶ 235. Plaintiff was ordered to stop resisting but failed to do so. *Id.* ¶¶ 238, 240-241. The officers grabbed plaintiff's arm and took him to the ground. *Id.* ¶ 237. One officer applied leg shackles while another officer applied handcuffs and plaintiff was subsequently lifted to his feet and brought to the three-point search area. *Id.* In the search area, Captain Ryan ordered plaintiff to squat, but he refused to squat and instead lunged towards Ryan. *Id.* ¶¶ 246-247. Plaintiff eventually squatted as requested, and a piece of triangular metal wrapped in black electrical tape fell out of his rectum. *Id.* ¶ 250.

Plaintiff sustained some bruises during the extraction and was treated at the medical clinic with an ice pack and pain medication. *Id.* ¶¶ 252-253. He was subsequently arrested and indicted in connection with the incident. *Id.* ¶ 254. On December 1, 2014, plaintiff pled guilty to Promoting Prison Contraband in the Second Degree in satisfaction of the indictment issued in connection with the incident. *Id.* ¶ 255; Defs.' Ex. V (Certificate of Disposition on Jan. 16, 2013 incident), ECF No. 78-22.

Plaintiff's account of the January 16, 2013 incident differs from defendants' account in the following ways. Plaintiff admits that he had a bag of cheese in his possession but denies that he had any other object in his possession. *See* Pl.'s 56.1 Counter-Stmt. ¶ 198; Pl.' Ex. A (Frost Deposition), Tr. 273:4-273:21. Plaintiff asserts that the metal contraband was planted on him by Captain Ryan. Pl.'s 56.1 Counter-Stmt. 11 197-198, 200, 221, 229-230. Plaintiff disputes that he was

secreting anything in his anal cavity. *Id.* ¶ 203. Plaintiff also denies resisting officers during the extraction. *Id.* ¶ 238-240. Lastly, plaintiff admits to pleading guilty to promoting prison contraband but asserts he did so "to get the incident over with and move on without doing further jail time rather than because he was guilty." *Id.* ¶ 255.

D. July 16, 2013 Incident

On July 16, 2013, Plaintiff was housed in "Housing Area 1 South" of the Central Punitive Segregation Unit ("CPSU"). Defs.' 56.1 Stmt. ¶ 258. Defendants McDuffie, Soria, and Previllon were all assigned to work at the recreation post of the CPSU that day. *Id.* ¶¶ 259-64. Plaintiff and eighteen other inmates were escorted to the recreation post around 6 a.m. on July 16, 2013. *Id.* ¶ 270. Nineteen inmates, including plaintiff, refused to leave the recreation yard at the end of their allotted hour. *Id.* ¶¶ 272-73. Defendant McDuffie and other officers spent approximately seven hours speaking with plaintiff and other inmates in an unsuccessful attempt to get them to come back inside. *Id.* ¶ 275. An extraction team was assembled to extract plaintiff. *Id.* ¶ 282. The extraction team consisted of defendants McDuffie, Soria, Previllon, Souffrant, Carty, Tatulli, Gonzales, and non-party Savage. *Id.* ¶ 283. When the extraction team arrived at plaintiff's pen, plaintiff was holding the gate with one hand and had ripped his orange clothing to make elbow pads and a mouth guard. *Id.* ¶ 284.[21] Plaintiff threw several

[21] Plaintiff asserts a blanket dispute to defendants' account of the July 16, 2013 incident. Pl.'s 56.1 Counter-Stmt. ¶¶ 284-296. Plaintiff's reply violates Federal Rule of Civil Procedure 56(c) in that it does not respond to each numbered paragraph and instead cites to several pages of plaintiff's deposition without clarifying which statements of fact are in dispute. Regardless, we need not

punches at Officer Soria and Soria subsequently lost his balance and fell to the ground. *Id.* ¶ 287. Plaintiff got on top of Officer Soria. *Id.* ¶ 288. It took three members of the extraction team approximately 40 seconds to remove plaintiff from Officer Soria. *Id.* ¶ 290. Plaintiff was ordered to stop resisting during the extraction but persisted in resisting. *Id.* ¶¶ 292-293.

Plaintiff was treated at the CPSU mini clinic on the same day for sustaining a black eye. *Id.* ¶¶ 297-298. Plaintiff also had mild abrasions and superficial contusions, was in "no apparent distress," and was given bacitracin and Tylenol to relieve pain. *Id.* ¶¶ 299-300.

Procedural History

Plaintiff filed his complaint on June 22, 2015 and the operative amended complaint on February 5, 2016. *See* ECF Nos. 1, 21. After a very prolonged discovery period due to plaintiff's utter failure to prosecute the case on a timely manner, *see* Letter from the Court to Ellie A. Silverman, Apr. 19, 2018, ECF No. 67, the discovery period ended on March 31, 2018, and defendants moved for summary judgment on July 10, 2018, *see* ECF No. 77.

Plaintiff's answering brief was due August 28, 2018. *See* ECF No. 70. However, plaintiff's counsel, Ellie A. Silverman, sought an extension of the deadline until September 14, 2018, based on "the unforeseen lack of attorney coverage" at her law firm, and we granted the

---

credit assertions that "are flatly contradicted by the video evidence." *Hicks v. Vill. of Ossining*, No. 12-cv-6874 (VB), 2016 WL 345582, at *5 (S.D.N.Y. Jan. 27, 2016). Here, video footage of the incident of the incident clearly corroborates defendants' factual assertions. *See* Defs.' Ex. W, ECF No. 78-23 (Handheld Video of Jul. 16, 2013 Incident) ("Video of the Recreation Post Incident").

request. *See* ECF No. 87. The day before the extended deadline, Ms. Silverman informed the Court that the sole principal of her law firm, Ilya Novofastovsky, had been suspended from the practice of law and, given the numerous ethical issues that the suspension raised, asked for another adjournment of the deadline. *See* Letter from Ellie A. Silverman to the Court, Sep. 13, 2018, ECF No. 88. We granted plaintiff a 30-day extension "to file answering papers to the pending summary judgment motion either *pro se* or by counsel." Sep. 18, 2018 Order, ECF No. 95.

Ms. Silverman informed the Court that plaintiff "wanted [Ms. Silverman] to continue representing him." *See* Letter from Ellie A. Silverman to the Court, Oct. 16, 2018, ECF No. 96. She also asked for a brief stay on all motion practice until Mr. Novofastovsky turned over plaintiff's physical and electronic files to her. *Id*. We ordered Ms. Silverman to submit the answering brief within three weeks of receiving the files "but in no event later than December 3, 2018." ECF No. 97. After learning that Mr. Novofastovsky was ignoring her requests, *see* ECF No. 98, we issued an order to show cause "as to why he, as a suspended lawyer who was terminated as plaintiff's counsel, was entitled to place conditions on the transfer of the files and/or retain the files," Dec. 6, 2018 Order, ECF No. 105. Mr. Novofastovsky then delivered the files to Ms. Silverman. Subsequently, plaintiff filed his answering

brief on January 18, 2019,[22] and defendants filed their reply brief on February 19, 2019.[23]

Discussion

I. Motion for Summary Judgment

Summary judgment is granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material when it might affect the outcome of the suit under governing law," and "[a]n issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007) (citations and internal quotation marks omitted). In determining whether there are genuine issues of material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997).

---

[22] Plaintiff submitted for this Court's consideration a recent opinion by the Eastern District of New York in *Hamilton v. City of New York*, 15-cv-4574 (CBA). *See* Letter from Ellie A. Silverman to the Court, Mar. 25, 2019, ECF No. 127. However, we find that the facts in that case are readily distinguishable from those before this Court, and that the opinion is thus not relevant.

[23] On the same day they filed their reply brief, defendants filed a letter seeking a pre-motion conference to exclude plaintiff's proposed expert report by Joseph Pollini as both untimely and inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See* Letter from Nicholas Manningham to the Court, Feb. 19, 2019, ECF No. 125. Given our resolution of the summary judgment motion, we need not reach defendants' potential motion. However, even a cursory review of the report makes clear that the motion would have been granted.

"The moving party bears the initial burden of demonstrating 'the absence of a genuine issue of material fact.'" *F.D.I.C. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the movant meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and "may not rely on conclusory allegations or unsubstantiated speculation." *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (internal citations and quotation marks omitted).

II. Malicious Prosecution (Count 5)

To state a § 1983 claim analogous to a state law malicious prosecution claim, plaintiff must not only establish the four elements of the state law claim,[24] but he must also demonstrate "a violation of [his] right under the Fourth Amendment to be free from unreasonable seizure." *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018). Defendants challenge two of the five elements: that defendants initiated a prosecution against plaintiff and that they did so

---

[24] To state a malicious prosecution claim under New York law, plaintiff must show: "(1) the defendant initiated a prosecution against plaintiff, (2) without probable cause to believe the proceeding can succeed, (3) the proceeding was begun with malice, and (4) the matter terminated in plaintiff's favor." *Cameron v. City of New York*, 598 F.3d 50, 63 (2d Cir. 2010) (quoting *Ricciuti v.* N.Y.C. *Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)).

without probable cause to believe that the prosecution could succeed.[25]

While police officers do not generally "commence or continue" criminal proceedings against defendants, a claim for malicious prosecution can still be maintained against a police officer if the officer either (1) created false information and forwarded it to prosecutors or (2) withheld relevant and material information. *See Mitchell v. Home*, 434 F. Supp. 2d 219, 227 (S.D.N.Y. 2006). Defendants argue that they, as a matter of law, were not the initiators of proceedings against Frost because they did "no more than disclose to a prosecutor all material information within [their] knowledge." *Husbands ex rel. Forde v. City of New York*, No. 05-cv-9252 (NRB), 2007 WL 2454106, at *9 (S.D.N.Y. Aug. 16, 2007), *aff'd*, 335 F. App'x 124 (2d Cir. 2009) (internal citation and quotation marks omitted). We agree.

Plaintiff's malicious prosecution claim is premised on Vega's September 12, 2018 declaration in which Vega asserts that Detectives Spennicchia and O'Neil allegedly forced him into identifying Frost as the shooter.[26] *See* Decl. of Leon Vega ¶¶ 13-18. The scant,

---

[25] Defendants also challenge the "malice" element. However, at the summary judgment stage, "actual malice can be inferred when a plaintiff is prosecuted without probable cause." *Rentas v. Ruffin*, 816 F.3d 214, 221-22 (2d Cir. 2016). Therefore, any finding of malice hinges on our probable cause analysis.

[26] Vega also asserts that he "refused to testify against [Frost] because [he] did not want to continue to lie." Decl. of Leon Vega ¶ 20. However, Vega was in fact called as a witness and testified at trial. *See* Transcript of Trial at 181-206, *People v. Frost*, Indictment No. 00473-2011 (N.Y. Sup. Ct. 2014). At trial, Vega repeatedly claimed lack of memory and, most significantly, did not take the opportunity to recant his original statements to the ADA in

three-page declaration – which was signed more than three years after plaintiff and his counsel filed this instant action, six months after the discovery period concluded, and two months after defendants filed their summary judgment motion – omits the undisputed and determinative fact that Vega's attorney and an ADA were present at his interview with the detectives. *See* Defs.' 56.1 Stmt. ¶ 74. As defendants argue, Vega's assertion, if true, would "mean that the two attorneys present during the interview, in violation of their ethical and legal obligations, condoned, countenanced and permitted the detectives to coerce Vega into testifying falsely." Reply Mem. Law in Supp. of Defs.' Mot. Summ. J., ECF No. 124, at 4. Vega's naked, uncorroborated assertion that he was forced to identify Frost as the shooter after given a photo array in the presence of his criminal defense attorney is "so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit" his allegation. *Jeffreys v. City of New York*, 426 F.3d 549, 551 (2d Cir. 2005). *See also Blake v. Race*, 487 F. Supp. 2d 187, 203 (E.D.N.Y. 2007) (holding that, although the Second Circuit in *Jeffreys* declined to credit the plaintiff's own testimony, the Circuit's reasoning could apply with equal force to a non-party witness's testimony if the testimony is "so fanciful and lacking in any corroboration that it [is] insufficient to create an issue of fact").

Assuming *arguendo* the veracity of Vega's declaration, we still find that no genuine issue of material fact exists as to whether defendants "misled or pressured [the prosecutor] who could be expected to exercise independent judgment." *Townes v. City of New York*,

---

the presence of his counsel and Detectives Spennicchia and O'Neil.

176 F.3d 138, 147 (2d Cir. 1999). As the undisputed facts show, prosecutors from the Bronx District Attorney's Office were present when Frost, Vega, and McLaurin made their statements. *See* Defs.' Ex. O, ECF No. 78-15, Bates No. DEF 4674 (stating that ADA Bijra-Koessler was present when Frost made his stenographic statement); *id*. Bates No. DEF 4744 (stating that ADA Baumgardner was present when McLaurin made his audio statement); Defs.' 56.1 Stmt. ¶ 74 (stating that an ADA was present during Vega's interview). After evaluating those statements, the District Attorney's Office made the decision to arrest Frost. *See* Dep. of Michael Lopuzzo, ECF No. 78-7, Tr. 90:13-17. Thus, the prosecutors used their independent judgment to prosecute Frost, which breaks the chain of causation with respect to any potential liability of the officers for the prosecution. *See Townes*, 176 F.3d at 147.

Furthermore, there was probable cause to arrest and prosecute plaintiff for each of the charges set forth in the indictment. First, "there is a presumption of probable cause created by the fact that a grand jury" indicted Frost. *Bermudez v. City of New York*, No. 11-cv-750 (LAP), 2014 WL 11274759, at *10 (S.D.N.Y. Mar. 25, 2014). Second, it is undisputed that: (1) the shots that killed Chapman came from a doorway leading to the stairwell inside the apartment complex; (2) plaintiff was in the stairwell at the time of the murder; (3) he had a motive to retaliate against the neighborhood gang; and (4) McLaurin identified plaintiff as the shooter. Thus, even without Vega's statement, NYPD officers and the prosecutor had "knowledge of, or reasonably trustworthy information as to, facts and circumstances sufficient to provide

probable cause" for all of Frost's four charges.[27] *Zellner v. Summerlin*, 494 F.3d 344, 369 (2d Cir. 2007).

III. Excessive Force (Count 9)

A pretrial detainee bringing excessive force claims must show "that the force purposely or knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). "[O]bjective reasonableness turns on the facts and circumstances of each particular case. A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* In determining whether force was objectively reasonable, we may consider factors such as: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Id*.

"Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). For plaintiff's excessive force claims to survive summary judgment, Frost must "allege that the officers used more than *de minimis* force." *Feliciano v. Thomann*, 747 F. App'x 885, 887 (2d Cir. 2019).

---

[27] Since we find that defendants had probable cause to prosecute plaintiff and did not "commence the criminal proceeding due to a wrong or improper motive," we also find that no genuine issue of fact exists regarding whether defendants acted with malice. *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 573 (2d Cir. 1996).

A. July 25, 2012 Incident

Plaintiff's excessive force claim related to the July 25, 2012 incident stems from the intentional breaking of his prescription eyeglasses by defendant Officer Torres. As a matter of law, "plaintiff's allegations that defendants intentionally destroyed his glasses . . . do not state a claim for relief under § 1983. Intentional, unauthorized deprivations of property by prison officials cannot be redressed pursuant to § 1983 if 'adequate state post-deprivation remedies are available.'" *Muhammad v. McMickens*, No. 86-cv-7376 (SWK), 1988 WL 7789, at *2 (S.D.N.Y. Jan. 25, 1988) (quoting *Hudson v. Palmer*, 468 U.S. 517, 533 (1984)). In plaintiff's case, "state tort law causes of action [constitute] an adequate post-deprivation state remedy." *Alloul v. City of New York*, No. 09-cv-7726 (JSR)(FM), 2010 WL 5297215, at *6 (S.D.N.Y. Dec. 21, 2010).

Moreover, no reasonable jury could conclude that the alleged deprivation of plaintiff's prescription glasses – when plaintiff did not expeditiously request replacement glasses and did not suffer any symptoms from not wearing prescription glasses -violated plaintiff's constitutional rights. *See Zigmund v. Solnit*, 199 F.3d 1325 (2d Cir. 1999) ("[R]equirements of due process do not apply when the property interest involved is *de minimis*.") (citations and internal quotations omitted); *see also Gardner v. Mental Health Unit of Sullivan Corr. Facility*, No. 07-cv-5535 (WHP), 2009 WL 1834382, at *2 (S.D.N.Y. June 17, 2009) (deprivation that "does not endanger an inmate's health and safety" does not establish constitutional violation). Accordingly, we grant defendants' motion for summary judgment as to plaintiff's excessive force claim arising from the July 25, 2012 incident.

B. October 9, 2012 Incident

Plaintiff's excessive force claim related to the October 9, 2012 incident arises from alleged use of excessive force by several DOC officers after plaintiff stated that he would spit on Officer Jemmott's face. In assessing the alleged use of excessive force, we must view the incident "from the perspective of a reasonable officer on the scene, including what the officer knew at the time." *Kingsley*, 135 S. Ct. at 2473 (2015). By the time of the October 9, 2012 incident, plaintiff had been placed on RED ID status – status well-earned – as the result of a use of force against correction officers On February 15, 2012. *Id.* ¶ 120. Plaintiff had also already pled guilty to assault as the result of yet another use of force against a correction officer on May 16, 2011. Defs.' 56.1 Stmt. ¶¶ 105, 115. Just months earlier, during the July 25, 2012 incident, plaintiff had been involved in a fight with another inmate that resulted in "lacerations" on the other inmate's face and thigh that bled "a lot" and required medical attention. *Id*. ¶ 140.

In sum, plaintiff had established himself as a violent inmate whose threats against DOC officers needed to be taken seriously. Considering "the legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained" and plaintiff's established history of violence, we find that, as a matter of law, defendants Captain Jemmott and Officer Joyce used objectively reasonable force to protect themselves from plaintiff's threat.[28] *See, e.g.*,

---

[28] Furthermore, the fact that plaintiff suffered relatively minor injuries in the course of his struggle with defendants "is not dispositive, [but] is nonetheless highly relevant to the reasonableness of the force applied." *Johnson v. Police Officer #17969*,

Coleman v. Hatfield, No. 13-cv-6519 (FPG), 2016 WL 2733522, at *3 (W.D.N.Y. May 10, 2016) (dismissing an excessive force claim where plaintiff was taken to the floor by defendant after plaintiff "suddenly became non-compliant . . . turned toward [defendant] and spit out an unknown object towards [defendant]."); *Smolen v. Dildine*, No. 11-cv-6434 (CJS), 2014 WL 3385209, at *8 (W.D.N.Y. July 9, 2014) (dismissing excessive force claim when plaintiff "seemingly began to spit" and was subsequently held down while struggling); *Bonet v. Shaw*, 669 F. Supp. 2d 300, 305 (W.D.N.Y. 2009) (holding that a use of force was justified after inmate-plaintiff committed "the most unsavory act of spitting in the face of one of the officers").

C. January 16, 2013 Incident

Plaintiff asserts an excessive force claim based on the extraction that occurred after plaintiff attempted to smuggle contraband into prison. Plaintiff admits that he was attempting to smuggle a bag of cheese on the date of this incident, but disputes defendants' assertion that he was also trying to smuggle in a contraband weapon. Plaintiff alleges that the weapon was planted on him by defendant Ryan. Regardless of this factual dispute, plaintiff's excessive force claim cannot survive given the dipositive video footage of the extraction of plaintiff. *See Boomer v. Lanigan*, No. 00-CIV-5540 (DLC), 2002 WL 31413804, at *6 (S.D.N.Y. Oct. 25, 2002) (granting summary judgment on excessive force claim when plaintiff failed to address video evidence that force used during a cell extraction was not excessive).

No. 99-cv-3964 (NRB), 2000 WL 1877090, at *5 (S.D.N.Y. Dec. 27, 2000).

The video footage of the extraction establishes that defendants used only force that was objectively reasonable to extract plaintiff. *See* Video of the Extraction Incident. The video footage shows that: (1) plaintiff held his hand in the cuffing port to prevent officers from entering the extraction cell, *id*. at MOV001, Timestamp 2:27-2:49; (2) defendant Ryan ordered plaintiff to move away from his cell door but plaintiff failed to do so, *id*.; and plaintiff was ordered not to resist the extraction team but resisted them, *id*., at MOV001, Timestamp 2:59-5:48. Thus, viewing "the facts in the light depicted by the videotape," plaintiff's account of the incident is irrefutably discredited by the record that "no reasonable jury could . . . [believe] him." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Furthermore, both parties agree that plaintiff's injuries related to this incident were isolated to "some bruises." Defs.' 56.1 Stmt. ¶ 252. Such injuries are *de minimis* and insufficient to establish an excessive force claim. *See Lemmo v. McKoy*, No. 08-cv-4264 (RJD), 2011 WL 843974, at *5 (E.D.N.Y. Mar. 8, 2011) ("Injuries held to be *de minimis* for purposes of defeating excessive force claims include short-term pain, swelling, and bruising . . . .") (internal citation omitted). Accordingly, we grant defendants' summary judgment as to plaintiff's excessive force claim arising out of the January 16, 2013 incident.

D. July 16, 2013 Incident

Plaintiff's final claim of excessive force stems from an incident on July 16, 2013, during which plaintiff and other inmates refused to leave the prison recreation yard. As discussed *supra*, plaintiff violates Local Rule 56.1 by asserting a blanket challenge to defendants' recital of the facts subsequent to the assembly of the extraction team. This blanket chal-

lenge is difficult to comprehend given that the contemporaneous video recording of the incident corroborates the following facts from defendants' Rule 56.1 Statement: (1) plaintiff was crouched down on the floor when the extraction team arrived, Video of the Recreation Post Incident, at MOV 00154, Timestamp 4:46-6:14; (2) plaintiff charged out the door and towards the officers when they opened the gate to plaintiff's pen, *id*. at Timestamp 6:20-6:26; (3) plaintiff got on top of a member of the extraction team and remained on top of that officer for approximately 40 seconds, *id*. at Timestamp 6:55-7:10; and (4) plaintiff was subsequently handcuffed 90 seconds after he was removed from being on top of the member of the extraction team, *id*. at Timestamp 7:10-8:45.

Considering the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," and "appropriately deferring to policies and practices that in th[e] judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security," plaintiff's excessive force claim as to this incident cannot survive summary judgment. *Kingsley*, 135 S. Ct. at 2473. The "severity of the security problem at issue" – inmates refusing to leave the recreation yard for approximately seven hours – necessitated the use of some amount of force to remove plaintiff from the recreation yard. *Id*. No reasonable jury could conclude that the force used to extract this resisting plaintiff – which resulted in relatively minor injuries including "mild abrasions," "swelling to his eye," and a prescription for Tylenol – was objectively unreasonable. *See Kingsley*, 135 S. Ct. at 2473 ("extent of the plaintiff's injury" relevant to objective reasonableness assessment); *Beauvoir v. Falco*, 345 F. Supp. 3d 350, 368 (S.D.N.Y. 2018) ("force that might seem

unnecessary in day-to-day civilian life" does not constitute excessive force "so long as the force was tethered to the legitimate need to maintain order in prisons"); *G.B. by & through T.B. v. Carrion*, No. 09-cv-10582 (PAC)(FM), 2012 WL 13071817, at *18 (S.D.N.Y. Jan. 19, 2012), *aff'd sub nom*. G.B. *ex rel. T.B. v. Carrion*, 486 F. App'x 886 (2d Cir. 2012) (constitutional protections against "excessive force do not prevent prison officials from using force in good-faith to keep order"). Accordingly, we grant defendants' motion for summary judgment as to plaintiff's excessive force claim stemming from the July 16, 2013 incident.

IV. Other Federal Claims (Counts 2, 4, 11)

In support of his fourth cause of action, plaintiff conclusorily alleges that defendants engaged in conduct that "shocks the conscience" in violation of his substantive due process rights. AC ¶ 125-27. "[T]he substantive due process guarantee of the Fourteenth Amendment protects individuals from 'conscience-shocking' exercises of power by government actors." *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2d Cir. 2001). The standard to determine what is "conscience-shocking" is not a bright line test, but abuses of government power "intended only to oppress or to cause injury and serve no legitimate government purpose unquestionably shock the conscience." *Id*. Having rejected plaintiff's claims premised on his prosecution and treatment in prison under standards either equivalent or less demanding than the "conscience-shocking" standard, we grant defendants' motion for summary judgment as to plaintiff's substantive due process claims. *See Edrei v. Maguire*, 892 F.3d 525, 537 (2d Cir. 2018) (holding that the "objective reasonable" standard from Kingsley can be

used to determine the viability of substantive due process claims premised on alleged use of excessive force); *Fappiano v. City of New York*, 640 Fed. Appx. 115, 118 (2d Cir. 2016) (substantive due process claim based on denial of fair trial requires that defendants provide "false information likely to influence a jury's decision and forwards that information to prosecutors" (internal citation and quotation marks omitted)).

Having granted defendants' motion for summary judgment as to Counts 4, 5, and 9, there is no longer a constitutional underpinning for plaintiff's § 1983 claim in Count 2, as § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). Accordingly, we grant summary judgment as to Count 2.

Similarly, we grant summary judgment as to Count 11 because there is no remaining constitutional claim based on which plaintiff can assert a cause of action for failure to intervene. *See Henry-Lee v. City of New York*, 746 F. Supp. 2d 546, 566 (S.D.N.Y. 2010) ("[A]n underlying constitutional violation is an essential element of a failure to intercede claim under [section] 1983.").

V. Claims against NYC (Counts 3 & 16)

"*Monell* does not provide a separate cause of action for the failure by the government to train its employees." *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006). Rather, Monell "extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." *Id*. Because we have found that no individual

defendant committed an underlying constitutional violation, defendants' motion for summary judgment is granted as to plaintiff's claims of excessive force with respect to municipal liability (Count 3) and *Monell* liability (Count 16).

VI. Supplemental Jurisdiction over State Law Claims (Counts 4, 7, 8, 12, 13, 14, and 15)

None of plaintiff's federal law claims survives summary judgment, and retention of the remaining state law claims under supplemental jurisdiction is left to the discretion of the Court. 28 U.S.C. § 1367(c)(3); *Klein & Co. Futures, Inc. v. Bd. of Trade of City of N.Y.*, 464 F.3d 255, 262-63 (2d Cir. 2006). In most cases "in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendant jurisdiction doctrine — judicial economy, convenience, fairness and comity — will point toward declining jurisdiction over the remaining state-law claims." *In re Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998). In consideration of these factors, we decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted as to plaintiff's federal claims. Because the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims, those claims are dismissed without prejudice. The Clerk of Court is respectfully directed to terminate this case and the pending motions listed at docket entries 77, 98, and 125.

SO ORDERED.

Dated: New York, New York
March 27, 2019

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of January, two thousand twenty-one.

Docket No: 19-1163

JARRETT FROST,

Plaintiff-Appellant,

v.

NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY DEPARTMENT OF CORRECTION, THE CITY OF NEW YORK, DISTRICT ATTORNEY ROBERT T. JOHNSON, DISTRICT ATTORNEY ROBERT HERTZ, DETECTIVE MICHAEL LOPUZZO, DETECTIVE RICHARD SPENNICCHIA, DETECTIVE JOSEPH O'NEIL, CORRECTION OFFICER TORRES, CORRECTION OFFICER SORIA, CORRECTION OFFICER CARTY, CORRECTION OFFICER SOUFFRANT, CORRECTION OFFICER TATULLI, CORRECTION OFFICER CAPTAIN MCDUFFIE, CORRECTION OFFICER PREVILLON, CORRECTION OFFICER GONZALEZ, CORRECTION OFFICER CAPTAIN RYAN, CORRECTION OFFICER YOUNG, CORRECTION OFFICER MCLAUGHLIN, CORRECTION OFFICER BARKSDALE, CORRECTION OFFICER CORKER, CORRECTION OFFICER SANCHEZ, CORRECTION OFFICER HILL, CORRECTION OFFICER CAPTAIN CLAYTON JEMMOTT, CORRECTION OFFICER JAY JOYE,

Defendants-Appellees,

DETECTIVES JOHN DOE #1–4, Individually and
in Their Official Capacity as New York City Police
Officers, CORRECTION OFFICERS JOHN DOE #1–5,
Individually and in Their Official Capacity as
New York City Correction Officers,
CORRECTION OFFICER THOMAS,

Defendants.

ORDER

Appellees filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe
[SEAL]