17-0296-cv

United States Court of Appeals
for the
Second Circuit

EDWARD G. MCDONOUGH,

Plaintiff-Appellant,

– v. –

YOUEL SMITH, individually and as Special District Attorney for The County of Rensselaer, New York, aka Trey Smith, and JOHN J. OGDEN,

Defendants-Appellees,

RICHARD MCNALLY JR., KEVIN MCGRATH, ALAN ROBILLARD, COUNTY OF RENSSELAER, JOHN F. BROWN, WILLIAM A. MCINERNEY, KEVIN F. O'MALLEY, DANIEL B. BROWN, and ANTHONY J. RENNA,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK (SYRACUSE)

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, CENTER FOR APPELLATE LITIGATION, CONNECTICUT INNOCENCE PROJECT, THE INNOCENCE PROJECT, THE LEGAL AID SOCIETY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, NEW YORK COUNTY DEFENDER SERVICES, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, OFFICE OF THE APPELLATE DEFENDER, AND VERMONT OFFICE OF THE DEFENDER GENERAL SUPPORTING REHEARING *EN BANC*

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STATEMENT OF INTEREST

In rejecting the majority view among local district courts and splitting with five other Circuits to hold that a Section 1983 claim alleging fabrication of evidence can accrue while criminal proceedings are pending, the panel opinion seriously disrupts the law of police misconduct. Unfortunately, it does not acknowledge, let alone carefully consider, the consequences of its new rule.

Amici are a broad range of leading organizations from throughout this Circuit that defend civil liberties, the rights of persons accused of crimes, and the interests of wrongfully incarcerated persons in securing their freedom.[1] All share the same fundamental concern with the panel opinion: It has no grounding in practical reality, and it is unfair and unworkable as a result. Rehearing *en banc* will ensure thorough consideration of this exceptionally important issue. *See* Fed. R. App. P. 35(a)(2).

Fabricating evidence is among the most serious misconduct a law enforcement officer can commit. It is also a disturbingly common cause of wrongful convictions. The panel opinion puts an accused person who suspects that

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[1] *Amici curiae* are the American Civil Liberties Union, Bronx Defenders, Brooklyn Defender Services, Center for Appellate Litigation, Connecticut Innocence Project, Innocence Project, Legal Aid Society, National Association of Criminal Defense Lawyers, Neighborhood Defender Service of Harlem, New York County Defender Services, New York State Association of Criminal Defense Lawyers, Office of the Appellate Defender, and Vermont Office of the Defender General. No party or its counsel authored this brief in whole or part. Neither a party or its counsel nor any other person contributed money to fund its preparation or submission. This brief is submitted under Federal Rule of Appellate Procedure 29(b).

police have fabricated evidence against him in a bind. It effectively requires him to file his civil damages claim quickly, even if his criminal case is still pending. But the obstacles to filing such a claim and the risks it poses to his criminal defense are significant. If he does not file his claim, he risks losing it first to the *Heck* bar[2] and then to the statute of limitations. Wrongfully convicted plaintiffs will face similar obstacles to timely filing.

The panel opinion's approach promises confusion, wasted resources, the stifling of meritorious claims, and ultimately, as Plaintiff-Appellant's petition explains, less accountability for serious constitutional violations. The *en banc* Court should reconsider the panel's misguided approach and align this Circuit with the consensus view of the law.

ARGUMENT

I. THE PANEL'S AMBIGUOUS NEW ACCRUAL RULE WILL SOW CONFUSION

Unlike the bright-line rule adopted by every other Circuit to consider the issue—that civil evidence fabrication claims accrue when the criminal prosecution terminates in favor of the accused—the panel's cryptic "reason to know" standard creates confusion and uncertainty.

[2] *Heck v. Humphrey*, 512 U.S. 477 (1994), bars § 1983 actions that call into question the validity of existing convictions.

As an initial matter, the panel's decision conflicts with previous guidance from this Court about the applicable accrual rule. In *Walker v. Yastremski*, 159 F.3d 117 (2d Cir. 1998), the Court stated that a plaintiff's evidence fabrication claim "must have accrued" by the time the criminal proceedings against him had favorably terminated, and that "the latest date" the plaintiff could have brought his claim was three years after favorable termination. *Id.* at 119. The panel opinion rejected the accrual rule suggested by *Walker* without citing it. This intra-circuit conflict alone warrants *en banc* review.

Taken on its own terms, the panel opinion will make it difficult to determine when a fabrication claim accrues. It offers little guidance on this crucial issue, forcing victims of evidence fabrication to file based on minimal information or risk having their claims be time-barred by the time the extent of the wrongdoing comes to light.

The panel held that a fabrication of evidence claim accrues "when the plaintiff has reason to know of the injury which is the basis of his action." Op. at 15 (quotation omitted). In context, this rule is unclear. Does a defendant who knows that he was not at the scene of a crime "have reason to know" that an eyewitness identification of him at the scene was *fabricated*? Does he need to know that law enforcement was involved in creating the false identification, and if so, which law enforcement officers? What if he has a hunch that the police coached

the witness to give false testimony because the witness previously did not identify him, but has no actual knowledge of official wrongdoing? How—and when—is the accused to determine whether the fabricated evidence is "likely to influence a jury's decision," an element of the claim? *See Riccuiti v. N.Y.C. Transit Auth.* 124 F.3d 123, 130 (2d Cir. 1997). Will a court considering the timeliness of the claim delve into what the accused's criminal defense lawyer told her about the prosecution's evidence, or will knowledge of everything in defense counsel's files be imputed to the accused? The panel opinion leaves these and innumerable other questions unanswered.

The panel opinion's ambiguous rule will require district courts to consider events that may have occurred years or decades in the past to determine when a plaintiff had "reason to know" of each alleged fabrication. And because "[t]he time at which a party knows or has reason to know of potential claims against another is generally a question of fact," *Hanley v. Cafe des Artistes, Inc.*, No. 97-CV-9360, 1999 WL 688426, at *10 (S.D.N.Y. Sept. 3, 1999) (Chin, J.), it risks miring § 1983 cases in years of costly litigation over timeliness. The bright-line favorable termination accrual rule embraced by the Third, Fifth, Sixth, Ninth, and Tenth Circuits avoids these pitfalls and provides predictability to all parties.

II. THE PANEL OPINION REQUIRES CRIMINAL DEFENDANTS TO FILE CIVIL LAWSUITS WHILE CRIMINAL CHARGES ARE PENDING AGAINST THEM

Even if a criminal defendant were able to determine that she possessed an actionable fabrication of evidence claim while facing criminal prosecution, pursuing that claim would be impractical and dangerous.[3]

First, finding a civil attorney to file the claim during the criminal case will be nearly impossible. No civil lawyer is likely to take on an evidence fabrication case for statutory fees if the potential client may yet be convicted. The accused will likely need to plead his claims—and meet the *Iqbal* plausibility requirement—on his own. In New York, he will have the benefit of only very limited criminal discovery.

Second, filing a civil case would divert an accused's resources and attention from "the unhampered preparation of [his criminal] defense." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Civil rights litigation is "costly" and "time-consuming" for any litigant. *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002). The burden of finding counsel, pleading a plausible claim, and responding to motions—often

[3] Criminal cases can often last the better part of the three-year statute of limitations, particularly before a conviction becomes final after direct appeal. According to the most recent official data, it took nearly 20 months *on average* to get a misdemeanor jury trial in New York City. *See* N.Y.C. Crim. Ct., Annual Report 2016 at 50 (Aug. 2017), *available at* https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf. Defendants in homicide cases—in which wrongful convictions are most common—have no statutory speedy trial protections in New York. *See* N.Y. Crim. Proc. Law § 30.30(3)(a).

while incarcerated—would force a criminal defendant to choose between vigorously fighting the criminal charges and diligently pursuing his civil claim.

Third, filing or noticing a civil evidence fabrication claim may disincentivize prosecutors from dismissing cases where law enforcement misconduct is suspected. Prosecutors may be more insistent on a guilty plea and less willing to concede that a case lacks merit if they are concerned about civil liability for their law enforcement colleagues. On those occasions when an unethical prosecutor is complicit in or aware of the evidence fabrication, he may have an incentive to drag out the criminal case to make civil recovery more difficult.

Finally, publicly alleging facts related to a pending criminal case, even a case that is on appeal, poses a significant risk for the criminal defendant. A civil complaint would provide the prosecution with a wealth of potential cross-examination material against a person who chooses to testify in his own defense. The prosecution can also use the complaint to attack the defendant's credibility by suggesting that he is trying to profit off his prosecution.

The panel opinion's accrual rule forces criminal defendants to make difficult choices between vigorously protecting their liberty and vindicating their civil rights. This is entirely unnecessary. The consensus bright-line rule that fabrication of evidence claims accrue upon favorable termination of the criminal proceedings eliminates these concerns.

III. THE PANEL OPINION'S ACCRUAL RULE MAY FUNCTIONALLY BAR MOST FABRICATION CLAIMS AND WILL GENERATE LITIGATION INEFFICIENCY

Separate and apart from the challenges of identifying when a claim accrues and bringing a civil case during a criminal prosecution, the panel opinion risks stifling most evidence fabrication claims at the starting gate.

Say that a pretrial detainee *knows* he has an evidence fabrication claim and manages to file it protectively. That civil lawsuit will likely be stayed pending resolution of the criminal case. *See Kirschner v. Klemons*, 225 F.3d 227, 238-39 (2d Cir. 2000). If he is convicted, the case will likely be *Heck*-barred because the materiality of the fabricated evidence is an element of the claim. *Riccuiti*, 124 F.3d at 130. The stay will be lifted and the *Heck*-barred claim likely dismissed. *Wallace v. Kato*, 549 U.S. 384, 394 (2007). The statute of limitations will presumably resume running, and it will not be tolled while the *Heck* bar is in place. *Id.* at 395. A plaintiff who waits until after he is convicted to file the same claim fares no better—his claim will simply be *Heck*-barred from the start. Either way, unless the conviction is vacated before the limitations period expires, the plaintiff risks being forever deprived of his claim.

Encouraging protective filings during pending criminal cases will also lead to inefficient piecemeal litigation. This Court has emphasized that claims arising out of the same occurrence should be brought together, which conserves judicial

resources by "preventing piecemeal and wasteful litigation." *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, No. 17-cv-0361, 2018 WL 3650826, at *4 (2d Cir. Aug. 2, 2018).

The natural consequence of the panel's new rule is to force diligent litigants to engage in exactly such piecemeal litigation. A criminal defendant would have an incentive to bring her fabrication claim promptly upon learning of the fabrication, but would have to wait until favorable termination of the criminal case to bring other claims arising from the same events—*e.g.*, a malicious prosecution claim.

The panel opinion invites discordant and wasteful litigation. The full Court should correct its error.

IV. EVIDENCE FABRICATION CLAIMS SHOULD NOT BE TREATED LIKE FALSE ARREST CLAIMS

Any argument that evidence fabrication claims should be treated like false arrest claims for accrual purposes fails for reasons of both law and policy.

A false arrest claim, by definition, bears no relation to the legal proceedings against the accused. The claim "ends once the victim becomes held *pursuant to [legal] process*—when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the entirely distinct tort of malicious prosecution . . . ." *Wallace*, 549 U.S. at 389-90 (emphasis in original) (citation and quotation marks omitted). But fabrication of

evidence is unconstitutional because it corrupts the legal proceedings against the accused. *See Riccuiti*, 124 F.3d at 129-30.

For this reason, evidence fabrication claims pose *Heck* problems in a way that false arrest claims do not. There is never an extant criminal conviction at the time a false arrest claim accrues, *see Wallace*, 549 U.S. at 389-90, and there is generally no *Heck* bar to filing post-conviction because an unlawful arrest can still lead to a valid conviction, *see Fifield v. Barrancotta*, 353 F. App'x 479, 481 (2d Cir. 2009).

In contrast, evidence fabrication claims typically arise after the initiation of criminal proceedings. And the claim requires that the wrongful conduct be "likely to influence a jury's decision." *Riccuiti*, 124 F.3d at 130. Under the panel opinion's new rule, fabrication claims that accrue before trial or during trial will quickly become *Heck*-barred if the accused is convicted. And there is no federal tolling of the statute of limitations while the *Heck* bar is in effect. *See Wallace*, 549 U.S. at 394-95. It is unclear how such claims are supposed to be vindicated under the panel opinion's new rule.

While many of the practical downsides to the panel's approach may also exist in the false arrest context, the real-world consequences of stifling meritorious fabrication claims are far more serious. For someone who has spent years in prison because of serious police misconduct, a false arrest claim is usually immaterial

because damages are generally limited to the first 24 to 48 hours of detention before the initial appearance. False arrest claims are rarely brought under such circumstances, and even if they are, they are not the principal source of accountability for law enforcement misconduct or compensation for the victim.

Fabrication of evidence claims, however, often represent the main pathway to vindicate the rights of people who have wrongly suffered prolonged deprivations of liberty. The panel opinion's new rule makes it difficult to bring these important claims, gutting accountability for the "unacceptable corruption of the truth-seeking function of the trial process" that fabrication represents. *See Riccuiti*, 124 F.3d at 130 (quotation omitted). In this regard, the panel opinion is inconsistent with the "broad remedial scope" of § 1983. *Golden State Transp. Corp. v. City of L.A.*, 493 U.S. 103, 112-13 (1989).

Many wrongful convictions result from fabrication of evidence by law enforcement. For instance, 88 of the first 325 DNA exonerations documented by *amicus curiae* The Innocence Project—27%—involved false confessions, a paradigmatic type of fabricated evidence.[4] According to data available from the

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[4] *See* Innocence Project, *The Causes of Wrongful Conviction*, https://www .innocenceproject.org/causes-wrongful-conviction. Cases involving eyewitness misidentification (235 cases) and police informants (48 cases) also often involve allegations of evidence fabrication. According to the National Registry of Exonerations, 169 of 267 exonerations in New York since 1987 involved official misconduct. *See Exonerations in the United States Map*, The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages /Exonerations-in-the-United-States-Map.aspx.

New York City Law Department,[5] the twelve largest settlements paid out by the City of New York in cases involving the NYPD were *all* wrongful conviction cases that *all* involved claims of evidence fabrication. These twelve lawsuits—in which the plaintiffs spent an aggregate of over 264 years wrongfully imprisoned—would arguably *all* be barred, at least in part, by the panel opinion's rule. The panel's new rule reduces accountability for severe instances of intentional police misconduct and diminishes the ability of people who lost years of their liberty to seek justice.

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[5] *See* N.Y.C. Law Dep't, *NYC Administrative Code § 7-114: Civil Actions Regarding the Police Department*, https://www1.nyc.gov/site/law/public-resources/nyc-administrative-code-7-114.page.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing *en banc*.

Dated: August 24, 2018
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(4) and 29(b)(4). It contains 2,511 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: August 24, 2018
New York, New York

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