11-2610-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALAN NEWTON,

Plaintiff-Appellant,

—against—

CITY OF NEW YORK, MARIO MEROLA, DISTRICT ATTORNEY, individually and in his official capacity, ROBERT T. JOHNSON, DISTRICT ATTORNEY, individually and in his official capacity, ANDREA FREUND, individually and in her official

(*caption continued on inside cover*)

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

BRIEF FOR PLAINTIFF-APPELLANT

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Defendants-Appellees.

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This appeal arises from the Opinion and Order of the United States District Court for the Southern District of New York (Shira A. Scheindlin, *District Judge*) dated May 12, 2011, which granted Appellees' post-verdict motion for judgment as a matter of law and set aside the jury verdict below pursuant to Fed. R. Civ. P. 50(b). SPA-216. The opinion is reported at 784 F. Supp. 2d 470 (S.D.N.Y. 2011).

JURISDICTIONAL STATEMENT

The District Court's subject matter jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1988.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court's Opinions and Orders disposed of all of the parties' claims. Judgment was entered on May 27, 2011. A-247. Appellant timely appealed on June 23, 2011. A-3536.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in setting aside the jury's verdict on Appellant's Fourteenth Amendment due process claim?

2. Whether the District Court erred in setting aside the jury's verdict on Appellant's First Amendment court access claim?

STATEMENT OF THE CASE

Alan Newton spent more than twenty years in prison for a rape that he did not commit. This case concerns the twelve years during which Newton attempted in vain to obtain exculpatory DNA evidence from the New York City Police Department Property Clerk Division ("PCD"). Although the City repeatedly rebuffed these efforts, representing to Newton and the courts that the evidence had "likely been destroyed," PCD actually had the evidence the entire time. Newton languished in prison because of evidence management practices that the District Court called "chaotic," "dysfunctional," and "grave[ly] deficien[t]."

There is no question that Newton had a federally protected liberty interest in establishing the wrongfulness of his conviction and regaining his freedom and that the Due Process Clause therefore required the City to maintain an adequate evidence management system. In denying the City's motion for summary judgment, the District Court expressly held that whether the City's system was constitutionally adequate presented factual issues that could be resolved only by a jury. During the trial that ensued, the jury was presented with a mountain of evidence confirming that Newton's ordeal was not a random, unavoidable "tragedy," but rather the direct, proximate, and eminently foreseeable result of the City's reckless failure to take basic and obvious steps to safeguard the critical

forensic evidence with which it has been entrusted. The jury found the City liable for violating Newton's constitutional rights and awarded $18 million in damages.

In a startling about-face, the District Court then granted the City's Rule 50(b) motion for judgment as a matter of law. The primary reason the Court offered for its reversal was this Court's decision, issued one month after the verdict below, in *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010), which the District Court believed transformed the legal landscape governing Newton's due process claim. The District Court's reading of *McKithen*, and its other ostensible bases for setting aside the jury's verdict, are not even minimally plausible. They betray fundamental misunderstandings of settled principles of constitutional law and civil procedure, and they drastically exceed a trial court's narrow authority under Rule 50 for overturning a jury verdict.

The fact and expert testimony presented to the jury demonstrated that the City's evidence management system is not merely below average, but rather an outlier that stands out as among the most deficient systems in the nation. Those who have managed to obtain exonerative forensic evidence from the City have done so despite, rather than because of, the City's system, usually after many years of unrelenting effort. The sobering reality is that doubtless there are others like Newton, men and women whose innocence would have been conclusively established long ago were it not for the City's all but non-existent system.

The District Court got it right before it got it wrong. The jury's verdict is firmly grounded in established constitutional principles, and there was no lawful basis for disturbing it.

STATEMENT OF FACTS

A. Newton's Wrongful Conviction

In June 1984, Newton was arrested and charged with a violent rape and robbery that someone else had committed. The case against Newton was weak. The victim, V.J., was severely intoxicated at the time she was attacked and was able to give only a vague description of her assailant. A-4750. Her account of the attack changed materially as the investigation progressed. A-479-80. Although V.J. initially identified Newton in a lineup, she subsequently wavered. A-498-511. Notwithstanding that the police had collected a Rape Kit from V.J. at the hospital, and had taken Newton's sneakers and the victim's sweater for blood testing and shoe-print analysis, the prosecution presented no physical evidence linking Newton to the crime. A-1084. And Newton presented a credible alibi. A-512-13.

In May 1985, a jury nonetheless convicted Newton of first-degree rape, robbery, and assault. He was sentenced to 8 1/3 to 25 years for the rape and robbery, and a consecutive term of 5 to 15 years for the assault. A-1085. He thus faced up to 40 years in prison. A-2123.

B. Newton Attempts to Establish His Innocence

Soon after his conviction became final, Newton made the first of many efforts to establish his innocence through forensic testing of the Rape Kit. Although DNA testing was not yet widely available at the time, A-1690-91, Newton sought serology testing that could have demonstrated a 90-percent likelihood that he was not the assailant. A-1701. A state court granted Newton's motion to conduct such testing in 1988, ordering the Bronx District Attorney to deliver the Rape Kit to the Office of the Chief Medical Examiner ("OCME"), where the evidence was to be tested in the presence of Newton's expert. A-1636-37. Pursuant to this Order, a Bronx Assistant District Attorney ("ADA") retrieved the Rape Kit from PCD, the City agency responsible for the safekeeping of criminal evidence, and delivered it to the OCME. A-2778.

Patricia Ryan, an OCME scientist, received the Rape Kit. A-2151. She later reported to the court that the slides in the Rape Kit did not contain any spermatozoa that could be subjected to serology testing. A-1747. But testing of the very same slides that was performed during discovery in this case proved that Ryan's unequivocal statement was false. The slides in the Rape Kit actually contained *abundant*, *readily visible* spermatozoa. A-1694-99, 1712.

In 1994, as part of broader legislation recognizing the importance of new DNA testing technologies to criminal defendants and to the State, New York enacted its DNA access statute, New York Criminal Procedure Law § 440.30(1-a)(a), which directs courts to order DNA testing of specified evidence if "there exists a reasonable probability that the verdict would have been more favorable to the defendant" had the results of such testing been admitted at trial. The statute makes clear that DNA is a species of "evidence which could not have been produced by the defendant at the trial even with due diligence on his part," and that courts therefore should permit introduction of DNA evidence in motions pursuant to § 440.10 to vacate criminal convictions. *See* N.Y. Crim. Proc. Law § 440.30 (Practice Commentary).

Shortly after this statute was enacted, Newton filed a *pro se* motion seeking DNA testing of the Rape Kit. A-3310. Intending to consent to Newton's request, A-992, the Bronx District Attorney's Office (the "DAO") dispatched an ADA to secure the Rape Kit for testing. The ADA filed an affirmation in the Bronx County Supreme Court reporting that PCD had searched "extensively" for the Rape Kit but could not locate it. A-3350. In light of this representation, the Supreme Court denied Newton's application. A-3312.

Newton again sought testing pursuant to § 440.30(1-a)(a), in 1998. A-3318. The Bronx DAO again conceded that Newton satisfied the statute's

threshold requirement. But PCD once again advised that the Rape Kit "most likely" had been destroyed "in accordance with standard Police Department procedure" and therefore could not be produced. A-3332. In a letter to the ADA responsible for the motion, NYPD Sergeant (and then-PCD intake supervisor) Patrick McGuire, who would later describe himself as "the top person for finding things that may have been misplaced or lost," A-2465, represented that he was unable to say "when and if" the evidence Newton sought had been destroyed, but that the Bronx PCD office likely had destroyed all of its records relating to the evidence because it was more than six years old. A-2779. McGuire's letter further suggested that the records relating to the Rape Kit had been destroyed in a 1995 PCD warehouse fire (which they were not). *Id.*

Between 1994 and 2005, Newton filed Freedom of Information Law ("FOIL") requests for the Rape Kit with both the DAO and the OCME, A-2129-31, 3341-44, and a *pro se* habeas corpus petition in the U.S. District Court for the Southern District of New York, A-1128, 2126-28, 3314. In the course of the habeas proceeding, and in response to Newton's request in that proceeding that the City produce the Rape Kit for testing, the City informed Newton and the court that the Kit "could not then be located." A-3316.

In 2005, the Innocence Project took up Newton's cause. At the request of the Innocence Project, the Bronx DAO asked PCD to conduct another search for

the Rape Kit, notwithstanding repeated representations by PCD officials over the course of eleven years that the kit could not be located and was presumed destroyed. A-3346. In November 2005, the missing Rape Kit was finally found. A-3348. The evidence had been in PCD possession—in the very same barrel in which it had been placed when OCME returned it to PCD in 1989—the whole time. A-3354.

Subsequent DNA testing conclusively excluded Newton as the source of the sperm in the Rape Kit. A-3508-10. The Bronx County DAO consented to vacating Newton's conviction. A-2727, 3508-10. In July 2006, after serving more than 22 years for a crime he did not commit, Newton was released from prison. A-2733. Newton had been 22 years old when he was wrongly convicted. He was in his mid-40s when he was released. A-2122.

C. The Instant Action

Although important aspects of the circumstances relating to Newton's wrongful conviction and incarceration emerged during the course of this litigation, some were apparent by the time of Newton's release. Newton had, of course, maintained his innocence (and had asserted that, by fixating on him, the NYPD had enabled the true perpetrator to go unpunished). And he knew that, contrary to the representations of the PCD employees in response to each of his efforts to establish

his innocence, the Rape Kit had been in the City's possession, at the same location, since 1989.

Moreover, although Newton did not know the scope of PCD's systemic failures before this litigation, his interactions with PCD while incarcerated gave some indication of PCD's myriad deficiencies. For example, in response to Newton's requests for forensic testing, PCD had told him that the two other separately vouchered items of evidence he sought—the victim's clothing and his own sneakers—could not be found and were "likely destroyed." A-3332, 3350. But, like the Rape Kit, the clothing was later found in the City's possession. A-3336. In addition, none of the multiple tracking documents relating to any of the physical evidence Newton sought had been located at the time of his release. (In fact, as will be detailed *infra*, the Rape Kit had been found because a photocopy of an Invoice had been in the DAO's appeal file; the original version of the Invoice was found, misfiled, long after this action was commenced; the tracking documents for the sneakers and clothes would be found still later, crumpled up in an unmarked box in a PCD satellite warehouse.)

Finally, although evidence of the depth and extent of the defects in the City's evidence management system would not emerge until discovery and trial, Newton quickly learned that this experience was not idiosyncratic: others exonerated through DNA testing had persevered in the face of the City's repeated

representations that the evidence sought had been destroyed, and many Innocence Project clients had had their cases closed based on now-familiar yarns that evidence and corresponding documentation was "untraceable," "likely destroyed," and the like. A-3288, 3357.

(i) Pre-Trial Proceedings

Newton commenced this action in the District Court in July 2007. A-36. His Complaint asserted a variety of federal and state claims falling generally into two categories: (i) that he had been falsely arrested and maliciously prosecuted; and (ii) that the City's evidence management system, which had repeatedly failed to produce—or honestly account for—the evidence that would have established Newton's innocence long before 2006, was so grossly inadequate that it violated his rights to due process and access to the courts. A-77-150.[1]

In July 2009, the District Court granted Defendants' motion for summary judgment and dismissed Newton's claims challenging the lawfulness of his arrest and prosecution. SPA-1.

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[1] As with the claims relating to the handling of the Rape Kit, the facts that became known to Newton through investigation and discovery precluded any claim that his arrest or prosecution had been the product of honest mistake. He amassed evidence that the detective in charge of the investigation had fixated on him as the suspect, ruling out promising leads, and he unearthed irregularities relating to the witness identifications and other testimony that had not come out at his criminal trial. *See generally* A-473-521.

In January 2010, the District Court denied the City's motion for summary judgment on the claims based on the City's evidence management failures. SPA-102. The District Court held that the individual PCD officers were entitled to qualified immunity. But the District Court ruled that Newton was entitled to a trial on his due process claim against the City because a reasonable jury could conclude that the City's evidence management procedures were constitutionally inadequate. SPA-137. Specifically, the Court rejected the City's argument that the due process claim should be dismissed based on the Supreme Court's 2009 decision in *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. __, 129 S. Ct. 2308 (2009), which held that there is no substantive due process right to access DNA evidence but that state laws entitling inmates to post-conviction relief based on new evidence give rise to federally protected "liberty interests" and corresponding obligations to provide fair and adequate procedures.

The case then proceeded to a jury trial on (i) Newton's claims that the City violated his First and Fourteenth Amendment rights to due process and court access by failing to operate a minimally adequate evidence management system; (ii) Newton's state-law negligence claims; and (iii) his state-law intentional infliction of emotional distress (IIED) claims against four PCD employees who had been involved in the searches for the Rape Kit.

(ii) The Trial

The trial began in September 2010. It lasted 14 days and included the testimony of 29 witnesses. Newton presented the jury with overwhelming evidence that the City's system for handling, storing, tracking, and retrieving the evidence in its custody was not minimally adequate, and that the City was aware of but indifferent to its system's glaring deficiencies and the harm they foreseeably cause.

Trial witnesses explained how the PCD policies and procedures for storing and tracking evidence were intended (and claimed) to work, how PCD actually operated in practice, and the troubling gulf separating theory and the practice.

Prior to 2006, despite the quantity and importance of evidence in its custody, the PCD used the same system for tracking evidence that it had used *in the early 1900s*. A-2404. Evidence was stored on a shelf, usually in a PCD borough office, and its location was recorded on a piece of paper (known as an "Invoice"), which was then reproduced by carbon copy in sextuplicate. A-2744. The evidence, together with two copies of the Invoice—the Yellow Invoice and the White Invoice—was entrusted to the custody of the borough PCD office. A-2159. The White Invoice was placed in a binder organized by PCD office storage location number. The Yellow Invoice was placed in a file folder organized by the unique

"Invoice number" which was pre-printed on every Invoice and every colored copy. This was called the "Active Yellows" file. *Id.*

PCD thereafter used the Yellow Invoice to track the evidence. Whenever a piece of evidence was moved, either within PCD (*e.g.*, to a PCD warehouse facility) or outside the Division (*e.g.*, to court or to a lab), the movement was supposed to be recorded on the Yellow Invoice. A-2160-61. When evidence was moved out of PCD custody, a PCD employee was required to transfer the Yellow Invoice from the Active Yellows file into the "Out-to-Court Yellows" file, where it remained, filed by date moved, until the evidence was returned to PCD custody. *Id.* The clerk was then supposed to place an "Out-of-Custody" card in the Active Yellows file in place of the Invoice, so that anyone looking for the Invoice would be directed to the appropriate Out-to-Court file.

These and many other policies and procedures relating to storing, routing, tracking, and retrieving of evidence and other PCD responsibilities are collected in PCD's 500-page "Property Guide." A-2785. But even those PCD employees who are unfamiliar with the Guide (and there are many of them, *see infra*), are aware that, in this system, the Yellow Invoice is the key to tracking evidence. *See, e.g.*, A-2278.

At trial, Newton introduced voluminous testimony, including the uncontradicted testimony of an expert in evidence and property management,

Shannon Turner, regarding the myriad ways in which the City's system is deficient A-2491, 2497; of the many ways it had failed in Newton's case, A-2491 (explaining that PCD mishandled *every* Invoice relating to Newton's case *every* time it touched them, for a total of 39 discrete errors); and of the central causal role these deficiencies had played in prolonging for more than a decade his wrongful incarceration.

First, the evidence showed that although an array of written policies detailing how its evidence management system was meant to operate had been collected in the City's voluminous Property Guide, PCD employees were neither conversant in nor reliant on the Guide's procedures. Seven City employee witnesses whose responsibilities required them to access physical evidence, including McGuire—the NYPD Sergeant responsible for PCD's Pearson Place Warehouse in 1994, when Newton made his first request under New York's DNA access statute, and in 1998, when Newton filed his second such request—and PCD's Integrity Control Officer (the "ICO")—its ombudsman, A-2345—testified that they had never been provided with the Guide. A-1083, 1100-01, 2385, 2431, 2144, 2519, 2597-98. Indeed, McGuire had never even *seen* the PCD Property Guide until his deposition. A-2464.

Second, although the City relies exclusively on on-the-job training to familiarize employees with its detailed policies and procedures, A-2165-66, even

employees with higher-level evidence management responsibilities remain ignorant of basic and important rules. McGuire—a supervisor—admitted that he did not know what action PCD procedures required of a property clerk when evidence was left PCD custody, and he was *unaware of the existence of the Out-to-Court Yellows file*. A-2476. Chief Jack Trabitz, who had been PCD's commanding officer since 2000, testified that he received no formal training before taking over as chief. A-2104. Even the "Integrity Control Officers," who had no more familiarity with PCD procedures than the average patrol police officer before beginning work at PCD, were not provided with any formal training. A-2345, 2597.

Third, the City permitted Invoices to languish for years in Out-to-Court files without following up. The significance of this practice for Newton's case is manifest: In January 2009, Sergeant Thomas O'Connor, the officer in charge of the Bronx PCD, found the original Yellow Invoice for the Rape Kit in the Bronx PCD Out-to-Court Yellows file for May 11, 1988. A-2402. At that time, O'Connor found "hundreds" of other Yellow Invoices in decades-old Out-to-Court files, indicating hundreds—if not thousands—of items of evidence that were never "closed out," A-2408; that is, the evidence left PCD custody headed to, *e.g.*, court or laboratories, but either was never returned or was never properly recorded when it returned, and PCD failed to follow up. A-2403.

Fourth, the City has long arbitrarily (and inexplicably) destroyed evidence. Trabitz testified that prior to 2006, there was no PCD-wide policy regarding evidence destruction. Instead, the local PCD supervisors made all decisions regarding whether to destroy an item of evidence. A-2173. Under Trabitz, the evidence-destruction procedures have remained patchwork at best. Trabitz testified that under the current Property Guide, PCD staff could destroy arrest evidence—*i.e.*, evidence that is "invoiced . . . in connection with the arrest of at least one individual," A-2168—without DAO authorization. After Newton's trial counsel confronted Trabitz with the Property Guide, which requires DAO authorization before destroying arrest evidence, Trabitz admitted that, under his command, PCD employees had destroyed evidence in contravention of that section. A-2169-71, 2221-22. In addition, according to Trabitz's testimony, he orally issued a new policy in 2000 requiring the preservation of all Rape Kits. A-2173. But no written policy change was issued until September 2006. A-2172.[2]

Fifth, the City destroyed *Invoices* without regard to whether the corresponding evidence still existed. As Trabitz testified in his deposition and at trial, at no relevant time has the City had a uniform policy governing the retention and destruction of Invoices. A-2174. As a result, Invoices have been separated

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[2] That the City continued to destroy physical evidence, including rape kits, after New York's DNA access statute was enacted in 1994, is puzzling, to say the least.

from the evidence they reference and destroyed even while the evidence remains in PCD's possession and custody. But the evidence is no longer findable—it is "untraceable," in PCD parlance—because the key to its location, the Invoice, has been intentionally destroyed. A-2492.

Sixth, as this case demonstrates, the City destroyed Invoices *de facto* through its flippancy regarding their care and storage. Sergeant O'Connor testified that when he took part in inventorying property stored at one PCD warehouse, he not only found many hundreds of items of evidence that had no associated paperwork, rendering the evidence completely untraceable, but also discovered at least 100 Yellow Invoices that had not been "closed out" (that is, the related evidence had not been destroyed, auctioned, or returned to its owner), but instead had been shipped to a warehouse, and which O'Connor found loose in unmarked boxes with "crumpled up paper." A-2407-08; *see also* A-2361-62. (Indeed, in October 2010, O'Connor testified ahe was "still in the process of matching the lists [of evidence] to the paperwork." A-2408.) Included randomly among the papers, O'Connor found two other Yellow Invoices relating to evidence from Newton's case—for his sneakers and the victim's clothing, both of which Newton had requested several times during his incarceration. *Id.* The situation has not improved in recent years: According to his testimony, O'Connor was unable to explain the Bronx PCD's

inability to produce *eighty percent* of the post-conviction evidence sought from the Bronx PCD between 2005 and 2009. A-2401.

Seventh, when the City could not find evidence sought from it, it misrepresented or obscured the reasons for the disappearance of the evidence: *e.g.*, that the evidence was "untraceable" (a term not standardly used in evidence management). A-2492. Again, the facts of this case are illustrative. In his 1998 letter to the ADA regarding Newton's DNA access motion, McGuire represented that both the evidence and Invoice "must have been destroyed." A-2779. McGuire had no factual basis for either representation, each of which proved to be false. (Indeed McGuire's rationale for concluding that the evidence "must have been destroyed" reflected his ignorance of written PCD policy. A-2476.). Two Innocence Project attorneys testified as to other cases in which the City similarly has responded to inquiries regarding DNA evidence by making false, unsubstantiated, or misleading statements about the location or continued existence of evidence. A-2556-57, 2610, 2612. When pressed for supporting documentation regarding the disposition of this evidence, the City often ignored the request completely. A-2560.

Eighth, the City made *no* effort to implement internal controls that would mitigate the widely known deficiencies of its system. A-2497. For example, Turner found no record that *any* inspections of PCD sites had been conducted

during Trabitz's tenure, despite his claims that 400 had been performed. A-2496. And the ICOs neither helped with the searches for evidence as a matter of course, nor understood PCD's procedures well enough to meaningfully critique them. A-2347. According to their testimony, both PCD ICOs who worked during the relevant years *did not know of the existence* of the Property Guide, *id.*, although their job, in theory, was to ensure that PCD employees complied with official policy and procedure, A-2166.

Finally, these problems were pervasive. As the Innocence Project attorneys testified without contradiction at trial, the Innocence Project has handled at least twelve other cases—up to 50 percent of the organization's New York City docket—in which the City was unable to produce biological evidence, thereby barring prisoners with reasonable and sometimes strong claims of actual innocence from using DNA testing to establish the wrongfulness of their convictions. A-2553-66, 2569, 2602-12. Indeed, their testimony affirmed that the Innocence Project has had "a much, much harder time finding [post-conviction] evidence in New York City as compared to the rest of the country," A-2574, and that the City's record of failure in producing such evidence "stands out in comparison to the rest of the nation," A-2569. Innocence Project Attorney Nina Morrison confirmed that when the NYPD cannot find evidence, it offers conflicting explanations, including that the evidence or Invoices were destroyed in a warehouse fire, but provides no

documentation to support such assertions. A-2618; *see also* A-2553. The testimony of Turner, Newton's evidence expert, emphasized the systemic nature of the City's failures. A-2491.

(iii) The City's Rule 50(a) Motion

The City did not call any witnesses in its defense. At the close of the evidence, the City moved for judgment as a matter of law pursuant to Rule 50(a). The District Court granted the City's motion in part, dismissing Newton's negligence claim as a matter of law because he had not shown a "special relationship." The District Court denied the motion with respect to Newton's other claims. SPA-198.

(iv) The Verdicts

The jury found that the City had violated Newton's Fourteenth and First Amendment rights to procedural due process and to court access, respectively. Specifically, the jury found that "the City engaged in a pattern, custom or practice of mishandling evidence," that the City "acted with an intent to deprive Newton of his constitutional rights or with reckless disregard of those rights," and that City's acts proximately caused Newton's protracted incarceration. A-3502. The jury awarded Newton $18 million in compensatory damages. A-3506. The jury also found for Newton on his IIED claims against McGuire and Trabitz, and awarded

damages of $92,000 and $500,000, respectively. A-3505. The District Court entered judgment in Newton's favor on November 2, 2010. A-3511.

(v) The City's Rule 50(b) Motion

Following the verdict and entry of judgment, the City renewed its motion for judgment as a matter of law. The District Court granted the City's motion in its entirety. SPA-216.

The District Court held that Newton's procedural due process claim failed for two reasons. First, Judge Scheindlin concluded that this Court's post-verdict decision in *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010), precluded Newton's due process claim. Relatedly, the Court read subsection (b) of New York's DNA access statute, N.Y. Crim. Proc. Law § 440.30(1-a)(b), which, in the District Court's words, "contemplates the possibility that evidence might be missing or lost," to limit Newton's procedural due process right. SPA-230. Second, the District Court concluded that Newton's constitutional claims failed because he had not proven that an individual City employee had a culpable state of mind. SPA-238. The District Court also set aside—without explanation—the jury's verdict in Newton's favor on the First Amendment court access claim, and discarded his favorable verdict on his IIED claim against Trabitz and McGuire. SPA-243.

Newton timely appealed. A-3536.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's decision to grant a Rule 50 motion for judgment as a matter of law, applying the same standard as the district court." *Cash v. County of Erie*, 654 F.3d 324, 332-33 (2d Cir. 2011) (citation omitted). "[I]n entertaining a motion for judgment as a matter of law . . . [a] court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence" because these functions are reserved for the jury. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000); *see also Cash*, 654 F.3d at 333 ("[A] Rule 50 motion may be granted only if the court, viewing the evidence in the light most favorable to the non-movant, concludes that a reasonable juror would have been *compelled* to accept the view of the moving party." (emphasis in original)); 9B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 2524 (3d ed. 1998).

Rule 50 imposes a "particularly heavy" burden "after the jury has deliberated in the case and actually returned its verdict." *Cross v. N.Y.C. Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005). Under such circumstances, the verdict cannot be set aside unless there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Id.*

SUMMARY OF ARGUMENT

New York law vested Newton with a due process liberty interest in challenging his conviction and establishing his innocence. That liberty interest required the City to maintain adequate evidence management procedures to ensure that Newton's right to challenge his conviction was not rendered meaningless. The jury was presented with plentiful evidence demonstrating that Newton languished in prison unnecessarily for twelve years because the City's system was gravely deficient.

The District Court's decision to overturn the jury's verdict violated a host of well-established constitutional principles and basic rules of civil procedure. Contrary to the Court's conclusions, *McKithen* did not alter the due process principles that the Court correctly applied in denying the City summary judgment; § 440.30(1-a)(b) does not "limit" Newton's liberty interest or the procedural protections to which he was entitled; and Newton's challenge to the City's system did not require him to identify an individual City official who acted recklessly (and, in any event, he did). In setting the jury's verdict aside, the District Court improperly weighed the evidence and drew inferences in the City's favor in violation of Rule 50.

ARGUMENT

I. THE DISTRICT COURT ERRED IN SETTING ASIDE THE JURY'S VERDICT ON NEWTON'S DUE PROCESS CLAIM

A. The Jury Properly Determined that the City Violated Newton's Right to Due Process

After hearing testimony from 29 witnesses over 14 days, the jury returned a verdict finding unanimously that the City of New York failed to maintain a minimally adequate evidence management system, and that the City's pervasive practice of mishandling evidence proximately caused Newton to languish in prison unjustifiably for over a decade, in violation of his right to due process of law. The jury's due process verdict is amply supported by the record and settled law.

Procedural due process claims are analyzed in two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir. 1994) (citations omitted).

There is no question that Newton demonstrated that he had a protected liberty interest. In *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. __, 129 S. Ct. 2308 (2009), the Supreme Court held that an Alaska inmate seeking to test DNA evidence stated a cognizable procedural due process claim. Although the Court found no "freestanding right" to test such

evidence, it held that Alaska's statute authorizing a post-conviction motion for a new trial based on newly discovered evidence created a federally protected liberty interest that might entitle an inmate to secure and test DNA evidence to attack a conviction. *Id.* at 2319. *Osborne* held that because this state-created liberty interest "beget[s] yet other rights to procedures essential to the realization of the parent right," *id.*, the federal Due Process Clause prohibited Alaska from maintaining post-conviction DNA testing rules that were "fundamentally inadequate to vindicate the substantive right[]," *id.* at 2320.

In *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010), this Court held that under *Osborne*, New York Criminal Procedure Law § 440.10(1)(g), which entitles New York prisoners to seek to vacate their convictions based upon newly discovered evidence, creates an "analogous" liberty interest "in demonstrating innocence with newly discovered evidence." *Id.* at 152. There thus is no question, and the City did not contest, that Newton had "a liberty interest in vacating his conviction by accessing evidence in the state's possession for the purpose of DNA testing." SPA-133.

Although *Osborne* recognized the liberty interest at stake here, this case is, as the District Court initially recognized, markedly different from *Osborne*. SPA-134 ("Newton's case and *Osborne* sharply diverge"). In *Osborne*, the claimant brought a facial challenge to Alaska's rules governing entitlement to post-

conviction forensic evidence without first attempting to obtain the evidence pursuant to state law. Newton, in stark contrast, relentlessly pursued every avenue of relief that New York and federal law afforded him. Indeed, he eventually obtained the evidence and conclusively established his innocence. Newton does not challenge the constitutionality of New York State's DNA statute, either facially or as applied to him, because that law is not what deprived him of his liberty interest. Rather, as the District Court expressly recognized prior to its abrupt post-trial about-face, the gravamen of Newton's claim is that the liberty interest created by New York law was effectively abrogated by the *City's* "failure to create and enforce a coherent evidence management system." SPA-137; *see also Dail v. City of Goldsboro*, No. 5:10-cv-451, 2011 WL 2837067, at *4 (E.D.N.C. July 14, 2011) (sustaining claim that city's evidence retention policy violated procedural due process and holding that "[t]he interests that were at play before the Supreme Court in *Osborne* are distinct from those at play" where an exonerated inmate "uses section 1983 to seek redress for the Defendants' allegedly unconstitutional evidence retention policies").

In denying the City's motion for summary judgment, the District Court expressly held that the second step—whether the City's evidence management system was "fundamentally inadequate" to protect his liberty interest, *Osborne*, 129 S. Ct. at 2320—presented factual questions that only could be resolved by a

jury. SPA-137 ("Newton has raised a question of material fact as to whether New York's procedures for access to evidence for DNA testing violated principles of fundamental fairness such that he was wrongly deprived of his right to procedural process.").

During the trial that ensued, Newton presented the jury with copious evidence demonstrating that the City's evidence management system was fundamentally inadequate in ways that assured that individuals like Newton would be deprived of their liberty interest in challenging their convictions:

- The City maintained an evidence management system ostensibly governed by the 500-page "Property Guide," but the great majority of the PCD officials who testified at trial were not even *aware of the existence* of the Guide;

- The City had no real procedure for following up on Out-to-Court Invoices and allowed countless Invoices to languish for years in Out-to-Court files without any follow up, despite the commonsense reality that evidence is rarely if ever out to court for years on end;

- The City maintained a custom and practice of arbitrarily and haphazardly destroying evidence, including rape kits, even after the advent of serology and DNA testing and the enactment of New York's DNA access law in 1994;

- The City maintained a custom and practice of destroying Invoices without regard to whether the associated evidence still existed, even though its entire system depended on Invoices to find associated evidence;

- The City has been unable to produce forensic evidence in its custody in response to most of the post-conviction requests it has received;

- The City routinely misrepresented the facts surrounding its inability to locate evidence under its care, including by providing misleading statements to courts and prosecutors;

- The City maintained no internal controls to limit these glaring deficiencies; and

- The deficiencies in the City's putative "system" were so pervasive that when the Innocence Project requested an inquiry into the City's evidence management failures and identified 87 items of lost evidence, the City could find *only three* of them.

See supra at 13-19.

B. The District Court Misunderstood and Misapplied the State-Created Liberty Interest Doctrine

Despite the fact that the District Court had already expressly held, in denying the City's motion for summary judgment, that the record contained sufficient evidence to support a finding that the City's evidence management system was constitutionally inadequate, the District Court nonetheless set aside the jury's verdict and granted the City's post-trial motion for judgment as a matter of law. In doing so, the District Court concluded (i) that *McKithen* transformed the legal landscape governing Newton's due process claim; and (ii) that a provision of the New York DNA access statute, § 440.30(1-a)(b), "clarified" (and, in the District Court's view, nullified) the liberty interest the City was obligated to respect. Both of these ostensible reasons for setting aside the jury's verdict betray serious misunderstandings of controlling legal principles.

(i) *McKithen* Provides No Authority for Setting Aside the Jury's Due Process Verdict

The District Court's principal basis for overturning the jury's due process verdict was its surprising conclusion that this Court's decision in *McKithen*, decided one month after the trial, had transformed the governing legal landscape. SPA-223. The District Court acknowledged that "at an earlier point in this case," it was "persuaded by th[e] argument" that "the City violated [Newton's] due process right by failing to put in place appropriate procedures to safeguard his access to the DNA evidence," but reasoned that it was "forced to reconsider" that holding "in light of the Second Circuit's decision in *McKithen*." *Id.*; *see also* SPA-232 n.42 (describing *McKithen* as "controlling authority on an issue of first impression in the circuit").

Contrary to the District Court's view, *McKithen* was no watershed. Indeed, *McKithen* broke no new doctrinal ground. Rather, *McKithen* was a straightforward *a fortiori* application of *Osborne*, which was already "controlling authority" at the time the City sought summary judgment before trial, and which the District Court expressly concluded at the summary judgment stage did *not* preclude Newton's due process claim. SPA-136-37.

Just like *Osborne*, *McKithen* was a § 1983 action brought by an inmate claiming that the government's refusal to permit post-conviction DNA testing of potentially exculpatory evidence violated his right to due process. Like in

Osborne, the plaintiff in *McKithen* claimed a liberty interest created by state law (New York's post-conviction newly discovered evidence provision, as opposed to Alaska's). And like in *Osborne*, the plaintiff in *McKithen* claimed that the State's standard governing entitlement to DNA testing was unconstitutionally stringent. Given that the standard in § 440.30(1-a)(a) is *more permissive* than the one upheld in *Osborne*, *McKithen* unexceptionably held that the New York regime is "*a fortiori*" constitutional. *McKithen*, 626 F.3d at 154.

In granting the City's Rule 50(b) motion, the District Court held that allowing the verdict to stand would "directly contradict" *McKithen*. SPA-232. That plainly is wrong. Unlike in *McKithen*, the claim here is not that *the statutory standard* governing access to DNA evidence is unconstitutional, but rather that the judicial procedures that were facially upheld in that case—which entitle those who, like Newton, met the "reasonable probability" test to pursue post-conviction relief based on DNA testing—were effectively abrogated in practice by the City's woefully inadequate evidence management system.

The District Court's belief that *McKithen* is dispositive in this case appears to emanate from its statement that "*McKithen* expressly rejected the notion a prisoner is 'constitutionally entitled to *receive* evidence for the purpose of post-conviction DNA testing.'" SPA-234 (emphasis supplied in District Court opinion). *McKithen* actually held nothing of the sort. The District Court lifted this language

not from the portion of *McKithen* setting forth the Court's *holding*, but rather from the Court's prefatory recitation of *the trial court's disposition*. *See* 626 F.3d at 145. Indeed, *McKithen* actually held, among other things, that the plaintiff was not barred from bringing his claim under § 1983 (as opposed to through a habeas petition) pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994), because had he prevailed, he "would not [have] be[en] entitled to the invalidation of his conviction" but rather only would have "*receive[d] evidence* that could be put toward a subsequent challenge to the legality of his confinement." 626 F.3d at 147 (emphasis added). In other words, the *McKithen* panel was well aware that the government was in possession of the knife that the plaintiff sought to test, and that the practical effect of sustaining his due process claim would have been recognizing his entitlement to "receive" the knife for testing. That practical reality posed no bar to the plaintiff's claim. Consistent with *Osborne* and *McKithen*, Newton is not asserting a freestanding right to "receive" anything other than the process he was constitutionally due, notwithstanding that respecting his procedural rights would have "resulted," SPA-229, in his receipt of the evidence he sought.

The analytical framework articulated in *Osborne* and applied in *McKithen* is straightforward: there is no federal substantive due process right to post-trial forensic testing, but if the state chooses to afford prisoners the right to challenge their convictions, then the federal Due Process Clause requires at least minimally

adequate procedures that ensure that the state-recognized right is not rendered meaningless. Nothing in *McKithen* allowed, let alone required, the District Court to repudiate its previous, correct analysis of the governing due process principles espoused in *Osborne*.

(ii) Section 440.30(1-a)(b) Does Not Undermine Newton's Due Process Claim

The District Court also concluded that New York Criminal Procedure Law § 440.30(1-a)(b) ("subsection (b)"), which the Legislature added to the DNA access statute in 2004, was "highly relevant"—and effectively fatal—to Newton's due process claim. SPA-229.[3] The District Court observed that subsection (b) "explicitly contemplates the possibility that the evidence might be missing or lost," SPA-230 n.39, but does not provide that "if the evidence is missing, the defendant

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[3] Subsection (b) provides:

> In conjunction with the filing of a [440.30(1-a)] motion . . . the court may direct the people to provide the defendant with information . . . concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and documentary evidence concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section.

N.Y. Crim. Proc. Law § 440.30(1-a)(b).

goes free," SPA-230. From these observations, the District Court held that Newton "received the process that he was due under" subsection (b), which supposedly "clarified" the Legislature's "inten[t]" to "limit" Newton's federally protected interests. SPA-230. These conclusions rest on an extraordinary misreading of both subsection (b) and controlling constitutional principles.

The District Court's understanding of the meaning and intent of subsection (b) is manifestly implausible. As the District Court would have it, that provision "clarifies" that, after a state court has found that a prisoner has demonstrated a "reasonable probability" that DNA testing of evidence in the government's possession would exonerate him, the Legislature is indifferent as to whether the government (i) produces the evidence for testing or (ii) shrugs its shoulders and reports that the evidence is lost. But subsection (b) was enacted not to qualify the right in subsection (a) but instead to *strengthen* New York's DNA statute—no doubt in response to fact that since the enactment of subsection (a) ten years earlier, dozens of wrongfully convicted people had been exonerated based on DNA evidence. N.Y. Crim. Proc. Law § 440.30 (Practice Commentary) (observing that subsection (b) was intended to overrule case law suggesting that it was the petitioner's burden "to show that the evidence in question still existed and was available in quantities sufficient to make testing feasible"). There certainly is no basis in the language or history of subsection (b) to believe that the Legislature

meant it to *shield* the government from due process scrutiny of gravely deficient evidence management practices that systematically precluded those who have satisfied the "reasonable probability" requirement from obtaining DNA testing.

Nor is the District Court's conclusion about the Legislature's intent supported by the second sentence of subsection (b). That sentence merely provides that the fact that potentially exculpatory evidence has been lost or destroyed does not "in and of itself" entitle a prisoner to an adverse inference in connection with *a motion for post conviction relief*. In this case, of course, Newton was not seeking to overturn his conviction. He had already sought and received that relief in state court. Rather, Newton sought to hold *the City* accountable for its inadequate evidence management system, which the jury below found deprived him of his constitutionally protected liberty interest in proving his innocence in accordance with New York law. The fact that subsection (b) sensibly ensures that lost evidence does not bestow a windfall upon an undeserving criminal seeking to vacate his conviction hardly demonstrates that the Legislature also intended to insulate the City from civil liability in a § 1983 action brought by a plaintiff who has already conclusively established his innocence.

In any event, even if the Legislature had intended subsection (b) to confer on the City immunity from § 1983 liability based on its deliberately indifferent evidence management practices—though there is no basis in its text, structure, or

history of the provision for that reading—the District Court's constitutional analysis still would be untenable. The Supreme Court has squarely held that in state-created liberty interest cases, state law *does not control* the nature or degree of process that is due under the federal Constitution. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the Court conclusively rejected the so-called "bitter with the sweet" theory, *i.e.*, that states should be free to define the limits of the procedural protections applicable to liberty interests created by state law:

> The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

Id. at 539-40; *see also Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 432 (1982) (holding that "any other conclusion would allow the State to destroy at will virtually any state-created property interest"); *Vitek v. Jones*, 445 U. S. 480, 491 (1980) (minimum requirements under the Due Process Clause are "a matter of federal law" and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate"); *see also Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law").

The District Court's failure to appreciate this principle is fatal to its entire analysis of subsection (b).

Nor is it at all clear that Newton received the process "that was due under the statute." SPA-223. Subsection (b)—which was not enacted until 10 years after Newton filed his first DNA motion, and therefore was never applied in any of his attempts to obtain the evidence that ultimately exonerated him—contemplates a representation about "the last known physical location" of destroyed or missing evidence. Even leaving aside that the last location of the Rape Kit in this case was, in a meaningful sense, "known" to the City—the property clerk possessed the Yellow Invoice indicating "DOA Barrel #22" at all relevant times—the City time and again provided Newton and the courts with *false* information about the Rape Kit, the victim's clothing, and the corresponding Invoices. *See Dail*, 2011 WL 2837067, at *5 (holding that the state-created liberty interest in presenting newly discovered evidence "was logically and necessarily accompanied by an implied right to receive reasonably accurate and truthful information" about the location of the evidence).

The District Court repeatedly invoked the "limited" nature of Newton's liberty interest, expressing its view that "[w]here, as here, there is only a limited liberty interest at stake, a disorganized or even dysfunctional system for realizing that interest does not give rise to a constitutional violation." SPA-223. That

proposition cannot be squared with *Osborne*. *Osborne* identified the "limits" of the liberty interest it recognized—namely, that it owed its existence to state law and was less extensive than the rights that apply pre-conviction—but the Court nonetheless emphasized that even the "limited" liberty interest it recognized "beg[ot] yet other rights to procedures essential to [its] realization." 129 S. Ct. at 2329. Indeed, the Supreme Court's entire procedural due process doctrine rests on the bedrock premise that even those liberty interests that are "limited" are worthy of significant procedural protections. Here, a minimally functional system for managing the forensic evidence with which the City was entrusted was "essential to the realization" of Newton's liberty interest in seeking to overturn his conviction, *id.*, however "limited" that interest may be characterized. The jury so found.

C. The District Court Erroneously Concluded that Newton Was Required to and Failed to Demonstrate that an Individual City Official Violated His Rights

Alternatively, the District Court held that Newton's due process claim failed as a matter of law "because he did not adduce sufficient evidence to permit the jury to conclude that any City official acted with a culpable state of mind." SPA-236. Purporting to apply the Supreme Court's decisions in *Daniels v. Williams*, 474 U.S. 327 (1986), and *Board of County Commissioners Bryan County v. Brown*, 520 U.S. 397 (1997), the District Court held that Newton's due process claim required

him to prove that an individual City official (ostensibly per *Bryan County*) acted more than just negligently (ostensibly per *Daniels*). SPA-239 n.54 ("Newton must demonstrate that at least one City employee acted with a greater degree of culpability than mere negligence *before* he can argue that the City's acts of negligence were so numerous as to reach constitutional proportions.") (emphasis in original). The District Court was wrong for two reasons. First, the due process "rule" that the Court believed it divined from *Daniels* and *Bryan County* is unsupported by those decisions and, in fact, foreclosed by decades of controlling precedent. Second, even if there were such a "rule," the evidence in the trial record, especially when viewed under the deferential standard Rule 50 requires, would easily satisfy it.

(i) Newton's Due Process Claim Against the City Did Not Require Him to Demonstrate that a Particular Official Acted with a Culpable State of Mind

The due process "rule" that the District Court conjured cannot be squared with *Osborne* or *McKithen*. In both of those cases, like this one, the claimed deprivation occurred when the evidence sought was not produced, thereby precluding a post-conviction motion based on new evidence. There was no suggestion in either case that this action reflected any intent on the part of any individual government official to harm the plaintiff, let alone a specific intent to violate his federal constitutional rights. Indeed, even if there had been evidence of

such subjective intent in those cases, it would not have made a difference in light of the Courts' conclusions that the procedures at issue (state rules governing post-conviction entitlement to DNA testing) were constitutionally adequate.

Nor do the procedural due process precedents on which *Osborne* relied hold—or even suggest—that proof of an individual government official who acted with a culpable state of mind is an element of the "underlying constitutional violation." SPA-221. For example, in *Little v. Streater*, 452 U.S. 1 (1981), the Court held that a Connecticut statute that entitled defendants in civil paternity litigation to perform "exculpatory" blood group testing, but required them to bear the expense of such testing, violated the indigent plaintiff's due process rights. In so holding, the Court focused on the adequacy of the *system* compared to the interest at stake, and invalidated the statute without any suggestion that an individual state actor (or the Legislature that enacted the law) had acted with any improper intent. So too in *Wolff v. McDonnell*, 418 U.S. 539 (1974), where the Court struck down as a violation of due process Nebraska's procedures for revoking "good time" credits based on prisoner misconduct. As in *Little*, there was no suggestion in *Wolff* that any individual state actor acted with any improper intent.

Nor have this Court's procedural due process cases required the identification of an individual who acted intentionally. *See, e.g.*, *Nnebe v. Daus*,

644 F.3d 147 (2d Cir. 2011) (system for suspending taxi drivers' licenses); *Kuck v. Danaher*, 600 F.3d 159 (2d Cir. 2010) (system for appealing from the denial of firearm permit renewal applications); *Spinelli v. City of New York*, 579 F.3d 160 (2d Cir. 2009) (system for revoking firearm dealers' licenses); *Butler v. Castro*, 896 F.2d 698 (2d Cir. 1990) (system for recovering property from the police).

Indeed, the Supreme Court effectively precluded the District Court's rule in *Owen v. City of Independence*, 445 U.S. 622 (1980). *Owen* was a procedural due process case in which the Court upheld liability after expressly recognizing that no individual government employee had reason to know he was depriving the plaintiff of a protected interest, let alone doing so unconstitutionally. *See id.* at 634 (adopting lower court's finding that city officials "could not have been aware of [the plaintiff's] right to a name-clearing hearing in connection with the discharge"). In rejecting the argument that the "good faith" of the individual officials should entitle the municipality to immunity against the imposition of § 1983 damages, the *Owen* majority explained that "the threat that damages might be levied against the city may encourage those in a policymaking position" to "prevent[] those '*systemic*' injuries that result *not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith*." *Id.* at 652 (emphasis added).

The District Court's reliance on *Daniels* was misplaced. *Daniels* was a personal injury suit between two individuals—the plaintiff was an inmate who had slipped on a pillow that the defendant, a guard, had left on a prison staircase—dressed in constitutional clothes merely because the alleged tortfeasor happened to be a state actor. *Id.* at 332. It was in that context, deciding when an ordinary civil wrong becomes a "constitutional tort," that the Supreme Court held that more than "mere negligence" is required to constitute a constitutional "deprivation." *Id.* The Court sought to ensure that due process claims reflect the Constitution's focus on actions that are "governmental in nature." *Id.* ("The only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond city jail and petitioner was an inmate confined in that jail."). *Daniels* did not purport to introduce a freestanding individual *mens rea* requirement into procedural due process case law—a field that by its nature is concerned with the adequacy of governmental *systems and processes*.[4]

The District Court's reliance on *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), is even more peculiar. *Bryan County* did not involve the Due Process Clause at all—rather, it involved a violation of the Fourth Amendment, which does not require or even permit the

[4] Notably, the *Daniels* Court expressly distinguished *Wolff*, explaining that the deprivation in that case was the intentional "decision to deprive the inmate of good-time credit." 474 U.S. at 333-34.

consideration of any subjective intent—nor did it create the requirement the District Court ascribed to it. The issue in *Bryan County* was not whether an individual wrongdoer is always *necessary* to establish a constitutional violation or municipal liability under § 1983, but rather the standards for determining when proven individual wrongdoing is *sufficient* to give rise to municipal liability under the statute. The Court held that the county's decision to employ a rogue sheriff's deputy was insufficient to hold it legally responsible for the plaintiff's Fourth Amendment injury.

Not surprisingly, since *Bryan County*, this Court and others have repeatedly rejected the "rule" that the District Court held required the jury's verdict to be set aside. *See Barrett v. Orange County Hum. Rts. Comm'n*, 194 F.3d 341, 349-50 (2d Cir. 1999) (holding that "a municipality may be found liable under § 1983 even in the absence of individual liability" and "even in situations where the acts or omissions of individual employees do not violate an individual's constitutional rights"); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 428 (2d Cir. 1995) ("The fact that the jury did not find that the individual defendants acted [unconstitutionally] was not inconsistent with the finding that the Village itself had committed the violation"); *see also Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985); *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985).

Moreover, the supposed individual culpable actor requirement, which was a centerpiece of the City's Rule 50(b) motion, is belied by the City's own proposed jury instructions and verdict form in this case. The City urged the District Court to instruct the jury that "[h]ere, the sole defendant on plaintiff's Section 1983 claim is the City of New York." A-1663.53. Far from suggesting that the jury must determine *both* the culpability of the City *and* particular individuals, the City proposed instructing the jury that liability could be imposed if "the conduct complained of was committed by the defendant City of New York *or* its agents or employees"; "the conduct complained of deprived plaintiff of a right protected by the Constitution of the United States; and "the acts *of the City of New York* were a proximate cause of plaintiff's injuries and consequent damages." A-1663.52 (emphases added). And although the District Court correctly rejected the City's erroneous proposed instruction about municipal state of mind, it is notable that the City sought to instruct the jury that "Newton must prove . . . *that the defendant City of New York* intentionally deprived him of his federal constitutional right to due process of law," A-1663.53 (emphasis added), without mentioning individuals at all.

The irony of the District Court's legal error is that the court believed it would be unfair to hold any of the individuals accountable for the deprivation *precisely because* the system was so dysfunctional. SPA-223, 238, 239 n.54

(finding that the City's evidence management system was "incoherent," "dysfunctional," and "grave[ly] deficien[t], but that "[u]nder these circumstances, the continued failure by City officials to find the rape kit does not give rise to any sort of constitutional culpability"). It is one thing to rely on a systemic deficiency to excuse an individual government official's wrongful conduct. *See*, *e.g.*, *Amore v. Novarro*, 624 F.3d 522 (2d Cir. 2010) (granting qualified immunity to individual police officer who enforced a statute that had previously been stricken as unconstitutional because the copy of the penal law he was issued still had the statute in it). But it would be perversely circular to then find the *system* constitutionally blameless merely because the ostensibly blameless individuals acted pursuant to it.

(ii) The Trial Record Contains Abundant Evidence Supporting the Jury's Finding that the City and Its Officials Acted Recklessly

Even if Newton's due process claim somehow required proof that a particular individual City official acted with a culpable state of mind, there still would be no basis for setting aside the jury's verdict. Although Newton's trial proof understandably focused on the systemic deficiencies of the City's evidence management procedures—after all, Newton's due process claim was tried only against the City, not against any individual defendant—the jury was presented with considerable evidence of recklessness and deliberate indifference on the part of multiple officials.

Remarkably, the District Court's opinion granting the City's post-trial Rule 50 motion did not even *mention*—let alone analyze in the light most favorable to jury's verdict—*any* of the evidence in the trial record demonstrating that individual City officials acted recklessly. This omission is all the more startling because the District Court had already denied *both* the City's summary judgment motion *and* the Rule 50(a) motion it made at the close of Newton's case. A-2634-35. Indeed, given that the City did not call any witnesses, the trial record *did not change at all* between the District Court's denial of the City's Rule 50(a) motion and the subsequent grant of its Rule 50(b) motion.

In any event, there is no need for this Court, in undertaking its *de novo* review of the District Court's Rule 50 decision, to sift through the trial record in great detail, for the record plainly contains abundant—and at a bare minimum sufficient—evidence supporting the finding that individual City officials acted at least recklessly.

For example, Sergeant McGuire, who held himself out as "the top person [in PCD] for finding things that may have been misplaced or lost," A-2465, admitted at trial that he was ignorant regarding the most fundamental PCD policies. Indeed, McGuire testified that he was unaware of the *existence*—let alone the important purpose—of an Out-to-Court Yellows file. A-2476. Had McGuire bothered to acquaint himself with this basic and important aspect of PCD's stated evidence

management procedures, he could have (and likely would have) found the Yellow Invoice for the Rape Kit misfiled as Out-to-Court, and thereby enabled Newton to avoid years of needless, unjustified incarceration. Instead, the jury heard McGuire make demonstrably false representations about the "likely destruction" of the Rape Kit and Yellow Invoice, representations he plainly knew would ensure that Newton's efforts to prove his innocence would be thwarted.

The conduct of Deputy Chief Trabitz was at least as egregious. Despite his leadership post, Trabitz did not educate himself or those under him regarding the City's own rules and procedures. He acknowledged at trial that PCD staff destroyed evidence in violation of City procedures. A-2169-71, 2221-22. Indeed, when confronted at trial with the text of the PCD policies, Trabitz was left scratching his head. A-2168-71. In addition, Trabitz was aware when he took office in 2000 of the power of DNA evidence to free the innocent and of the importance of preserving PCD Invoices in accessing that evidence. Yet he waited for six years to issue formal guidance altering PCD policy regarding retaining Invoices. A-2171-72. Trabitz's failure to implement clear and consistent policies regarding evidence and Invoice destruction enabled PCD employees to assert, without any basis, that evidence likely had been "destroyed pursuant to departmental policy"—not because the evidence actually had been destroyed (in which case the destruction would have or should have been substantiated by

documentation), but because the particular employee was disinclined to continue to search.

Indeed, the evidence of McGuire's and Trabitz's misconduct was so strong that the jury held them personally liable for *intentional infliction of emotional distress* ("IIED"). A-3502-03. Because the jury was specifically instructed that Newton's IIED claim required proof of "intent[] or reckless[ness]" in addition to "extreme and outrageous" behavior, A-2673, and because the claims related to their evidence management roles, there is no doubt that the jury was persuaded that these two individuals acted at least recklessly.[5]

The so-called "Integrity Control Officers" provide another example of individual recklessness. The ICOs, whose ostensible responsibility was to ensure PCD staff compliance with the Division's procedures and policies, were not themselves versed in the basics of those procedures, and did not make any effort to become knowledgeable. Nor did the ICOs make any attempt to address the

[5] In light of the exceedingly high standard for proving IIED and the limited space available in this appellate brief, Newton does not appeal from the District Court's dismissal of the IIED verdicts in his favor. However, the District Court's discussion of the IIED evidence provides yet another example of the Court's failure to apply Rule 50 correctly. Other than noting that McGuire and Trabitz ostensibly assisted in Newton's belated exoneration (and otherwise impermissibly weighing the evidence), the Court's only basis for setting aside the IIED verdicts was that the award against McGuire should have been higher than that against Trabitz because "Newton benefitted significantly more from Chief Trabitz's intervention." SPA-245 n.69. There plainly was no basis for the District Court to ignore the jury's amply supported findings, based on their observations of both defendants' demeanor, that Trabitz's conduct was condemnable and that his self-serving testimony was not credible.

glaringly apparent problems undermining the "integrity" of PCD's system, or take it upon themselves to assist in or help direct searches for vital evidence such as the Rape Kit.[6]

The District Court did not merely fail to acknowledge any of this evidence of individual recklessness and deliberate indifference. It went a considerable step farther, viewing the evidence in the light most favorable to the party that *lost* the trial. For example, the District Court affirmatively praised Trabitz, based on his own self-serving testimony, for supposedly making changes to the City's evidence destruction policies. SPA-231 n. 41; *but see Cash*, 654 F.3d at 338-39 (reaffirming that in considering a Rule 50 motion, courts must recognize that juries are not "*compelled*" to credit self-serving testimony (emphasis in original)). In doing so, the court ignored all the evidence of the role that Trabitz's actions played in exacerbating Newton's ordeal. *See, e.g.*, A-2164 (stating that a manual search for evidence—which Trabitz never required when PCD staff could not produce the physical evidence Newton sought—would be necessary if the Yellow Invoice was unavailable and the White Invoice did not list the evidence's most recent location);

[6] Indeed, at trial, these individuals did not maintain (nor could they) that they had conscientiously fulfilled their important systemic responsibilities, but rather insisted that their job titles were mere puffery and that their main duties related to monitoring their colleagues' lunch breaks. *See, e.g.*, A-2497, 2596. The jury was not compelled to credit these officers' curious account—that the City supposedly had a Potemkin village "integrity control" operation, one that existed merely to assure occasionally concerned outsiders that the system was functional. *Cf. Cash*, 654 F.3d at 338-39.

A-2165-66 (conceding that he did not require PCD staff to study the Property Guide or otherwise introduce a formal training program); A-2167 (admitting knowledge that PCD never filed a "missing property" report regarding the Rape Kit with the Internal Affairs Bureau, in derogation of PCD procedures); A-2170-71 (acknowledging that under Trabitz's leadership, PCD staff had destroyed evidence without the proper permission).

The District Court also cited evidence of one ADA's ineffectual but good-faith attempts to locate the Rape Kit, SPA-240, without acknowledging all of the evidence in the trial record demonstrating that the recklessness of *other* City officials ensured that the ADA's efforts were destined to fail (as they did). Even if Newton were required to point to a culpable individual actor (which, as discussed *supra* at I.C.i, he was not), he certainly was not required to demonstrate that *every* participant in the City's system acted culpably.[7]

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[7] There are myriad other examples of inferences that arguably *could* have been drawn against Newton from the record, but that the jury was not "*compelled*" to draw. *Cash*, 654 F.3d at 339 (emphasis in original). For example, even if a rational juror could have found it would have been reasonable to expect nothing more once PCD staff determined that the Yellow Invoice was not in its proper place in the Active Yellows folder, a reasonable juror would not have been *compelled* to reach such a conclusion in light of, *e.g.*, Shannon Turner's testimony that a functioning evidence management system should not permit any piece of evidence to be "untraceable," and should regularly scour its files to ensure that all the location of all evidence is known at all times. *See, e.g.*, A-2494-95. Indeed, looking for and failing to find the Yellow Invoice in the "right" place and then giving up is no more a complete answer than was issuing a policy statement against prison guard sexual contact with prisoners, and then failing fully to train officers on the policy or to enforce it, as was the case in *Cash*. *See* 654 F.3d at 335-36.

For all of these reasons, it cannot possibly be said that the jury's finding, after weighing *all* the evidence, that City officials acted recklessly (or *worse* than recklessly) was based on "such a complete absence of evidence" that "the jury's findings could only have been the result of sheer surmise and conjecture." *Cross v. N.Y.C. Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005). The jury's findings of recklessness were reasonable, and the District Court had no authority to disturb them.

The District Court's failure to heed the basic principles animating Rule 50 is even more apparent with respect to the evidence of the City's recklessness. The District Court's Rule 50 opinion barely *mentioned*—and certainly did not analyze in the light most favorable to Newton—the abundant record evidence demonstrating that the City was deliberately indifferent to the foreseeable consequences of its woefully inadequate evidence management system. *See supra* at I.A. Indeed, the jury apparently credited—and unquestionably was entitled to credit—the unrebutted and damning testimony of Newton's evidence management expert, Shannon Turner, that the City's system was not merely sub-par, but deficient in ways that were serious, consequential, and obvious, especially to those within it. *See, e.g.*, A-2495-97; *see Cash*, 654 F.3d at 324 (holding that "the jury was entitled to rely on unrebutted expert testimony" and that the Court "must assume that the jury credited the opinion of [plaintiff's] expert and permissibly

relied on it"). Although the jury may have recognized that a stranger to the system might not have appreciated how improper it was to maintain an Out-to-Court Yellows file bulging with Invoices that were decades old, let alone to destroy Invoices deliberately, A-2494-95, the jury was entitled to conclude, based on the overall context of the evidence of the City's system before them, that these practices amounted to deliberate indifference. *See Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992) (observing that even where need for different policy "would not be obvious to a stranger to the situation [the] particular context might make [the failure by City officials to act] . . . constitute deliberate indifference").

It is also notable that jury reached its verdict after the District Court had explicitly instructed it that it could not hold the City liable based on "mere negligence," and that specific proof of "reckless indifference" to Newton's rights was required:

> *Mere negligent conduct is not sufficient.* Thus, *Mr. Newton must show both that the acts undertaken by the City . . . deprived him of his First Amendment and/or Fourteenth Amendment rights, and that the City . . . took these acts with an intent to deprive Mr. Newton of his rights or which reckless indifference to those rights*. . . . An act is intentional if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. . . . An act is reckless if done in conscious disregard of its known probable consequences. In other words, even if the City, through its agents, servants, or employees, did not intentionally seek to deprive Mr. Newton of his rights, if nevertheless the City, through its agents, servants, or employees, *purposely disregarded the high probability that its actions would deprive Mr. Newton of his rights, then the second essential element would be satisfied.*

A-2672 (emphasis added).

The jury listened to these instructions, heard the City's closing argument, weighed the evidence, and rejected the City's insistence that it and its property clerks were at worst negligent. The evidence supporting the jury's finding of recklessness was more than sufficient to support the verdict, and the District Court had no lawful basis for setting it aside. *See In re Dana Corp.*, 574 F.3d 129, 152 (2d Cir. 2009) (recounting Rule 50's stringent standards); *see also Black v. Finantra Capital, Inc.*, 418 F.3d 203 (2d Cir. 2005) (reversing grant of Rule 50 motion and reinstating jury verdict); *Tolbert v. Queens Coll.*, 242 F.3d 58 (2d Cir. 2001) (same); *This Is Me, Inc. v. Taylor*, 157 F.3d 139 (2d Cir. 1998) (same).

II. THE DISTRICT COURT ERRED IN SETTING ASIDE THE JURY'S VERDICT ON NEWTON'S COURT ACCESS CLAIM

In addition to denying the City summary judgment on Newton's due process claim, the District Court also allowed Newton to proceed to trial on his analytically distinct claim that the City's inadequate evidence management system deprived him of his First Amendment right to access to the courts. *See*, *e.g.*, *Borough of Duryea v. Guarnieri*, __ U.S. __, 131 S. Ct. 2488, 2494 (2011) (reaffirming that "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes," and that the "right of access to courts for redress of wrongs is an aspect of the First

Amendment"); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008).

The trial record demonstrated that for twelve years, the City's reckless and systemically deficient evidence management practices prevented Newton from proceeding with the motion, pursuant to New York Criminal Procedure Law § 440.10(g), that eventually would overturn his unjust conviction and restore his freedom. The jury concluded that the City's failure to locate the Rape Kit it had been ordered to produce directly and proximately prevented Newton from attacking his conviction and establishing his innocence and awarded him $18 million in damages on his First Amendment court access claim. A-3501-02, 3506.

In yet another startling omission, the District Court's opinion barely *mentions* the court access verdict or the underlying claim. Indeed, other than acknowledging in passing that Newton had asserted and prevailed upon this claim, SPA-218-19, 221, the District Court's Rule 50 opinion does not discuss the First Amendment claim *at all*.

This omission is all the more peculiar because, just as the District Court denied the City's Rule 50(a) motion regarding Newton's due process claim, it also denied the City's Rule 50(a) motion with respect to Newton's court access claim, only to reverse itself even though the City did not call any witnesses in its defense, and therefore *the record did not change* between the Court's denial of the City's

Rule 50(a) motion and its subsequent (and wholly unexplained) grant of the Rule 50(b) motion.

Indeed, in denying the City's Rule 50(a) motion, the District Court expressly commented that, in the Court's view, Newton's access to courts claim was "so important" because the fact that the City did not have an adequate procedure for maintaining the DNA evidence precluded him from seeking redress from the courts. A-2635. When the City's counsel subsequently asked to be heard on this issue further "just to preserve it," the District Court reiterated that the City's Rule 50(a) motion on the court access claim was denied: "I'm not going to be granting it. I made a decision . . . . I think it deserves to go to the jury." A-2643-44.

As with Newton's due process claim, there is no basis in First Amendment jurisprudence or in the body of law governing post-trial motions for the District Court's casual (and again, wholly unexplained) overturning of the jury's verdict on this independent cause of action.

The Supreme Court has explained that the fundamental right to court access exists in order to "provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). As this Court has explained, the right to court access is violated when "government officials obstruct legitimate efforts to seek judicial redress," *Whalen v. County of Fulton*, 126 F.3d 400, 406 (2d Cir. 1997), or when

the government prevents someone from asserting a claim through "arbitrary interference," *Barrett v. United States,* 798 F.2d 565, 575 (2d Cir. 1986). To state a claim for denial of the right to access to the courts, a plaintiff must allege "that the defendant took or was responsible for actions that hindered [the plaintiff's] efforts to pursue a legal claim." *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) (quotation omitted); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996) (plaintiff must demonstrate that the policy or practice at issue "hindered his efforts to pursue a legal claim"); *Simkins v. Bruce*, 406 F.3d 1239, 1244 (10th Cir. 2005) (holding that the plaintiff must demonstrate that his "efforts to pursue a claim [we]re impeded"). The right is violated where the government interferes with a legitimate claim that "could have produced a remedy" that the interference rendered "unobtainable." *Harbury*, 536 U.S. at 414.[8]

This right applies not only to the access rules of the courts themselves, but also to the actions of individual government officials whose conduct effectively deprive potential plaintiffs of the "adequate, effective, and meaningful" ability to obtain judicial remedies. *Germany v. Vance*, 868 F.2d 9, 15 (1st Cir. 1989)

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[8] In *Harbury*, the Court explained that the right to court access derives from a number of constitutional provisions in addition to the First Amendment, but throughout its opinion, the Court discussed these precedents interchangeably. *See* 536 U.S. at 415 n.12.; *see also Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 430 n.5 (1982) (noting the affinity between due process and court access claims); *Evitts v. Lucey*, 469 U.S. 387, 403-05 (1984) (rejecting the contention that court access cases did not apply when due process alone was implicated).

(holding that the failure of social services officials to inform juvenile who had been placed in custody for assault and battery that her accuser had given false testimony implicated the right to court access) (quotation omitted); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("To deny [judicial] access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress."); *Ryland v. Shapiro*, 708 F.2d 967, 971-75 (5th Cir. 1983) (sustaining access to court claim alleging that government officials concealed facts surrounding a murder, thereby preventing a full investigation and prosecution).

This constitutional right to court access is not extinguished—or even diminished—when a person is convicted of a crime. To the contrary, this right applies equally before a person is convicted, while his conviction is on direct appeal, and when he seeks to bring a post-conviction challenge to the legality of his confinement. *Bourdon v. Loughren*, 386 F.3d 88, 96 (2d Cir. 2004). Indeed, the Supreme Court established long ago that post-conviction proceedings in which prisoners "seek[] new trials [and] release from confinement" are within the heartland of this constitutional protection. *Bounds v. Smith*, 430 U.S. 817, 827 (1977); *id.* at 823 (reaffirming that the right to court access applies when prisoners are "challenging the legality of their confinements").

Newton's court access claim fits squarely within this doctrinal rubric. The City's gravely deficient practices were, for more than a decade, the only impediment to Newton's ability to engage in a specific judicial proceeding: the state court's consideration of his meritorious (and ultimately unopposed) motion to vacate his wrongful conviction and end his unjust incarceration. The City therefore plainly "obstruct[ed] [his] legitimate efforts to seek judicial redress," *Whalen*, 126 F.3d at 406; prevented him from asserting his claim through "arbitrary interference," *Barrett*, 798 F.2d at 575; and "hindered [his] efforts to pursue a legal claim," *Davis*, 320 F.3d at 351.

Notably, during the trial, in response to a request from the jury to define the right to court access, the District Court explained to the jury as follows:

> The constitutional right of access to the courts assures that prisoners have the tools they need to attack their convictions and sentences directly or collaterally. In other words, that prisoners not be impeded from presenting claims for formal adjudication by a court. In this case, plaintiff claims that he could not file a petition for post-conviction relief based on newly obtained evidence because he was unable to obtain that evidence.

A-2678. Given that the District Court denied the City summary judgment, denied its Rule 50(a) motion, and expressly instructed the jury about the access to courts claim, the District Court's subsequent decision to cast aside the jury's verdict without any explanation is as inexplicable as it is unjustified.

Newton presented more than sufficient evidence for the jury to conclude that the City violated his First Amendment right. The City's patently inadequate evidence management system directly and proximately caused Newton to be deprived of the *evidence* necessary to seek redress from the courts by *demonstrating his actual innocence*. If anything, this injury implicates the right more directly and measurably than in the many cases in which court access claims have been sustained. If the right to court access guarantees prisoners (many of whom have barely colorable claims to relief) adequate law libraries to research their claims and transcripts to pursue their post-conviction remedies, this fundamental constitutional right surely is implicated by the City's dysfunctional system, which prevents those who have satisfied the Legislature's "reasonable probability" requirement from having their day in court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court's Rule 50(b) decision should be reversed, and that the jury's verdict on Newton's due process and court access claims should be reinstated.

Dated: New York, New York
November 4, 2011

Respectfully submitted,

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