23-900

IN THE

United States Court of Appeals for the Second Circuit

LARRY THOMPSON

Plaintiff-Appellant,

v.

CITY OF NEW YORK, POLICE OFFICER PAGIEL CLARK, SHIELD # 28472, POLICE OFFICER PAUL MONTEFUSCO, SHIELD # 10580, POLICE OFFICER GERARD BOUWMANS, SHIELD # 2102, POLICE OFFICER PHILLIP ROMANO, SHIELD # 6295,

Defendants-Appellees,

POLICE OFFICER WARREN RODNEY, SHIELD # 13744, SERGEANT ANTHONY BERTRAM, SHIELD # 277, POLICE OFFICERS JOHN AND JANE DOES 1-10,

Defendants.

On Appeal from the United States District Court for the Eastern District of New York, No. 14−CV−7349

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INTRODUCTION

Almost ten years ago, Mr. Thompson brought this case to hold Officer Clark accountable for lying in a sworn complaint to charge Mr. Thompson with two crimes he never committed. Officer Clark comments on the "extraordinary path" this case has taken, Br. for Appellee 1, without acknowledging that *his litigation decisions* are the reason for it. The district court warned that his favorable termination argument was "troubling," even "insane." JA241; JA301. But at the close of trial, Officer Clark prevented the jury from deciding Mr. Thompson's malicious prosecution claim, only for the Supreme Court to reject the erroneous argument.

Officer Clark's latest gambit is even more troubling. He asks this Court to treat the jury verdict on Mr. Thompson's separate claims for unlawful entry, false arrest, and denial of a fair trial as *precluding* genuine disputes of fact for his malicious prosecution claim. This is a remarkable litigation tactic: prevent the jury from deciding the malicious prosecution claim, but treat the verdict as if it did.

If Officer Clark wanted the jury to resolve particular issues, "it was incumbent on [him] to request that the jury be asked the pertinent question[s]" in special interrogatories. *Kerman v. City of New York*, 374 F.3d 93, 120 (2d Cir. 2004). He *knew* that, but at the close of trial, Officer Clark decided not to submit interrogatories. He is "not entitled to have the court, in lieu of the jury, make the finding[s]." *Id.* Mr. Thompson's claim should finally be decided by a jury.

ARGUMENT

I. Standing In The Door Of One's Home And Insisting Upon A Warrant Is Not A Crime.

As Mr. Thompson explained in his opening brief, Mr. Thompson did not commit a crime by "standing in the door and refusing orally" to let the police enter without a warrant. JA540; Br. for Appellant 23-36. Doing so was his constitutional right, and no reasonable officer would prosecute someone for exercising a constitutional right—especially not by *lying*. Br. for Appellant 41-49.

A. Officer Clark Tries To Use The Verdict On Mr. Thompson's Other Claims To Circumvent The Malicious Prosecution Claim.

Rather than respond to the well-established law Mr. Thompson cites, Officer Clark rests his entire brief on the jury's general verdict on Mr. Thompson's other claims. Officer Clark argues that the verdict—which Officer Clark ensured did not address Mr. Thompson's malicious prosecution claim—defeats Mr. Thompson's malicious prosecution claim because the verdict necessarily established that (1) Officer Clark did not provide "a materially false account to prosecutors or in the criminal complaint that led to a liberty deprivation," (2) the officers' entry into the apartment was "justified by exigent circumstances," and (3) "there was probable cause to arrest." Br. for Appellee 13, 19, 25-26.

The problem with that argument is that the jury never made any such findings. To treat a verdict as resolving a disputed issue—like probable cause, exigent

circumstances, or the veracity of Officer Clark's criminal complaint—Officer Clark bears the burden of proving that the issue was "actually and necessarily decided" by the jury in his favor. *Schiro v. Fraley*, 510 U.S. 222, 232 (1994). He must do so, moreover, "with clarity and certainty." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 49 (2d Cir. 2003). To meet his burden, it was "incumbent" on Officer Clark to submit special interrogatories to the jury so that they could make explicit findings on each issue. *Kerman*, 374 F.3d at 120; *see Zellner v. Summerlin*, 494 F.3d 344, 373 (2d Cir. 2007) (requiring special interrogatories to establish any fact that defendants "wished to argue provided either probable cause or arguable probable cause").[1]

Officer Clark knew this, and he prepared interrogatories mirroring some of the issues he raises now. *Compare* Br. for Appellee 19 (arguing that Officer Clark intended to "check on an infant who was the reported victim of an ongoing sexual assault"), *with* ECF 127 at 1 (asking the jury, "Did Defendant Pagiel Clark reasonably believe . . . a baby inside the apartment unit may be in danger?"). At the close of trial, however, Officer Clark "made a strategic choice to forgo submission of such questions to the jury." *Outlaw v. City of Hartford*, 884 F.3d 351, 371 (2d

[1] Officer Clark wrongly suggests that Mr. Thompson was required to address Officer Clark's erroneous theory of preclusion preemptively in the opening brief. *See* Br. for Appellee 16. But the district court held that the verdict was *not* preclusive, and only deferred to the verdict under the law of the case doctrine. *See* JA537; JA540. Mr. Thompson properly responded to the district court's unwarranted deference in the opening brief. *See* Br. for Appellant 23 n.1.

Cir. 2018); *see* JA343 (defense counsel stating "special interrogatories should only be submitted to the jury in this case if there is a finding of liability"). Because of that choice, the jury only returned a general verdict—responding "Yes" or "No" to each claim—without making any findings about exigent circumstances, probable cause, or Officer Clark's truthfulness (or the lack thereof). JA86-89.

Officer Clark may regret his choice, but he is "not entitled to have the court, in lieu of the jury, make the finding[s]" he failed to request. *Kerman*, 374 F.3d at 120; *see Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 729 (2d Cir. 1981) (rejecting preclusion where "[t]he jury was not asked . . . to render a special verdict in the form of special findings"). Absent specific findings from the jury, "it is not known what factual issues the jury has decided, for the defendant was entitled to the verdict if the plaintiff failed to persuade the jury as to any element of his claim." *Tucker*, 646 F.2d at 729; *see Foster v. Moore-McCormack Lines*, 131 F.2d 907, 908 (2d Cir. 1942) (describing a general verdict's "mantle of impenetrable darkness over the operations of the jury"). Officer Clark cannot simply *assume* that the jury made certain findings to prevent a jury from deciding Mr. Thompson's malicious prosecution claim *again*. *See, e.g.*, *Tucker*, 646 F.2d at 728 (holding the verdict did not resolve an issue of knowledge because it "was not the only issue for the jury and

the jury's verdict was a general one"); *Zellner*, 494 F.3d at 373 (denying preclusion over an issue because "[n]o such question" was submitted to the jury).[2]

This Court rejected a similar theory of preclusion in *Devilla v. Schriver*, 245 F.3d 192 (2d Cir. 2001). There, the plaintiff brought several claims relating to improper disclosures of personal information by an official named Lynch. *Id.* at 194-95. A jury found that Lynch did not violate the plaintiff's right to privacy, but another claim was dismissed—erroneously—before the verdict. *Id.* After this Court vacated the dismissal, the district court treated the jury's verdict as establishing that "no secrets were disclosed by Lynch." *Id.* at 196. This Court rejected that conclusion because, among other things, the jury could have instead rejected the privacy claim on the ground that the disclosure was not statutorily protected. *Id.* at 197 n.5; *see also id.* at 198. Because the jury never specified the basis for its decision, the district court could not assume the jury had resolved the disclosure question.[3]

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[2] *See In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008) ("[I]f the judgment is based on one or more of several grounds, but does not expressly rely on any of them, none is conclusively established."); *C.B. Marchant Co. v. Eastern Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985); *Stephens v. Jessup*, 793 F.3d 941, 944 (8th Cir. 2015); *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000); *S.E.L. v. Maduro (Fla.), Inc. v. M/V Antonio de Gastaneta*, 833 F.2d 1477, 1483 (11th Cir. 1987).

[3] Officer Clark misreads *Devilla* to argue that "there was not even an extant verdict." Br. for Appellee 18. The district court set aside the verdict as to a defendant named Schriber only, leaving the verdict in place as to Lynch. *See Devilla*, 245 F.3d at 195.

For the same reason, Officer Clark's preclusion theory fails. For example, he argues that the verdict on Mr. Thompson's fair trial claim necessarily establishes that Officer Clark did not provide a "false account of the encounter." Br. for Appellee 28. But the jury never made such a finding because Officer Clark never asked them to. *See Outlaw*, 884 F.3d at 369 ("The factual flaw [in the argument] is, of course, that there were no jury findings."). As a result, it is impossible to know whether the jury concluded that Officer Clark had been truthful, or relied on another issue, like whether "the fabricated evidence was of a material nature." JA349; *see Tucker*, 646 F.2d at 729 (rejecting preclusion over the issue of knowledge because the defendant "put in issue the elements of knowledge, reliance, and causation," and the "fact that [the jury] returned a general verdict in [his] favor . . . does not mean that it found in [his] favor on the issue of knowledge"). Indeed, it would be bizarre to assume the jury found Officer Clark was truthful when he admitted under oath that he was not. *See* JA261.

Similarly, the verdict on the unlawful entry claim does not establish that "the jury found exigent circumstances." Br. for Appellee 39. Officer Clark prepared interrogatories asking the jury to make such a finding, but chose not to submit them. *See* ECF 127 at 1. Instead, he argued that Mr. Thompson bore the burden of proof on the unlawful entry claim. *See* JA335. Having made that choice, he cannot assume that the jury made the affirmative finding he failed to request. *See Outlaw*, 884 F.3d

at 370-71 (rejecting defendant's argument that a verdict established a particular fact because the jury could have "viewed the evidence as to [the plaintiff's] claim as being in equipoise"); Br. for Appellant 23 n.1.

Finally, Officer Clark argues that the verdict on Mr. Thompson's false arrest claim establishes that "there was probable cause for obstructing governmental administration." Br. for Appellee 27. Once again, Officer Clark prepared several interrogatories specifically addressing probable cause (focusing on a different crime, no less), but he chose not to submit them. *See* ECF 127 at 2. As a result, the jury never made any finding as to probable cause.[4]

Moreover, even if the jury had found probable cause to arrest, that still would not be preclusive of probable cause for malicious prosecution, as those standards differ in multiple ways. *See NLRB v. Thalbo Corp.*, 171 F.3d 102, 109 (2d Cir. 1999) ("If the issues were not identical, there is no collateral estoppel."). For starters, probable cause for malicious prosecution requires a higher level of certainty. *See Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013). In addition, probable cause

[4] Officer Clark now argues that probable cause was "the claim's only disputed element," Br. for Appellee 8, but at trial, he never conceded the other elements of false arrest. *See* ECF 98 at 5 (defendants' proposed jury instructions arguing that Mr. Thompson bore the burden of proof on other elements); JA318 (defense counsel refusing to concede the personal involvement element); JA356 (noting that the general verdict as "defendants propose[d] it" combined "the probable cause and the personal involvement [elements] together as one question"). This is another example of Officer Clark's shifting litigation strategy: contesting elements when it served his interests, and disclaiming them now that the trial is over.

for malicious prosecution is measured not "as of the moment of the arrest," as the jury was instructed, but the following day, when Officer Clark initiated criminal proceedings. *See* JA263; JA348. Therefore, the jury never decided the issue that Officer Clark seeks to preclude.[5]

Finally, unlike probable cause to arrest, probable cause for malicious prosecution "must be shown as to each crime charged in the underlying criminal action." *Kee v. City of New York*, 12 F.4th 150, 166 (2d Cir. 2021); *see Lowth v. Town of Cheektowaga*, 82 F.3d 563, 571 (2d Cir. 1996). Because the jury was only instructed on probable to arrest, it was told that probable cause "for *any* offense, whether charged or not," would suffice. JA348 (emphasis added). The jurors did not even need to agree on a crime. *Id.* Thus, even if the jury had made a finding of probable cause, that still would not establish probable cause to prosecute an obstruction charge. *See Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991) ("Since we

[5] Officer Clark tries to convert probable cause to arrest into probable cause to prosecute by claiming that he did not learn "any intervening facts between arrest and prosecution." Br. for Appellee 26. That argument fails even on its own terms because, as Mr. Thompson explained in his opening brief, Officer Clark learned critical new facts after arresting Mr. Thompson and entering his apartment: "that 'the baby was not abused,'" and thus Mr. Thompson was being truthful when he told the police that the 9-1-1 call was mistaken. Br. for Appellant 35, 43. Those facts confirmed that Mr. Thompson had not been trying to obstruct the police.

cannot know which charge or charges the jury may have found to have lacked probable cause, the claims as to all three charges . . . must be retried.").[6]

The only case that Officer Clark cites for treating a verdict as preclusive, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995), is inapposite because it concerned whether a verdict was preclusive for the *same claims* brought by another litigant. In *LeBlanc-Sternberg*, several individuals and the federal government sued for violations of the Fair Housing Act. *Id.* at 419. The litigants went to trial jointly, and the jury decided—through a special verdict sheet containing special interrogatories—that one defendant had violated the private plaintiffs' rights. *Id.* at 422. The district court, however, later ruled against the federal government as to the same defendant. *Id.* This Court held that the jury's express finding of a violation precluded the district court from making the opposite determination on the same claims. *Id.* at 433-34.

Unlike in *LeBlanc-Sternberg*, the jury here never decided Mr. Thompson's malicious prosecution claim, and Officer Clark failed to submit special

[6] Because probable cause for malicious prosecution must justify each charge, Officer Clark's claim that the charges he advanced at trial "were of equivalent seriousness and factually overlapping" is irrelevant. Br. for Appellee 26-27. Officer Clark also specifically argued at trial that one of the crimes he advanced, harassment, was "a violation, not a misdemeanor or felony." JA318. And although the Supreme Court is reviewing the charge-specific rule in *Chiaverini v. City of Napolean*, No. 23-50, any decision will not affect this case because Officer Clark's preclusion theory fails on multiple grounds.

interrogatories to resolve any specific issues. Thus, "[t]he jury made none of the factual findings he wishes to impute to it." *Outlaw*, 884 F.3d at 371. Officer Clark cannot "put words in the jury's mouth." *Id.*[7]

B. People Cannot Be Prosecuted For Requesting A Warrant Simply Because The Police Believe There Are Exigent Circumstances.

Once Officer Clark's verdict theory is cast aside, this appeal comes down to whether "standing in the door and refusing orally" to let the police enter without a warrant necessarily constitutes obstruction. JA540; *see* Br. for Appellee 19-20. As Mr. Thompson explained in his opening brief, *regardless* of whether there were exigent circumstances, it is not a crime to stand in the door of one's home and insist that the police produce a warrant before entering. Br. for Appellant 24-29. A contrary rule would make it impossible to exercise people's Fourth Amendment rights. *See, e.g.*, *Reed v. Campbell Cnty.*, 80 F.4th 734, 748 (6th Cir. 2023) ("If the state could criminalize refusing entry to one's home to police officers, it would eviscerate the core protections of the Fourth Amendment."); *United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988).

Unsurprisingly, New York does not criminalize the peaceful exercise of Fourth Amendment rights. The state's obstruction statute does not apply to Mr.

[7] In a footnote, Officer Clark cites a series of cases in which a pre-verdict dismissal was treated as harmless based on a preclusive jury verdict. *See* Br. for Appellee 17 n.2. Those cases are not relevant because the verdict is not preclusive, and Officer Clark's pre-verdict dismissal on favorable termination grounds is not at issue.

Thompson for two independent reasons: Mr. Thompson never physically interfered with the police, nor did he intend to obstruct the police.

i. *Opening The Door And Standing There To Speak With The Police Is Not Physical Interference*.

As every case Officer Clark cites makes clear, New York's obstruction statute requires a physical act "to interfere with the police," such as "intrud[ing] himself into, or get[ting] in the way of, an ongoing police activity." *In re Kendall R.*, 897 N.Y.S.2d 83, 84 (App. Div. 2010); *see Kass v. New York*, 864 F.3d 200, 210 (2d Cir. 2017) (noting the plaintiff had "physically gotten in the way of and had frustrated the officers' efforts" (cleaned up)); *Matter of Davan, L.*, 689 N.E.2d 909, 911 (N.Y. 1997) (finding the individual "placed his own safety, as well as the safety of the officers and others in the public, at risk"). In *People v. Paige*, 911 N.Y.S. 176 (App. Div. 2010), for example, the police expressly identified themselves "as having an arrest warrant," and warned that the "defendant faced arrest if he did not allow them into the residence." *Id.* at 178. Despite being presented with a warrant and being warned, the defendant "slammed the door to prevent the troopers from executing the warrant." *Id.*; *see also People v. Broughton*, 94 N.Y.S.3d 830, 833 (Crim. Ct. 2019) (noting "[t]he defendant refused numerous commands and chose to remain blocking the entrance").

Taking the evidence in the light most favorable to Mr. Thompson, as it must be, Mr. Thompson never intruded himself into police activity, defied police

warnings, or otherwise physically interfered. He simply opened his door and asked to see a warrant. *See* JA447-48; *District of Columbia v. Little*, 339 U.S. 1, 4 (1950) ("For even if the Health Officer had a lawful right to inspect the premises without a warrant, . . . respondent's statements to the officer were not an 'interference.'"). That is the reason Officer Clark *lied* in his sworn criminal complaint to claim that he repeatedly warned Mr. Thompson that he could be arrested—to try to create some semblance of physical interference. *See* JA261 (Officer Clark testifying that he never warned Mr. Thompson); JA176; JA283.[8]

Instead of defending his false claims, Officer Clark now argues that Mr. Thompson committed physical interference by "blocking an officer's lawful entry." Br. for Appellee 6, 20. But that is simply an improper attempt to construe the evidence against Mr. Thompson. *See id.* at 28 (falsely claiming Mr. Thompson "pushed or shoved an officer to prevent entry"); *id.* at 20 n.4 (asking that the defendants' testimony be "credited in full" to establish Mr. Thompson "engaged in intimidation"); *id.* at 38 (characterizing the events as a "heated confrontation"). As the district court recognized, Officer Clark's claims that Mr. Thompson "used physical force against any Defendant" are genuinely disputed, JA540, and thus

[8] Even those false claims would not have been enough for probable cause. *See Kendall*, 897 N.Y.S.2d at 83; *Edger v. McCabe*, 84 F.4th 1230, 1237-38 (11th Cir. 2023) (holding that the plaintiff's "statements and noncompliance without more do not begin to support arguable probable cause").

cannot be considered at summary judgment. To the contrary, Mr. Thompson specifically testified that he did not "put [his] hands on anyone." JA280; *see* JA283 (Q: "Did you push an officer?" A: "No, never."). The only physical contact was initiated by the officers, when they "rushed [Mr. Thompson] and . . . put [him] in a choke lock." JA448.[9]

Finally, in an effort to sidestep the genuine disputes of fact, Officer Clark falsely asserts that Mr. Thompson "acknowledged blocking their path." *See* Br. for Appellee 6 (citing JA281-84; JA297). But the record shows the opposite: Mr. Thompson testified that he "opened the door" to speak with the officers and "was holding the door open" when the officers grabbed him. JA281. Mr. Thompson specifically denied pushing, yelling at, or otherwise impeding any officer. JA282-83. Because the evidence must be construed in Mr. Thompson's favor, Officer Clark lacked probable cause.

[9] Officer Clark cites a district court comment that "there was substantial evidence that . . . the plaintiff pushed, or at a minimum physically interfered with, a governmental official." JA122. That comment is not relevant because it was made in the context of the favorable termination requirement; the same district court recognized that genuine disputes of fact preclude summary judgment. *See* JA123 (noting evidence of Mr. Thompson's innocence); JA82-83.

ii. *Officer Clark Knew That Mr. Thompson Did Not Intend To Obstruct, Especially After Learning That Nala Was Never In Any Danger.*

Officer Clark also lacked probable cause because it was apparent that Mr. Thompson never intended to "prevent the public servant from engaging in a specific official function." *In re Armell N.*, 905 N.Y.S.2d 471, 474 (Fam. Ct. 2010). A person does not possess criminal intent if his aim is to invoke his Fourth Amendment rights. *See People v. Rodriquez*, 851 N.Y.S.2d 342, 348 (Crim. Ct. 2008) ("Without knowledge that the police officer possessed a warrant for entry, the defendant . . . may have reasonably believed himself entitled to exclude the officer."). And that is exactly what Mr. Thompson intended, telling the officers, "I'm not agreeing to it *without a warrant*." JA447-48 (emphasis added).

Officer Clark's primary response is that he did not have to consider Mr. Thompson's intent at all. *See* Br. for Appellee 21-22 (arguing that a lack of intent "has no bearing on [probable cause]"). Officer Clark claims that *Kass* held that probable cause for obstruction requires only that the officers "were engaged in a lawful function." *Id.* at 23-24. To the contrary, *Kass* was clear that probable cause requires a reasonable belief that "all three" elements "were met," including the requisite intent. 864 F.3d at 207; *see also Zellner*, 494 F.3d at 370 ("'Arguable' probable cause must not be misunderstood to mean 'almost' probable cause."). A reasonable jury could conclude that Mr. Thompson's intent plainly was to invoke

his constitutional rights, not obstruct the police. *See Provost v. City of Newburgh*, 262 F.3d 146, 158 (2d Cir. 2001) (rejecting probable cause argument because a reasonable jury could conclude that the officers "were aware of [the plaintiff's] legitimate reason for shouting" and thus knew the plaintiff lacked criminal intent).

Officer Clark's only attempt to identify a criminal intent is that Mr. Thompson was trying to prevent the police from "enter[ing] and check[ing] on the baby." Br. for Appellee 22. But a reasonable jury could reject that theory even based on the events *prior* to the arrest. *See* Br. for Appellant 34-35; JA447-48 (Mr. Thompson testifying that he explained that the 9-1-1 call was mistaken, as he had already told the EMTs). A reasonable jury certainly could reject that theory based on what Officer Clark knew the day *after* the arrest, when he initiated criminal proceedings. Once the police entered Mr. Thompson's apartment, they quickly confirmed that Nala "was never in any danger." JA93. As the lead officer testified, "after seeing the baby," there was no reason to be "concerned about the welfare." JA209.[10] Thus, as Officer Clark admitted, he signed the criminal complaint despite knowing that "the baby was not abused." JA263. At that point, there was no reason to think that Mr.

[10] Officer Clark suggests there was uncertainty because the EMTs were "not able to definitively rule out abuse at the scene." Br. for Appellee 7 (emphasis omitted). But the lead officer testified that, "at the scene," the EMTs' "official diagnosis" was diaper rash. JA151. The EMTs then took Mr. Thompson's wife and daughter to the hospital to confirm their diagnosis. JA191. Thus, by the time Officer Clark signed the criminal complaint, he "knew the baby was not abused." JA263.

Thompson had been trying to prevent anyone from "enter[ing] and check[ing] on the baby." Br. for Appellee 22. For that reason, too, Officer Clark lacked probable cause.

II. Qualified Immunity Should Be Denied.

More than five years after he raised his favorable termination argument (and no other defense) at the close of trial, Officer Clark seeks to assert qualified immunity. That belated attempt should be rejected.

A. Officer Clark Cannot Use The Accident Of Remand To Excuse His Repeated Failure To Raise Qualified Immunity.

Officer Clark does not dispute that "[t]he qualified immunity defense can be waived" by the "failure to raise it in a timely fashion." *McCardle v. Haddad*, 131 F.3d 43, 51 (2d Cir. 1997). At trial, he had at least four opportunities to move for judgment as a matter of law, and each time, he failed to assert qualified immunity. *See* JA132; JA309; ECF 123; ECF 125.

In doing so, he waived his "ability to renew his Rule 50 motion" on that ground. JA534. Rule 50 states that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . resolve the issue against the party" and "grant a motion for judgment as a matter of law." Fed. R. Civ. P. 50(a). That is what Officer Clark argued on remand, insisting that "Plaintiff has had his 'day in court'" and "presented all of his evidence in support of all his claims, including his federal malicious prosecution claim, to a twelve

person jury." JA487. Officer Clark asked the court to "resolve the issue[s]" against Mr. Thompson, including that "Plaintiff cannot prove a lack of probable cause," and to grant judgment "as a matter of law." JA488, JA491.

That request should have been denied "because no motion for JMOL on that basis had been directed to the claim . . . at trial." *McCardle*, 131 F.3d at 51-52. The only reason this case is not straightforwardly resolved by Rule 50 is that there was a trial on the malicious prosecution claim, but no verdict. Officer Clark's favorable termination argument survived just long enough for him to prevent the jury from returning a verdict, before the Supreme Court rejected the argument on appeal. He now seeks to take advantage of the situation he created to excuse his failure to raise qualified immunity prior to the jury's verdict, as Rule 50 requires. He should not be allowed to "use the accident of remand as an opportunity to reopen waived issues." *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001).

That is especially true because Officer Clark *also* failed to raise qualified immunity at summary judgment. Almost seven years ago, Officer Clark chose not to assert qualified immunity against the malicious prosecution claim. *See* JA47; JA50-53. But after his favorable termination argument was rejected, he asked the district court to reconsider its prior denial of summary judgment. *See* JA488 (Officer Clark seeking summary judgment "despite . . . previously moving for summary judgment"); JA494 (Officer Clark arguing that the prior denial was "subject to

reconsideration at any time"); *see also* JA536 (district court "[r]econsidering whether summary judgment is appropriate"). Arguments "raised for the first time" in a motion for reconsideration are waived, too. *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015).

Ultimately, Officer Clark asks this Court to excuse his waiver. Br. for Appellee 35. But this Court exercises its discretion when "there is no need for additional fact-finding." *Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012). Here, there are genuine disputes of fact, and this Court should not excuse a repeated waiver to prevent a jury from deciding this claim again.

B. Officer Clark's Qualified Immunity Arguments Fail.

i. *No Reasonable Officer Would Lie To Initiate Criminal Proceedings.*

Even if this Court reaches qualified immunity, Officer Clark's arguments fail on the merits. By 2014, it was clear to every reasonable officer that it is unlawful to lie in order charge someone with a crime. *See, e.g.*, *Boyd v. City of New York*, 336 F.3d 72, 77 (2d Cir. 2003); *Manganiello v. City of New York*, 612 F.3d 149, 165 (2d Cir. 2010). These cases resolve the qualified immunity inquiry—and Officer Clark has no response to them. *See* Br. for Appellee 36-41.

Instead, he claims that *Richardson v. McMahon*, No. 22-582, 2023 WL 3102910 (2d Cir. Apr. 27, 2023), held that "allegations of lying do not defeat arguable probable cause." Br. for Appellee 40. But *Richardson* did not concern an

officer who lied in order to initiate criminal proceedings. In that case, the police arrested the plaintiff for assault based on eyewitness testimony that the plaintiff claimed was false. *Richardson*, 2023 WL 3102910, at *2. This Court granted qualified immunity because a reasonable officer could have credited the eyewitness testimony over the plaintiff's uncorroborated statement. *Id.*

This case is not about an officer weighing two conflicting statements. Officer Clark deliberately lied—as he later *admitted* in sworn testimony—in order to prosecute Mr. Thompson. *See* JA261. Qualified immunity does not apply when the officer's conduct "move[s] beyond a simple conflict of stories . . . and into the possibility that the police . . . lied in order to secure an indictment." *Boyd*, 336 F.3d at 77; *see also Scotto v. Almenas*, 143 F.3d 105, 113 (2d Cir. 1998).

Officer Clark tries to sidestep his fabrications by claiming that he had arguable probable cause for other reasons. Br. for Appellee 37. As explained below, Officer Clark did not have arguable probable cause. Equally important, those post-hoc justifications do not matter: Qualified immunity should be denied because "no objectively reasonable public official could have thought" that lying to initiate charges was lawful. *Coggins v. Buonora*, 776 F.3d 108, 114 (2d Cir. 2015).

ii. *No Reasonable Officer Would Prosecute Someone For Standing In The Door Of His Home And Requesting A Warrant.*

Even if the Court looks past Officer Clark's lies, qualified immunity does not apply. By 2014, no reasonable officer would prosecute someone for "standing in the

door and refusing orally" to let the police enter without a warrant. JA540; *See v. City of Seattle*, 387 U.S. 541, 546 (1967) ("[A]ppellant may not be prosecuted for exercising his constitutional right to insist that the [official] obtain a warrant."); *United States v. Hyppolite*, 65 F.3d 1151, 1157 (4th Cir. 1995) ("[A]n objectively reasonable officer should have known that the mere assertion of constitutional rights cannot establish probable cause."); *Little*, 339 U.S. at 6-7 ("The word 'interfere' . . . cannot fairly be interpreted to encompass respondent's failure to unlock her door and her remonstrances on constitutional grounds.").[11] And no reasonable officer would believe that such a basic exercise of constitutional rights constitutes obstructing governmental administration.

No reasonable officer would think that speaking with the police created probable cause because "mere words" do not constitute obstruction. *People v. Case*, 365 N.E.2d 872, 875 (N.Y. 1977); *Davis v. Williams*, 451 F.3d 759, 767 (11th Cir. 2006) (finding no arguable probable cause based on "an owner's simple inquiry as

[11] Officer Clark suggests that officers are "not expected" to consider citizens' Fourth Amendment rights "in the field." Br. for Appellee 23 n.6. That is plainly incorrect. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[A] reasonably competent public official should know the law governing his conduct."). Indeed, the NYPD Patrol Guide expressly instructs officers that "[p]olice-initiated enforcement actions, including, but not limited to, arrests . . . must be based on the standards required by the Fourth and Fourteenth Amendments of the U.S. Constitution." NYPD Patrol Guide, Proc. No. 203-25 (June 2, 2016), https://www.nyc.gov/html/nypd/downloads/pdf/public_information/public-pguide1.pdf.

to why officers are present on his property"); *Ekukpe v. Santiago*, 823 F. App'x 25, 30 (2d Cir. 2020) (finding no arguable probable cause because the plaintiff "simply asked why he and his companions had to leave"). According to one officer, Mr. Thompson's conversation with the police lasted "about 30 seconds." JA148. Nothing he said in that short time made him guilty of a crime. *See Zellner*, 494 F.3d at 377 (finding no arguable probable cause for obstructing governmental administration based on a "20- or 30-second conversation" with the police).

During that brief conversation, Mr. Thompson was entirely within his rights to stand in the doorway of his home, rather than step aside and risk being treated as having consented to a warrantless entry. *See* Br. for Appellant 23-24; *Little*, 339 U.S. at 7 ("Had the respondent not objected to the officer's entry of her house without a search warrant, she might have thereby waived her constitutional objections."). In fact, under New York law, Mr. Thompson did not need to open his door or speak with the police at all. *See People v. Offen*, 408 N.Y.S.2d 914, 916 (Crim. Ct. 1978) ("[I]t is no crime to refuse to open a door to police officers."); *Rodriquez*, 851 N.Y.S.2d at 348; *People v. Goli*, 934 N.Y.S.2d 782, 783 (App. Div. 2011) ("[D]efendant's failure to comply with the police directive to open the door did not evince the requisite intent to obstruct the police investigation through 'physical force or interference.'"). Far from obstructing the police, Mr. Thompson chose to *cooperate* by opening the door and speaking with the officers, hoping to clear up the

mistaken 9-1-1 call. *See* JA451-52 (asking to speak with the officers' supervisor about the issue). If doing so constitutes obstruction, then every New Yorker should wonder, if the police are ever mistakenly called to their home, "What's a citizen to do?" JA128.

The cases that Officer Clark cites only confirm that he lacked arguable probable cause. In *Shaheed v. Kroski*, 833 F. App'x 868 (2d Cir. 2020), for example, this Court held that a person commits obstruction if he "refus[es] to comply with a search warrant." *Id.* at 871. This Court expressly distinguished cases, like this one, where "the police . . . had not obtained a warrant." *Id.* at 871 n.3. Thus, *Shaheed* shows that Mr. Thompson was entirely within his rights to insist that the police show him a warrant before allowing them to enter his home.

Officer Clark also cites *Antic v. City of New York*, 740 F. App'x 203 (2d Cir. 2018), to argue that "noncompliance with police orders to 'move away from a designated area'" creates arguable probable cause. Br. for Appellee 37. That is not what *Antic* held. There, the Court explained that "officers specifically ordered [the plaintiff] to evacuate the crime scene"—located at a public street corner, not the plaintiff's home—and the plaintiff responded by making "physical contact with a police officer involved in the arrest of [the plaintiff's] friend, who was physically struggling with multiple nearby officers." 740 F. App'x at 206. In other words, *Antic* confirms that physical interference—not just standing in the door of one's own

home—is required for obstruction. *See also Ekukpe*, 823 F. App'x at 30 (rejecting argument that the "failure to comply with a lawful order is alone sufficient").

Finally, Officer Clark argues that he was reasonably mistaken about probable cause because of "practical restraints on police in the field." Br. for Appellee 22. But Officer Clark did not sign the criminal complaint in the field. He signed it the following day, when there was no question that the 9-1-1 call was mistaken and Nala was never in any danger. Officer Clark had ample time to recognize that Mr. Thompson had committed no crime. *See Reitz v. Woods*, 85 F.4th 780, 793 (5th Cir. 2023) (noting officers acted in an "unhurried setting"). His decision to lie shows that this was not a mistake at all—it was an intentional violation—and therefore "the shield of qualified immunity is lost." *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991).

III. Officer Clark's New Seizure Arguments Are Waived And Meritless.

Finally, Officer Clark resurrects an issue that the district court resolved long ago, claiming that Mr. Thompson was not seized pursuant to legal process. *See* Br. for Appellee 29. That argument is waived and meritless.

A. Officer Clark Failed To Raise This Argument At Summary Judgment And Trial.

This Court should reject Officer Clark's argument as waived. He failed to dispute this issue at summary judgment almost seven years ago. *See* JA50-53. As a result, the district court held that Mr. Thompson "was deprived of his liberty when

he was held in jail for two days and then required to make several court appearances before his case was dismissed." JA82-83. Then, Officer Clark *again* did not dispute this issue at trial, causing the district court to prepare jury instructions that "[t]his element is deemed proven." *See* ECF 112-1 at 19.

As a result, when Officer Clark raised this new argument on remand, the district court ignored it. *See* JA530-46. Instead, the district court held that, because Mr. Thompson *was* seized as a result of the obstruction charge, the resisting arrest charge did not create any additional seizure. JA545 ("This restraint on Plaintiff's liberty would have occurred if Plaintiff had been charged with only OGA.").

Like the district court, this Court should ignore Officer Clark's waived argument. His attempt to reopen this settled issue—while blaming Mr. Thompson for a perceived lack of evidence, *see* Br. for Appellee 31—is remarkable.

B. Mr. Thompson Was Seized By Officer Clark's Initiation Of Criminal Proceedings.

Even if it were proper to reach this issue, Officer Clark is incorrect. Because of his fabricated criminal complaint, Mr. Thompson was seized in three ways: (1) he was detained in jail, (2) he was compelled to attend court hearings, and (3) he was subject to additional restrictions during his release pending the proceedings.

First, as the district court recognized, Mr. Thompson was seized because "he was held in jail" following the initiation of criminal proceedings. JA82-83; *see* JA289. As the federal government noted before the Supreme Court, "some period of

petitioner's detention . . . occurred after the criminal complaint" was filed, creating a "seizure pursuant to legal process." Br. of United States at 11-12, *Thompson v. Clark*, 142 S. Ct. 1332 (2022) (No. 20-659), 2021 WL 2458462; *Manuel v. City of Joliet*, 580 U.S. 357, 368 (2017) ("Manuel stated a Fourth Amendment claim when he sought relief . . . for his (post-legal-process) pretrial detention."); *Poulos v. Cnty. of Warren*, No. 21-2656, 2023 WL 4004692, at *2 (2d Cir. June 15, 2023) (finding "a deprivation of liberty stemming from his pretrial detention"). Officer Clark fails even to address this seizure.

Second, Mr. Thompson was seized because he was "required to make several court appearances before his case was dismissed." JA82-83; *see* JA98. This Court has "consistently held that a post-arraignment defendant who is 'obligated to appear in court in connection with [criminal] charges . . .' suffers a Fourth Amendment deprivation of liberty." *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013); *see Spak v. Phillips*, 857 F.3d 458, 466 (2d Cir. 2017); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997) (treating "periodic court appearances" as seizures).

In response, Officer Clark cites *Faruki v. City of New York*, 517 F. App'x 1 (2d Cir. 2013), but that case concerned two pre-arraignment appearances resulting from a non-felony summons. *Id.* at 1. This Court has expressly distinguished such cases from those, like Mr. Thompson's, in which "a post-arraignment defendant . . .

is obligated to appear in court in connection with [criminal] charges." *Swartz*, 704 F.3d at 112 (internal quotation marks omitted).

Finally, Mr. Thompson was seized by restrictions during his release. This Court has recognized that "in New York, a criminal defendant released on his own recognizance . . . must 'render himself at all times amenable to the orders and processes of the court,' and therefore must ordinarily remain in the state." *Rohman v. New York City Transit Auth.*, 215 F.3d 208, 216 (2d Cir. 2000) (quoting N.Y. Crim. Proc. L. § 510.40); *see Murphy*, 118 F.3d at 946 (recognizing such restrictions "are appropriately viewed as seizures").

Officer Clark responds that *Rohman* was "mistaken" about New York law. Br. for Appellee 30. But Officer Clark never challenged *Rohman* below. *See* JA493-514. And that case correctly held that, by initiating criminal proceedings, Officer Clark "rendered [Mr. Thompson] at all times subject to the orders of the court," limiting his ability to travel. *Swartz*, 704 F.3d at 112; *see Murphy*, 118 F.3d at 946 ("[S]uch conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment."); *see also Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring).

Officer Clark claims that several "subsequent amendments" show that travel restrictions "must be affirmatively imposed." Br. for Appellee 30-31. None of those amendments is relevant, however, because they were enacted in 2020, years after

Officer Clark initiated criminal proceedings against Mr. Thompson in 2014. *See People v. Portoreal*, 116 N.Y.S.3d 514, 517, 519-20 (Sup. Ct. 2019) (discussing amendments). Even after the amendments, individuals released on their recognizance must still "be at all times amenable to the orders and processes of the court," as *Rohman* recognized. N.Y. Crim. Proc. L. § 510.40(1); *id.* § 500.10(2).

Finally, Officer Clark claims that any "seizure would not be attributable" to him. Br. for Appellee 32. But Officer Clark plainly caused the seizures by signing the complaint that initiated criminal proceedings against Mr. Thompson. *See Swartz*, 704 F.3d at 112 ("When [the officer] swore out a complaint . . . and filed it in a criminal court, he commenced a criminal action."); JA23; JA261. As Officer Clark himself admits, "an officer who fabricates the basis for the prosecution may be said to have initiated the prosecution." Br. for Appellee 33; *see Manganiello*, 612 F.3d at 163. Mr. Thompson's evidence shows that Officer Clark did exactly that, and Mr. Thompson is entitled to have his claim decided by a jury.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and remand for a trial on Mr. Thompson's malicious prosecution claim.

Dated: February 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Local Rule 32.1(a)(4)(B) because this brief contains 6,994 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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: February 7, 2024

/s/ Gregory Cui
Gregory Cui

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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Dated: February 7, 2024

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