23-900

United States Court of Appeals
for the Second Circuit

LARRY THOMPSON,

Plaintiff-Appellant,

against

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

BRIEF FOR APPELLEES

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December 27, 2023

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PRELIMINARY STATEMENT

This § 1983 action began when plaintiff Larry Thompson's sister-in-law called 911 reporting that an infant was being sexually assaulted in the family's apartment. When NYPD officers arrived on the scene, Thompson prevented them from entering the apartment to check on the infant's safety, physically blocking the officers, leading to a struggle and Thompson's arrest. An independent prosecutor later charged Thompson with obstructing governmental administration and resisting arrest. The prosecutor later dropped the charges, and Thompson brought this suit.

For a case with no merit, this action has taken an extraordinary path. Thompson had a trial before a jury on several claims, including claims for unlawful entry, false arrest, and fabrication of evidence. In its unchallenged verdict, the jury rejected Thompson's narrative of the encounter, rendering a complete defense verdict on his allegations that officers: (1) entered the apartment without justification; (2) arrested him without probable cause; and (3) caused a liberty deprivation by providing a materially false account to prosecutors or in the criminal complaint.

One claim was resolved before the case went to the jury—a Fourth Amendment "malicious prosecution" claim, sometimes described as a

claim for unreasonable seizure pursuant to legal process. That claim is asserted against Officer Pagiel Clark, the sole remaining defendant. Ruling on an issue first surfaced by Thompson, the United States District Court for the Eastern District of New York (Weinstein, J.) granted Clark judgment as a matter of law on the claim, holding that the prosecution did not terminate in Thompson's favor under the then-prevailing "indications of innocence" standard. After granting certiorari, the United States Supreme Court rejected that standard and remanded for consideration of other issues, as appropriate.

On remand, the district court (Gonzalez, J.) granted summary judgment to Clark, concluding, based on the full trial record, that there was probable cause to charge Thompson with obstructing governmental administration and that he suffered no independent liberty deprivation by being charged with a different offense of equivalent seriousness. In the alternative, the district court found that Clark was entitled to qualified immunity. This Court should affirm, for three separate reasons.

First, the jury's verdict rejecting all of Thompson's other claims also defeats his last claim. This is true in three ways: (1) in rejecting the false arrest claim, the jury found there was probable cause to arrest, and no

matter which offenses the jury found supported the arrest, there was probable cause for Clark to sign the criminal complaint the next day—his last act tied to the prosecution; (2) in rejecting the unlawful entry claim, the jury found that the officers' entry was justified, eliminating the linchpin of Thompson's argument that his blocking of the officers' entry did not give rise to probable cause for obstruction of governmental administration; and (3) in rejecting the fabrication of evidence claim, the jury found that Clark did not provide a materially false account to prosecutors or in the criminal complaint that caused a liberty deprivation. No Fourth Amendment malicious prosecution claim can survive these findings. While Thompson would prefer that the verdict be ignored, the jury's work is entitled to more respect than that.

Second, though the district court did not reach the issue, Thompson's claim also fails because he did not suffer a seizure pursuant to legal process. The jury found that the initial seizure—Thompson's arrest—was lawful. If there was a second seizure, it could only have occurred at arraignment. But Thompson was released on his own recognizance and appeared in court just once more, when the charges were dismissed. This does not constitute a Fourth Amendment seizure.

Third, as the district court found in the alternative, Clark is entitled to qualified immunity. Thompson's opening brief does not identify any clearly established law, in existence at the time of the encounter, that would have compelled every reasonable officer to conclude that probable cause was lacking under the circumstances. There is no such law. And the jury's finding that there was probable cause to arrest confirms that there were, at the very least, grounds to debate whether there was probable cause when Clark signed the criminal complaint the next day. On top of that, two district court judges found either that there was probable cause to initiate a prosecution or that the evidence of Thompson's criminality was "very high"—additional indications that Clark did not violate clearly established law.

On appeal, Thompson all but ignores the jury's verdict and focuses on his subjective viewpoint and experience. But that is not the relevant inquiry. What matters is whether Officer Clark's conduct was objectively reasonable (it was) or consistent with clearly established law (it was). This Court should affirm and bring this case to an end.

ISSUE PRESENTED FOR REVIEW

Did the district court correctly grant summary judgment on Thompson's Fourth Amendment malicious prosecution claim against Officer Clark, where (a) the claim is foreclosed by the jury's verdict against Thompson on overlapping claims; (b) Thompson did not suffer a Fourth Amendment seizure pursuant to legal process; and (c) Clark is at the very least entitled to qualified immunity?

STATEMENT OF THE CASE

A. Thompson's arrest after preventing police officers from investigating a reported in-progress sexual assault of an infant

On the night of January 15, 2014, Officer Clark and other police officers were dispatched to Thompson's Brooklyn address to respond to a 911 call reporting possible child abuse (Joint Appendix ("JA") 145-47). The officers knew that the 911 caller was at the scene, and by the time they arrived, the call had been reclassified as a reported "sexual assault in progress" (JA147, 199-200).

On arrival, the officers met two privately employed EMTs, who relayed that a woman identifying herself as the 911 caller had met them in the building lobby (JA157-58, 163-64). The officers learned that she had escorted the EMTs upstairs to Thompson's apartment, but the EMTs

were unable to examine the baby because Thompson angrily confronted them (JA153, 269). The EMTs sought to deescalate the situation by suggesting they might have the wrong apartment, and then retreated to the lobby to wait for the police (JA159, 164, 244, 248).

The officers also learned from the EMTs that Thompson remained in the apartment with the baby and other family members, including the 911 caller (JA165, 202-03, 269). The officers and EMTs then went up to Thompson's apartment together. None of the officers could see the infant from outside the apartment (JA154, 258-59). When the officers told Thompson that they needed to check on the baby and speak to the 911 caller, Thompson responded by yelling and blocking their path into the apartment (JA154, 165, 170, 259). Thompson denied yelling at the officers, but acknowledged blocking their path (JA281-84, 297).

At trial, each officer and the two privately employed EMTs testified that, when one officer attempted to enter the apartment, Thompson forcefully shoved him, causing him to stumble backward (JA165, 170-71, 205, 259, 270). Thompson denied the shove (JA283). In any event, a struggle ensued, with the officers ultimately handcuffing and arresting Thompson (JA165, 171, 271).

The officers and EMTs then entered the apartment (JA162, 208, 250). The EMTs inspected the baby, and then brought her and the mother to a hospital, where an examination revealed no signs of abuse (JA162, 166, 210, 250, 260, 272). Contrary to Thompson's claim (Appellant's Brief ("App. Br.") 10-11), the EMTs testified that while the baby appeared normal upon examination, they were *not* able to definitively rule out abuse at the scene (JA166, 250).

B. The criminal case brought by an independent prosecutor, with Thompson released on his own recognizance and the charges soon dismissed

An assistant district attorney interviewed Clark and drafted a criminal complaint that Clark signed the day after the encounter (JA22-25, 261). The complaint alleged that Thompson refused to allow officers into the apartment to conduct their investigation after being warned that the failure to do so could result in his arrest and then flailed his arms to prevent being handcuffed (JA23, 261-62). Clark had no further involvement with the prosecution after signing the criminal complaint.

The district attorney's office charged Thompson with two Class A misdemeanors: obstructing governmental administration and resisting arrest (JA23, 261). *See* N.Y. Penal Law §§ 195.05, 205.30. At arraignment

two days after his arrest, the criminal court released Thompson on his own recognizance (JA293). Thompson understood that he was "free to go and come back to court" (*id.*). At Thompson's next court appearance, the case was dismissed "in the interest of justice" on the prosecutor's motion (JA98-99). Contrary to Thompson's assertion (App. Br. 12), no evidence suggests the prosecutor dismissed the charges because they lacked merit.

C. This § 1983 action, the pre-verdict resolution of Thompson's malicious prosecution claim, and the jury's verdict rejecting multiple overlapping claims

Thompson sued the City and individual police officers. After the parties' cross-motions for summary judgment were largely denied (EDNY ECF Nos. 56, 58; Special Appendix ("SA") 19-49), the case went to trial. As has become common in § 1983 cases of this kind, four different claims centered around the basis for Thompson's arrest and prosecution. Three of those claims went to the jury.

First, Thompson's Fourth Amendment "false arrest" claim alleged that defendants arrested him without probable cause (EDNY ECF No. 34 at 4-6). The jury rejected this claim, finding there was probable cause for Thompson's arrest—the claim's only disputed element and one where defendants bore the burden of proof (JA347-48, 358).

Second, Thompson's Fourth Amendment "unlawful entry" claim alleged that defendants forced entry into his apartment without justification (EDNY ECF No. 34 at 12-13). The jury rejected this claim too, finding that the officers' entry was supported by "an urgent need to prevent possible ongoing harm to the child or to provide immediate aid to the child" (JA346-47, 358). Thompson's argument that the entry was unlawful was the linchpin of his contention that his admitted blocking of the officers' entry did not give rise to probable cause for obstructing governmental administration (JA329-30; EDNY ECF No. 101 at 10).

Third, Thompson's 14th Amendment "fabrication" or "denial of fair trial" claim alleged that Clark provided a materially false account of the encounter to prosecutors and in the criminal complaint, causing a deprivation of his liberty (JA331, 349; EDNY ECF No. 34 at 9).[1] The jury also found against Thompson on this claim (JA349, 359).

The fourth claim—and the only one that did not go to the jury—was labeled a "malicious prosecution" claim under the Fourth Amendment. By Thompson's account, the malicious prosecution label is a simple

[1] By the time the case went to trial, Thompson's fabrication of evidence and malicious prosecution claims had been narrowed to Clark (EDNY ECF No. 112-1 at 10-11).

"shorthand." Reply Br. for Petitioner 6, *Thompson v. Clark*, No. 20-659 (U.S. Sept. 15, 2021). He has said that his "claim is and always has been the same: that he was unreasonably seized 'pursuant to legal process' in violation of the Fourth Amendment." *Id.* at 1 (citing *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017)).

In any case, shortly before trial, Thompson sought a ruling on "the issue of favorable termination" with respect to this claim (EDNY ECF No. 83 at 6), but the district court withheld decision (EDNY ECF No. 112-1). Before the trial record closed, though, the district court (Weinstein, J.) granted Clark judgment as a matter of law on the claim (JA301-02). The court ruled that Thompson could not show that the prosecution terminated in his favor under the then-prevailing "indications of innocence" standard, particularly as the "evidence of criminality … was very high" (JA301). After Thompson noticed an appeal, the court issued an opinion tracking these points and noting the "substantial evidence that the officers' warrantless entry was lawful" (JA122).

Thompson appealed the disposition of his Fourth Amendment malicious prosecution claim, and this Court affirmed on the basis that, to establish favorable termination, Thompson had to demonstrate

indications of innocence. *Thompson v. Clark*, 794 F. App'x 140, 141-42 (2d Cir. 2020). The Court also noted the district court's conclusion, following an evidentiary hearing, that evidence of Thompson's guilt was "substantial" and the criminal case's dismissal was "likely based on factors other than the merits." *Id.* at 142.

D. The Supreme Court's reinstatement of Thompson's "malicious prosecution" claim and the district court's ruling on remand

The United States Supreme Court granted certiorari to address whether favorable termination in this context requires a showing of indications of innocence. *Thompson v. Clark*, 142 S. Ct. 1332, 1336 (2022). The Court concluded that a plaintiff bringing a Fourth Amendment "malicious prosecution" claim—"sometimes referred to as a claim for unreasonable seizure pursuant to legal process," *id.* at 1337—need only demonstrate that their prosecutions ended without a conviction and, accordingly, Thompson was able to satisfy this requirement, *id.* at 1341. The Supreme Court reinstated the claim and remanded for consideration, "as appropriate," of "whether Thompson was ever seized … whether he was charged without probable cause, and whether respondent is entitled to qualified immunity," as well as "other pertinent questions." *Id.*

On remand, the district court (Gonzalez, J.) granted summary judgment to Clark. As an initial matter, the court rejected Thompson's argument—not pressed on this appeal—that the motion was barred by the law of the case because the court (Weinstein J.) had previously denied summary judgment on a pre-trial record (SA6-8). The court underscored that summary judgment was especially appropriate because the jury's verdict on other claims "rendered immaterial any disputes of fact that may have existed at the pre-trial summary judgment stage" (SA8, quoting *Bradshaw v. Hernandez*, 788 F. App'x 756, 759 (2d Cir. 2019)).

Moving to the merits, the court found that no reasonable juror could conclude that Clark lacked probable cause to sign the criminal complaint, as a jury had already found that the officers' entry was lawful—establishing that they were performing a lawful official function—and Thompson's own account established that he had physically interfered with that function (SA9-11). The court alternatively held that Officer Clark was entitled to qualified immunity (SA12-14).

Additionally, the court held that Thompson's separate charge for resisting arrest failed to support a claim because it did not result in an independent deprivation of liberty (SA15-17). As the court noted, both

charges were Class A misdemeanors, and thus of equivalent seriousness (SA16). And because Thompson was released on his own recognizance at arraignment, the only alleged "deprivation of his liberty" was the need to appear in court once more, which would have been required on the charge for obstructing governmental administration by itself (*id.*).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

On de novo review, *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126-27 (2d Cir. 2013), this Court should affirm the grant of summary judgment to Officer Clark on Thompson's Fourth Amendment malicious prosecution claim, also known as a claim for unreasonable seizure pursuant to legal process, on any one of three independent grounds.

First, the jury's verdict against Thompson defeats his overlapping Fourth Amendment malicious prosecution claim. In rejecting claims for false arrest, unlawful entry, and fabrication of evidence, the jury found that there was probable cause to arrest; that the officers' entry was lawful; and that Clark did not provide a materially false account to prosecutors or in the criminal complaint that led to a liberty deprivation. These findings preclude Thompson's sole remaining claim: no matter which offenses the jury found were supported by probable cause, there

was probable cause when Clark signed the criminal complaint the next day—his last act tied to the prosecution; the lawfulness of the entry eliminates the underpinning of Thompson's claim that he was justified in physically blocking the officers from entering his apartment, establishing probable cause for obstructing governmental administration; and the finding that Clark did not provide a misleading account to prosecutors or in the criminal complaint, that his account did not cause a liberty deprivation, or both bars any parallel claim. Any way you cut it, the jury's verdict extinguishes Thompson's malicious prosecution claim.

Second, while the district court did not reach this issue, Thompson's claim also fails for the independent reason that he was not seized pursuant to legal process, as he was released at his own recognizance at arraignment and made a single post-arraignment court appearance. And even assuming there was a seizure pursuant to legal process, it would not be attributable to Clark, where the jury's verdict against Thompson on his fabrication of evidence claim means that Clark could not have effectuated a seizure pursuant to legal process through his conversations with prosecutors or through his account in the criminal complaint that was before the magistrate who arraigned Thompson.

Third, Officer Clark is entitled to qualified immunity. As the district court held, no clearly established law in existence at the time of the encounter would have compelled all reasonable officers to conclude that probable cause did not exist under these circumstances.

On appeal, Thompson focuses on a series of irrelevancies while assiduously ignoring the existence of the jury verdict.

First, Thompson insists that by the time Clark signed the criminal complaint, he knew the child abuse report was not true. But as the district court noted, Thompson was not charged with child abuse.

Second, Thompson insists that his conduct in denying the officers entry was not "a crime," but that is beside the point. The probable cause standard contemplates the possibility that an officer may lawfully effectuate a seizure of someone who is ultimately not found to have committed a crime. Thompson's assertions that he was not aware of the officers' lawful objectives, or that he did not subjectively intend to interfere with a government function, are likewise irrelevant to whether a reasonable police officer would believe there was probable cause.

Third, Thompson repeatedly accuses Officer Clark of lying by saying Thompson resisted arrest. But as the district court found, there

was probable cause to arrest Thompson for obstruction, and there no additional deprivation of liberty tied to the charge for resisting arrest.

ARGUMENT

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THOMPSON'S FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM

A. The claim is foreclosed by the jury's verdict rejecting a constellation of overlapping claims.

Though Thompson barely acknowledges it, a jury has already rejected a series of related § 1983 claims, all arising out of the same set of facts. As the district court recognized, the jury's verdict has legal significance, circumscribing the claims and arguments available to Thompson (SA9-10). Thompson's brief to this Court does not dispute that core point. In the *sole* reference to the effect of the jury verdict in Thompson's argument, he disputes only the district court's interpretation of the verdict on his unlawful entry claim (App. Br. 23 n.1). He has accordingly abandoned any argument that the verdict has no force here. And in fact, the jury's verdict ends Thompson's case.

1. The jury verdict is entitled to respect and precludes any findings that contradict it.

This Court has held that a jury verdict has binding effect and prevents a court from making findings that contradict it. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 433-34 (2d Cir. 1995) (finding that where jury's verdict in parallel action overlapped with claims before district court, the court "was bound to respect that verdict and could not properly make findings that contradicted it").[2] The jury's verdict in defendants' favor, rejecting Thompson's claims for false arrest, unlawful entry, and fabrication of evidence, is therefore binding at this stage.

The district court applied a more forgiving standard, concluding that the verdict did not have preclusive effect, but was the law of the case,

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[2] The Supreme Court and numerous other circuits have recognized a variation on this principle: a court "need not resolve whether a pre-verdict dismissal of a claim was proper if the jury's verdict on the remaining claims shows that any error in failing to present the dismissed claim to the jury was harmless." *Abassid, Inc. v. First Nat'l Bank*, 666 F.3d 691, 696 (10th Cir. 2012); *see, e.g.*, *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co.*, 248 U.S. 55, 62 (1918) (jury rejected only "substantial ground" for dismissed claim); *Bridges v. Wilson*, 996 F.3d 1094, 1095 (10th Cir. 2021) (claim foreclosed by jury's resolution of competing accounts of police encounter against plaintiff); *Russell v. Anderson*, 966 F.3d 711, 730 (8th Cir. 2020) (jury presumably already rejected premise of claim); *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 690 (9th Cir. 2001) (jury rejected claims "predicated on the same facts and similar legal inquiries"); *Gross v. Weingarten*, 217 F.3d 208, 219 (4th Cir. 2000) (jury rejected predicate of claim, "preclud[ing] the possibility that [the plaintiff] might have prevailed"); *Wills v. Brown Univ.*, 184 F.3d 20, 30 (1st Cir. 1999) (jury rejected "stronger" claim and "the theories effectively overlap[ped]").

allowing the court to exercise its discretion in deciding "how much weight to assign to [the] jury's verdict" (SA8). But the only authority that the district court cited for that conclusion, *Devilla v. Schriver*, 245 F.3d 192 (2d Cir. 2001), addressed a very different situation.

In *Devilla*, one claim never went to the jury because the district court found it was barred by qualified immunity, and this Court reversed and reinstated the claim; a second claim did go the jury, but the district court set it aside on inconsistency grounds and this Court affirmed on qualified immunity grounds. *See id.* at 194-96. Nonetheless, on remand, the district court granted summary judgment based on the verdict's preclusive effect. On a second appeal, this Court simply said the verdict could not have preclusive effect because, given how those claims were resolved, the plaintiff never had a full opportunity to challenge the verdict, *see id.* at 196-97—indeed, there was not even an extant verdict.

Devilla has little to say about the circumstances here, where the jury's verdict not only remains in place, but has never been challenged by Thompson—not in his first appeal and not in this one either. If anything, *Devilla* confirms that jury verdicts ordinarily do carry preclusive effect, just not under the unusual circumstances of that case.

To be sure, the district court's discretionary application of the law of the case doctrine leads to the same result—that the jury verdict in this case leaves no room for Thompson to succeed on his final claim. Likewise, under the "harmless error" rubric, the jury's rejection of Thompson's other claims forecloses any possibility he could have succeeded on this one (*see supra* at 17 n.9). Whether the governing framework is preclusion, law of the case, or harmless error, the jury verdict ends the case.

2. The jury's verdict on Thompson's unlawful entry claim precludes his remaining claim.

The jury's rejection of Thompson's overlapping claims is fatal to his Fourth Amendment malicious prosecution claim. Because the district court focused on Thompson's unlawful entry claim (SA10-11), we begin there. In rejecting that claim, the jury found that the officers' entry into the apartment was lawful and justified by exigent circumstances—to check on an infant who was the reported victim of an ongoing sexual assault (JA346-47, 358). The verdict thus forecloses any argument that

the officers were not engaged in a lawful governmental function for the purpose of a charge for obstructing governmental administration.[3]

As the district court correctly noted (SA11), once the lawful function question is resolved, the conclusion that probable cause existed for an obstruction of governmental administration charge is ineluctable, because Thompson's own account confirms the requisite physical interference: he stood in the doorway and physically blocked the officers from entering the apartment to discharge their function (JA281-84, 297).[4]

Thompson argues that merely standing in the doorway and obstructing the officers with his body does not constitute physical interference (App. Br. 30-33). But New York courts have held that blocking an officer's lawful entry into an apartment satisfies obstruction's *actus*

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[3] In New York, the offense of "obstructing governmental administration in the second degree" applies when a person intentionally "prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference." N.Y. Penal Law § 195.05; *Kass v. City of N.Y.*, 864 F.3d 200, 206-07 (2d Cir. 2017). Any interference must (1) be physical and (2) obstruct a governmental function authorized by law. *Dancy v. McGinley*, 843 F.3d 93, 111 (2d Cir. 2016).

[4] If the officers' and EMTs' testimony is credited in full—as it almost certainly was by the jury—Thompson also engaged in intimidation, first behaving so aggressively that the EMTs were forced to retreat to the lobby to wait for the police, then shouting at the police officers as they attempted to gain entry (JA164, 171, 214, 244, 258).

reus. *See, e.g.*, *People v. Paige*, 77 A.D.3d 1193, 1195 (3d Dep't 2010), *aff'd*, 16 N.Y.3d 816 (2011); *People v. Broughton*, 63 Misc. 3d 435, 439 (N.Y. Crim. Ct. 2019); *see also In re Davan L.*, 91 N.Y.2d 88, 91-92 (1997) ("criminal responsibility should attach to minimal interference set in motion to frustrate police activity"). This Court has also confirmed that "physical interference" does not require "physical force." *Kass v. City of N.Y.*, 864 F.3d 200, 209-10 (2d Cir. 2017).

Thompson cites criminal cases about a defendant's ultimate guilt to argue that he had reason to subjectively believe that he was entitled to stand in his doorway (App. Br. 34-35). But none of those cases involved a binding jury finding that the officers' entry was lawful and justified by exigent circumstances.[5] In any case, Thompson's subjective viewpoint, while potentially forming a defense at a criminal trial, has no bearing on

[5] *See People v. Maddaus*, 5 A.D.2d 886, 886 (2d Dep't 1958) (overturning criminal conviction for refusal to allow sanitary inspection); *People v. Offen*, 408 N.Y.S.2d 914 (N.Y. Crim. Ct. 1978) (noting in dicta—in a case involving littering— that it is not a crime to refuse to open the door to police officers); *People v. Perez*, 47 A.D.3d 1192, 1193-94 (4th Dep't 2008) (overturning conviction for obstruction where defendant refused to open door to officers responding to a loud music complaint). *Kentucky v. King*, 563 U.S. 452 (2011) likewise has no bearing on this case: the question there was whether officers were entitled to warrantless entry when suspects refused to answer the door *and* started destroying evidence, and the Court found they were, merely noting in passing that the suspects could instead have just refused to open the door—in which case there would not have been exigent circumstances justifying entry.

whether the officers had an objectively reasonable basis to believe he was obstructing governmental administration by blocking their access to the apartment to check on the infant. After all, given "the practical restraints on police in the field are greater with ascertaining intent, the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great." Kass, 864 F.3d at 210 (cleaned up) (holding officers could infer intent to interfere with lawful function from plaintiff's refusals to move). An officer therefore is not obliged to "engage in an essentially speculative inquiry into a suspect's potential state of mind." *Soomro v. City of N.Y.*, 739 F. App'x 51, 54 (2d Cir. 2018) (cleaned up).

Beyond that, even if Thompson's belief that he was entitled to block the doorway were *correct*—in other words, if the interference element of obstructing governmental administration were somehow *not* satisfied by this conduct—that still would not vitiate probable cause. At a minimum, it was reasonable for Officer Clark to believe that Thompson was interfering with his lawful actions in attempting to enter and check on the baby (*see infra* at 37-40). Even if that belief was mistaken—and no authority says it was—it was objectively reasonable. After all, "probable

cause may be based on reasonable mistakes of fact or law, so long as those mistakes are 'objectively reasonable.'" *Norton v. Town of Islip*, No. 22-2797, 2023 U.S. App. LEXIS 28723, at *3 (2d Cir. Oct. 30, 2023) (summary order) (citing *Heien v. North Carolina*, 574 U.S. 54, 66-67 (2014)).[6]

And no authority supports Thompson's apparent argument that he needed to know the governmental function was lawful in order to have the requisite *mens rea* for obstructing governmental administration (App. Br. 24-28). To the contrary, in *Kass*, for example, the plaintiff argued—as Thompson does here—that he was constitutionally entitled to disobey the officers' orders. 864 F.3d at 207. But because the officers were engaged in a lawful function, and the plaintiff obstructed it, there was probable cause for the officers to believe that he had obstructed

[6] Thompson seems to argue that because he lacked clear knowledge that a warrant wasn't required in exigent circumstances, he had a constitutional right to demand a warrant, and therefore his doing so cannot constitute interference for purposes of obstructing governmental administration. But even if he could raise an argument as a criminal defendant about the constitutionality of the offense under these circumstances, officers are not expected to resolve such questions in the field. *See Connecticut ex rel Blumenthal v. Crotty*, 346 F.3d 84, 104-05 (2d Cir. 2003). Indeed, in *Shaheed v. Kroski*, 833 F. App'x 868, 870-71 (2d Cir. 2020), this Court found probable cause to prosecute for obstructing governmental administration under similar circumstances, where the plaintiff refused entry and demanded a warrant, but the officers had a lawful basis to demand entry.

governmental administration—notwithstanding the plaintiff's belief that the First Amendment rendered the officers' orders unlawful. *Id.*

In a passing footnote, Thompson also suggests that because he bore the burden of proof on unlawful entry and defendants only had the burden of production (JA300; s*ee Ruggiero v. Krzemenski*, 928 F.2d 558, 563 (2d Cir. 1991)), the jury did not necessarily find that the entry *was* lawful and may have found only that he failed to prove it was unlawful (App. Br. 23 n.1). This distinction is meaningless, though, when it comes to whether Thompson could succeed on a Fourth Amendment malicious prosecution claim. Thompson would also bear the burden of proving to a jury that there was no probable cause to charge him with obstruction.[7] He does not even attempt to explain how a jury that found he failed to prove the entry was unlawful could nevertheless find that the officers were not effectuating a lawful governmental function. As the district

[7] Unlike proving probable cause for the arrest, which was defendants' burden, Thompson has the burden of proving the absence of probable cause on his malicious prosecution claim. *See, e.g.*, *Kee v. City of N.Y.*, 12 F. 4th 150, 161-62 (2d Cir. 2017) ("[A] plaintiff must show… the absence of probable cause for the criminal proceeding") (cleaned up); *Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010) (same). Thompson's counsel admitted as much before the Supreme Court, Transcript of Oral Argument at 45, 142 S. Ct. 1332 (No. 20-659), and in his proposed jury instructions in the district court (EDNY ECF No. 101 at 15).

court found, the jury's verdict on Thompson's unlawful entry claim, by itself, establishes probable cause for obstruction.

Nothing more is required to conclude that Thompson's Fourth Amendment malicious prosecution claim can go nowhere. To be sure, Thompson was also charged with resisting arrest, but as the district court recognized (SA16), obstruction and resisting arrest are of equivalent seriousness, and the only "deprivation of liberty" Thompson allegedly suffered was attending two court appearances—one where he was arraigned and a second where the charges were dismissed. Even assuming two appearances counts as a "seizure" (and they do not, as explained below at 29-33), the appearances would have occurred even if Thompson had been charged only with obstruction (SA16). Because the resisting arrest charge did not cause an independent seizure, it cannot support the claim either. *See Kee v. City of N.Y.*, 12 F.4th 150, 162 (2d Cir. 2021); *Coleman v. City of N.Y.*, 688 F. App'x 56, 58 (2d Cir. 2017).

3. The jury's verdict on Thompson's false arrest and fabrication of evidence claims also bar his remaining claim.

The jury's verdict against Thompson on two other claims drives the point home. *First*, in rejecting the false arrest claim, the jury found that

there was probable cause to arrest (JA348). That this Court has applied a "slightly higher" probable cause standard[8] to Fourth Amendment malicious prosecution claims, *Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013), makes no difference: where, as here, a defendant does not learn any intervening facts between arrest and prosecution to undermine probable cause, a malicious prosecution claim cannot survive. *Moore v. City of New York,* 854 F. App'x 397, 399 (2d Cir. 2021); *Powell v. Murphy*, 593 F. App'x 25, 28 (2d Cir. 2014). There is no credible argument that probable cause dissipated in the short period between the arrest and the time Clark signed the criminal complaint—which marked the end of his involvement with the district attorney's prosecution. And indeed, Thompson's opening brief makes no "dissipation" argument.

To be sure, we do not know which offenses the jury found were supported by probable cause. That may sometimes matter in a case where there is probable cause for only a subset of charges, where the charges

[8] This is one area where it is worth remembering that Thompson's claim, however labeled, alleges that Clark caused a Fourth Amendment seizure pursuant to legal process on the heels of the arrest. Where, as here, a plaintiff brings two intertwined Fourth Amendment claims against a law enforcement officer—one for "false arrest" and another "malicious prosecution"—it is hard to justify applying different probable cause standards to the officer's conduct.

differ in seriousness. *Cf. Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991) (finding it error to instruct jury that probable cause for any charged crime defeated malicious prosecution claim, where one was a lesser charge).[9] But it does not matter here, where the relevant charges were of equivalent seriousness and factually overlapping in critical respects.

The jury was instructed that the false arrest claim failed if there was probable cause for obstructing governmental administration, obstructing emergency medical services, harassment, or some combination of the three (JA348). If there was probable cause for any one of those offenses, then there was probable cause for Clark to sign the criminal complaint in which the district attorney charged Thompson with obstructing governmental administration and resisting arrest.

If the jury found there was probable cause for obstructing governmental administration, then in the absence of a dissipation

[9] The Supreme Court recently granted certiorari on the question whether a Fourth Amendment malicious prosecution claim is defeated when there is probable cause as to any charge. *See Chiaverini v. City of Napoleon*, No. 23-50, 2023 U.S. LEXIS 4915 (Dec. 13, 2023). But in *Chiaverini,* as in *Posr* and unlike in this case, the pertinent charges differ in severity: there, the Sixth Circuit found that the existence of probable cause for lesser charges—a misdemeanor charge and a licensing violation—defeated plaintiff's malicious prosecution even though he was also charged with a felony count for which the court did not find probable cause. *See Chiaverini v. City of Napoleon*, ___F.3d___, 2023 U.S. App. LEXIS 865 at *10-11 (6th Cir. Jan. 11, 2023).

argument there was probable cause for the same offense when Clark signed the criminal complaint (*see infra* at 37). If the jury found there was probable cause for one of the latter offenses, then it must have either found that Thompson blocked the EMTs from entering the apartment, or it credited the officers' and EMTs' account of Thompson's conduct, including that he pushed or shoved an officer to prevent entry (JA348). Either way, the "interference" element of obstruction is satisfied, and alongside the jury's finding that the officers' entry was lawful (*see supra* at 20-24), nothing more was required to give rise to probable cause for obstruction. And again, it does not matter whether there was probable cause for resisting arrest, because Thompson was not subject to any additional seizure by dint of that charge (*see supra* at 25).

Second, the jury's verdict on the fabrication of evidence claim presents another barrier. The verdict on that claim means that the jury found that Officer Clark did not cause a deprivation of Thompson's liberty, did not provide a materially false account of the encounter to prosecutors or in the criminal complaint, or both (JA349). That outcome is incompatible with a claim that Clark made misrepresentations to prosecutors or in the criminal complaint that caused a Fourth

Amendment seizure. Thompson's brief is replete with accusations that Officer Clark "lied," and "falsified," or "fabricated" evidence (*see e.g.* App. Br. 1, 3, 4, 5, 11, 12, 17, 21-22, 36, 41-43), but not once does he mention that his fabrication of evidence claim was rejected by a jury.

B. The lack of any Fourth Amendment seizure attributable to Officer Clark is independently fatal to Thompson's claim.

Thompson's claim also fails because he did not suffer a seizure pursuant to legal process attributable to Officer Clark. Thompson's claim requires him to show a Fourth Amendment seizure. But after Thompson's arrest—which the jury found to be lawful—Thompson was released on his own recognizance at arraignment and appeared in court just once more, when the charges were dismissed (JA22-25, 261-62). *See Thompson*, 142 S. Ct. at 1343 (Alito, J., dissenting) ("The term seizure would have to be given a novel and extravagant interpretation … to reach a defendant awaiting trial on his own recognizance.").

At times, Thompson has suggested that he was "seized" because he was subject to travel restrictions during his criminal case (*see*, *e.g.*, EDNY ECF No. 168 at 21-22). While this Court has recognized a seizure under such circumstances—itself a dubious conclusion—a closer look at the

underlying precedent is instructive. In *Rohman v. New York City Transit Authority*, 215 F.3d 208, 216 (2d Cir. 2000), the Court interpreted the New York law as requiring a defendant released on his own recognizance to remain within the state, but that was not clearly supported by the statutory text, which required only that a defendant "render himself at all times amenable to the orders and processes of the court." N.Y. Penal Law § 510.40. And *Rohman* relied on the Court's ruling in *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997), but the defendant there was affirmatively ordered to remain within the state. *Id.* at 942, 946.

But *Rohman*'s apparent understanding of New York law was mistaken, as confirmed by subsequent amendments that clarify the point. New York law now codifies what has always been true: travel restrictions are not automatic and must be affirmatively imposed. *Compare* N.Y. Penal Law § 500.10(2) (defining "release on own recognizance"), *with id.* § 500.10(3-a) (defining "release under non-monetary conditions," with only the latter allowing travel restrictions based on an "individualized determination"); *see also id.* § 510.10(3) (court should release defendant on own recognizance unless return to court is not "reasonably assured," in which case release under non-

monetary conditions may be justified); *id.* § 510.40(1) (specifying that a defendant released under non-monetary conditions must "be at all times amenable to the orders and processes of the court," indicating that the amenability requirement is separate and distinct from non-monetary conditions, such as travel restrictions).

As this Court has recognized, not every prosecution comes with travel restrictions. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995). And the bottom line is that Thompson has never presented any evidence that he was actually subject to travel restrictions during his brief criminal case. In fact, the transcript of his arraignment makes no mention of any such restrictions (EDNY ECF No. 171-1).

Nor do Thompson's two court appearances—one when he was arraigned and the second when the charges were dismissed—count as a Fourth Amendment seizure. Indeed, in *Faruki v. City of New York*, 517 F. App'x 1, 2 (2d Cir. 2013), this Court held that a plaintiff who was required to appear in court twice on a non-felony summons was not "seized" within the meaning of the Fourth Amendment. While Thompson was arrested and arraigned on non-felony charges, not issued a

summons, that should not make a difference under the Fourth Amendment, especially where a jury has found the arrest was lawful.

The cases where the Court has found a seizure based on post-arraignment court appearances tend to involve more than this. In *Franco v. Gunsalus,* Nos. 22-71, 22-339, 2023 U.S. App. LEXIS 12641 (2d Cir. May 23, 2023) (summary order), the plaintiff had to "continually" return to court "on a monthly basis until the case was over in connection with serious criminal charges." *Id.* at *13 (cleaned up). And in *Swartz v. Isogna*, 704 F.3d 105 (2d Cir. 2013), not only did the plaintiff make three court appearances, but the charges also remained pending for years.

Even assuming, for argument's sake, that Thompson was seized pursuant to legal process, the seizure would not be attributable to Clark. The jury found that Thompson's arrest—the initial (and only) seizure—was lawful. And in rejecting Thompson's fabrication of evidence claim, the jury found that Clark did not provide a materially false account to prosecutors, or in the criminal complaint, leading to a liberty deprivation. No argument remains that Clark caused a seizure in either "initiating" a prosecution by providing a misleading account to prosecutors, or in

leading the magistrate who arraigned Thompson astray through a misleading account in the criminal complaint.

Simply reporting a crime to an independent prosecutor isn't initiation under the Court's malicious prosecution cases. *Manganiello v. City of NY*, 612 F.3d 149, 163 (2d Cir. 2010). To be sure, an officer who *fabricates* the basis for the prosecution may be said to have initiated the prosecution. *Cameron v. City of N.Y.*, 598 F.3d 50, 63-64 (2d Cir. 2010); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d. Cir. 1997). But this Court has never said that the same is true when an officer provides a materially accurate report of the facts. Again, the jury rejected the allegation that Clark provided a materially false account to prosecutors or in the criminal complaint, at least in any way that caused a liberty deprivation (never mind a seizure).

C. At minimum, Officer Clark is entitled to qualified immunity under the circumstances.

1. Thompson's arguments that Clark has forfeited the qualified immunity defense are misguided.

As the district court found, Clark is at the very least entitled to qualified immunity (SA12-14). Thompson argues that Clark waived or forfeited the defense (App. Br. 37-40), even though Clark undisputedly

preserved the defense in his answer (EDNY ECF No. 42 at 12). Thompson's theory is that Clark waived the defense because he did not raise it in an earlier summary judgment motion arguing that the claim failed on the merits (JA50-53), or in his successful Rule 50(a) motion at trial focusing on the favorable termination requirement (App. Br. 37-40).

Neither part of the theory makes sense. On the first part, this Court has "never … required defendants who have properly pled their defense in their answer to also file a motion for summary judgment … to preserve the defense." *Villante v. VanDyke*, 93 F. App'x 307, 309 (2d Cir. 2004) (rejecting a similar argument that defendants waived defense by first raising it in their second summary judgment motion). Indeed, qualified immunity need not even be pleaded; it need only be asserted in some pretrial submission. *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003).

Thompson cites no authority for the proposition that a defense not raised in a summary judgment motion is forfeited for a future summary judgment motion. Not surprisingly, most of the cases he cites deal with a completely different scenario—the scope of a motion for reconsideration (App. Br. 39). But this was a summary judgment motion, and Thompson's

attempt to characterize it as a "reconsideration" motion makes sense only in a world where the trial and verdict never happened.[10]

Even setting all this aside, this Court has held that it may consider qualified immunity even where not raised below, "where the argument presents a question of law and there is no need for additional fact-finding." *Fabrikant v. French,* 691 F.3d at 212. That is undoubtedly the case here, where—as the district court's analysis demonstrates—the qualified immunity question turns not on any disputed facts, but on the jury verdict and Thompson's own account of his conduct.

The second part of Thompson's theory—the relevance of the successful Rule 50(a) motion at trial—fares no better. Thompson cites no authority for the remarkable proposition that a Rule 50(a) motion on a claim that never went to verdict hamstrings the parties on a future motion for summary judgment in the event the claim is reinstated. Nor does he explain why Clark would be unable to raise particular arguments under Rule 50 if this case were to go to a second trial. Defendants made

[10] Thompson also cites *Samuels v. Air Transportation Local 504*, 992 F.2d 12, 14-15 (2d Cir. 1993), but all that case says is that Rule 50 motions must specify the grounds for relief, and *McArdle v. Haddad*, 131 F.3d 43, 50-51 (2d Cir. 1997), but in that case the defendant never raised qualified immunity after his answer.

their Rule 50(a) motion at the district court's direction before the close of evidence (JA301-02; EDNY ECF No. 123, 125). Thompson does not even cite any authority for the proposition that a subsequent pre-verdict Rule 50(a) motion—which could be made at any time before the case was submitted to the jury—would be limited to the same arguments; the only authority he cites says that any *post-verdict* motion would be so limited (App. Br. 37-38, citing *Provost v. City of Newburgh*, 262 F.3d 146, 161 (2d Cir. 2001)). In any event, Rule 50 motions, too, are subject to the same preservation rule: the procedures for preserving factual sufficiency-of-the-evidence claims do not apply to purely legal issues. *Dupree v. Younger*, 598 U.S. 729, 731-37 (2023).

2. No clearly established law would have compelled all officers to conclude it would be unlawful to sign the criminal complaint.

The doctrine of qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). The purpose of the doctrine is to give "government

officials breathing room to make reasonable but mistaken judgments," unless they are "plainly incompetent" or "knowingly violate the law." *Id.*

Thus, an officer will be entitled to qualified immunity so long as there is "arguable probable cause." *Garcia v. Doe*, 779 F.3d 84, 92 (2d Cir. 2014). Arguable probable means either (1) that it was objectively reasonable for the officer to believe that probable cause existed, or (2) that officers of reasonable competence could disagree on that question. *Id*. Here, there was at least arguable probable cause for Officer Clark to believe that Thompson's refusal to allow them to enter his apartment to check on the infant constituted obstruction of governmental administration. *See, e.g.*, *Antic v. City of N.Y.*, 740 F. App'x 203, 206 (2d Cir. 2018) (holding that noncompliance with police orders to "move away from a designated area" supplied arguable probable cause to prosecute for obstructing governmental administration").

Beyond that, a jury found there was probable cause to arrest Thompson—confirming there was at the very least arguable probable cause when Clark signed the criminal complaint the next day, particularly where no dissipation occurred. Judge Weinstein, who presided over the first trial, underscored that the "evidence of criminality

by [Thompson was] very high," citing the "substantial evidence that the officers' warrantless entry was lawful and the plaintiff pushed, or at minimum physically interfered with, a government official" (JA122, 301). And on remand, Judge Gonzalez found that there was probable cause for the prosecution. When the findings of a jury and two federal judges all point to an arguable basis for the prosecution, it hard to see how Clark was compelled to conclude there was no basis for the prosecution. *See Terebesi v. Torreso*, 764 F.3d 217, 233 (2d Cir. 2014) ("It is difficult to ask that a police officer identify clearly established law that three judges of this Court could not find"). That is especially true where the nature of the abuse report, the heated confrontation outside the apartment, and other factors made this, in Judge Weinstein's words, an "unusual case" (JA122)—itself is an "important indication" that Clark did not violate clearly established law. *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017).

Thompson cannot cite a single case showing that clearly established law in January 2014 would have put Clark on notice that probable cause for the prosecution did not exist. He simply attacks the cases the district court cited to show otherwise (App. Br. 48-49). Thompson claims that *Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1995), is different because the

officers there had authority to take possession of a car that the plaintiff locked herself into and attempted to escape in, but the officers here likewise had a lawful basis to enter Thompson's apartment. Once again, Thompson's argument rests on ignoring the jury verdict. Because the jury found exigent circumstances, Thompson would have to show some clearly established law that he was entitled to block entry into his home even under those exigent circumstances, such that no reasonable police officer could have believed otherwise. He has not and cannot do so. Though Thompson believes a charge of obstruction cannot lie where a suspect refuses to allow police into his home, as opposed to some other location, he cannot show that the law said so as of January 2014—let alone that it was clearly established at the time.

Thompson argues that "mere words" cannot constitute obstruction (App. Br. 46). But this Court rejected a similar argument in *Shaheed v. Kroski*, 833 F. App'x 868, 870-71 (2d Cir. 2020), finding that "plaintiffs' refusal to allow officers to lawfully enter their home was *not* pure speech." And in any event Thompson did not merely use words; he admittedly blocked the officers' entry into the apartment. As discussed above at 20-21, settled law from this Court and New York courts holds that standing

or moving in such a way as to block officers engaged in law enforcement activity is sufficient for obstruction, even without physical force.

Thompson's primary response to the district court's finding of qualified immunity is to repeat that Officer Clark lied (App. Br. 41-44). But as noted (*supra* at 28-29), Thompson put a fabrication of evidence claim before the jury, and the jury rejected it. In any case, this Court has clarified that allegations of lying do not defeat arguable probable cause, though they may give rise to a fabrication of evidence claim. *Richardson v. McMahon*, No. 22-585-cv, 2023 U.S. App. LEXIS 10287 at **5-6 (2d Cir. Apr. 27, 2023) (summary order). Nor is there any relevance to Clark's "admission" that at some point after Thompson's arrest "he knew that 'the baby was not abused'" (App. Br. 43), where alleged abuse did not form the basis of any charge against Thompson.

At the end of the day, Thompson must confront the jury verdict. A jury found that the officers lawfully entered Thompson's apartment, had probable cause to arrest him, and did not fabricate evidence against him that resulted in a deprivation of his liberty. Taken together, these findings foreclose any claim that Officer Clark's conduct effectuated an unlawful seizure pursuant to legal process. The Court should hold that

the issues Thompson repeatedly tries to relitigate under the guise of a Fourth Amendment malicious prosecution claim are foreclosed.

CONCLUSION

The judgment should be affirmed.

Dated: New York, NY
December 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 8,707 words, not including the table of contents, table of authorities, this certificate, and the cover.

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