No. 15-

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK,

Petitioner,

v.

ALAN NEWTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rather than constitutionalizing rules for DNA exoneration, this Court has cautioned that issues relating to preservation of evidence and access to DNA evidence should be left to the judgment of Congress and state legislatures. Many States like New York have enacted statutory procedures to enable convicted prisoners to access evidence for DNA testing. But the availability and reliability of DNA testing is a relatively recent phenomenon. For many past convictions, evidence was not collected, stored, or preserved with the possibility of modern-day DNA testing in mind. Plaintiff sought to challenge the City of New York's practices in preserving evidence from his 1985 rape conviction, alleging that City was negligent in storing and tracking evidence. The questions presented are:

1. Whether a convicted prisoner can bring a § 1983 damages claim for deprivation of liberty—based on state DNA evidence-access procedures not mandated by the Constitution—when the same prisoner would have no due process right to habeas or actual release from prison due to alleged negligence in storing evidence.

2. Whether a municipality may be held liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for negligent actions of line-level municipal employees in misfiling information necessary for the tracking and retrieval of evidence from a concluded criminal prosecution that would later prove exculpatory.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES AND OTHER AUTHORITIES

Cited Authorities

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit from which petitioner the City of New York seeks certiorari were issued on February 26, 2015. The opinion is reported at 779 F.3d 140 (2d Cir. 2015) and appears in the Appendix at p. 1a. The court's judgment was issued the same day. The court's opinion and judgment vacated the district court's judgment in the City's favor, reinstated an $18 million jury verdict against the City, and remanded for further proceedings in the district court.

The Second Circuit's February 26, 2015 opinion and judgment followed an appeal from an opinion and order of the United States District Court for the Southern District of New York (Scheindlin, U.S.D.J.), filed May 12, 2011, which granted as a matter of law the City's post-trial motion and entered judgment for the City. *Newton v. City of N.Y.*, 784 F. Supp. 2d 470 (S.D.N.Y. 2011). The district court's order appears in the Appendix at p. 41a.

JURISDICTION

The Second Circuit issued the opinion and judgment from which the City seeks certiorari on February 26, 2015. The Circuit denied a petition for rehearing and rehearing en banc on May 11, 2015. On July 29, 2015, Justice Ruth Bader Ginsburg granted the City an extension of time until September 9, 2015 to file a petition for certiorari. This Court has jurisdiction to review the order under 28 U.S.C. § 1254(1).

SUMMARY OF THE ARGUMENT

The Second Circuit's decision in this case improperly constitutionalizes broad questions about the storage, tracking, and retrieval of evidence from long concluded criminal prosecutions that may now yield exculpatory information due to advances in DNA testing—despite this Court's express recognition in *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 62 (2009), that such questions should be left to policy makers in the legislative and executive branches of government.

The facts of this case are unquestionably tragic. Plaintiff Alan Newton spent years in prison for a rape that he did not commit. The rape kit prepared at the time of the crime could not be located for several years during post-conviction proceedings because of a filing error following his first post-conviction motion (where scientific testing had proved inconclusive). Once the rape kit was located years later, more sophisticated DNA testing exonerated Newton of the crime. The court of appeals' dismay about the case is understandable.

But the Second Circuit's conclusion that federal liability under 42 U.S.C. § 1983 should lie against the City is seriously mistaken, stands in plain tension with this Court's precedents, and warrants the Court's review. The past missteps of line employees in the tracking of the rape kit, years before DNA testing had attained the prominence and technical sophistication that it holds today, are not constitutional violations. The significance of DNA evidence was neither known nor obviously foreseeable at the time of plaintiff's conviction in 1985.

Although DNA testing would grow to be a well-accepted and integral part of the criminal justice system, it was not until 1987, two years after plaintiff's conviction, that DNA evidence was first used in a criminal case in the United States to convict a defendant in Florida of rape, after DNA tests matched his DNA from a blood sample with that of semen traces found in a rape victim. It was not until 1989, four years after plaintiff's conviction, and after his first application for post-conviction relief, that New York courts even uncontroversially accepted the relevance and admissibility of DNA evidence in criminal proceedings—even then deeming DNA identification to be based on "new," "novel," and "complex" science and practice. *See People v. Castro*, 144 Misc. 2d 956 (Sup. Ct. N.Y. County 1989).

The Second Circuit's creation of a sweeping and retroactive new due process right to an "adequate" evidence-management system subjects tens of thousands of concluded state criminal proceedings to post-hoc attack and reevaluation—based on current knowledge about the relevance and importance of DNA evidence that was not available at the time when past evidence was collected and stored. The new due process right also lacks judicially administrable standards, and it raises the same concerns about judicial policymaking that led this Court in *Osborne* to sharply limit the role of federal judges in reviewing DNA evidence claims under § 1983. In *Osborne*, the Court warned that convicted prisoners do not have a freestanding due process right to access DNA evidence post-conviction. The Court reached that holding to avoid the precise problem raised by this case: having federal courts decide policy-driven evidence preservation questions that are best left to the judgment and determination of state judges and lawmakers.

The Second Circuit's decision also defies fundamental principles of municipal liability under § 1983. Contrary to the Second Circuit's holding, the existence of other past instances, besides this case, where evidence-tracking documents were negligently misfiled by line-level municipal employees or where evidence was otherwise unable to be retrieved does not provide a sufficient basis to impose municipal liability on the City under § 1983. The court of appeals concluded that too many mistakes had been made by employees implementing the City's past evidence-management system, but this does not mean that the City itself followed a policy or custom that was unconstitutional, especially when the exonerative potential of DNA evidence was neither known nor foreseen at the time of the relevant events.

Whether and how the City's system for managing and retrieving evidence from concluded prosecutions should now be improved, reviewed, or updated, in light of our current understanding of the significance of DNA evidence, are questions for the policy-making branches of government. So, fundamentally, is the question whether taxpayers should compensate Newton or others who are exonerated at the post-conviction stage following DNA testing. Indeed, Newton himself has already prevailed on liability in state court under specific criteria governing compensation set forth in New York's wrongful conviction statute. The Second Circuit's decision to impose federal § 1983 liability as well extends constitutional law into new areas that should continue to be the domain of policy-makers and distorts basic principles of municipal liability under § 1983.

STATEMENT OF THE CASE

A. Newton's Criminal Conviction and Post-Conviction Proceedings

Alan Newton was convicted in two separate cases of sexual assault in 1985. Newton was sentenced to an indeterminate term, in total, of 16 2/3 to 50 years' imprisonment. He served over 20 years of his sentence before he was exonerated of one of the two crimes following DNA testing, leading to the vacatur of that conviction in 2006 (43-44, 63, 76, S216-218).[1]

Newton's conviction of the crime in 1985 was based primarily on eyewitness testimony (S216). No DNA evidence was offered at trial, as DNA testing was not available or trustworthy at the time (1690-1691, S216).

In 1988, years before the enactment of any New York statute targeted at post-conviction access to evidence for DNA testing, Newton filed an application in state court seeking serology testing (or testing based on blood-typing) on the rape kit from the crime in question.

A state court ordered the Office of the Bronx District Attorney to deliver the rape kit to the Office of the Chief Medical Examiner ("OCME") where the evidence was to be tested. The rape kit was located and delivered to OCME (1636-1637, 1701, 2151, 2778). OCME determined that the kit did not contain sufficient spermatozoa to yield

1. Unless otherwise indicated, numbers in parentheses refer to pages in the Joint Appendix, and numbers in parentheses preceded by the letter "S" refer to pages in the Special Appendix.

results (1626). *See also* Dist. Ct. Docket Entry No. 202, Trial Transcript, Sept. 29, 2010, at pp. 395-96.

In 1988 or 1989, following Newton's first round of post-conviction proceedings, administrative errors occurred that ultimately would prevent the rape kit from being located in future searches. First, the invoice for the rape kit, which bore the location of the evidence within the City's massive evidence warehouse in Queens, New York, was misfiled (Pet. App. 64a). In addition, no copy of the invoice for the kit was kept in the warehouse itself (Pet. App. 64a).

In 1994, several years after the resolution of Newton's first post-conviction application, and years after these administrative errors occurred, the New York State Legislature for the first time established specific procedures for convicted persons to obtain DNA testing of evidence. Adding a new subdivision 1-a to section 440.30 of the New York Criminal Procedure Law (NYCPL), the Legislature directed the court to grant a post-conviction application for DNA testing, where (a) evidence containing DNA was secured in connection with the defendant's trial, and (b) a "reasonable probability" existed that, if DNA testing had been conducted and introduced at trial, the verdict would have been more favorable to the defendant.

Pursuant to the new statute, Newton thereafter sought and was granted permission by a New York court to conduct DNA testing on crime scene evidence three times between 1994 and 2002 (63-64, S217). Each time, the City of New York was unable to locate the rape kit containing the biological evidence sought by Newton. And each time, the City informed Newton that the rape kit could not be located. (*See* Pet. App. 58a-59a).

In 2004, the New York State Legislature returned again to the question of post-conviction DNA testing. The Legislature added a new provision stating that a court may direct the People to provide evidence in its possession regarding the location of evidence containing DNA material. NYCPL § 440.30(1-a)(b). Recognizing that such evidence sometimes may have been destroyed or may be missing, the Legislature required that, in such cases, the People must represent that the evidence is destroyed or missing and give information about its last known location. *Id.* The statute further provided that no adverse inference may be drawn against the People on a post-conviction motion based on the fact that evidence no longer existed or was missing. *Id.*

The statute, as amended, does not mandate evidence collection or storage practices for municipalities, nor does it require municipalities to take specific steps to locate DNA evidence in their custody. Rather, the statute provides that if "the current physical location" of DNA evidence is "unknown," the People must report that fact to the convicted prisoner and the court. The Legislature also declined to impose monetary liability on municipalities or other parties involved in past prosecutions for failing to preserve, store, or locate evidence.

The year following the statutory amendment, in 2005, an assistant district attorney in Bronx County was able to locate a copy of the invoice for the rape kit from Newton's case which—unlike the other invoices in the City's possession—reflected the then-current location of the rape kit in the City's Queens warehouse. *See* Dist. Ct. Docket Entry No. 203, Trial Transcript, Oct. 1, 2010, at p. 828. The prosecutor forwarded that information to

the evidence warehouse, and the rape kit was located and produced. *Id.* Technological advances that had occurred since the kit was last produced now allowed for meaningful DNA testing to be conducted. The results excluded Newton as the source of the sperm collected from the victim (3508-3509).

A state court thereafter vacated Newton's conviction, resulting in his release from prison in 2006 (3510).

B. Newton's State-Court Action for Compensation Under New York's Wrongful Conviction Statute

After his conviction was vacated, Newton brought suit in state court against the State of New York under the State's unjust conviction and imprisonment statute (Section 8-b of the New York Court of Claims Act). New York's compensation statute allows individuals to recover damages from an unjust conviction and resulting incarceration if, among other things, they establish their actual innocence by clear and convincing evidence.

On June 21, 2011, the New York State Court of Claims (Schweitzer, J.) granted summary judgment in Newton's favor on liability and ordered that the case proceed to its damages phase. The state-court case has not proceeded further, given the pendency of Newton's federal action under § 1983.

C. This § 1983 Action

In addition to his suit under New York's unjust conviction statute, Newton also brought a federal action against the City and several individual employees of

the City, in which he alleged federal civil rights claims and pendent state law claims based on the City's failure to produce the rape kit when it was requested (36-151). Newton also claimed initially that he had been wrongfully convicted (mainly because of purportedly suggestive identification procedures), but that claim was rejected on summary judgment *See Newton v. City of New York*, 640 F. Supp. 2d 426 (S.D.N.Y. 2009).

The case proceeded to trial on the following claims: (1) a *Monell* claim under 42 U.S.C. § 1983, asserting violations of Newton's Fourteenth Amendment right to due process and First Amendment right to access to the courts; (2) a general negligence claim based upon the City's alleged breach of its voluntarily assumed duty to provide Newton with the rape kit; and (3) and an intentional infliction of emotional distress claim against four City employees for their alleged role in the search for the rape kit (S218).

At the close of the liability phase, defendants moved for judgment as a matter of law on all of Newton's claims, pursuant to Rule 50 of the Federal Rules of Civil Procedure. Newton cross-moved for a judgment of liability on the negligence claim. The district court granted the City judgment on the negligence claim, but otherwise denied both motions (S218).

Newton's claims under § 1983 and for intentional infliction of emotional distress were submitted to the jury. The jury found that the City had denied Newton his constitutional rights to due process and access to the courts, and held the City liable for $18 million in damages. In addition, the jury found that two of the four individual

defendants were liable to Newton on his intentional infliction of emotional distress claims for a total of around $600,000 (S218-219).

D. The District Court's Post-Trial Grant of Judgment to Defendants

Following entry of the jury's verdict, defendants renewed their motion for judgment as a matter of law. The United States District Court for the Southern District of New York (Scheindlin, U.S.D.J.) granted the motion and entered judgment for defendants on all claims.

The district court concluded that the claims against individual officers for intentional infliction of emotional distress failed, because the record contained no evidence that any individual defendant had acted in the outrageous manner necessary to support such a claim (Pet. App. 66a-68a). To the contrary, the court observed, the record showed that both the individual officers attempted to locate the rape kit in question, and that one of the officers indeed had "facilitated" the search that resulted in the recovery of the evidence (Pet. App. 69a-70a).

The district court also rejected Newton's § 1983 claim against the City as a matter of law, holding that Newton received all the process that was due, and in any event, failed to adduce evidence that any city official acted with a culpable state of mind.

The district court noted that, in *Osborne*, this Court held that convicted defendants have no substantive due process right to access to DNA evidence and possess only a limited procedural due process right. The court

further observed that the Second Circuit's recent decision in *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010), had confirmed the adequacy of New York's statutory procedures for post-conviction access to DNA evidence.

The district court rejected Newton's claim that the City's evidence-management system had frustrated his rights under the New York statute. The court noted that New York's statute contemplated the possibility that evidence may be missing, observing that the statute "[did] not require that DNA evidence actually be produced, only that reasonable efforts be made to locate it and to inform the defendant of its location" (Pet. App. 57a). The district court concluded that "[u]nder *Osborne* and even more clearly under *McKithen*, Newton has a right to the *process* under the New York statute, but not to any particular outcome" (Pet. App. 57a-58a).

The district court held that Newton had received the process due under the New York statute, because the state courts had repeatedly granted his requests for access to evidence. And although the statutory amendments governing the People's response to such applications were not in effect at the relevant times, the record showed that Newton received all process that would have been due under those amendments. Those amendments, at most, would have given Newton the right "to information about the current or last known location of the evidence, if known" (Pet. App. 58a). As the court noted: "For many years, the location of the evidence [in Newton's case] was *not* known, and Newton was so informed" (Pet. App. 58a-59a).

The district court further concluded that, even if Newton were entitled to access to the rape kit, his due process claim would fail because he had not presented evidence that any city official acted with more than "mere negligence" (Pet. App. 61a). The court suggested that the inability to locate the rape kit resulted from "[r]outine administrative errors" (Pet. App. 63a). The court concluded that Newton failed to establish that any city actor withheld evidence in deliberate contravention or disregard of his due process rights, noting that "[n] one of the individual employees responsible for handling the paperwork [for the rape kit] could have reasonably anticipated that their actions might one day implicate Newton's constitutional rights" (Pet. App. 64a).

E. The Second Circuit's Reversal as Against the City

The United States Court of Appeals for the Second Circuit reversed, vacating the judgment as against the City, reinstating the jury's verdict against the City, and remanding the matter for further proceedings in the district court (Pet. App. 3a).[2]

The Second Circuit reasoned that, as New York Criminal Procedure Law § 440.30(1-a) requires the People, upon a defendant's motion, to "show what evidence exists and whether the evidence is available for testing," the statute "creates an 'essential' corollary procedural right to a faithful accounting of evidence" (Pet App. 21a). The court of appeals held that this "corollary" due process

2. On appeal, Newton did not challenge the portion of the judgment dismissing the claims for intentional infliction of emotional distress against the individual defendants.

right entitled convicted defendants to an "adequate" system for storing, managing, and tracking evidence from their already-concluded criminal prosecutions (Pet App. 25a).

The Second Circuit further held that a reasonable jury could conclude that the evidence-management system that was in place in the City at the relevant times was inadequate and prevented Newton from vindicating his liberty interest in violation of his Fourteenth Amendment right to due process (Pet App. 23a-24a). The court also concluded that a jury could find that the City maintained an unconstitutional policy or custom sufficient to support liability under *Monell*, asserting that the problem of lost invoices for evidence "was by no means isolated to Newton's case" (Pet. App. 28a), and that Newton's expert opined that the NYPD's evidence management system was inadequate (Pet. App. 31a).[3]

REASONS FOR GRANTING THE PETITION

This petition raises broad questions of vital importance to state and local governments nationwide. The emergence of DNA testing as a powerful tool both to establish criminal guilt and innocence has transformed many aspects of the criminal justice system in the past decades. This case raises a key question about the intersection between due process rights enforceable via damages claims under § 1983 and legislative efforts to provide

3. The Second Circuit also held that the district court had erroneously dismissed Newton's First Amendment claim for access to the courts, and remanded for the district court to reconsider its dismissal of that claim (Pet. App. 39a-40a).

convicted defendants with access to evidence, gathered before the relevance of DNA proof was known, for new testing and analysis.

The Second Circuit reached a novel holding that, under the Due Process Clause, the New York Legislature's enactment of a statute setting forth post-conviction procedures for persons to apply for access to DNA evidence has created new and unwritten constitutional duties regarding local governments' past practices (in this case decades old) in storing and managing evidence from concluded criminal proceedings. Under the court of appeals' holding, the City faces retroactive liability for newly perceived deficiencies in evidence management, dating to a time before the relevance and importance of DNA was known and accepted, and before the New York's statute governing access to DNA evidence was even enacted.

Certiorari should be granted because the Second Circuit's holding injects a new federal constitutional requirement in an area where state and local interests are paramount: how to deal with the emerging importance of DNA proof for long concluded and final state criminal convictions when prosecutors, law enforcement officers, and state and local governments had little reason previously to preserve or store evidence with modern-day DNA testing and exoneration claims in mind.

Imposing retroactive constitutional liability, as the Second Circuit mandated, conflicts with multiple decisions of this Court. The court of appeals expanded the scope of the Due Process Clause far beyond the limits set by the Court in *Osborne*, and also in its earlier decision in

Arizona v. Youngblood, 488 U.S. 51 (1988). The panel also disregarded basic limits on municipal liability, effectively holding the City liable in respondeat superior for two filing mistakes made by line-level employees years before DNA testing had attained anything near the prominence or technical sophistication that it holds today.

This case presents an ideal vehicle for the Court's consideration of these questions. The case is post-trial, so the record has been fully developed, and only legal questions, no factual disputes, are presented. And the only defendant here is the City of New York, so the constitutional due process question is directly presented for adjudication, without the overlay of qualified immunity. The Second Circuit's decision warrants review even if correct. If evidence preservation and storage rules are subject to due process requirements, then jurisdictions throughout the nation are entitled to clear and unambiguous notice about the existence and scope of their constitutional obligations.

A. The Court of Appeals' Decision Constitutionalizes Evidence Storage and Access Questions that this Court Has Cautioned Should Be Left to the Judgment of State Policy-Makers.

The Second Circuit's decision here created a novel and unprecedented due process right imposing affirmative requirements on local law enforcement and prosecutors to create "adequate" systems to store and track evidence after a criminal prosecution has ended. The court of appeals' holding thus constitutionalizes the regulation of out-of-court practices for the storage and management of evidence at the post-conviction stage. And, beyond that, the decision constitutionalizes those areas *retroactively*,

finding that the City violated the plaintiff's rights by actions taken by municipal employees decades before the post-conviction proceedings at issue, and at a time when DNA technology was much less developed and the relevance of DNA evidence much less well known than it is today.

The scope of state post-conviction remedies and the preservation and storage of evidence from decades past have never been subject to federal constitutional mandates. As we show below, these areas should remain regulated by the legislative and executive branches of state and city government, not governed by judge-made principles newly adopted and retroactively imposed under the Due Process Clause of the federal Constitution.

The Second Circuit's decision to bring these new areas under federal judicial superintendence via the Due Process Clause clashes with this Court's repeated holdings in the area of evidence preservation and testing. This Court has already addressed convicted prisoners' liberty interest in the preservation of potentially useful evidence. In *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court held that a convicted defendant had no due process right to overturn his rape conviction based on law enforcement's negligent failure to preserve potentially useful biological evidence—absent a showing the officials acted in bad faith in failing to preserve the evidence. As this Court recognized in *Youngblood*, many forms of evidence may later turn out to be useful, but officials do not have a constitutional obligation to preserve (let alone keep and maintain) evidence not known to be exculpatory simply because later tests might potentially exonerate a defendant. *Id*. at 57.

Nor do States have an obligation to ensure the preservation of evidence through state procedural rules. In *Osborne,* this Court held that convicted prisoners had no freestanding due process right to access DNA evidence for post-conviction testing. 557 U.S. at 73. This Court recognized that "[m]odern DNA testing can provide powerful new evidence unlike anything known before." *Id.* at 62. But rather than constitutionalizing rules for preservation of evidence and access to DNA testing, this Court left judgments about how to address the new evidentiary tool of DNA testing to state legislatures. *Id.* at 55-56.

Osborne confirmed that a convicted prisoner's "liberty interest in demonstrating his innocence with new evidence under state law" must be adjudicated—if at all—not under § 1983, but instead within the framework of the State's procedures for post-conviction relief unless those procedures fail a basic "fundamental fairness" test. 557 U.S. at 68-69. This Court later cautioned in *Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289 (2011), that "*Osborne* severely limits the federal action a state prisoner may bring for DNA testing," noting that the case "rejected the extension of substantive due process to this area . . . and left slim room for the prisoner to show that general state post-conviction procedures den[y] him procedural due process." *Id.*

The lessons of *Youngblood* and *Osborne* are clear. While DNA evidence has the undoubted power to transform the criminal justice system, *Osborne*, 557 U.S. at 62, federal courts should not drive and control the change—taking the matter out of the hands of state judges and lawmakers— through application of broad, new

due process principles, *id.* at 74-75 (observing that state criminal justice systems have "historically accommodated new types of evidence"). *Youngblood* confirms that federal courts should not find due process violations on a backwards looking basis—based on failure to preserve or store biological evidence whose exculpatory value was unknown or unconfirmed at the time of a defendant's conviction. *Osborne* confirms the same in terms of future solutions. This Court emphasized that state legislatures had the responsibility and discretion to determine how best to accommodate DNA testing claims within *existing* state post-conviction procedures. Policy decisions in this difficult field must come from "within the state criminal justice system" not through "lawsuit[s] in federal court under 42 U.S.C. § 1983." *Id.* at 55-56.

The Second Circuit's decision—while purporting to be narrow—fatally conflicts with this Court's decisions. The court concluded that convicted prisoners could pursue DNA evidence claims under § 1983. The court further concluded that local governments could be liable for actions taken decades in the past without any showing of bad-faith conduct in failing to preserve evidence, or the to preserve the ability to locate such evidence, for later DNA testing. Finally, rather than leaving complicated DNA testing questions to state legislative action, the court substituted its own judgment for the policy decisions made by state lawmakers.

These errors are structural and critically important. Post-conviction DNA testing necessarily involves a balancing of interests and "myriad" policy determinations, not subject to judicial competence. *Osborne*, 557 U.S. at 74. One of the primary questions involved is whether and

how evidence should be preserved and stored in the first instance. *Id.*

In *Osborne*, this Court reiterated that deference to state legislatures is critical in this area, because "it is hard to imagine what tools federal courts would use to answer" policy questions about what sort of physical evidence should be collected for eventual DNA testing, how long it should be preserved, and similar issues. *Id.* at 74; *see also Medina v. California*, 505 U.S. 437, 452-3 (1992).

The Second Circuit's decision runs headlong into that problem. The court not only answered the very same policy questions this Court deemed outside the scope of judicial competence; it also purported to do so on a backwards-looking basis for evidence-storage decisions made and actions taken far in the past. The court held that convicted defendants have a due process right to an "adequate" system to store, track, and manage evidence post-conviction, but it did not identify any judicially administrable principle or standard that exists to determine whether a system for storing and managing evidence was or is "adequate." Indeed, the panel recognized that mistakes are inevitable in a complex evidence storage system, and that the mere inability to locate particular evidence post-conviction does not violate due process. Yet the panel offered no reasoned basis to determine what kind of training, data collection, or evidence tracking practices it would now deem to have been necessary for compliance with the Due Process Clause.

The circuit's reliance on a state procedural statute enhances rather than mitigates the constitutional error. Newton conceded that New York's statutory procedures

for DNA evidence access are constitutionally adequate. In the court's view, the State's statutory procedures created a "corollary" due process right that required the City to provide a "faithful accounting" of the evidence in its possession—by which the court, in substance, meant that the City's past system for managing and tracking evidence from decades-old prosecutions was required to satisfy some new and still unarticulated constitutional standard of "adequacy."

Recognition of broad and untethered due process rights in this area is no better simply because the court purports to add those rights—in this case a right to a "faithful accounting"—based on state statutes that contain no such duty or obligation. As with most legislative enactments, the absence of requirements is as integral to a statute as the express duties imposed. This is particularly true with respect to complex policy-driven statutes like the DNA-testing statute at issue in this case. Interpreting such statutes through a due process lens—precisely what this Court has cautioned against—leads to fundamental distortion.

Here, for example, the court of appeals was incorrect in asserting that its decision is consistent with the New York Criminal Procedure Law. The statute enacted by the New York Legislature has provided since 2004 that the People must disclose the "current physical location" of the DNA evidence if known, but if the location of the evidence is "unknown," the People are only required to disclose the "last known physical location" of the evidence. CPL § 440.30(1-a)(b). The Legislature thus recognized that DNA evidence from past prosecutions sometimes would not be able to be located, and determined that in

such cases, the People would be required only to disclose the evidence's last known physical location. The Second Circuit's holding that the People must also implement "adequate" systems for the tracking and location of DNA evidence imposes requirements that the State Legislature deliberately declined to enact. That choice by the Legislature does not "nullify" the statute; rather, it recognizes the reality that the relevance of DNA evidence and the importance of preserving evidence were not known in the past and represents a policy judgment that, as *Youngblood* confirms, the Constitution does not proscribe.

The Second Circuit's due process analysis also rests fundamentally on an anachronism. New York's statutory procedures governing applications for access to evidence for DNA testing were not enacted until 1994. The filing mistakes that prevented the rape kit in this case from being located occurred in 1988 and 1989, five or six years before New York's statute even existed. Contrary to the court of appeals' suggestion, this is not a case where a "parent right" established by state law "begets" additional, procedural rights. This case does not resemble, for example, *Wolff v. McDonnell*, 418 U.S. 539 (1974), where the Court held that a state statute providing that prisoners could lose good-time credits in cases of serious misconduct created a right to procedures to fairly adjudicate the question whether the inmate had committed serious misconduct, including the right to notice of the charges and the right to a written decision.

Here, the Second Circuit has done something far different. First, the procedural right recognized by the court of appeals has nothing to do with extending

notice or an opportunity to be heard to an applicant for access to DNA evidence—New York's statute governing post-conviction access to DNA evidence already affords individuals those procedural rights. Rather, the court of appeals' ruling imposes requirements for internal police department procedures for managing vast stores of evidence from decades of concluded prosecutions. Second, the court of appeals' ruling is retroactive, holding that the State's enactment of statutory procedures governing applications for access to DNA evidence spawned additional due process rights regarding *past* evidence management, for time periods that predate the statute's existence, and based on requirements that the New York Legislature chose not to mandate.

Although the Second Circuit's holding will benefit the particular plaintiff here, it undermines the very process of adjustment and reform this Court deemed necessary in the area of DNA testing. In that area, as with any form of new evidence, sustainable institutional change comes from within the state criminal justice system—"not by [the] Federal Judiciary . . . leap[ing] ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it." *Osborne*, 557 US at 74.

The complex interplay between the emerging importance of DNA evidence, post-conviction remedies for concluded state criminal proceedings, and the storage, preservation, and retrieval of evidence is ill-suited for federal court intervention. These are all areas of policy judgment that are quintessentially legislative and executive in nature. For example, the Innocence Project promotes model legislation on post-conviction DNA testing

and evidence preservation.[4] And the National Institute of Justice within the U.S. Department of Justice has developed a grant program to help defray the significant costs associated with the post-conviction location of evidence for DNA testing.[5] Indeed, the New York Police Department and the Innocence Project are recipients of a grant under that program, with most of the money going to NYPD to fund efforts to search through its "massive evidence storage collection facility" and assign bar codes to evidence from past sexual assault and homicide case, so that systems for retrieving evidence from past and long concluded cases can be brought up to date with the NYPD's modernized evidence-tracking system.[6]

These efforts confirm that reform and change is being accomplished—but through legislative and executive action—not via § 1983 actions brought in federal court. Whereas *Osborne* took pains to afford deference to state legislatures, essentially encouraging them to act in these areas, the Second Circuit's decision here warns

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4. See http://www.innocenceproject.org/free-innocent/improve-the-law/model-legislation.

5. See U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice, Postconviction Testing of DNA Evidence to Exonerate the Innocent, http://www.nij.gov/topics/justice-system/wrongful-convictions/pages/postconviction-dna-funding-program.aspx

6. Innocence Project, New York City Police Department, Office of the Chief Medical Examiner, and Innocence Project Awarded Federal Funds to Identify Wrongful Convictions, http://www.innocenceproject.org/news-events-exonerations/nypd-and-innocence-project-awarded-federal-funds-to-identify-wrongful-convictions

legislatures away, by telling them that taking steps to promote access to DNA evidence may result in broad additional duties beyond what the statute recognizes and may lead to unintended and retroactive monetary liability for state and local governments.

Imposing liability also creates perverse incentives. The court acknowledged that convicted prisoners have no due process right to "preservation of evidence" in the first instance, yet upheld millions of dollars in liability based on the City's voluntary decision to keep evidence from past convictions. Local governments and law enforcement officials would be better off under the circuit's reasoning not preserving evidence all, rather than risking § 1983 liability for potential missteps if evidence is preserved.

Finally, the circuit's efforts to limit the impact of its decision to § 1983 suits for damages do not succeed. The panel emphasized that plaintiff would not be able to seek habeas release based on his allegations about the City's evidence storage and tracking faults. But it makes no sense to recognize due process rights protected only by § 1983, but not in a direct appeal from a criminal conviction or in state post-conviction proceedings or a federal habeas petition. Under the circuit's reasoning, the due process right is not a right to liberty enforceable in federal court, but only a right to compensation. Quite apart from the stark novelty of such a right, the court of appeals was mistaken in its view that authorizing § 1983 damages somehow avoids federalism costs.

Channeling DNA testing claims to state and federal post-conviction and habeas proceedings protects compelling "interests of federalism, comity, and finality."

Osborne, 557 U.S. at 87 (Alito, J., concurring). Recasting the same claim as a § 1983 claim for damages works independent harm because § 1983 was not designed to be an adjunct to the state criminal justice system. As this Court recognized in *Osborne*, the policies behind DNA testing reform are complicated, and decisions have broad impact. The Constitution does not compel officials to focus on tracking evidence from decades-old convictions, for example, rather than concentrating efforts on clearing "severe backlogs in state crime labs across the county" for the testing of samples in pending cases. *Id.* at 85 (Alito, J., concurring).

State legislatures—like New York's—have "moved expeditiously" to enact legislative solutions. *Id.* at 85 (Alito, J., concurring). If it would be unwise for federal courts "wielding the blunt instrument of due process, to interfere prematurely with these efforts," *id.* (Alito, J., concurring), such interference is no less harmful merely because federal judges drive policy in this area by authorizing millions in damages awards. That result is still outside the framework and procedures of the state criminal justice system. Here, as in *Osborne*, removing the underlying policy questions from state lawmakers and state judges "is precisely what [a] § 1983 suit seeks to do," *id.* at 75, and the course sanctioned by the Second Circuit here is the very result that this Court prohibited in *Osborne*.

B. The Court of Appeals' Decision Also Distorts Basic Principles of Municipal Liability under *Monell*.

In addition to recognizing constitutional due process rights that run counter to the Court's decisions in

Osborne and *Youngblood*, the court of appeals' decision also distorts fundamental and long-standing principles regarding municipal liability under § 1983, as established by *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

The court of appeals imposed retroactive liability on the City, based on missteps in the tracking of evidence by line-level employees that occurred before DNA testing was known and in widespread use in criminal proceedings, and indeed occurred years before the New York Legislature enacted the post-conviction procedures for DNA testing that the court advanced as the ultimate source of the due-process right that was supposedly violated here.

The Second Circuit's ruling contravenes this Court's precedents recognizing that for liability to be imposed upon a municipality under § 1983, a plaintiff must establish culpability and causation to ensure that the municipality is not held liable for the actions of its employee. *Board of County Commissioners v. Brown*, 520 U.S. 397, 404-406 (1997). The plaintiff must prove (1) that a municipal actor violated her constitutional rights, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), and (2) that the municipality itself actually caused that violation through its own policies or customs. *City of Canton v. Harris*, 489 U.S. 378, 391 (1989).

Thus, "[i]n any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation." *Brown*, 520 U.S. at 405. The evidence here at most shows negligence by municipal employees, which this Court has rejected as a sufficient basis for a violation of due process. *See Daniels v. Williams*, 474 U.S. 327, 331

(1986). As the district court concluded in granting the City judgment as a matter of law, the evidence presented at trial conclusively established that the rape kit could not be located because subordinate, non-policymaking employees committed paperwork filing errors "in 1988 and 1989, before DNA evidence was used in criminal cases and post-conviction defendants had any statutory rights to access evidence for testing." *Newton v. City of New York*, 784 F. Supp. 2d 470, 482 (S.D.N.Y. 2011). At that time, "[n]one of the individual employees responsible for handling the paperwork could have reasonably anticipated that their actions might one day implicate Newton's constitutional rights." *Id.* Indeed, the filing errors here occurred after the rape kit from Newton's case had been located and produced for serology testing in 1988, and after such testing had been unable to yield any meaningful results. At the very most, the evidence may suggest negligence (though Newton's state-law negligence claims were dismissed). But proof of negligence would not be enough to establish a violation of due process by any municipal employee, and necessarily defeats any claim of municipal liability against the City. *See Brown*, 520 U.S. at 405; *Heller*, 475 U.S. at 799.

Even if there were any evidence of a due process violation by line-level municipal employees, that would not suffice to hold the City itself liable, because respondeat superior liability will not lie under § 1983. The court of appeals again defied basic principles of *Monell* in holding that city policymakers demonstrated "deliberate indifference" to a pattern of constitutional violations by subordinate employees (Pet. App 34a-35a).

The court of appeals asserted that the City has had difficulty retrieving evidence from concluded prosecutions for post-conviction DNA testing in other cases (Pet. App. 32a), and that a number of invoices for evidence were seemingly misfiled in the past. But as the district court correctly observed (Pet. App. 48a, 64a), negligent acts by various line employees, not individually unconstitutional, do not become an unconstitutional municipal policy or custom simply because they occur multiple times. The circuit also failed to place its discussion of other cases where evidence could not be located within the overall context of the City's massive evidence-storage system—as just one example, the City's property clerk holds about two million invoices for evidence (2217).

The court of appeals' "deliberate indifference" holding further reveals, most dramatically, the anachronisms that run throughout the court's reasoning. Again, at the relevant time, the role that DNA testing would come to assume within the criminal-justice system was neither known nor foreseeable. Nor does the record show that any policymaker within the City was aware of any mistakes in the filing of evidence invoices at the time of the misfiling of the invoice for the rape kit here in 1988 or 1989. To the contrary, those misfilings, such as they are, came to light only much later, after post-conviction applications for DNA testing assumed prominence.

Moreover, as the Second Circuit itself had recognized in an earlier decision, for a municipality "[t]o be 'deliberately indifferent' to rights requires that those rights be clearly established." *Young v. Fulton County*, 160 F.3d 899, 904 (2d Cir. 1998). Around the time of the filing errors here, this Court definitely rejected, in *Youngblood*,

the existence of a duty to preserve evidence that might turn out someday to yield exculpatory information after testing. The Court would go on to confirm, in *Osborne*, that the Constitution contains no standalone right to post-conviction evidence. And the New York statute that the court of appeals cited as the font of the due process right that was supposedly violated here had not even been enacted at the relevant time and would not be enacted for several more years.

The limitations on municipal liability are important. Bypassing those limitations "raises serious federalism concerns" and "risks constitutionalizing" rules "that States have themselves elected not to impose" on local governments. *Brown,* 520 U.S. at 415. Hence, the broad and retroactive form of municipal liability recognized by the Second Circuit not only defies the Court's due process precedents in *Osborne* and *Youngblood*, but also conflicts with vital bedrock principles established by the Court for municipal liability under § 1983.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED FEBRUARY 26, 2015

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: October 3, 2012 Decided: February 26, 2015)

Docket No. 11-2610-cv

ALAN NEWTON,

Plaintiff-Appellant,

v.

CITY OF NEW YORK,

*Defendant-Appellee.**

* The Clerk of Court is respectfully directed to amend the official caption to conform with the above.

Appendix A

Before:

LYNCH, LOHIER, and DRONEY, *Circuit Judges*.

LOHIER, *Circuit Judge*:

Nearly thirty years ago, Alan Newton was wrongly convicted of a crime he didn't commit. He served over twenty years in prison. Had he been given access to exonerating DNA evidence that the City of New York long misplaced and mishandled, Newton very likely would have been a free man years earlier. Newton and his attorneys procured his freedom, and a New York State court vacated his conviction, only after countless efforts to access that evidence finally came to fruition in 2006. Once freed, Newton sued the City and various officials in the New York City Police Department ("NYPD"), claiming that the City's evidence management system was inadequate and had deprived him of his rights to due process and access to the courts in violation of the Fourteenth and First Amendments, respectively. Newton prevailed in a federal jury trial in the United States District Court for the Southern District of New York on these constitutional claims against the City, but the District Court set aside the verdict based on our decision in *McKithen v. Brown*, 626 F.3d 143 (2d Cir. 2010).

We consider two primary issues on appeal. First, does New York law provide a convicted prisoner a liberty interest in demonstrating his innocence with newly available DNA evidence? Second, if so, does the Due Process Clause of the Fourteenth Amendment entitle such

a prisoner to reasonable procedures that permit him to vindicate that liberty interest? *McKithen* answers neither of these questions; *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), requires that we answer both in the affirmative. We therefore vacate and remand with instructions to reinstate the jury verdict with respect to Newton's Fourteenth Amendment claim and to reconsider Newton's First Amendment claim in light of this opinion.

BACKGROUND

A. Alan Newton's Conviction

On June 23, 1984, a woman, V.J., was assaulted, raped, and robbed after leaving a convenience store in the Bronx. V.J. lost her left eye and suffered four broken ribs. She described her attacker to a police detective as a black male who identified himself as "Willie," approximately five feet, nine inches tall, from twenty-five to twenty-seven years old, with a moustache and short, neat afro. The NYPD collected a rape kit from V.J. that contained pubic and head hair, three cotton swabs, and four microscope slides. Based on photo arrays and later an in-person line-up, V.J. identified Newton as her assailant. A store clerk, too, identified Newton from a photo array and a line-up.

In May 1985 a Bronx County jury convicted Newton of rape, robbery, and assault based on eyewitness testimony, including the store clerk's and V.J.'s identification of Newton as her attacker. Newton was sentenced to concurrent prison terms of eight and one-third to twenty-

five years for each of the rape and robbery charges and a consecutive term of five to fifteen years for the assault. The rape kit was not tested for DNA evidence prior to Newton's trial.[1]

B. Attempts to Obtain DNA Testing and Exoneration

In 1988 Newton moved for an order authorizing an expert to inspect the rape kit and conduct forensic tests to permit him to move to set aside his verdict pursuant to New York Criminal Procedure Law Section 440.10.[2] The New York State Supreme Court granted Newton's motion and ordered the Bronx County District Attorney to arrange to deliver the DNA sample to the City's Office of the Chief Medical Examiner, where Newton's expert

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1. At the time, only limited serological testing was available.

2. At all relevant times, Section 440.10 provided as follows:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence . . . .

N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 2012); N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 1970).

could supervise testing. The District Attorney's Office retrieved the rape kit from the NYPD's Property Clerk Division ("PCD") and delivered it to the Office of the Chief Medical Examiner, which reported that the sample contained no testable spermatozoa.

Six years later, in 1994, the New York State legislature enacted New York Criminal Procedure Law Section 440.30(1-a), which permits a defendant to seek testing of DNA evidence in order to vacate his conviction as follows:

> [W]here the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 1994). Shortly after Section 440.30(1-a) was enacted, Newton filed a *pro se* motion in State court seeking DNA testing of the rape kit on the ground that technological advances since 1988 had enabled scientists to test samples they had previously deemed untestable. In opposing the motion, the District Attorney's Office responded that its extensive

investigation had revealed that the physical evidence was never returned after the 1988 analysis and that the rape kit could not be found at the District Attorney's Office, the PCD, or the Office of the Chief Medical Examiner. The State court denied Newton's motion.

In 1995 Newton filed a habeas corpus petition under 28 U.S.C. § 2254 in the Southern District of New York. In the course of the habeas proceeding, and in response to Newton's request in that proceeding that the City produce the rape kit for testing, the City informed Newton and the court that the kit "could not . . . be located." Joint App'x 3316. Other than V.J.'s clothes, which the City was able to find as part of its response to Newton's petition, little else appears to have come of Newton's habeas proceeding. And so, in 1998, Newton again sought DNA testing of the rape kit and other physical evidence from State court. Citing conversations with the PCD, the District Attorney's Office reaffirmed that the rape kit could not be located and opposed the motion. As part of the government's opposition, an NYPD Sergeant explained that the voucher describing the location of the rape kit was not in its last listed location and that the kit "must have been destroyed." Joint App'x 2779. The Sergeant elaborated that the voucher was probably destroyed, either because a 1995 fire at the Property Clerk's Office had destroyed several files or because the Property Clerk's Office had a practice of destroying inactive records after six years. Although the State court granted Newton's motion insofar as he sought DNA testing of V.J.'s clothes, which the police had found, it denied his motion as to the rape kit.

In 2005 Newton, through counsel, asked an Assistant District Attorney ("ADA") who was then Chief of the Sex Crimes Bureau of the Bronx County District Attorney's Office and who had previously not been directly responsible for handling Newton's case whether the PCD would search once more for the rape kit. Attaching a copy of the voucher that had previously been reported lost, the ADA asked Inspector Jack Trabitz at the PCD to retrieve the rape kit.[3] Based on the barrel number for the rape kit that appeared on the voucher, the PCD was able to find the rape kit in a barrel located in the PCD's Pearson Place Warehouse in Queens.

In June 2006 the Office of the Chief Medical Examiner concluded that the DNA profile derived from the rape kit did not match Newton's DNA profile. Within a month, Newton and the District Attorney's Office jointly moved to vacate his conviction. The next day, the New York State Supreme Court vacated Newton's conviction pursuant to New York Criminal Procedure Law Section 440.10(1)(g). By this time, Newton had been incarcerated for more than twenty years. He had been seeking the evidence for the renewed testing that exonerated him — and had been repeatedly told that it no longer existed and could not be found — for over a decade.

3. It is unclear how the ADA obtained this copy of the voucher.

C. Newton's Lawsuit

Newton was immediately released from prison and filed his lawsuit a year later. His complaint asserted twenty-one causes of action against the City and individual defendants. As relevant to this appeal, Newton alleged that the City's evidence management system "deprive[d] [him] of important and well established rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution," as well as his right to access to the courts under the First Amendment. In October 2009 the District Court dismissed his constitutional claims against the individual defendants so that only common law claims remained against some of them.

Relying on *Osborne*, however, the District Court allowed Newton to continue his claim against the City for violating his due process rights.[4] In *Osborne*, the Supreme Court ruled that an Alaska statute that permitted a prisoner to challenge his conviction when newly discovered evidence requires vacatur of the conviction gave the plaintiff "a liberty interest in demonstrating his innocence with new evidence." 557 U.S. at 68. The District Court concluded that Section 440.30(1-a)(a) of New York's Criminal Procedure Law[5] conferred on Newton a similar

4. The District Court also separately refused to dismiss Newton's First Amendment claim.

5. Section 440.30(1-a)(a) was not enacted until 2004. The District Court's mistaken reference to subsection (1-a)(a) -- rather than to subsection (1-a), which was in effect at the time that Newton filed his *pro se* motion in State court seeking DNA testing

"liberty interest in vacating his conviction by accessing evidence in the state's possession for the purpose of DNA testing." *Newton v. City of New York*, 681 F. Supp. 2d 473, 489 (S.D.N.Y. 2010). The court also determined that Newton had raised a triable question as to whether New York's procedures were inadequate to vindicate his rights: "Newton has tested New York's procedures and has shown them to fail."[6] *Id.* at 490.

Before trial, discovery in the case uncovered the original voucher for the rape kit, which in turn revealed that the PCD had received a photocopy of an "out-to-court" log from the City's Corporation Counsel in 2009 indicating that the rape kit had last been removed in 1988. The photocopy had prompted the PCD to review the file

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of the rape kit — is understandable and of no moment because the relevant language in both versions of the statute is the same. *Compare* N.Y. Crim. Proc. Law § 440.30(1-a)(a) (McKinney 2004), *with* N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 1994).

6. The District Court initially determined that Newton stated a claim against the City for failure to train or supervise. The defendants then moved for reconsideration in light of *Young v. County of Fulton*, 160 F.3d 899, 904 (2d Cir. 1998), which held that a plaintiff could not sustain a municipal liability claim under a failure to train theory when the city's employees had violated a right that was not clearly established at the time. In a January 2010 order, the District Court acknowledged that it was bound by our decision in *Young* and instead relied on *Tenenbaum v. Williams*, 193 F.3d 581, 595-97 (2d Cir. 1999), in which we allowed a plaintiff to pursue a claim against a municipality for an unlawful city policy when the rights at issue were not clearly established at the time of the violation. Newton was then permitted to proceed on the theory that the City maintained an unlawful policy, custom, or practice.

of out-to-court vouchers for 1988 and led to the discovery of the original voucher in that file.

After a three-week trial, a jury found that the City had denied Newton his First Amendment right of access to the courts and his Fourteenth Amendment right to due process of law, had "engaged in a pattern, custom or practice of mishandling evidence" and "acted with an intent to deprive . . . Newton of his constitutional rights or with a reckless disregard of those rights," and had proximately caused Newton's protracted incarceration.[7] The jury awarded Newton $18 million in compensatory damages against the City.

The defendants moved to set aside the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, arguing that our decision in *McKithen v. Brown*, issued after the verdict, foreclosed relief. In granting that motion, the District Court relied on *McKithen*, *Osborne*, and New York Criminal Procedure Law Section 440.30(1-a)(b). Based on *McKithen* and *Osborne*, it determined that Newton did not have "a right to receive the DNA evidence," but merely "a right to the process under the New York statute." *Newton*

7. The jury also found Inspector Jack Trabitz, the then-head of the PCD, and Sergeant Patrick McGuire, a PCD intake supervisor, liable for intentional infliction of emotional distress ("IIED"). The District Court later overturned the entirety of the jury's verdict, including its IIED finding. *Newton v. City of New York*, 784 F. Supp. 2d 470, 483-85 (S.D.N.Y. 2011). Newton does not appeal the District Court's decision on his IIED claims. Therefore, we consider only Newton's First Amendment access-to-courts and Fourteenth Amendment due process claims against the City.

v. City of New York, 784 F. Supp. 2d 470, 479 (S.D.N.Y. 2011) (emphases omitted). It also interpreted Section 440.30(1-a)(b) as (1) authorizing a State court, faced with a motion to vacate, to order the police to disclose the last known physical location of evidence, but (2) preventing the same court from drawing an unfavorable inference from the fact that the evidence has been lost. *Id.* at 478. The District Court observed that prior to the enactment of Section 440.30(1-a)(b) in 2004 the City was not obligated to disclose the location of evidence and that, in any event, Section 440.30(1-a)(b) contemplated the possibility of lost evidence. *Id.* at 479-80. For these reasons, the District Court held that Newton was entitled to no more than the last known location of the evidence.

The District Court also held that Newton's constitutional due process claim failed because there was not enough evidence that City officials had acted with a culpable state of mind. *Id.* at 480-81. It concluded that although Newton had demonstrated that the City's evidence management system was deficient, he had failed to prove that a specific person had acted with anything more than negligence. In addition, relying on the failure of his underlying Fourteenth Amendment claim, the District Court granted the City's motion to set aside the verdict as to Newton's First Amendment claim.

Newton appealed.

Appendix A

DISCUSSION

"We review *de novo* a district court's decision to grant a Rule 50 motion for judgment as a matter of law, applying the same standard as the district court." *Cash v. Cnty. of Erie*, 654 F.3d 324, 332-33 (2d Cir. 2011) (citations omitted). A court may grant a Rule 50 motion only if "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." Fed. R. Civ. P. 50(a)(1). Although a party making a Rule 50 motion always faces a heavy burden, "[t]hat burden is particularly heavy where, as here, the jury has deliberated in the case and actually returned its verdict in favor of the non-movant." *Cash*, 654 F.3d at 333 (quotation marks omitted).

A. Fourteenth Amendment Due Process Claim

We review Newton's Fourteenth Amendment Due Process claim "according to the familiar two-part test for analyzing alleged deprivations of procedural due process rights: (1) whether [Newton] has a cognizable liberty or property interest under state or federal law . . .; and (2) if so, whether [Newton] was afforded the process he was due under the Constitution." *McKithen,* 626 F.3d at 151.

1. Newton's Liberty Interest

To determine whether New York law conferred on Newton a liberty interest in demonstrating his innocence with newly discovered evidence, we start with *Osborne*.

Appendix A

William Osborne was convicted by an Alaska jury of kidnapping, assault, and sexual assault and sentenced to twenty-six years in prison. 557 U.S. at 58. In a federal post-conviction proceeding, Osborne sued State officials under 42 U.S.C. § 1983, claiming the Due Process Clause gave him a constitutional right to access DNA evidence in the case for testing by an advanced method not available at the time of his trial. *Id.* at 60. The Ninth Circuit held that Alaska was required to disclose the DNA evidence to Osborne as part of its *Brady* obligations, which extended to certain potentially viable post-conviction claims of actual innocence. *Osborne v. Dist. Att'y's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1128-32 (9th Cir. 2008), *rev'd*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). Without identifying the precise standard Osborne needed to satisfy in order to prevail on his access-to-evidence claim, the Ninth Circuit determined that Osborne had demonstrated more than a reasonable probability that he would not have been convicted had the DNA evidence been disclosed to the defense at trial. *Id.* at 1133-34 .

The Supreme Court reversed on the ground that there was no freestanding substantive due process right to DNA evidence. 557 U.S. at 72. Citing the progress of individual States in passing DNA-testing statutes, the Court expressed its reluctance to expand the scope of substantive due process or to embroil federal courts in questions of State-based policy — for example, questions such as "how long" a State must "preserve forensic evidence that might later be tested," or whether a State would be obligated to collect evidence before trial. *Id.* at 73-74.

Despite its reservations about expanding the scope of the substantive due process right, the Court located a liberty interest grounded in a general post-conviction relief statute enacted by the Alaska legislature that made evidence from DNA testing available to defendants. *Id.* at 68. That statute provided:

> A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims . . . (4) that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice . . . .

Alaska Stat. § 12.72.010 (2008). A related provision stated, in relevant part:

> (b) . . . a court may hear a claim [brought under Alaska Stat. § 12.72.010] . . . (2) based on newly discovered evidence if the applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible and . . . (D) [that] establishes by clear and convincing evidence that the applicant is innocent.

Alaska Stat. § 12.72.020 (2008). Based on these Alaska statutory provisions, the Court concluded that "Osborne does . . . have a liberty interest in demonstrating his innocence with new evidence under state law," 557 U.S. at 68, and that "Alaska provides a substantive right to

be released on a sufficiently compelling showing of new evidence that establishes innocence," *id.* at 70.

The City does not genuinely dispute that New York law conferred on Newton "a liberty interest in demonstrating his innocence with new evidence." *McKithen,* 626 F.3d at 152. Newton retains such an interest even without the City's concession. For the purpose of determining whether a liberty interest exists in this case, we think the New York statute that Newton invokes is materially indistinguishable from the Alaska statute upon which Osborne relied. Specifically, at the time Newton filed suit, Section 440.10(1)(g)[8] of the New York Criminal Procedure Law provided that a court "may, upon motion of the defendant, vacate" a conviction on the ground that "[n]ew evidence has been discovered" that would probably have led to an outcome at trial more favorable to the defendant.[9]

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8. Section 440.10(1)(g-1) now permits a judge to vacate a sentence in light of "[f]orensic DNA testing of evidence." This section, which gives a movant a more specific liberty interest in proving his innocence with DNA testing, was not enacted until 2012, long after Newton's conviction was vacated. *See* 2012 N.Y. Sess. Laws 294 (McKinney). Newton therefore cannot rely on the current version of the statute. Under *Osborne*, however, the broader language of subsection (1)(g) covers newly available DNA evidence and gives Newton a liberty interest.

9. Although the language of the Alaska statute in *Osborne* provides only that a court may "*hear a claim*" brought under Section 12.72.010, Alaska Stat. § 12.72.020(b) (2008) (emphasis added), and Section 12.72.010 provides only that the defendant may "*institute a proceeding* for post-conviction relief," *id.* § 12.72.010 (emphasis added), the Supreme Court read this State

N.Y. Crim. Proc. Law § 440.10(1)(g) (McKinney 1970). Moreover, the State's explicit statement on the importance of DNA testing — reflected in its enactment of Section 440.30(1-a) in 1994 — only strengthens the case for State recognition of a liberty interest.

2. What Process Was Due

We turn next to determine what process was due to vindicate Newton's State-created liberty interest in demonstrating his innocence with new evidence, mindful of *Osborne*'s related pronouncement that "[t]his 'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" 557 U.S. at 68 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463, 101 S. Ct. 2460, 69 L. Ed. 2d 158 (1981)).

As the Supreme Court explained, "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Id.* In identifying any "other" procedural rights that may exist in this case, therefore, we start with the principle that a defendant who has been convicted after a fair trial "has only a limited interest in postconviction relief" and that the State may flexibly fashion and limit procedures to offer such relief. *Id.* at 69. We have explained that "the . . . deferential standard of *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), governs the

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law to confer a liberty interest in *demonstrating one's innocence* with new evidence. *Osborne*, 557 U.S. at 68.

process due a prisoner seeking evidence for the purpose of obtaining post-conviction relief." *McKithen*, 626 F.3d at 152. In keeping with that standard, "which the *Medina* Court described as applying to 'state procedural rules which . . . are part of the criminal process,'" we evaluate New York's procedures for fundamental adequacy. *Id*. at 152-53 (quoting *Medina*, 505 U.S. at 443). Fundamental adequacy does not mean that State procedures must be flawless or that every prisoner may access the DNA evidence collected in his case. Nor does it mean that DNA evidence must be stored indefinitely. It means only that when State law confers a liberty interest in proving a prisoner's innocence with DNA evidence, there must be an adequate system in place for accessing that evidence that does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgress[] any recognized principle of fundamental fairness in operation.'" *Medina,* 505 U.S. at 445, 448 (quotation marks omitted).

Before turning to New York law (both in *McKithen* and in this case), we consider how these principles applied to the Alaska statute in *Osborne*. The procedures Alaska implemented to vindicate a defendant's right to post-conviction relief could not plausibly be described as inadequate under the *Medina* standard: with caveats not relevant here, Alaska law provided for discovery of newly available DNA evidence in post-conviction proceedings, 557 U.S. at 69-70, and the Alaska courts reinforced the statutory protection with a prophylactic measure that permitted defendants to access DNA evidence if they could demonstrate that (1) the conviction rested primarily

on eyewitness identification evidence, (2) there was a demonstrable doubt concerning the identification of the defendant, and (3) scientific testing was likely to resolve the doubt, *id.* at 65 (citing *Osborne v. State*, 110 P.3d 986, 995 (Alaska Ct. App. 2005)). Moreover, in concluding that the Alaska State "procedures [we]re adequate on their face," the Supreme Court emphasized that "without trying them, Osborne [could] hardly complain that they do not work in practice," *id.* at 71, and that Osborne's decision to file a § 1983 action instead of "avail[ing] himself of all possible avenues for relief in [Alaska] state court" had impaired his due process claim, *id.* at 88 (Stevens, J., dissenting) (summarizing majority opinion). Accordingly, the Court concluded that Osborne had received the process he was due and had no free-standing federal constitutional right to the DNA evidence he sought.

Although, as we have pointed out, the New York statute at issue in this case, Section 440.30(1-a), is in several respects quite similar to the Alaska statute in *Osborne*, what differences exist between the two statutes inure to Newton's benefit. For example, Alaska's statute requires that the new evidence prove actual innocence by clear and convincing evidence, while New York's Section 440.30(1-a) demands less of New York defendants, who must show only that the evidence creates a probability of a more favorable outcome. Considering the similarities and differences between the two statutes, we conclude that the liberty interest created by New York law is no narrower than that created by Alaska law; procedures for vindicating this interest therefore should also be evaluated under the standard described in *Osborne*.

In asking us in effect to condone its evidence management procedures in this case, the City invokes our decision in *McKithen*, on which the District Court also relied to dismiss Newton's Fourteenth Amendment claim. McKithen had been convicted by a Queens jury of a number of serious crimes. He moved pursuant to Section 440.30(1-a)(a) for DNA testing of evidence recovered at the crime scene. The State court denied his motion on the ground that "there was no reasonable probability that McKithen would have received a more favorable verdict had the forensic testing been performed and the results been admitted at trial." 626 F.3d at 146. McKithen then sued the Queens District Attorney in federal court, claiming that the denial of access to evidence for post-conviction DNA testing on its face violated his right to due process under the Fourteenth Amendment. Rejecting McKithen's facial due process challenge, we held that New York State's procedure for post-conviction relief under Section 440.30(1-a)(a) is facially adequate, *see id.* at 152, and that federal courts "are to defer to the judgment of state legislatures concerning the process due prisoners seeking evidence for their state court post-conviction actions," *id.* at 153. Our decision in *McKithen* thus represented a straightforward application of *Osborne* to New York State law, as both *Osborne* and *McKithen* addressed direct facial challenges by plaintiffs relating to the effectiveness of State (in contrast to municipal) post-conviction relief procedures. *See Osborne*, 557 U.S. at 71.

McKithen resolved an issue different from the one that this appeal compels us to consider. Unlike McKithen, Newton readily concedes that the State's statutory

procedures are adequate. Instead, he contends that the *City*, not the State, provided him with fundamentally inadequate process by undermining the State's procedures by its recklessly chaotic evidence management system. Having demonstrated that (in contrast to Osborne and McKithen) he diligently and repeatedly tried the State's procedures for obtaining the necessary DNA evidence, Newton claims that the NYPD's evidence management system was so inadequate as to nullify those procedures. This appeal and Newton's arguments thus present an issue that we have yet to address relating to the interaction between State law and local government in the context of post-conviction relief. We are unaware of precedent that prevents Newton from challenging a municipal custom or practice that, he contends, undermines otherwise adequate State procedures. *McKithen* certainly does not do so, and so the District Court erred insofar as it held that *McKithen* squarely foreclosed Newton's claims. Moreover, by pointing out Osborne's failure to avail himself of Alaska's procedures, *Osborne* appears to have contemplated precisely such as-applied challenges by plaintiffs who attempt unsuccessfully to invoke State post-conviction relief procedures. *See* 557 U.S. at 71.

The procedures created by Section 440.30(1-a) require the State, upon a defendant's motion, to "show what evidence exists and whether the evidence is available for testing." *People v. Pitts,* 4 N.Y.3d 303, 311, 828 N.E.2d 67, 795 N.Y.S.2d 151 (2005).[10] In essence, Section 440.30(1-

10. *Pitts* was decided in 2005 after the New York State Legislature amended Section 440.30(1-a) through the addition of subsection (b), which permitted a court to "direct the people

a) creates an "essential" corollary procedural right to a faithful accounting of evidence. *See Osborne*, 557 U.S. at 68. In New York, local government appears to play an integral role in this process, *see* N.Y.C. Admin. Code § 14-140(a)(1)-(2) (instructing the property clerk of the PCD to "take charge of all property" seized by police and requiring that "[a]ll such property . . . be described and registered by the property clerk in a record kept for that purpose"), and a failure of local government in carrying out its role can nullify the adequacy of State procedures and expose the municipality to constitutional liability.

This is hardly a new concept. In other contexts we have permitted plaintiffs to pursue claims against municipalities for deprivations of State-created interests. *See*, *e.g.*, *Kapps v. Wing*, 404 F.3d 105, 112, 118-26 (2d Cir. 2005) (City administration of State Home Energy Assistance Program was constitutionally inadequate to vindicate plaintiffs' property interest in program benefits); *Winston v. City of New York*, 759 F.2d 242, 247-49 (2d Cir. 1985) (provision of City Administrative Code

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to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence." N.Y. Crim. Proc. Law § 440.30(1-a)(b); *see* 2004 N.Y. Sess. Laws 2794 (McKinney). However, the New York Court of Appeals concluded that the statute as originally enacted did not "place on defendants the burden to establish the location and status of the evidence they seek to be tested." *Pitts*, 4 N.Y.3d at 311.

violated teachers' due process rights by depriving them of a property interest in their contractual right to a pension, derived from the State Constitution); *see also Goldberg v. Kelly*, 397 U.S. 254, 260-66, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (City procedures inadequate to vindicate rights created by State and federal programs). If procedures followed by a municipality rather than a State prove to be constitutionally inadequate, even in the context of facially adequate State procedures, then a defendant may sue the municipality for violating his due process rights on the ground that the municipality's implementation of State procedures is inadequate.

Even in the realm of municipal (rather than State) inadequacy, however, we must take care to avoid "suddenly constitutionaliz[ing]" the area of DNA testing and thereby "plac[ing] the matter outside the arena of public debate and legislative action." *Osborne,* 557 U.S. at 73 (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)). At least three factors help us avoid that pitfall here.

First, reinstating the § 1983 verdict against the City will not impair the validity of, or expand the rights provided by, Section 440.30(1-a)(a). As noted, this case presents a challenge to the City's *execution* of State law, not to the law itself. *See McKithen,* 626 F.3d at 153 ("[T]he *Osborne* Court was clear that the lower federal courts are to defer to *the judgment of state legislatures* concerning the process due prisoners seeking evidence for their state court post-conviction actions." (emphasis added)); *see also id.* at 154 ("Barring proof of fundamental inadequacy,

Osborne obligates us to defer to the New York [State] legislature's judgment . . . ."). We defer to States in this area because "it is normally within the power of the State to regulate procedures under which its laws are carried out," *Patterson v. New York,* 432 U.S. 197, 201, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (quotation marks omitted), and States have "considerable expertise in matters of criminal procedure and the criminal process . . . grounded in centuries of common law tradition," *Medina*, 505 U.S. at 445-46.

Second, when, as here, a municipality promulgates policies or practices that affect the criminal procedure laws of the State, those policies or practices may fail to reflect the considered judgment of the State legislature. A local pattern, custom, or practice may frustrate or even obstruct otherwise adequate State law procedures. In those instances, it seems to us, neither *Osborne* nor *Medina* mandates the same level of deference to local government as they do to State legislative action.

Third, the procedural right at issue here is quite narrow: Newton was not entitled to the preservation of evidence under State law, but only to a faithful accounting of the evidence in the City's possession. We do not decide what specific City procedure is necessary to manage and track evidence. We simply reinstate a jury verdict that found that the then-existing system was inadequate and that the City, through its agents, servants, or employees, intentionally or recklessly administered an evidence management system that was constitutionally inadequate and that prevented Newton from vindicating his liberty

interest in violation of his Fourteenth Amendment right to due process.

The addition in 2004 of New York Criminal Procedure Law Section 440.30(1-a)(b) does not alter our analysis. That section provides that in conjunction with a motion to vacate under Section 440.30:

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

N.Y. Crim. Proc. Law § 440.30(1-a)(b). By envisioning that evidence might be lost or destroyed, the provision reinforces the limited nature of a convicted defendant's liberty interest in proving his innocence through DNA evidence. But it does so without eliminating the requirement that fundamentally adequate procedures be

in place to allow the defendant to vindicate that interest. Again, a fundamentally adequate system for permitting defendants to access evidence does not mean one in which evidence is never lost or destroyed. Any police department will occasionally lose evidence, including useful evidence; absent more, that lapse will not violate a defendant's due process rights. *See Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). Rather, Section 440.30(1-a)(b) is consistent with requiring the NYPD's evidence management system to provide an adequate means to determine if evidence is available for testing and, if so, where the evidence is located. In addition, Section 440.30(1-a)(b)'s proscription that no "inference unfavorable to the people may be drawn" from the fact that evidence is missing or destroyed applies exclusively to motions to vacate. The legislature's reasonable determination that a convicted defendant should not be released because the police have lost relevant evidence does not prevent an exonerated person from having a civil remedy under § 1983 against a municipality for an inadequate evidence management system.

3. Whether the Evidence Was Sufficient for a Reasonable Jury to Find that the City Denied Newton the Process He Was Due

To impose liability on a municipality under § 1983, a plaintiff must "identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of Cnty. Comm'rs of Bryan Cnty. Okla. v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (citing *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 694, 98 S.

Ct. 2018, 56 L. Ed. 2d 611 (1978)). The City acknowledges that the District Court correctly instructed the jury that in order to find the City liable it was required to find that the "municipality itself directly cause[d] the constitutional violation by a policy, custom or practice," that is, "a persistent, widespread course of conduct by municipal officials or employees that has become the usual and accepted way of carrying out policy, and has acquired the force of law, even though the municipality has not necessarily formally adopted or announced the custom." Joint App'x 2672. Nevertheless, the City argues that there was insufficient evidence to support the jury's findings that the City's evidence management system was fundamentally inadequate, and that the City officials' failures and misconduct relating to that system reflected a practice or custom.

A careful review of the record demonstrates otherwise. The PCD Property Guide describes the NYPD's official evidence management system and also contains the PCD's policies and procedures for storing and tracking evidence. According to the Property Guide, a key tool for tracking a particular piece of property was a "yellow invoice" created when the property arrived at a PCD borough office. The yellow invoice was stored in an "active yellows" file. Whenever the property moved, its new location was to be printed on the yellow invoice. When the property was transported to court, the yellow invoice was to be stored temporarily in an "out-to-court yellows" file, with an "out of custody" card placed in its stead in the active yellows file. When the property was destroyed or auctioned, that fact and the date of destruction or sale were noted on the

yellow invoice and the invoice itself placed in a "closed-out yellows" box. If property was missing from its storage location, the supervisor of the PCD facility was required to start a preliminary search that included (1) asking the arresting officer whether the property was ever removed to court and subsequently repackaged after return, and then (2) checking with Pearson Place Warehouse, a warehouse facility in Queens, to determine if the missing property was located there.

The NYPD's evidence management system failed miserably in Newton's case. When Newton moved for DNA testing under Section 440.30(1-a), the District Attorney's Office filed an opposition containing a statement by an NYPD Sergeant that mistakenly reported that the evidence and yellow invoice had likely been destroyed. In fact, the yellow invoice for the rape kit had been in the PCD "out-to-court yellows" folder since May 1988, when the evidence was first removed to be examined. The invoice had never been returned to the active yellows file, even though the rape kit had been returned to storage at Pearson Place Warehouse. Sergeant Thomas O'Connor was involved with documenting property stored in another PCD warehouse in the Bronx and ultimately assigned to locate the yellow invoice for the rape kit while Newton's federal suit was pending. In one search, he found hundreds of property items and evidence with no paperwork attached to them in the warehouse, as well as "[a]bout a hundred or so" loose invoices that had not been marked either "destroyed" or "auctioned." Joint App'x 2407-08. Included among the loose invoices were invoices for Newton's blue suede sneakers and for clothing from

the victim, V.J., related to Newton's case. *See* Joint App'x 2408; *see also* Joint App'x 2767, 2773.

Of course, as Sergeant O'Connor's experience suggested, the problem of lost invoices and evidence was by no means isolated to Newton's case: Sergeant O'Connor was aware of other evidence that had been lost, Joint App'x 2401, and the NYPD's failure to track evidence appears to have been pervasive. Around the time of Newton's trial, the Bronx property clerk's office had hundreds of "out-to-court yellows" folders, dating back to the 1970s, that contained thousands of yellow invoices; the property reflected on those invoices had never been returned to the PCD or, like the rape kit in Newton's case, had been returned but not properly recorded. Joint App'x 2403. Inspector Jack Trabitz, the PCD's commanding officer at the time of the 2010 jury trial, testified that between approximately 1800 and 3200 invoices went out to court from the Bronx borough office each year from 1994 to 2006. Joint App'x 2220. Sergeant Bruce Kessler, the commanding officer of the Bronx PCD borough office from approximately 1992 to 2003, could not even recall the procedure for evidence retrieval in the event an item of evidence had not been returned to the borough office after a year. Joint App'x 2359-60.[11]

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11. Although Newton refrains from advancing a failure-to-train claim on appeal, we cannot help but note that, based on the evidence, the inadequacy of the City's evidence management system appears to have been rooted in some part in the City's inadequate training of NYPD officers regarding evidence management. According to the evidence at trial, several PCD officers, including high-ranking officials, were unfamiliar with the

The failures of the NYPD's evidence management and retrieval system directly affected the offices of the District Attorneys, as well as certain non-governmental entities. From 2005 to 2009, requests from the District Attorney's offices for post-conviction evidence frequently went unanswered because logbooks contained inaccurate information and in "[n]umerous" cases yellow invoices were missing. Only about twenty percent of prosecutorial requests for pre-1988 post-conviction evidence were satisfied. Joint App'x 2401. Other, equally disquieting examples of missing invoices involved the Innocence Project, an organization devoted to exonerating innocent convicted defendants. *See* Joint App'x 2601. At the request of the Innocence Project in 2006, the PCD identified and located eighty-seven invoices relevant to Innocence Project cases. Nevertheless, the City acknowledged that the remaining eighty-three relevant invoices "were not in

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Property Guide and lacked training in evidence management. And before 1995, when the Property Guide was created, there was no written procedure for evidence management. Joint App'x 2357. As a result, both a former commanding officer who supervised the PCD starting in 1990 and one of his successors who started in 2000 received no formal training whatsoever regarding the operations of the PCD. Joint App'x 2516-17, 2519, 2164. Similarly, throughout the 1990s, lower-ranking officers who worked at the PCD — including the Pearson Place Warehouse — failed to receive relevant training or a written manual on property and evidence management. Joint App'x 2461, 2464. More disturbing still, Integrity Control Officers responsible for ensuring that employees at the PCD complied with the procedures in the Property Guide appeared to be unfamiliar with those procedures or the evidence management component of their positions. Joint App'x 2166, 2345-47, 2364, 2598.

the custody of the [PCD], ha[d] already been destroyed or were released according to Department procedures." Joint App'x 3444; *see also* Joint App'x 2556, 2610. Fifty percent of the cases that the Innocence Project terminated in the City over a ten-year period were closed because the PCD had lost or destroyed DNA evidence.[12] Joint App'x 2603.

Newton also adduced evidence that, prior to his release, the PCD had no reliable system to determine what evidence had been destroyed and that, as a result, evidence may have been improperly destroyed, or, as in Newton's case, reported destroyed when it had not been. Prior to 2000, for example, the PCD routinely disposed of rape kits,[13] Joint App'x 2171-73, as well as so-called "white" invoices, which described whether a piece of evidence had been destroyed or retained by the NYPD, Joint App'x 2469. Destroying the white invoice for evidence prevented the PCD from tracking that evidence. In 1992 and 1998, moreover, the PCD engaged in what may aptly be characterized as sweeps, in which it disposed of a substantial amount of arrest evidence that had not been claimed. Joint App'x 2470. Although the evidence management system improved after 2000, the PCD's commanding officer starting that year was unaware that

12. According to the testimony of an Innocence Project attorney, the national percentage of Innocence Project cases closed due to lost or destroyed DNA evidence was significantly lower than the percentage of such cases in the City. Joint App'x 2603.

13. In 2006 the commanding officer of the PCD finally issued a written memorandum instructing that sexual assault evidence kits should never be destroyed. Joint App'x 2172-73.

the Property Guide prohibited the destruction of arrest evidence without a district attorney release, and he admitted that arrest evidence may have been improperly destroyed under his command. Joint App'x 2171.

Newton's expert witness, an "evidence specialist" who consulted with police departments throughout the United States regarding evidence management, also described the inadequacy of the NYPD's evidence management system. The expert concluded that the City's evidence management system, as it existed from 1994 to 2005, was "sporadic at best." Joint App'x 2497. Aspects of the system, including chain-of-custody procedures and practices, were "weak, if not nonexistent" and failed to meet the most widely accepted professional or "industry standards" in the field of evidence management.[14] Joint App'x 2490; *see also* Joint App'x 2491.

In sum, Newton presented evidence that thousands of sometimes decades-old yellow invoices at the Bronx property clerk's office — out of a total of not more than 3200 such invoices per year — were in old out-to-court folders that had improperly never been closed out;

14. According to Newton's expert witness, the two most widely accepted industry standards in the field of evidence management are promulgated by the International Association of Property and Evidence, an organization that provides educational resources and training on evidence management practices, and the Commission on Accreditation for Law Enforcement Agencies, a credentialing authority that determines whether law enforcement agencies have met industry-wide public safety standards. Joint App'x 2484-85.

evidence listed as "out-to-court" for over twenty years was lost; the PCD had lost track of and was unable to retrieve evidence in an unreasonably large number of cases (involving evidence older than five years); several high-level officials tasked with supervising the NYPD's evidence management system were unfamiliar with the PCD's procedures; and the PCD's dysfunction had an unconstitutionally deleterious effect on case closings in a large number of cases, including, obviously, Newton's. The problem in Newton's case was with the retrieval of evidence that was sitting there all along. Despite the preservation of the evidence that proved crucial in exonerating Newton, the PCD was unable to locate it from 1994 to 2005 and inaccurately represented that it had been destroyed either in a fire or pursuant to a regular disposal procedure that may not even have existed. Had Newton accepted the City's recklessly erroneous representations about the evidence at face value, he might have remained in prison far longer than he did. Taken together, this evidence supports a finding that the City, through the poor administration of its evidence management system, perpetuated a practice or custom that was wholly inadequate.

We acknowledge the City's argument that a § 1983 plaintiff seeking to hold a municipality liable must "show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Brown*, 520 U.S. at 404. There must be "proof that the municipality's *decision* was unconstitutional" to "establish that the municipality

itself [i]s liable for the plaintiff's constitutional injury." *Brown*, 520 U.S. at 406 (emphasis added). The Supreme Court has declined to consider "whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of the Due Process Clause."[15] *Daniels v. Williams*, 474 U.S. 327, 334 n.3, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (quotation marks omitted). But in *Brown* it held that "a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with deliberate indifference as to its known or obvious consequences." *Brown*, 520 U.S. at 407 (quotation marks omitted). Although we have not explicitly addressed this question in our subsequent cases, *see Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir. 1987), we have maintained that "a state prison guard's deliberate indifference to the consequences of his conduct for those under his control and dependent upon him may support a claim under § 1983."[16]

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15. The Supreme Court has held that in a § 1983 claim against a municipality for failure to train its police force, a plaintiff is required only to show that the municipality was deliberately indifferent to the rights of those with whom the police would come into contact; however, the Court distinguished that standard from the state of mind required for an underlying claim of a constitutional violation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 & n.8 (1989).

16. Other courts of appeals have suggested that recklessness or deliberate indifference may suffice to establish grounds for a constitutional violation. *See, e.g.*, *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir. 1991); *Torres Ramirez v. Bermudez*

Morales v. N.Y. State Dep't of Corr., 842 F.2d 27, 30 (2d Cir. 1988).

In keeping with *Brown* and *Morales*, we conclude that under the circumstances presented here Newton at most needed to demonstrate that the City acted with recklessness or deliberate indifference[17] toward his constitutional rights.[18] Here, of course, the jury actually

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Garcia, 898 F.2d 224, 227 (1st Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583, 587-88 (9th Cir. 1989); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 948-50, 273 U.S. App. D.C. 266 (D.C. Cir. 1988).

17. "[T]he Courts of Appeals have routinely equated deliberate indifference with recklessness." *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

18. It is not altogether clear that Newton was required to make even this showing (although, as we explain *infra*, he has plainly done so). A plaintiff can identify a municipal policy by proving the existence of an unlawful practice or custom that is "so manifest as to imply the constructive acquiescence of senior policy-making officials." *Sorlucco v. N.Y.C. Police Dep't*, 971 F.2d 864, 871 (2d Cir. 1992)). After considering Newton's Fourteenth Amendment claim, the jury also found that the City "directly cause[d] the constitutional violation by a policy, custom or practice," because the mismanagement of evidence was "persistent" and "widespread," "ha[d] become the usual and accepted way of carrying out policy, and ha[d] acquired the force of law." Joint App'x 2672. Because Newton proved that the City engaged directly in an unlawful custom or practice, he may not have also needed to prove that City officials acted with recklessness or deliberate indifference. *See Brown*, 520 U.S. at 404 ("Where a plaintiff claims that a particular municipal action *itself* violates federal law, . . . resolving [the] issues of fault and causation is straightforward.").

found that the City had "acted with an intent to deprive . . . Newton of his constitutional rights or with a reckless disregard of those rights." Joint App'x 3502. This finding, to which we afford "considerable deference," is supported by the record. *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 671 (2d Cir. 2012). And so a recklessness or deliberate indifference analysis should have compelled the District Court to uphold the 2010 jury verdict.

4. Arizona v. Youngblood

Our conclusion is consistent with *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). In *Youngblood*, the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed," *id.* at 56 n.*, and is relevant "when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," *id.* at 57.

In light of *Youngblood*, we must again recognize that a fundamentally adequate system for permitting defendants

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We do not need to decide that issue here, however, because the trial evidence supports the jury's finding of reckless disregard.

to access evidence may be, and will be, imperfect — one where evidence is sometimes lost or inadvertently destroyed. Largely because this is not a "failure to preserve" case, however (the DNA evidence that Newton sought was preserved, after all), our holding falls outside the scope of *Youngblood* and reflects the limited prescription of Section 440.30(1-a)(b), which demands only that the NYPD's evidence management system provide an adequate means to determine if evidence is available for testing and, if so, where the evidence is located. Although *Youngblood* makes clear that Newton was not entitled to the preservation of evidence, he *was* entitled to a faithful accounting of the evidence in the City's possession. Otherwise, it seems to us, the statutory scheme developed by the State would have little if any purpose.

Our view that *Youngblood* does not control the disposition of this appeal is fortified when we consider the two concerns that appear to have animated *Youngblood*'s requirement that the plaintiff show bad faith on the part of the police under these circumstances. First, the requirement relieves courts from undertaking "the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Id.* at 58 (quotation marks omitted). Second, the Court was "unwilling[] to read the 'fundamental fairness' requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* (citation omitted). "[R]equiring a defendant to show bad faith on the part of the police both limits the extent of

the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.*

Neither concern exists in this case.[19] As an initial matter, Newton may recover under *§* 1983 for inadequate evidence management because the DNA evidence had already exonerated him. The District Court did not need to "divine" the exculpatory import of the DNA evidence; its import was clear by the time Newton started this action with the benefit of that evidence. In addition, we neither discern nor impose an "absolute" duty on the police to preserve evidence based on a freestanding constitutional due process right. To the contrary, Section 440.10(1)(g) applies to newly discovered evidence, including new DNA test results, and says next to nothing about a duty to maintain evidence.

In short, had the City destroyed his DNA evidence according to a legitimate procedure that conformed with State law, Newton would have no claim under § 1983. Without deciding a question not before us, we do not see how an incarcerated defendant (or even a person like Newton) without exonerating evidence obtained by invoking State procedures would have a due process claim for relief under § 1983 based on our holding today. In contrast to

19. The jury did not find that the City acted in bad faith, as defined in *Youngblood*, and the record does not support such a finding.

Youngblood, the issue here is whether a municipality may be held liable for its reckless maintenance of a system that made it impossible to retrieve evidence that *had been* preserved, that State law recognized as particularly significant, and that ultimately exonerated the defendant.

5. Jury Instructions Regarding Newton's Due Process Claim

Lastly, the City also challenges the jury instructions relating to Newton's due process claim. The District Court instructed the jury that it could find that the City had violated Newton's Fourteenth Amendment rights only if, among other requirements, "the City engaged in a pattern, custom or practice of mishandling evidence by operating a poor or a nonexistent evidence management system," and this "violated [Newton's] constitutional rights by . . . denying [Newton] his Fourteenth Amendment right to due process by employing an inadequate evidence management system that caused City employees to prematurely abandon their search for his evidence in 1994 under the mistaken assumption that it had been destroyed." Joint App'x 2673.

The challenged jury instructions were not wrong. They correctly required the jury to find that the City's evidence management system was "inadequate" as a matter of due process if it prevented Newton from availing himself of the procedures in Section 440.30(1-a)(a). The jury instructions also correctly premised the City's liability on the failure of its evidence management system to *account* for the evidence, not on the destruction of evidence. *Cf.* Joint App'x 2673.

B. First Amendment Court-Access Claim

Newton also claims that the City is liable under § 1983 for violating his First Amendment right of access to the courts based on its failure to provide him with evidence to challenge his conviction. We need not address this issue at length. Because the jury awarded damages on the § 1983 claim in order to "compensate . . . Newton for any pain and suffering caused by the city's failure to produce the rape kit for test[ing]," Joint App'x 2720, the damages award would be reinstated in full even if we were to affirm the District Court with regard to either Newton's Fourteenth Amendment due process claim or his First Amendment access-to-the-courts claim, as long as we did not affirm with regard to both. *Cf. This is Me, Inc. v. Taylor*, 157 F.3d 139, 146 (2d Cir. 1998) ("As long as there is some evidence based upon which the jury could have held [the defendants] individually liable, we must reinstate the verdict.").

In any event, the District Court's decision to grant the City's motion to set aside the jury's verdict on this claim appears to have rested almost entirely on its rejection of Newton's underlying Fourteenth Amendment claim that the City violated his procedural right to due process. On appeal, the City parrots the District Court's rationale, arguing that Newton's access-to-courts claim fails because he had no viable constitutional claim to DNA evidence in the first place. Having rejected the premise of the District Court's decision and the City's principal argument, we vacate the District Court's judgment dismissing Newton's First Amendment claim and remand

to the District Court to reconsider the claim, if necessary, in light of this opinion.[20]

CONCLUSION

We are confident that the evidence management failures identified in this case have been or will soon be remedied with the help of modern technological advances and stronger recordkeeping practices. For the foregoing reasons, however, we VACATE the judgment of the District Court and REMAND the case with instructions to reinstate the jury verdict with respect to Newton's Fourteenth Amendment claim and to reconsider Newton's First Amendment claim in light of this opinion.

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20. The City also argues that Newton's access-to-courts claim was inadequately pleaded and procedurally barred and that Newton forfeited his First Amendment claim because he first mentioned denial of access in his trial brief and in his opposition to the defendants' August 2010 motion to dismiss. After reviewing the record, we conclude that both arguments are without merit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED MAY 12, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

07 Civ. 6211 (SAS)

ALAN NEWTON,

Plaintiff,

- against -

THE CITY OF NEW YORK; SERGEANT PATRICK J. McGUIRE, POLICE OFFICER STACY HASKINS, GERALDINE KIELY, AND CHIEF JACK J. TRABITZ, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS EMPLOYEES OF THE CITY OF NEW YORK,

Defendants.

May 12, 2011, Decided
May 12, 2011, Filed

SHIRA A. SCHEINDLIN, U.S.D.J.:

Appendix B

I. INTRODUCTION[1]

The story of Alan Newton's wrongful incarceration for rape and assault is a familiar and troubling one for this Court. Newton was convicted in 1985, primarily on the basis of eyewitness testimony. No DNA evidence was offered at trial, as such testing was not available or trustworthy at that time. In August, 1994, New York passed a new law — subdivision 1-a to section 440.30 of the New York Criminal Procedure Law ("Section 440.30 (1-a)"), which provides, in substance, that a post-conviction defendant may obtain DNA testing on specified evidence if the court determines that had such testing been done, and had the results been received at trial, there is a reasonable probability that the verdict would have been more favorable to the defendant. Eight years later, in 2004, New York passed a new subdivision to the same statute — subsection 440.30(1-a)(b) — which provides, in substance, that upon a post-conviction defendant's request for DNA testing on specified evidence, the court may direct that the defendant be provided with information concerning the current or last known location of the evidence that defendant seeks to be tested. But if the evidence no longer exists or its whereabouts are unknown, no adverse inference may be drawn against the prosecution.

Between 1994 and 2002, pursuant to section 440.30 (1-a), Newton thrice sought and was granted permission by a New York court to conduct DNA testing on evidence from the crime scene. In each instance, the City of New York

1. I presume familiarity with the underlying facts of this case, and recount only those relevant to the instant motion.

(the "City") was unable to locate the rape kit containing the biological evidence critical to his freedom. When the rape kit was finally found in 2005, DNA tests excluded Newton as the source of the sperm collected from the victim. Newton's conviction was vacated by the New York Supreme Court and he was released from prison in 2006.

Newton brought an action against the City and several individual City employees, alleging a federal civil rights claim and pendent state law claims for the City's failure to produce the rape kit when requested. The case proceeded to trial on the following claims: (1) a *Monell* claim under section 1983, asserting violations of Newton's Fourteenth Amendment right to due process and First Amendment right of access to the courts; (2) a general negligence claim based on the City's alleged breach of its voluntarily assumed duty to provide Newton with the rape kit; and (3) an intentional infliction of emotional distress ("IIED") claim against four City employees for their alleged roles in the search for the rape kit.

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, at the close of the liability phase of trial, the City moved for judgment as a matter of law on all of Newton's claims.[2] Plaintiff cross-moved for a judgment of liability on the negligence claim. I denied the cross-motions, with the exception of granting defendants' motion to dismiss the negligence claim.[3]

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2. *See* Trial Transcript ("Tr.") at 2201:07-2226:19.

3. *See Newton v. City of New York (Newton I)*, No. 07 Civ. 6211, 2010 U.S. Dist. LEXIS 112737, 2010 WL 4177383 (S.D.N.Y. Oct. 22, 2010); Tr. at 2229:01-2240:07.

Newton's section 1983 and IIED claims were submitted to the jury, which found that the City had denied Newton his constitutional rights to due process and access to the courts, and held the City liable for eighteen million dollars in damages. The jury also found that two of the four individual defendants, Sergeant Patrick J. McGuire and Chief Jack Trabitz, were liable to Newton on his IIED claim for ninety-two thousand dollars and five hundred thousand dollars, respectively.[4]

Defendants now renew their motion for judgment as a matter of law on Newton's section 1983 and IIED claims.[5] For the reasons discussed below, defendants' motion to set aside the verdict pursuant to Federal Rule of Civil Procedure 50(b) is granted in its entirety.

II. LEGAL STANDARD

A. Judgment As a Matter of Law

Rule 50 permits a court to override a jury's verdict and enter judgment as a matter of law when "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

4. *See* Tr. at 2387:03-2388:25. The jury found that the other two individual defendants, Geraldine Kiely and Stacy Haskins, were not liable to Newton on his IIED claims.

5. Alternatively, defendants move for a new trial or remittitur of the damages award. Because I grant defendants' Rule 50(b) motion in its entirety, I do not consider these other claims.

issue."[6] A jury verdict cannot be set aside lightly. A court may not grant judgment as a matter of law unless (1) there is such a "complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture" or (2) there is "such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [it]."[7] Moreover, the scope of a post-verdict renewal of a motion for judgment as a matter of law under Rule 50(b) cannot exceed the pre-verdict motion made under Rule 50(a).[8]

The standard for granting judgment as a matter of law "mirrors" the standard for granting summary judgment.[9] Accordingly, "[a] court considering a request for judgment as a matter of law must 'consider the evidence in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in

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6. Fed. R. Civ. P. 50(a)(1).

7. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 429 (2d Cir. 2005) (quoting *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992)). *Accord Doctor's Assocs. v. Weible*, 92 F.3d 108, 111-12 (2d Cir. 1996).

8. *See Provost v. City of Newburgh*, 262 F.3d 146, 161 (2d Cir. 2001). *See also Lambert v. Genesee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993).

9. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (quotation marks and citations omitted); *Kerman v. City of New York*, 374 F.3d 93, 118 (2d Cir. 2004).

his favor from the evidence.'"[10] "'The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.'"[11]

III. DISCUSSION

A. Section 1983

The jury concluded that the City had violated Newton's procedural right to due process by failing to provide him with access to "DNA evidence to which he was entitled."[12] This underlying constitutional violation gives rise to both Newton's *Monell* claim and his right of access claim,[13] but

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10. *Space Hunters*, 429 F.3d at 429 (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 70 (2d Cir. 2001)) (omission in original).

11. *Id.* (quoting *Tolbert*, 242 F.3d at 70).

12. Plaintiff's Memorandum of Law in Opposition to Defendants' Post-Trial Motions ("Pl. Mem.") at 4.

13. *See Board of County Comm'rs. Bryan County, Okl. v. Brown*, 520 U.S. 397, 405-07, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (noting that "[i]n any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation" and distinguishing the state of mind required for the underlying violation from that required to prove municipal liability); *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under *Monell* was entirely correct."). *See also Christopher v. Harbury*, 536 U.S. 403, 414-15, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002) ("[T]he very point of recognizing any access

the City asserts that "under recent, controlling authority, Newton has no due process rights that can be vindicated in this . . . lawsuit."[14] Specifically, the City argues that Newton's constitutional claims are "foreclosed as a matter of law" by *McKithen v. Brown*,[15] a Second Circuit decision issued after the close of Newton's trial.[16] Additionally, the City argues that no rational juror could have concluded that any individual defendant acted with the requisite state of mind to implicate the due process clause.[17]

Before evaluating the parties' competing contentions, I emphasize that Newton's claim is based on an alleged *constitutional* violation under section 1983. A

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claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong . . . [T]he right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.").

14. Defendants' Memorandum of Law in Support of Their Post Trial Motions ("Def. Mem.") at 2.

15. 626 F.3d 143, 153 (2d Cir. 2010).

16. *McKithen* was issued on November 19, 2010. Newton's trial concluded on October 19, 2010. The jury rendered a liability verdict on October 18, 2010 and a damages verdict on October 19, 2010.

17. Alternatively, the City also argues that Newton did not provide jurors with a sufficient evidentiary basis to establish a City policy, custom or practice of mishandling post-conviction evidence for purposes of his *Monell* claim. Because I conclude that Newton cannot demonstrate an underlying constitutional violation to support municipal liability, I need not address the City's alternative argument.

constitutional due process claim cannot be based on mere negligence, but rather must arise out of deliberate acts.[18] It is not enough for Newton to have shown that the City's post-trial evidence management system is disorganized, or even that the City has lost post-trial evidence upon occasion. Where, as here, there is only a limited liberty interest at stake, a disorganized or even dysfunctional system for realizing that interest does not give rise to a constitutional violation. As disturbing as such negligence may be, in the end, that is what it is: mere negligence.[19] To the extent that I have held otherwise in earlier opinions in this case, I am now required to shift my conclusions based upon the controlling authority of *McKithen*. As the Second Circuit based its reasoning on the Supreme Court's decision in *District Attorney's Office for the Third Judicial District v. Osborne*,[20] I begin with a discussion of that case.

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18. *See Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005) (citing *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).

19. *Cf Smith v. Carpenter*, 316 F.3d 178, 184 (2d Cir. 2003) (noting in the context of a section 1983 claim, "[b]ecause the Eighth Amendment is not a vehicle for medical malpractice claims, nor a substitute for state tort law, not every lapse in prison medical care will rise to the level of a constitutional violation."); *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (establishing that, in the context of a section 1983 claim, "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.").

20. 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).

Appendix B

1. Section 440.30

In *Osborne*, the Supreme Court held that a post-conviction defendant has no constitutional substantive due process right, and only a limited procedural due process right, to obtain DNA evidence for testing in order to support his claim of actual innocence.[21] As the Court construed his argument, Osborne claimed that he had "an entitlement (what our precedents call a 'liberty interest') to prove his innocence, even after a fair trial has proved otherwise."[22] The Court began by rejecting Osborne's claimed entitlement to meaningful access to state clemency proceedings, based on its earlier holding that "noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law."[23]

However, the Court recognized that a prisoner may retain a "liberty interest in demonstrating his innocence with new evidence under state law."[24] The Court held that this due process right is not parallel to a trial right, "but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in post[-]conviction relief."[25] As such, the post-conviction defendant's procedural due process right

21. *Id.* at 2320-21.

22. *Id.* at 2319.

23. *Id.* (quotations and citations omitted) (emphasis in original).

24. *Id.*

25. *Id.* at 2320.

is a limited one, and "[t]he State accordingly has more flexibility in deciding what procedures are needed in the context of post[-]conviction relief."[26]

After further discussion, the Court held that Alaska's post-conviction relief statute — under which a post-conviction defendant could access DNA evidence for testing only if the evidence was newly available, had been diligently pursued, and would establish the defendant's innocence under the clear and convincing standard — provided a defendant with sufficient due process.[27] Applying the deferential *Medina* standard,[28] the Court found that Alaska's procedures were not "fundamentally inadequate" to vindicate a post-conviction defendant's limited liberty interest in post-conviction relief generally, or in access to DNA evidence in particular.[29] Thus, in denying Osborne access to DNA evidence for testing under the Alaska statute, the Alaska Court of Appeals did not unconstitutionally deprive Osborne of any liberty interest.

Following the decision in *Osborne*, the Second Circuit addressed a very similar petition under the relevant

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26. *Id.*

27. *Id.* at 2317, 2320.

28. *See Medina v. California*, 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (establishing that a state's criminal procedure law does not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation.").

29. *Osborne*, 129 S. Ct. at 2320.

New York statute in *McKithen v. Brown*.[30] Finding that *Osborne* required the reversal of the district court's decision in *McKithen*, the court stated that prisoners who "seek[] evidence for their state court post-conviction actions" are only entitled to those due process rights recognized by the state legislature.[31]

As noted earlier, New York's post-conviction procedures for DNA testing were established in 1994 by section 440.30(1-a), which provides:

> Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.[32]

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30. 626 F.3d 143.

31. *McKithen*, 626 F.3d at 153 (citing *Osborne*, 129 S. Ct. at 2320-21) ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.").

32. N.Y. Crim. Proc. L. § 440.30(1-a)(a). The quoted language was originally the full extent of § 440.30(1-a). Upon the enactment

Section 440.30(1-a) was amended in 2004 to require the disclosure of information regarding the physical location or disposition of DNA evidence, if it is known. Subsection 440.30(1-a)(b) provides that "[t]he court may direct the people to provide the defendant with information . . . concerning the current . . .[or] last known physical location of [the] specified evidence." However, no adverse inference may be drawn against the people if "the specified evidence no longer exists or [its] physical location . . . is unknown . . . ."[33]

Newton asserts that the City's failure to provide him with access to evidence for DNA testing "def[ied] the policy judgment reflected in the state legislation — and effectively nullif[ied] the liberty interest it affirms."[34] Newton's argument must now be rejected. In *McKithen*, the Second Circuit expressly held that New York's post-conviction DNA statute is not "fundamentally inadequate to vindicate [a prisoner's] residual liberty interest in demonstrating his innocence through a state post-conviction proceeding."[35] Applying the deferential *Medina* standard of review as dictated by *Osborne*, the *McKithen* court held that subsection 440.30(1-a)(a) satisfies due process, even if read in a way that allows courts the

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of § 440.30(1-a)(b), the original language was placed under the heading of § 440.30(1-a)(a).

33. *Id.* § 440.30(1-a)(b).

34. Pl. Mem. at 4 (emphasis omitted).

35. *McKithen*, 626 F.3d at 145.

discretion to reject a prisoner's requests for DNA testing.[36] In approving of the state court's exercise of discretion not to order production of DNA evidence, *McKithen* further underscored that the liberty interest the statute confers on a post-conviction defendant is a limited one, contrary to Newton's contention.

The *McKithen* court declined to reach the issue of whether the statute was constitutional "as-applied" in McKithen's case, after determining that it lacked subject matter jurisdiction to do so, under the *Rooker-Feldman* doctrine.[37] The *McKithen* court also did not reach the issue of whether subsection b of the statute is constitutionally adequate. Because the New York courts denied McKithen the right to access DNA evidence, the City's obligation to inform him of the current or last known location of that evidence was not implicated.

In contrast, the New York courts repeatedly granted Newton the right to test the DNA evidence, but the City was unable to produce the evidence that Newton

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36. *See id.* at 153 n.6 ("[I]n light of the procedure *Osborne* upheld, McKithen cannot prove that New York's post-conviction DNA statute is fundamentally inadequate to vindicate his residual liberty interest in demonstrating his innocence through a state post-conviction proceeding.").

37. *See id.* at 154 ("*Rooker-Feldman* directs federal courts to abstain from considering claims when . . . (1) the plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) the plaintiff invites district court review of that judgment, and (4) the state court judgment was entered before the plaintiff's federal suit commenced.").

requested. As a result, and notwithstanding Newton's contention that subsection 440.30(1-a)(b) "has nothing to do with"[38] his claim, the legislative intent evident in subsection b is highly relevant to the question of whether the City committed a *constitutional* violation by failing to maintain the evidence from Newton's case in a manner that would have resulted in the production of that evidence upon Newton's demand. There is no need to decide here whether subsection b is constitutional, as it was not in effect when Newton requested the evidence, nor is he challenging its constitutionality. Nonetheless, its enactment in 2004 helps to clarify the legislative intent behind the statute and thus the extent of the liberty interest that the legislature meant to confer.

In *McKithen*, the Second Circuit held that 440.30 (1-a)(a), granting post-conviction defendants a right to test DNA evidence under certain circumstances, is facially constitutional. Subsection b grants post-conviction defendants an *additional* procedural right and imposes an additional burden on the City — to inform the defendant of the current or last location of DNA evidence, if it is known. Prior to the enactment of subsection b, there was no authority for the proposition that the City had an obligation even to inform a defendant of the location of the evidence, much less an absolute obligation to provide the evidence.

By enacting subsection b, the New York State legislature clarified that it intended to give post-conviction

38. Pl. Mem. at 5.

defendants the right to access DNA evidence, but that the right was a limited one. Notably the statute does not mandate that the City must provide the DNA evidence and if the evidence is missing, the defendant goes free and is automatically entitled to financial compensation. On the contrary, the statute is clear that, upon court order, the City must inform the defendant of the location of the evidence, *if it is known*, and that no adverse inference can be drawn against the City if it is not known.[39]

The thrust of Newton's argument is that because the New York legislature created a statutory right to access DNA under certain conditions, and because New York courts found that Newton satisfied those conditions, the City violated his due process right by failing to put in place appropriate procedures to safeguard his access to the DNA evidence.[40] As Newton takes pains to remind me, at an earlier point in this case, I was persuaded by that argument. However, I have been forced to reconsider, in light of the Second Circuit's decision in *McKithen*. That decision makes clear that the New York statute confers only a limited procedural due process right to access DNA evidence, not a *substantive* due process right. The fact that

39. As Newton suggests, the prohibition on drawing an adverse inference pertains specifically to the context of an appeal filed under § 440.10(1)(g). *See* Pl. Mem. at 5. However, even apart from that provision, the statute explicitly contemplates the possibility that the evidence might be missing or lost, in which case the only obligation of the City is to make a representation to that effect and to provide information about its last known location. *See* § 440.30(1-a)(b).

40. *See* Pl. Mem. At 6.

it is a limited right signifies that a failure to provide the DNA, as a result of negligence but not of any intentional act, does not rise to the level of a constitutional violation.[41]

Under these circumstances, the jury verdict on Newton's constitutional claim cannot be upheld. Newton

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41. It bears noting that neither the 1994 statute, nor its 2004 amendment, existed at the time of Newton's trial. Thus, at the time of these events, the City had no obligation to preserve the evidence, under *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"). The City's evidence management system during that period, while less than ideal, would have easily satisfied any constitutional standard to preserve evidence post-conviction. However, after 1994, when § 440.30(1-a) took effect, the City was on notice that greater accountability with respect to preservation of DNA evidence would be required. That has been made all the clearer over the past decade, as scores of defendants across the country have been exonerated by DNA evidence testing not available at the time of their convictions. In fact, Deputy Chief Trabitz testified that when he became the head of the NYPD property clerk division in 2000, he ordered that sexual assault kits not be destroyed, as had been the previous policy. He explained that he was motivated by the fact that "[t]he . . . technology advances every single day . . . I cannot predict what the entire future will bring, but as . . . a trained investigator for the City of New York, if I can keep these things knowing today what I know, that wasn't available in the past . . . I thought it was important to keep these items." Tr. at 661:8-13 (Trabitz). *See also id.* at 755:2-16 (Trabitz) (describing the City's efforts to switch from a paper-based system to an "automated property and evidence control system" in 2006 or 2007).

argues that due process "requir[es] that DNA evidence that is, in fact, within government custody be *produced* (and be kept in a manner so that it is capable of being produced) in order that those wrongly convicted may have the factual grounds for establishing their innocence."[42] However, the New York statute does not require that DNA evidence actually be produced, only that reasonable efforts be made to locate it and to inform the defendant of its location. To hold that Newton has a right to *receive* the DNA evidence under the New York statute would be contrary to the plain meaning of the statute and would directly contradict both *Osborne* and *McKithen*. Furthermore, adopting Newton's argument would confer a substantive due process right, which the Supreme Court in *Osborne* expressly held does not exist.[43] Under *Osborne*,

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42. Pl. Mem. at 7 n.2. (original emphasis omitted) (emphasis added). In his opposition to the City's motion, Newton frequently references my own words in previous opinions in this case. That is not surprising, given that I allowed the case to proceed to trial. It is also — unfortunately — not persuasive. McKithen represents controlling authority on an issue of first impression in the circuit. *See also Skinner v. Switzer*, 131 S. Ct. 1289, 1293, 179 L. Ed. 2d 233 (2011) ("[T]he Court's decision in *Osborne* severely limits the federal action a state prisoner may bring for DNA testing. *Osborne* rejected the extension of substantive due process to this area and left slim room for the prisoner to show that the governing state law denies him procedural due process.") (citations omitted).

43. *See Osborne*, 129 S.Ct. at 2323 ("Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues . . . there is no reason to suppose that [federal courts'] answers to [questions about obligations to

and even more clearly under *McKithen*, Newton has a right to the *process* under the New York statute, but not to any particular outcome.

In an earlier opinion in this case, I found that, unlike in *Osborne*, where Alaska procedures were facially adequate and the defendant had failed to test them as applied, Newton had tested New York procedures and showed that they were inadequate.[44] I held that if New York's inadequate evidence retention system prevented a defendant from accessing DNA evidence to which a court determined he was entitled, his due process rights had been violated.[45] However, *McKithen* holds that New York's procedures for post-conviction access to DNA evidence *are* constitutionally adequate, even if the end result is denial of access to such evidence.

Because the New York state courts repeatedly *granted* Newton's request for DNA testing of evidence, he received the process that he was due under 440.30(1-a)(a). He was due no further process under the statute as it then existed. At most, once subsection b came into effect, Newton would also have had an entitlement to information about the current or last location of the evidence, if known. For many years, the location of the evidence was *not*

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collect, retain and store forensic evidence] would be any better than those of state courts and legislatures, and good reason to suspect the opposite.").

44. *See Newton v. City of New York*, 681 F. Supp. 2d 473, 490 (S.D.N.Y. 2010).

45. *See id.* at 491.

known, and Newton was so informed. Thus, Newton also received the process that he was due under subsection b of the statute, or would have been due, had that subsection been in effect when he requested the evidence. Because the City could not locate the evidence until 2005, at no time during that period was Newton entitled to anything more than information about the last known location of the evidence.

The tragic fact that the evidence was not actually located and produced for testing until 2005 does not constitute a violation of Newton's procedural due process rights, since the *McKithen* court has expressly rejected the notion that a prisoner is "constitutionally entitled to *receive* evidence for the purpose of post-conviction DNA testing."[46] That this delay in producing the DNA evidence resulted from the City's poor or non-existent evidence management system is indicative of negligence, but does not rise to the level of a constitutional violation. Therefore, following *McKithen*, I now conclude that Newton's constitutional rights were not violated by the City's failure to locate or produce the DNA evidence that Newton sought under section 440.30(1-a).

2. Implied Liberty Interest

The City also persuasively argues that Newton cannot demonstrate a liberty interest based on an implicit promise or reasonable expectation that he would be able to access the rape kit for testing. Absent statutory language

46. *McKithen*, 626 F.3d at 145.

mandating that post-conviction defendants be provided with evidence for DNA testing, no prisoner can have a settled expectation in any particular outcome. As the Second Circuit has explained,

> [T]o claim a protected property interest in a particular administrative benefit or measure, an individual must have 'a legitimate claim of entitlement' in receiving the benefit or measure, not merely 'a unilateral expectation' in a desired administrative outcome. Where the administrative scheme does not require a certain outcome, but merely authorizes particular actions and remedies, the scheme does not create 'entitlements' that receive constitutional protection under the Fourteenth Amendment.[47]

The New York statute merely requires that the post-conviction defendant be informed of the location of DNA evidence *if it is known*. Subsection 440.30(1-a)(b)

47. *Sealed v. Sealed*, 332 F.3d 51, 57 (2d Cir. 2003) (finding that "the detailed and comprehensive procedures for investigating potential child abuse mandated by state law . . . standing alone, create no independent substantive entitlements, whose deprivation might trigger application of the Due Process Clause"). *Accord Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 462, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989) ("[A] State creates a protected liberty interest by placing substantive limitations on official discretion . . . [generally] by establishing substantive predicates to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.") (citations omitted).

anticipates and allows for variable outcomes when post-conviction defendants request access to DNA testing. For example, sometimes the City will know where the evidence is, and be ordered to produce it. If the City is not sure where the evidence is, it must provide any available information as to its whereabouts. If the evidence has been destroyed, that information too must be shared. Because access to evidence is contingent on the City's ability to locate the evidence, the City's failure to provide the rape kit for testing cannot support an implied due process claim based on the deprivation of a liberty interest, after the Second Circuit's holding in *McKithen*.

3. The State of Mind Requirement

Even assuming, *arguendo*, that Newton had an entitlement to the rape kit, his due process claim fails as a matter of law because he did not adduce sufficient evidence to permit the jury to conclude that any City official acted with a culpable state of mind — *i.e.*, something more than mere negligence.[48] Because the due process clause is

48. *See, e.g., Daniels*, 474 U.S. at 333 ("Where a government official's act causing injury to life, liberty, or property is merely negligent, no procedure for compensation is *constitutionally* required.") (citations omitted); *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986) ("[T]he Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property."). *See also Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) ("It is well established that mere negligence is insufficient as a matter of law to state a due process violation.").

concerned with preventing abusive government conduct, the Supreme Court has explained that its protections are triggered only by "*deliberate* decisions of government officials to deprive a person of life, liberty or property."[49]

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49. *Daniels*, 474 U.S. at 331-32. While *Daniels* and its progeny made clear that the due process clause is implicated by intentional state action, they arguably "left open the question of whether anything less than intentional conduct, such as recklessness or gross negligence[,]" can establish a constitutional deprivation. *Morales v. New York State Dept. of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988). *Compare, e.g., Bryant v. Maffucci*, 923 F.2d 979, 983-84 (2d Cir. 1991) ("The Supreme Court has . . . enunciated no general standard regarding due process claims . . . under § 1983, except that mere negligence is insufficient to state a viable claim.") (citations omitted) *with Shannon*, 394 F.3d at 94 (2d Cir. 2005) ("By ruling in *Daniels* that a negligent act could not amount to a constitutional deprivation, the Court . . . clearly articulated that a finding of intentional conduct was a prerequisite for a due process claim.") (citations omitted). At least in some circumstances in the prison context, the Second Circuit has allowed due process claims to survive based on evidence that a prison official acted with "deliberate indifference," a standard tantamount to recklessness. *See, e.g., Morales*, 842 F.2d at 30 ("[Following *Daniels*,] this circuit has continued to adhere to the position that a state prison guard's deliberate indifference to the consequences of his conduct for those under his control and dependent upon him may support a [due process] claim under § 1983.") (citations omitted). *Accord Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (explaining that deliberate indifference and recklessness are "equivalent" concepts and elucidate the same level of culpability).

Amidst this backdrop, the parties strenuously but needlessly dispute whether Newton's due process claim can be sustained by proof that a City official *recklessly* — as opposed to *intentionally*

Accordingly, Newton could not prevail on his due process claim at trial unless he presented adequate evidence to suggest that municipal officials acted with some degree of culpable intent, rather than mere carelessness, in failing to procure the rape kit for testing.

At trial, Newton demonstrated that the City's property clerk division relied on two paper documents to track the movement and disposition of evidence in its possession. As Newton's counsel explained to the jury, "these documents are essential" and necessarily work in tandem — if even one is lost, the evidence will "never" be found within the City's vast network of storage facilities.[50] Routine administrative errors can thus have devastating and irreversible consequences in terms of the ability to retrieve evidence.[51] Notwithstanding grave deficiencies in the City's evidence management *system*,

— deprived him of access to the rape kit. Because Newton failed to present sufficient evidence that City officials acted with "something more than mere negligence," his claim does not implicate any constitutional concerns and there is no need to ascertain the appropriate culpability standard for purposes of this motion. *Farmer*, 511 U.S. at 835. *Accord Grant v. New York City Dept. of Corrs.*, 104 F.3d 355, 1996 WL 734052, at *2 (2d Cir. 1996) (table) ("Although it is unclear . . . if 'gross negligence' or 'recklessness' would support a due process claim, this Court has held that the standard would, at the very least, require more than ordinary negligence.").

50. Tr. at 2292:02-2293:09 (Pl. Summation).

51. *See id.* at 2284:9-11 (reminding jurors of the following exchange with a former commanding officer of the property clerk division: (Q) "If you lost the paper, you lost the ability to find the evidence?" (A) "The game was over.").

however, Newton's due process claim cannot be sustained absent proof that a City *official* acted with the requisite constitutional culpability in withholding evidence.[52]

In Newton's case, the rape kit could not be located due to "(i) the misfiling of the rape kit invoice in the Bronx 'out to court' files, together with the loss of the 'out of custody' card, and (ii) the failure to keep a copy of the invoice in the Pearson Place warehouse books."[53] These errors were committed in 1988 and 1989, before DNA evidence was used in criminal cases and post-conviction defendants had any statutory rights to access evidence for testing. None of the individual employees responsible for handling the paperwork could have reasonably anticipated that their actions might one day implicate Newton's constitutional rights. As such, Newton did not establish that any City actor withheld evidence in deliberate contravention or disregard of his right to due process.[54]

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52. *See Board of County Comm'rs. Bryan County, Okl.*, 520 U.S. at 405-07 (noting that "[i]n any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation" in addition to the state of mind required to prove municipal liability). Newton appears to conflate the standard of proof required for his *Monell* claim with that required for his due process claim. *See* Tr. at 2335:07-11 (Pl. Summation) ("We have presented evidence that Mr. Newton was deprived of his . . . Fourteenth Amendment right to liberty. And this was all due to a poor or nonexistent evidence management system.").

53. Def. Mem. at 6 (citing Tr. at 674-81 (Trabitz); Tr. at 1247-49, 1254-55 (Kessler); Tr. at 1290-92 (Kiely); Tr. at 1604 (McGuire)). *Accord* Tr. at 2285 (Pl. Summation).

54. Tr. at 2247:19-2248:17 (Pl. Summation). In his summation, plaintiff's counsel passionately argued that the City's inability to

To the contrary, the trial evidence indicated that City officials often went to great lengths to locate and produce the rape kit for testing. For example, plaintiff's closing argument at trial reminded jurors about the testimony and story of Assistant District Attorney John Carroll, who was

> so frustrated by an inability to get an answer from the Bronx property clerk's office that they invited him to go back behind the cage and look for it himself . . . And John Carroll, very decent guy, undertook that task . . . [of] looking in the property clerk's office, the size of a football field, looking in books when he didn't know what he was looking for[.][55]

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produce the rape kit for testing was the result of "numerous acts of negligence" which collectively pushed the bar beyond "simple negligence" to "reckless disregard." *Id.* at 2285:04. Yet Newton cannot establish a constitutional deprivation by aggregating the City's alleged wrongs. *First*, to the extent that Newton's deprivation claim is based on reckless denial of access to evidence, the state of mind requirement can be satisfied only by those individuals who originally mishandled the paperwork and lost the proverbial "needle in a haystack." *Id.* at 2292:21-22. Regardless of the level of due care exercised by any municipal official, he or she could not have reasonably been expected to locate the rape kit without the invoice. Under these circumstances, the continued failure by City officials to find the rape kit does not give rise to any sort of constitutional culpability, despite the gross inadequacies of the City's evidence management system. *Second*, Newton must demonstrate that at least one City employee acted with a greater degree of culpability than mere negligence *before* he can argue that the City's acts of negligence were so numerous as to reach constitutional proportions.

55. *Id.* at 2287:06-15 (Pl. Summation).

Indeed, despite the impracticability of locating the rape kit without the paper record, City officials did not give up their search. As one of Newton's witnesses told the jurors, Assistant District Attorneys "will do what they can" to secure evidence for testing.[56]

Accordingly, as sympathetic as I am to Newton's claims, no reasonable juror could find that any municipal actor deprived Newton of a federal right based on the evidence proffered at trial. Newton must seek relief for any extant claims in the state courts.[57]

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56. *Id.* at 1983:17-20 (Vanessa Potkin ("Potkin"), Plaintiff's former counsel). *Accord id.* at 1886:19-1895:21, 1983:02-20 (Potkin) (testifying that ADA Elisa Koenderman was cooperative and immediately responsive to requests for permission to test existing evidence and for assistance in locating the missing rape kit; that her efforts helped locate the rape kit; and that she sought to get Newton released as soon as possible once the DNA results came back). Potkin is a staff attorney at the Innocence Project, a non-profit entity that "represent[s] people with claims of innocence that can be proven through DNA[,]" and which took Newton's case.

57. As I explained in ruling on the parties' Rule 50 cross-motions, Newton cannot sustain a negligence claim as a matter of law. *See Newton v. City of New York*, No. 07 Civ. 6211, 2010 U.S. Dist. LEXIS 112737, 2010 WL 4177383 (S.D.N.Y. Oct. 22, 2010). Briefly, the official action at issue in this case involved the exercise of discretion, and "[g]overnment action, if *discretionary*, may not be a basis for liability. . . ." *McLean v. City of New York*, 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009). Conversely, *ministerial actions* may be a basis for liability, "but only if they violate a *special duty* owed to the plaintiff, apart from any duty to the public in general." *Id.*

B. IIED Claims

The City argues that Newton's IIED claims against Chief Trabitz and former Sergeant McGuire for $500,000 and $92,000, respectively, cannot be upheld because Newton did not meet the exacting standard for such claims

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Even if the official action at issue in this cases were ministerial, any negligence on defendant's part cannot rise to the level of tortious behavior because the case does not fall within the "narrow class of cases in which a '*special relationship*' can arise from a duty voluntarily undertaken by a municipality to an injured person." *Id.* at 1172 (emphasis added) (noting how infrequently the government's failure to properly do its job results in liability because of the special relationship requirement). *First*, there was no "illusory promise of protection offered by the municipality." *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 256, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989) (emphasis added). *Second*, even if the City's undertaking to locate the rape kit constituted protection, that undertaking did not, as a matter of law, "constitute an action that would lull a plaintiff into a false sense of security or otherwise generate *justifiable reliance*." *Dinardo v. City of New York*, 13 N.Y.3d 872, 874, 921 N.E.2d 585, 893 N.Y.S.2d 818 (2009) (emphasis added) (holding that municipal defendants' "vaguely worded statements" that "something was being done" to have a violent student removed from a classroom were insufficient to "constitute an action that would lull a plaintiff into a false sense of security or otherwise generate justifiable reliance" in action by assaulted teacher). *Accord Kircher*, 74 N.Y.2d at 258 (finding no justifiable reliance where police officer's failure to respond to bystanders' report of kidnapping led to victim's repeated rape and assault, notwithstanding that the officer's assurance of assistance caused bystanders to abandon their efforts to aid the victim and that "plaintiff's failure to rely can be directly attributed to her dire circumstances").

under state law — *i.e.*, that the "conduct [is] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[58] In response, Newton argues that "the defendants are merely contesting a reasonable factual determination reached by a jury" and attempting to upset "credibility . . . determinations that may not be challenged now."[59] Newton contends that "[a]fter hearing the evidence and weighing all the facts, the jury found that Trabitz and McGuire, in fact, acted differently than they had testified and their reckless behavior made their actions extreme and outrageous."[60] The issue, for purposes of this motion, is thus whether Newton presented a "legally sufficient evidentiary basis" to support a finding in his favor on the IIED claims.[61]

After reviewing the evidence presented at trial, I do not believe that a reasonable juror could conclude that either Chief Trabitz or Sergeant McGuire acted

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58. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993) (quotation marks and citation omitted) ("The [outrageous conduct element of an IIED claim] serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine. . . [It is] the one most susceptible to determination as a matter of law." (quotation marks and citations omitted)).

59. Pl. Mem. at 18.

60. *Id.*

61. Fed. R. Civ. P. 50(a)(1).

atrociously or intolerably in the search for the rape kit. IIED "is a very narrow tort with requirements that 'are rigorous, and difficult to satisfy.'"[62] As the Second Circuit has noted, "'[c]ourts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation.'"[63] Here, neither Sergeant McGuire nor Chief Trabitz exhibited *any* malice towards Newton; to the contrary, Newton asserts that "their *reckless* behavior made their actions extreme and outrageous."[64]

Moreover, the testimony presented at trial indicated that both Sergeant McGuire and Chief Trabitz attempted to help Newton locate the rape kit. For example, Sergeant McGuire tasked his personnel at the property clerk division, police officer Stacey Haskins and civilian employee Geraldine Kiely, to assist with the search for the rape kit.[65] When their efforts proved futile, he

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62. *Snyder v. Phelps*, -- U.S. --, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (Mar. 2, 2011) (Alito, J., dissenting) (quoting W. Keeton *et al.*, Prosser and Keeton on Law of Torts § 12, 61 (5th ed. 1984)). *Accord Howell*, 81 N.Y.2d at 122 (noting the "strictness" of the IIED standard, and observing that "of the [IIED] claims considered by [the New York Court of Appeals], every one has failed because the alleged conduct was not sufficiently outrageous").

63. *Margrabe v. Sexter & Warmflash, P.C.*, 353 Fed. App'x 547, 550 (2d Cir. 2009) (quoting *Cohn-Frankel v. United Synagogue of Conservative Judaism*, 246 A.D.2d 332, 333, 667 N.Y.S.2d 360 (1st Dep't 1998)).

64. Pl. Mem. at 18.

65. Tr. at 1580:18-1583:16 (McGuire).

personally "took over [the] investigation and . . . did the exact same things that they did, just double checking, and . . . [incorporating] additional steps that they didn't take" by virtue of his additional supervisory authority.[66] Sergeant McGuire's efforts to locate the rape kit were reasonable under the circumstances. That he, like so many others, could not actually produce the rape kit does not transform his conduct into the realm of the indecent or intolerable.[67] Moreover, Chief Trabitz's contribution to the search efforts was noted by two of Newton's most important witnesses — the Assistant District Attorney and defense attorney who worked together to overturn his conviction and free him from prison.[68] Indeed, the rape kit was ultimately located during an additional evidentiary search that Chief Trabitz "facilitate[d]" and which was undertaken at his direction.[69] In light of the evidence

66. *Id.* at 1576:20-24 (McGuire).

67. Newton also asserted IIED claims against Haskins and Kiely, but the jury rejected those claims. Given that the evidence indicated that Sergeant McGuire's efforts to locate the rape kit were at least on a par with, if not more involved, than those of Haskins and Kiely, the jury's verdict against Sergeant McGuire cannot be reasonably sustained.

68. *See, e.g.*, Tr. at 828:17-831:15 (Koenderman); *id.* at 1890:08-1892:13 (Potkin). Plaintiff's counsel credited the testimony of these witnesses in his summation. *Accord id.* at 2291:08 (Pl. Summation) (commenting to the jurors that ADA Koenderman provided "very forthright testimony").

69. *Id.* at 828:23 (Koenderman). The reasonableness of the jury's IIED verdict is further undermined by its decision to hold Chief Trabitz liable for five times the damages imposed on

presented at trial, there exists no reasonable basis upon which a juror could determine that either Chief Trabitz or Sergeant McGuire acted contrary to all possible bounds of social decency.

IV. CONCLUSION

For the foregoing reasons, the City's motion to set aside the verdict is granted in its entirety. The Clerk of the Court is directed to close this motion [Docket No. 207] and this case.

SO ORDERED:

/s/
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
May 12, 2011

Sergeant McGuire, even though Newton benefitted significantly more from Chief Trabitz's intervention.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 11, 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 11-2610

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of May, two thousand fifteen.

ALAN NEWTON,

Plaintiff-Appellant,

CITY OF NEW YORK,

Defendant-Appellee.

ORDER

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

IT IS HEREBY ORDERED that the petition is denied.

Appendix C

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX D — NY CLS CPL § 440.30 (2015)

NY CLS CPL § 440.30 (2015)

§ 440.30. Motion to vacate judgment and to set aside sentence; procedure

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1-a. (a) (1) Where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(2) Where the defendant's motion for forensic DNA testing of specified evidence is made following a plea of guilty and entry of judgment thereon convicting him or her of: (A) a homicide offense defined in article one hundred twenty-five of the penal law, any felony sex offense defined in article one hundred thirty of the penal law, a violent felony offense as defined in paragraph (a) of subdivision one of section 70.02 of the penal law, or (B) any other felony offense to which he or she pled guilty after being charged in an indictment or information in superior court with one or more of the offenses listed in clause (A) of this subparagraph, then the court shall grant such a motion upon its determination that evidence containing DNA was

secured in connection with the investigation or prosecution of the defendant, and if a DNA test had been conducted on such evidence and the results had been known to the parties prior to the entry of the defendant's plea and judgment thereon, there exists a substantial probability that the evidence would have established the defendant's actual innocence of the offense or offenses that are the subject of the defendant's motion; provided, however, that:

(i) the court shall consider whether the defendant had the opportunity to request such testing prior to entering a guilty plea, and, where it finds that the defendant had such opportunity and unjustifiably failed to do so, the court may deny such motion; and

(ii) a court shall deny the defendant's motion for forensic DNA testing where the defendant has made his or her motion more than five years after entry of the judgment of conviction; except that the limitation period may be tolled if the defendant has shown: (A) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion for forensic DNA testing; (B) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of this statute of limitations; or (C) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety or welfare of the community, and the defendant's

diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by tolling such limitation period.

(b) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

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