

**United States Court of Appeals
for the Second Circuit**

AUGUST TERM 2024

No. 24-1785-cv

JOSIAH GALLOWAY,
Plaintiff-Cross-Defendant-Appellee,

v.

COUNTY OF NASSAU, DETECTIVE MATTHEW ROSS, (SHIELD #834),
DETECTIVE CHARLES DECARO, (SHIELD #1047) , DETECTIVE RONALD
LIPSON, (SHIELD #1296) , DETECTIVE THOMAS D'LUGINSKI, (SHIELD
#7900), DETECTIVE GEORGE DARIENZO, (SHIELD #1038),
Defendants-Cross-Defendants-Appellants,

DETECTIVE THOMAS BISCHOFF, (SHIELD #1001), KATHLEEN RICE,
ASSISTANT DISTRICT ATTORNEY JOSEPH LAROCCA, ASSISTANT DISTRICT
ATTORNEY ROBERT SCHALK, DETECTIVE CHARLES OLIE, SHIELD NO.
1047,
Defendants,

NASSAU COUNTY POLICE DEPARTMENT, JOHN DOES #1-20, being and
intended to be other parties from the County of Nassau, Nassau
County Police Department, Incorporated Village of Hempstead and
Incorporated Village of Hempstead Police Department whose names
are presently unknown, all jointly and severally, JANE DOES #1-20,
being and intended to be other parties from the County of Nassau,
Nassau County Police Department, Incorporated Village of
Hempstead and Incorporated Village of Hempstead Police
Department whose names are presently unknown, all jointly and
severally, DETECTIVE SERGEANT RICHARD DORSI, DETECTIVE RENE

1 YAO, DETECTIVE CARL M. STRANGE, SHIELD NO. 1225,
2 *Defendants-Cross-Defendants,*
3
4 INCORPORATED VILLAGE OF HEMPSTEAD, P.O. STEVEN HOROWITZ,
5 (SHIELD #144), DETECTIVE KEVIN CUNNINGHAM, (SHIELD
6 #112), DETECTIVE JOSEPH SORTINO,
7 *Defendants-Cross-Claimants.*
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10 SUBMITTED: APRIL 11, 2025
11 DECIDED: JUNE 26, 2025
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14 Before: JACOBS, CHIN, and MENASHI, Circuit Judges.
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16 Plaintiff-Appellee Josiah Galloway sued five current and
17 former Nassau County detectives, alleging (among other things) that
18 they denied him his constitutional right to a fair trial by:
19 (a) improperly inducing witnesses to identify him as the perpetrator
20 of a 2008 crime, (b) coercing a witness to sign a statement implicating
21 him, and (c) withholding evidence of those deficiencies in the state's
22 case in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Galloway
23 also sued Defendant-Appellant Nassau County for state-law
24 malicious prosecution.

25 Given the limitations of our interlocutory appellate jurisdiction,
26 as well as of the appellants' briefing, we decide only whether--
27 accepting Galloway's version of events--the detectives were entitled
28 to qualified immunity on the constitutional fair trial claim. Because
29 it was clearly established law by 2008 that detectives could not rig
30 witness identifications, coerce a witness to sign a false inculpatory
31 statement, or ensure that the state withheld evidence of the same from
32 the defense, the district court did not commit legal error in rejecting
33 the detectives' qualified immunity defenses.

1 DENNIS JACOBS, *Circuit Judge*:

2 After serving nearly a decade in prison for a 2008 attempted
3 murder, Plaintiff-Appellee Josiah Galloway was exonerated. As
4 relevant to this appeal, Galloway then sued five current and former
5 Nassau County detectives alleging that they (1) maliciously
6 prosecuted him; and (2) denied him his constitutional right to a fair
7 trial by (a) improperly inducing witnesses to identify him as the
8 perpetrator, (b) coercing a witness to sign a statement implicating
9 him, and (c) withholding evidence of those deficiencies in the state's
10 case in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Galloway
11 also sued Defendant-Appellant Nassau County for malicious
12 prosecution under state law.

13 The detectives--Matthew Ross, Charles DeCaro, Ronald
14 Lipson, Thomas Dluginski, and George Darienzo--together with the
15 county moved for summary judgment, in part claiming qualified
16 immunity. The United States District Court for the Eastern District
17 of New York (Donnelly, J.) denied the motion in relevant part, and
18 adhered to that decision on reconsideration.

19 The detectives and county now pursue these interlocutory
20 appeals, ostensibly seeking that we reverse the denial of their motion
21 for summary judgment, which raised multiple issues. However,
22 because of the limitations of our interlocutory appellate jurisdiction,
23 as well as of the appellants' briefing, we consider only a sliver of the
24 claims as to which the defendants sought summary judgment. We
25 have jurisdiction over only the defense of qualified immunity, and
26 only as a matter of law.

27 Because New York does not grant municipalities a qualified
28 immunity defense to state-law malicious prosecution claims, we lack
29 jurisdiction over Nassau County's appeal. Of the issues within our
30 jurisdiction, the appellants press only qualified immunity as to the
31 fair trial claim. The only reference to malicious prosecution in
32 Defendants-Appellants' opening brief is a list of the claims asserted

1 in the complaint. The detectives have accordingly abandoned any
2 interlocutory challenge to the district court's denial of qualified
3 immunity as to malicious prosecution. See *In re Platinum & Palladium*
4 *Antitrust Litig.*, 61 F.4th 242, 276 (2d Cir. 2023) ("[A]rguments not
5 made in an appellant's opening brief are waived even if the appellant
6 pursued those arguments in the district court . . .") (citation omitted).

7 We therefore consider only whether, construing the facts in
8 Galloway's favor, the detectives were entitled to qualified immunity
9 on Galloway's fair trial claim. Because it was clearly established by
10 2008 that detectives could not rig witness identifications, coerce a
11 witness to sign a false inculpatory statement, or ensure that the state
12 withheld *Brady* evidence from the defense, the district court did not
13 commit legal error in rejecting the detectives' qualified immunity
14 defenses.

15 I.

16 We recite the facts in the light most favorable to Galloway.

17 In 2008, taxi driver Jorge Anyosa was shot in the face during an
18 altercation with another driver. Anyosa survived and assisted the
19 police in creating a sketch of the shooter, with accompanying
20 description: a 25- to 30-year-old man, 5'10" tall, with short black hair,
21 a medium complexion, and a discernible accent. Galloway was
22 arrested on an unrelated matter three weeks after the shooting.
23 Galloway was 21 years old, 5'5" tall, wore his hair in braids, and had
24 no accent.

25 The police then undertook the following measures.
26 Defendants-Appellants DeCaro and Darienzo interviewed
27 Galloway's friend, Robert Ogletree. They kept Ogletree at the
28 precinct for hours, threatened him with criminal charges, and thus
29 coerced him into signing a statement they had fabricated: that
30 Galloway had confessed to shooting a cab driver, near where Anyosa
31 was shot.

1 At DeCaro’s request, Defendant-Appellant Lipson put together
2 two photo arrays, each with the same photo of Galloway plus five
3 fillers. The arrays were first displayed to cab driver Wilmer
4 Hernandez, who witnessed the argument between Anyosa and the
5 shooter. Lipson (and a non-defendant officer) told Hernandez that
6 they “had the person who was the cause of the [Anyosa] incident” in
7 custody, but that “they wanted to show [Hernandez] pictures” as part
8 of an identification process. *Galloway v. Cnty. of Nassau*, No. 19-CV-
9 5026 (AMD) (JMW), 2024 WL 1345634, at *2 (E.D.N.Y. Mar. 29, 2024)
10 (quoting Hernandez’s deposition testimony). Hernandez identified
11 Galloway.

12 Lipson then presented Anyosa with two or three photo arrays
13 containing Galloway’s photo. Lipson told Anyosa that Hernandez
14 had already picked the “right person[’s]” photo. *Id.* at *3 (quoting
15 Anyosa’s deposition testimony). Anyosa initially failed to identify
16 Galloway, but ultimately selected Galloway’s photo in one of the
17 arrays. Lipson affirmed that Anyosa had selected the right person.

18 Galloway was charged in connection with the Anyosa shooting
19 and ordered by the court to participate in a lineup. Defendants-
20 Appellants Ross and Dluginski, who conducted the lineup, seated
21 Galloway with five fillers. They sat Galloway on two phone books,
22 which made him appear taller, and covered Galloway and the fillers
23 with white sheets to mask the adjustment. Besides Galloway,
24 nobody else in the lineup had braids; yet Ross and Dluginski had
25 Galloway and the fillers wear hats. When Anyosa identified
26 Galloway at the lineup, detectives told Anyosa that he had done “a
27 good job” and “got the right person.” *Id.* at *5 (quoting Anyosa’s
28 deposition testimony). Hernandez, having recognized Galloway
29 from the photo array, then selected Galloway from the lineup.

30 Ross’s then-fiancée, Lori Magliaro, submitted an affidavit
31 attesting that Ross had since admitted that he had “contrived a lineup
32 where [Galloway] wore a baseball cap to conceal the difference in
33 hair” and “made adjustments” “to make [him] look taller” because

1 “his height was not the same as the assailant[']s.” *Id.* (quoting
2 Magliaro’s affidavit). Magliaro later disavowed some of her
3 affidavit.

4 Lipson never disclosed the particulars of his photo
5 identification procedures to the prosecutors, who in turn failed to
6 disclose them as *Brady* material. DeCaro and Darienzo likewise
7 never informed prosecutors that they had coerced and fabricated
8 Ogletree’s signed statement, and the prosecutors in turn failed to
9 disclose these facts as *Brady* material.

10 At trial, Anyosa and Hernandez again identified Galloway as
11 Anyosa’s shooter. Ogletree testified that he had been coerced into
12 making a fabricated statement implicating Galloway in the shooting.
13 After receiving an *Allen* charge, the jury convicted Galloway on all
14 counts. Galloway was sentenced to a determinate prison term of 25
15 years, and five years of post-release supervision.

16 More than nine years into the prison term, Galloway was
17 exonerated when new evidence implicated a different suspect in
18 Anyosa’s shooting. Anyosa told officers in the reopened
19 investigation that he would not have identified Galloway as his
20 shooter if he had been informed that Galloway was several inches
21 shorter than 5’10”-11”.

22 II.

23 In an interlocutory appeal of the denial of qualified immunity,
24 we review *de novo*, construing the facts in the light most favorable to
25 the non-moving party (here, Galloway). *See Demoret v. Zegarelli*, 451
26 F.3d 140, 148 (2d Cir. 2006). Summary judgment is appropriate “if
27 the movant shows that there is no genuine dispute as to any material
28 fact and the movant is entitled to judgment as a matter of law.” Fed.
29 R. Civ. P. 56(a).

1 Pursuant to the collateral order doctrine, we have
2 circumscribed appellate jurisdiction over the interlocutory appeal of
3 an order denying qualified immunity. See *Plumhoff v. Rickard*, 572
4 U.S. 765, 771-72 (2014) (explaining that qualified immunity is
5 immunity from suit, not liability, and therefore is collateral to the
6 merits). Specifically, we have jurisdiction “to the extent that
7 [qualified immunity] turns on an issue of law.” *Jok v. City of*
8 *Burlington*, 96 F.4th 291, 294 (2d Cir. 2024) (citation omitted). We
9 may consider only “stipulated facts, facts accepted for purposes of the
10 appeal, or the plaintiff’s version of the facts that the district judge
11 deemed available for jury resolution.” *Salim v. Proulx*, 93 F.3d 86, 90
12 (2d Cir. 1996).

13 Our jurisdiction does not extend to Nassau County’s appeal
14 from the denial of summary judgment on the state law malicious
15 prosecution claim. True, we have discretion to exercise “[p]endent
16 appellate jurisdiction” over an “otherwise unappealable claim [if] the
17 issue is inextricably intertwined with an issue” over which we have
18 jurisdiction, or if “review of the otherwise unappealable issue is
19 necessary to ensure meaningful review of the appealable one.” *Britt*
20 *v. Garcia*, 457 F.3d 264, 273 (2d Cir. 2006). But the malicious
21 prosecution claim against Nassau County does not turn on such an
22 issue. While New York recognizes a state law qualified immunity
23 defense to malicious prosecution, see *Jones v. Parmley*, 465 F.3d 46, 54-
24 55, 63 (2d Cir. 2006) (Sotomayor, J.), a municipal defendant cannot
25 invoke it, even when (as here) municipal liability depends on
26 *respondeat superior*. See *Triolo v. Nassau Cnty.*, 24 F.4th 98, 113 (2d Cir.
27 2022). Consequently, the county’s liability is too far removed from
28 a qualified immunity question to allow for pendent appellate
29 jurisdiction.

30 We are thus limited to considering the individual defendants’
31 entitlement to qualified immunity. On appeal, they press qualified
32 immunity only as to the fair trial claim; so we consider only that claim.

1 Qualified immunity “shields officials from civil liability so long
2 as their conduct does not violate clearly established statutory or
3 constitutional rights.” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (cleaned
4 up). “To be clearly established, a right must be sufficiently clear that
5 every reasonable official would have understood that what he is
6 doing violates that right.” *Reichle v. Howards*, 566 U.S. 658, 664 (2012)
7 (cleaned up). “In making this determination, we consider Supreme
8 Court and Second Circuit precedent as it existed at the time of the
9 challenged conduct.” *Tripathy v. McKoy*, 103 F.4th 106, 116 (2d Cir.
10 2024) (citation omitted). “We do not require a case directly on point,
11 but existing precedent must have placed the statutory or
12 constitutional question beyond debate.” *Id.* at 116 (quoting *Ashcroft*
13 *v. al-Kidd*, 563 U.S. 731, 741 (2011)).

14 The Due Process Clause “guarantees a criminal defendant’s
15 right to a fair trial,” and it may be vindicated “in an action for
16 damages under 42 U.S.C. § 1983.” *Frost v. New York City Police Dep’t*,
17 980 F.3d 231, 244 (2d Cir. 2020). By 2008, it was clearly established
18 that police officers violate the due process right to a fair trial if they
19 rig witness identifications, coerce a witness to sign a fabricated
20 inculpatory statement, or ensure that the state withholds evidence of
21 the same from the defense. In *Bermudez v. City of New York*, 790 F.3d
22 368 (2d Cir. 2015), we evaluated police conduct from the early 1990s;
23 we denied qualified immunity where a jury could find that police
24 pursued an improper “photo array, lineup, and interrogation of [a
25 witness],” and the “officers misled [the prosecutor]” about those
26 procedures. *Id.* at 376 nn.3-4.

27 Galloway alleges that each of the individual defendants
28 violated his right to a fair trial through one or more of the following:
29 suggestive photo arrays; a suggestive lineup; coercing Ogletree’s
30 fabricated statement; and *Brady* violations. For the following
31 reasons, we find no error of law in the district court’s determination
32 that a rational jury could find all five individual defendants liable for
33 violating Galloway’s clearly established right to a fair trial.

1 Specifically: (1) Lipson conducted dubious photo identifications and
2 then withheld *Brady* evidence of that fact from prosecutors (*infra* Part
3 III); (2) Ross and Dluginski conducted an unconstitutionally
4 suggestive lineup (albeit with Galloway present, avoiding any
5 compounding *Brady* issue) (*infra* Part IV); and (3) DeCaro and
6 Darienzo coerced Ogletree into signing a false statement and then
7 withheld *Brady* evidence of that fact from prosecutors (*infra* Part V).

8 III.

9 “A defendant’s right to due process includes the right not to
10 be the object of suggestive police identification procedures that create
11 ‘a very substantial likelihood of irreparable misidentification.’”
12 *United States v. Concepcion*, 983 F.2d 369, 377 (2d Cir. 1992) (quoting
13 *Simmons v. United States*, 390 U.S. 377, 384 (1968)). Due process also
14 “precludes the generation of . . . increased certainty through a
15 suggestive [identification procedure].” *Raheem v. Kelly*, 257 F.3d 122,
16 135 (2d Cir. 2001). Photo arrays and lineups alike will violate due
17 process if unduly suggestive. See *Concepcion*, 983 F.2d at 377;
18 *Raheem*, 257 F.3d at 134. The suggestiveness of an identification
19 procedure is assessed holistically: even if “none of the[] aspects of the
20 [procedure] alone necessarily would have invalidated the
21 identification, the combination of them all” may “comprise[] a highly
22 suggestive identification procedure.” *Dickerson v. Fogg*, 692 F.2d 238,
23 245 (2d Cir. 1982).

24 Photo arrays that included Galloway were presented by Lipson
25 to both Hernandez and Anyosa. When the array was presented to
26 Hernandez, Lipson told Hernandez that the suspect was already in
27 custody. In the context of lineups, we have disapproved a similar
28 practice. See *Jenkins v. City of New York*, 478 F.3d 76, 93 (2d Cir. 2007)
29 (“[T]he police generally should refrain from informing a witness that
30 the suspect is in the lineup, [though] a lineup is not unduly suggestive
31 merely because they do so.”). Telling the witness a suspect is in
32 custody is even more dangerous before a photo identification.
33 While “any witness . . . must realize that he would not be asked to

1 view the lineup if there were not some person there whom the
2 authorities suspected," *id.*, the same is not true of photo arrays. *See*,
3 *e.g.*, *Humbert v. Mayor & City Council of Balt. City*, 866 F.3d 546, 551 (4th
4 Cir. 2017), *as amended* (Aug. 22, 2017) (describing presentation of a
5 photo array to a witness two days before a photo was taken of the
6 suspect ultimately arrested).

7 Armed with Hernandez's tainted identification, Lipson then
8 showed arrays to Anyosa and obtained an even less reliable
9 identification. Whereas Lipson told Hernandez that the police had
10 a suspect in custody, Lipson went further with Anyosa, confiding that
11 Hernandez had already identified the shooter correctly. Then, once
12 Anyosa identified Galloway's photo after viewing multiple arrays,
13 Lipson confirmed that Anyosa had selected the suspect. We have
14 disapproved of "endorsing the correctness of the selection." *United*
15 *States v. Thai*, 29 F.3d 785, 810 (2d Cir. 1994); *see United States v.*
16 *Moskowitz*, 581 F.2d 14, 20 (2d Cir. 1978) ("[A] witness's belief" in her
17 identification "may be improperly reinforced by the confirmatory
18 remarks of [law enforcement].").

19 Most importantly, Lipson compounded the prejudice to
20 Galloway by withholding information about the photo array
21 procedures from the prosecutors. It was clearly established by 2008
22 that police officers violate *Brady* when they withhold exculpatory
23 evidence from prosecutors. *Cf. Walker v. City of New York*, 974 F.2d
24 293, 299 (2d Cir. 1992) ("[P]olice satisfy their obligations under *Brady*
25 when they turn exculpatory evidence over to the prosecutors.").
26 That specifically includes "mis[leading]" prosecutors "as to the
27 nature of . . . photo identification procedures." *Bermudez*, 790 F.3d at
28 376 n.4. While we have disapproved tactics used in the photo
29 identifications here, we need not decide whether they violated clearly
30 established law; Lipson's qualified immunity defense fails in any
31 event because he misled prosecutors.

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IV.

Next, a jury could find that Ross and Dluginski conducted an unduly suggestive lineup. Anyosa had described his shooter as over 5'10", with short hair. Yet Ross and Dluginski conducted a seated lineup that masked Galloway's 5'5" height and hid his (braided) hair.¹ It is clear, as confirmed in the first affidavit of Ross's fiancée, that these machinations invited an identification that would not otherwise have been made.

Ross and Dluginski defend their lineup on the ground that neither the concealment of hair or of height is *per se* unduly suggestive; and that their subjective intent could not turn acceptable identification techniques into an unduly suggestive procedure. These arguments are sound, but miss the point.

"A lineup may be suggestive to one viewer even though it is not to another." *Raheem*, 257 F.3d at 134. In *Raheem*, we observed that a lineup that includes only one short participant--the suspect--will be unduly suggestive only to a viewer who has already insisted that the perpetrator is short. *See id.* at 134-35. This case presents the converse: a lineup that *hides* that the suspect is short is unduly suggestive to a viewer known to believe that the perpetrator is tall.

Qualified immunity does not shield Ross and Dluginski. It was clearly established that police could not use identification procedures that are unduly suggestive *as to a particular investigation*, even if those same procedures would be textbook in another. "[I]t is the *likelihood* of misidentification," by the particular viewer "which violates a defendant's right to due process," not the method. *See*

¹ It also appears that Galloway and the fillers did not speak as part of the lineup, despite that Anyosa had described his assailant as having an accent, while Galloway had none. *See* Appellant's Br. 12 ("Anyosa and Hernandez each *viewed* the lineup" (emphasis added)).

1 *Raheem*, 257 F.3d at 133-34 (emphasis added) (quoting *Neil v. Biggers*,
2 409 U.S. 188, 198 (1972)); *see also Neil*, 409 U.S. at 198 (explaining that
3 evidence of a “showup” does not categorically violate due process;
4 “the likelihood of misidentification” at a given showup is
5 dispositive).

6 Moreover, the jury could find, based on the first affidavit of
7 Ross’s fiancée, that Ross and Dluginski knew that the lineup would
8 be unduly suggestive. True, as the partial dissent usefully explains,
9 “we do not consider the subjective intent, motives, or beliefs of the
10 officials” when “determining whether official conduct was
11 objectively reasonable.” *Connecticut ex rel. Blumenthal v. Crotty*, 346
12 F.3d 84, 106 (2d Cir. 2003); Dissent at 7-8. *But cf. Galloway*, 2024 WL
13 1345634, at *12 (stating, perhaps imprecisely, that the lineup would be
14 unduly suggestive if Ross and Dluginski “inten[ded] to conceal the
15 plaintiff’s height and deprive him of a fair trial”). Nevertheless, “the
16 information that [Ross and Dluginski] possessed when they made
17 the[ir] decisions . . . is a part of the mix.” *Id.* The question is
18 whether a reasonable officer “*acting under the circumstances then*
19 *confronting [him]*,” would have understood that the applicable law was
20 being violated.” *Id.* (quoting *Vega v. Miller*, 273 F.3d 460, 466 (2d Cir.
21 2001)). Ross and Dluginski, knowing that the witnesses believed the
22 shooter to be tall with short hair, would have so understood--Anyosa
23 has since confirmed that he never would have identified Galloway as
24 his shooter if he had known Galloway’s height.

25 V.

26 Galloway alleges that Defendants-Appellants DeCaro and
27 Darienzo coerced Ogletree into signing a fabricated statement: that
28 Galloway had confessed to shooting a cab driver. Under law clearly
29 established by 2008, a police officer violates a plaintiff’s right to a fair
30 trial when he “creates false information likely to influence a jury’s
31 decision and forwards that information to prosecutors.” *Ricciuti v.*
32 *N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997). In *Frost*, we
33 found this standard satisfied where (1) a witness was purportedly

1 coerced to identify the plaintiff as a perpetrator, and (2) a reasonable
2 jury could have found that this coerced identification “critically
3 influenced” the prosecutor’s decision to pursue charges. 980 F.3d at
4 248 (citing *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 277 (2d
5 Cir. 2016)). Ogletree’s statement was provided to prosecutors before
6 they charged Galloway with the shooting. A reasonable jury could
7 conclude that, as in *Frost*, this coerced statement “critically
8 influenced” the decision to prosecute Galloway. Moreover, a
9 reasonable jury could also find that DeCaro and Darienzo “misled
10 [the prosecutor]” about “the fact that [Ogletree’s] testimony was
11 coerced,” *Bermudez*, 790 F.3d at 376 n.4--a *Brady* violation.

12 **VI.**

13 Finally, each individual defendant argues that he is entitled to
14 summary judgment on qualified immunity grounds for events in
15 which he did not participate. Ross, for example, argues that he
16 “could not have intervened . . . in events he was not involved in,” and
17 that “it was clearly established at the time of these events that a police
18 officer does not violate a suspect’s constitutional rights by merely not
19 intervening where the officer is not present.” Appellant’s Br. 23.

20 The defendants are pressing on an open door. The district
21 court’s rulings on qualified immunity did not hold expressly or
22 implicitly that the detectives could be liable for constitutional
23 violations in which they played no role, whether under a “failure to
24 intervene” theory or otherwise. The district court rejected that
25 suggestion when confronted with a motion for reconsideration on this
26 very ground.

27 The district court observed that “[o]ne of the themes the County
28 presses . . . is that the defendants cannot be held liable if they were
29 not physically present for certain conduct.” *Galloway v. Cnty. of*
30 *Nassau*, No. 19-CV-5026 (AMD) (JMW), 2024 WL 2960532, at *2
31 (E.D.N.Y. June 11, 2024). The court specifically acknowledged each
32 such argument: “Darienzo, [Dluginski], and DeCaro cannot be held

1 liable for . . . the photo array”; “Lipson, DeCaro, and Darienzo cannot
2 be held liable for . . . the line-up”; “Ross cannot be held liable for
3 any . . . violations that occurred before the line-up”; and “[Dluginski]
4 cannot be held liable” for “Ogletree’s statement.” *Id.* at *3. The
5 district court confirmed that it agreed, and had already “accounted
6 for these unremarkable propositions in its order,” *id.* at *3, and
7 underscored them in so many words: “[o]bviously, the defendants
8 cannot be liable for conduct in which they had no involvement,” *id.* at
9 *3 n.4 (discussing malicious prosecution claims that survived “[f]or
10 the same reasons” as the fair trial claims). Moreover, the district
11 court has ample tools to ensure that each defendant is liable only for
12 his own conduct. For example, Fed. R. Civ. P. 49(b)(1) allows the
13 court to require “a jury to return only a special verdict in the form of
14 a special written finding on each issue of fact.” *See, e.g., Aczel v.*
15 *Labonia*, 584 F.3d 52, 54-55 (2d Cir. 2009) (describing juror form that
16 asked jurors to identify the damages that each defendant’s
17 constitutional violation had proximately caused). The district court
18 did not make the error the defendants urge us to correct.

* * *

20 All members of the panel agree that summary judgment was
21 appropriately denied on Galloway's Due Process claim against
22 Lipson, DeCaro, and Darienzo. See Dissent at 13. Insofar as there
23 is a parting of ways, we disagree respectfully, as follows:

1. Our partially dissenting colleague would hold that Ross and Dluginski are entitled to qualified immunity. *See* Dissent at 6-7. The dissent reasons that “existing precedent” in 2008 had not “placed . . . beyond debate” the “statutory or constitutional question” of whether police may use phone books, hats, and sheets to obscure a suspect’s short height and braided hair from a witness who they know believes the perpetrator is tall and short-haired. *See* Dissent at 8 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

1 We disagree. It is (and was) clearly established that
2 identification methods bearing a “likelihood of misidentification” of
3 the accused violate due process, no matter their form--just as
4 procedures without such a likelihood do not. See *Raheem*, 257 F.3d
5 at 133-34; *Neil*, 409 U.S. at 199. It is immaterial whether appearance
6 is disguised by phone books, or by cigar boxes, or by pillows, or by
7 hats, sheets, eyelashes, moustaches or pimples. With enough artifice
8 and disguise, almost anybody may end up fingered.

9 In employing such artifices, Ross and Dluginski could claim
10 qualified immunity only if a “reasonable official” would not “have
11 understood” that he was “violat[ing]” due process. *Horn v.*
12 *Stephenson*, 11 F.4th 163, 169 (2d Cir. 2021) (cleaned up).
13 “[P]recedent involving ‘fundamentally similar’ facts” is not required;
14 “[t]he salient question is whether the state of the law gave the
15 defendant fair warning that his alleged treatment of the plaintiff was
16 unconstitutional.” *Id.* at 171 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741
17 (2002)). Ross and Dluginski had such warning: every reasonable
18 officer would have understood that their lineup was unduly likely to
19 result in a misidentification--as the state, having now released
20 Galloway, apparently believes that it did.

21 **2.** The dissent argues that Lipson is entitled to summary
22 judgment on Galloway’s “separate due process claim that Lipson
23 subjected Galloway to impermissibly suggestive identification
24 procedures,” as distinguished from Galloway’s claim premised on
25 *Brady* violations. Dissent at 5. But the district court has already
26 clarified that there is no such freestanding claim against Lipson;
27 Galloway has a single, unitary fair trial claim against Lipson under
28 the Due Process Clause. See *Galloway*, 2024 WL 1345634, at *22; 2024
29 WL 2960532, at *3. As the district court held on reconsideration, “at
30 least one theory of liability applies to each fair trial claim against each
31 County defendant,” so that those claims “survive summary
32 judgment.” 2024 WL 2960532, at *3.

1 3. The dissent argues that the district court erred in denying
2 qualified immunity as to the malicious prosecution claims. *See*
3 Dissent at 11. As we have explained, *see supra* at 4-5, this challenge
4 has been waived for want of briefing. Accordingly, we express no
5 opinion on its merits.

6 For the foregoing reasons, Nassau County's appeal is
7 dismissed. We affirm in all other respects.

MENASHI, *Circuit Judge*, dissenting in part and concurring in part:

Qualified immunity shields a government official from liability for civil damages when his actions did not violate clearly established law. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Even if an official acted unlawfully, liability attaches only if the existing precedent had “placed the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017)). Government officials thus remain free to “perform their duties reasonably,” subject to constraints of which a reasonable person would be aware. *Pearson*, 555 U.S. at 231. In this way, the “immunity protects all but the plainly incompetent or those who knowingly violate the law.” *White*, 580 U.S. at 79 (internal quotation marks omitted). If the applicable law is unclear—or if our precedents have permitted the conduct—we must dismiss the case.

We may entertain an appeal from the denial of qualified immunity only “to the extent that it turns on an issue of law.” *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). So in this case, we appropriately rely on “the facts favorable to the plaintiff that the trial judge concluded the jury might find.” *Salim v. Proulx*, 93 F.3d 86, 90 (2d Cir. 1996). According to the district court, a reasonable jury could find that Detective Lipson told the witnesses—Wilmer Hernandez and Jorge Anyosa—that they selected the “right person” from the photo arrays. And a reasonable jury could find that Detectives Ross and Dluginski used generally permissible lineup procedures to obscure certain differences between Josiah Galloway and Anyosa’s description of the shooter.

We have previously held that such conduct did *not* violate a defendant’s constitutional rights. Furthermore, because under our

precedents these identifications were independently reliable, a reasonable officer would have had arguable probable cause to initiate criminal charges against Galloway. For these reasons, the officers are entitled to qualified immunity on the malicious prosecution claim and on the claim that the officers subjected Galloway to unconstitutionally suggestive identification procedures. Because the majority holds otherwise, I dissent in part. I concur that, at this stage, the officers are not entitled to qualified immunity on the remaining claims.

I

Accepting the facts in the light most favorable to Galloway, Detective Lipson made potentially suggestive remarks to Hernandez and Anyosa. Before Hernandez viewed the photo array, Lipson told him that the police had the shooter in custody. *See Galloway v. County of Nassau*, No. 19-CV-5026, 2024 WL 1345634, at *13 (E.D.N.Y. Mar. 29, 2024). After Hernandez identified Galloway from the array, Lipson or another officer confirmed that Galloway was the right choice. *See id.* Before showing Anyosa the array, Lipson told him that Hernandez had already selected the “right person,” and after Anyosa also identified Galloway as the shooter, Lipson told Anyosa that he made the correct identification. *Id.* at *12-13. The question in this appeal is whether Lipson violated clearly established law by making those comments. He did not.

To violate a defendant’s right to due process, an identification procedure must be “unduly suggestive of the suspect’s guilt.” *Styers v. Smith*, 659 F.2d 293, 297 (2d Cir. 1981). Unduly suggestive procedures “elicit a specific identification” of the defendant by singling him out as the perpetrator. *United States v. Al-Farekh*, 956 F.3d 99, 111 (2d Cir. 2020). In the context of a photo-array identification, we have “rejected” the “contention that agents’ post-selection

confirmatory comments are forbidden” and that such comments render the identification “impermissibly suggestive.” *United States v. Marrero*, 705 F.2d 652, 655 n.5 (2d Cir. 1983). “Indeed,” we have said, “such a rule would be incompatible with other necessary police procedures which indirectly signal a witness that he has selected the person under investigation.” *United States v. Leonardi*, 623 F.2d 746, 755 (2d Cir. 1980). We have also held that a lineup is not unduly suggestive when the police tell the witness that there is a suspect in the lineup. “[A]lthough the police generally should refrain from informing a witness that the suspect is in the lineup, a lineup is not unduly suggestive merely because they do so.” *Jenkins v. City of New York*, 478 F.3d 76, 93 (2d Cir. 2007) (citing *Sales v. Harris*, 675 F.2d 532, 538 (2d Cir. 1982)).

Given this precedent, it is incorrect to conclude that Lipson violated clearly established law. He made remarks during a photo array that we have specifically held do *not* render the identification unduly suggestive. That prior precedent “squarely demonstrates that no clearly established law precluded [the officer’s] conduct at the time in question.” *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014).

The majority implicitly acknowledges the mismatch between our precedent and the denial of qualified immunity in this case; it quotes our earlier decision that “a lineup is not unduly suggestive merely because” police officers tell a witness that a suspect is in custody. *Ante* at 10 (quoting *Jenkins*, 478 F.3d at 93). The majority nevertheless suggests that Lipson violated clearly established law because in two cases we have “disapproved” of such confirmatory remarks. *Id.* at 11. But in both of those cases, we held that the identifications were “*not* so impermissibly suggestive” as to violate a defendant’s rights. *United States v. Moskowitz*, 581 F.2d 14, 20 (2d Cir. 1978) (emphasis added) (internal quotation marks omitted); *see also*

United States v. Thai, 29 F.3d 785, 810 (2d Cir. 1994) (“[S]uch misguided postidentification remarks or actions will not render [the identification] invalid or preclude a subsequent in-court identification.”). These prior holdings—that the identification procedure was legal but inadvisable—do not suffice to defeat Lipson’s defense of qualified immunity. That is especially true because whether an identification was unconstitutionally suggestive depends on several factors. *See Thai*, 29 F.3d at 808. In “an area in which the result depends very much on the facts of each case,” the equivocal opinions on which the majority relies “by no means clearly established that the officer’s conduct violated” the Constitution. *Plumhoff*, 572 U.S. at 779 (internal quotation marks and alterations omitted).

The majority also sidesteps the rule that a suggestive procedure alone does not violate a defendant’s constitutional rights. “It is the likelihood of misidentification which violates a defendant’s right to due process.” *Neil v. Biggers*, 409 U.S. 188, 198 (1972). For that reason, “a suggestive procedure does not in itself intrude upon a constitutionally protected interest if it did not contribute significantly to the identification of the defendant.” *Raheem v. Kelly*, 257 F.3d 122, 135 (2d Cir. 2001). As we have explained, “even an unnecessarily suggestive identification does not violate due process so long as the identification possesses sufficient aspects of reliability.” *Richardson v. Superintendent of Mid-Orange Corr. Facility*, 621 F.3d 196, 204 (2d Cir. 2010) (internal quotation marks omitted). It is not enough to establish a constitutional violation, therefore, for Lipson’s comments to have been unduly suggestive; the witness identifications must also have been unreliable.

The majority does not even address whether Hernandez’s and Anyosa’s identifications were independently reliable. Yet the

reliability of the identifications again shows that neither the photo array nor the lineup violated clearly established law. These witnesses had close confrontations with the shooter. Anyosa remembered the shooter's face well enough that he could assist in creating a composite sketch, and both Anyosa and Hernandez identified the shooter within weeks of the incident. *See Neil*, 409 U.S. at 199-200. In fact, Galloway was ultimately exonerated because the alternative suspect closely resembled the composite sketch and was identified by Anyosa as the shooter *nine years after the shooting*. If the exonerating identification was reliable, then a reasonable officer could have believed the initial identification was reliable too.

Perhaps sensing these problems, the majority declines even to “decide whether [Lipson] violated clearly established law” in conducting the photo array. *Ante* at 11. The court instead concludes that “Lipson’s qualified immunity defense fails in any event because he misled prosecutors.” *Id.* at 12. That is a non sequitur. We must decide whether Lipson has qualified immunity for “each cause of action.” *Drimal v. Tai*, 786 F.3d 219, 226 (2d Cir. 2015) (quoting *Gill v. Monroe Cnty. Dep’t of Soc. Servs.*, 547 F.2d 31, 32 (2d Cir. 1976)). I agree with the majority that Lipson is not entitled to qualified immunity on the claim that he failed to disclose favorable evidence to prosecutors. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992). But Galloway alleged a separate due process claim that Lipson subjected Galloway to impermissibly suggestive identification procedures; the district court said that the suggestive-identification claim plausibly established a constitutional violation such that it is “for a jury to resolve” at trial. *Galloway*, 2024 WL 1345634, at *13; *see also id.* at *22.

The majority insists that Galloway has “a single, unitary fair trial claim against Lipson under the Due Process Clause,” no matter

how many separate “theor[ies] of liability” support that claim, so it does not need to evaluate each theory. *Ante* at 16. That makes no sense. The district court has decided to hold a trial not only about the *Brady* violations but also about the suggestive identification procedures. Because Lipson is entitled to qualified immunity for any claim based on the allegations of unduly suggestive identification procedures, it is incumbent on this court to say that the district court erred by allowing such a claim to proceed to trial.

Given the refusal of the majority to decide the issue one way or the other, it is unclear what will happen when the case proceeds to trial. Should the jury be instructed that the suggestiveness of the procedures could violate § 1983? Or should Galloway be limited to evidence that the prosecutors were misled? The majority does not say. I would provide an answer. I would reverse the judgment of the district court insofar as it denied Lipson qualified immunity on the claim—or, if the majority prefers, the “theory of liability”—that he subjected Galloway to unconstitutionally suggestive identification procedures. I would affirm the judgment insofar as it allowed the *Brady* theory to proceed.

II

When conducting the lineup, Detectives Ross and Dluginski asked Galloway and the fillers to wear hats, sit on chairs, and cover themselves with sheets “so that only their faces were visible.” *Galloway*, 2024 WL 1345634, at *11. Galloway sat on two phone books so that the men in the lineup appeared to be the same height. *See id.* at *4. Allegedly, Ross and Dluginski used these procedures to obscure the fact that Galloway’s height and hair did not match Anyosa’s description of the shooter. *See id.* at *12. The majority claims that these

actions violated clearly established law, but again the precedents have held otherwise.

A

Even the district court recognized that the lineup procedures, standing alone, “were *not* unduly suggestive.” *Id.* at *11 (emphasis added). It did so in reliance on a body of case law holding that a “line-up conducted with men seated, covered in sheets, [and] wearing hats was not unduly suggestive.” *Id.* (citing *Ashby v. Senkowski*, 269 F. Supp. 2d 109, 117 (E.D.N.Y. 2003); *Neree v. Capra*, No. 17-CV-5434, 2020 WL 2098097, at *7-8 (E.D.N.Y. May 1, 2020); *Roldan v. Artuz*, 78 F. Supp. 2d 260, 272-73 & n.9 (S.D.N.Y. 2000); *Solis v. Artus*, No. 09-CV-386, 2012 WL 1252722, at *3 (E.D.N.Y. Apr. 12, 2012); *United States v. Ríos-Orama*, No. 22-CR-174, 2023 WL 7403602, at *4-5 (D.P.R. Nov. 3, 2023)). The district court reasoned that the otherwise-permissible procedures *became* unduly suggestive because the officers “employed these procedures in bad faith.” *Id.* at *11-12.

That is wrong. Whether the procedures were unduly suggestive does not depend on the subjective intent of the officers. It depends on objective features of the identification procedures and whether, in light of those features, the “identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Neil*, 409 U.S. at 197 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). It contradicts our precedents to hold that a procedure that the police may generally employ to produce a reliable identification becomes unconstitutionally suggestive based on the officer’s state of mind.

Our court and the Supreme Court have specifically held that the subjective intent of the officer may *not* be the basis for denying qualified immunity. “[D]etermining whether official conduct was

objectively reasonable ‘requires examination of the information possessed’ by the officials at that time (without consideration of subjective intent).” *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 106 (2d Cir. 2003) (alteration omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). “On the other hand, *we do not consider the subjective intent, motives, or beliefs of the officials.*” *Id.* (emphasis added).

The majority’s analysis does not resolve the contradiction. The majority opinion holds that “[i]t was clearly established that police could not use identification procedures that are unduly suggestive *as to a particular investigation*, even if those same procedures would be textbook in another.” *Ante* at 12. That general assertion merely restates the platitude that the suggestiveness of a procedure depends on the “totality of the surrounding circumstances.” *Thai*, 29 F.3d at 808. But this truism “is far too general a proposition to control this case.” *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015). The Supreme Court has “repeatedly told courts ... not to define clearly established law at a high level of generality.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citation omitted). The majority fails to explain how “existing precedent ... placed the statutory or constitutional question beyond debate” when the only comparable cases have held that these identification procedures are permissible without regard to an officer’s subjective intent. *Id.* at 741.

B

The typical scenario in which a court has held a lineup to be unduly suggestive is when the defendant matches the description of the perpetrator but others in the lineup do not. *See, e.g., Frazier v. New York*, 156 F. App’x 423, 425 (2d Cir. 2005); *Piper v. Portuondo*, 82 F. App’x 51, 52-53 (2d Cir. 2003); *Raheem*, 257 F.3d at 134-36; *United States v. Wong*, 40 F.3d 1347, 1359-60 (2d Cir. 1994) (citing cases); *Foster*

v. California, 394 U.S. 440, 442-43 (1969). In evaluating such a scenario, we have explained that “[t]he critical question is whether a defendant’s appearance made him so stand out from the others in the lineup as to suggest unfairly that he was more likely to be the culprit.” *Piper*, 82 F. App’x at 52 (internal quotation marks and alteration omitted); see *Wong*, 40 F.3d at 1359-60. A lineup is unduly suggestive if it includes “only one person [who] possessed the most salient characteristic described by the victim.” *Frazier*, 156 F. App’x at 425.

Those cases do not apply here. The lineup procedure in this case did not make Galloway stand out as the likely shooter. There was no distinct facial feature of the shooter that Galloway exhibited but the fillers did not. The procedure prevented Anyosa and Hernandez from seeing Galloway’s height, but it also focused the witnesses’ attention on the faces of those in the lineup.

The case law does not prohibit the police from employing a procedure that focuses on facial characteristics. In this case, the shooter’s height “was hardly the single distinctive characteristic in either the witnesses’ descriptions or their lineup identifications.” *Piper*, 82 F. App’x at 52-53. Instead, the most detailed description the police had received of the shooter was of his face; that description was detailed enough for Anyosa to help create a composite sketch of his assailant. Once that feature was isolated, two witnesses independently identified Galloway as the shooter.

We have previously recognized that an eyewitness may not focus on every characteristic of a perpetrator even if he or she can still make a reliable identification. See *Wong*, 40 F.3d at 1360 (concluding that a witness’s identification was reliable even though the defendant “was taller than she remembered”). We have not—until today—held that police officers are prohibited from using a lineup procedure that

focuses on a distinctive feature while obscuring others. The police officers here may have been acting in bad faith. But that subjective intent—absent some future development in the case law—does not affect the qualified immunity analysis. The procedures here did not violate clearly established law for being unduly suggestive.

The majority opinion robotically repeats the general principle that “identification methods bearing a ‘likelihood of misidentification’ of the accused violate due process.” *Ante* at 16. But that incantation cannot alter the specific case law according to which the identification method here was neither likely to result in misidentification nor contrary to due process. Today’s opinion is the first time our court has held that identification procedures focused on facial characteristics are unconstitutionally suggestive. Far from applying clearly established law, the majority opinion announces a new rule and abrogates those decisions that have approved such identification procedures. See *Ashby*, 269 F. Supp. 2d at 117; *Neree*, 2020 WL 2098097, at *7-8; *Roldan*, 78 F. Supp. 2d at 272-73 & n.9; *Solis*, 2012 WL 1252722, at *3.

C

Even if the lineup were unduly suggestive under clearly established law, the majority again fails to consider whether the lineup identifications were independently reliable. But that inquiry is crucial. “It is not enough that the procedure may have in some respects fallen short of the ideal.” *Sexton v. Beaudreaux*, 585 U.S. 961, 966 (2018) (internal quotation marks omitted). A suggestive identification “does not violate due process so long as the identification possesses sufficient aspects of reliability.” *Richardson*, 621 F.3d at 204 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977)).

As explained above, Hernandez's and Anyosa's identifications had strong indicators of reliability.

In denying qualified immunity, the district court held that no reasonable officer could have believed that the identifications of the shooter by Anyosa and Hernandez were reliable. As the district court explained it, "Anyosa and Hernandez had an opportunity to view the criminal at the time of the crime or at least shortly before the shooting when, during the first encounter, the shooter drove up behind Anyosa and Hernandez, started honking, argued with them for a few minutes, and drove away." *Galloway v. County of Nassau*, No. 19-CV-5026, 2024 WL 2960532, at *6 (E.D.N.Y. June 11, 2024) (internal quotation marks and alteration omitted). Then "Anyosa also saw the shooter at 2:00 a.m., when he shot Anyosa in the face." *Id.* at *7. The district court concluded that no reasonable officer could have believed that Anyosa and Hernandez could provide reliable identifications because the "argument lasted only a few minutes, between midnight and 2:00 a.m.," and the later "encounter lasted for a few minutes at most, and the circumstances—getting shot in the face at night—were not conducive to a reliable identification." *Id.* at *6-7.

It is outlandish to think that no reasonable officer would have sought—and relied on—identifications of the shooter from the victim and the eyewitness who had close confrontations with the shooter. Even if the case law clearly prohibited the lineup procedure used here—which it does not—the officers still would be entitled to qualified immunity because the identifications were independently reliable.

III

Given the identifications, the officers are also entitled to qualified immunity on the malicious prosecution claim. "[A]

malicious prosecution claim will be defeated by a showing of probable cause (that is, by a showing of an independently reasonable basis for the deprivation of liberty).” *Barnes v. City of New York*, 68 F.4th 123, 132 (2d Cir. 2023). A “victim’s identification is typically sufficient to provide probable cause.” *Stansbury v. Wertman*, 721 F.3d 84, 90 (2d Cir. 2013). Yet “even when probable cause is lacking,” an “officer’s decision to initiate a prosecution is objectively reasonable if officers of reasonable competence could disagree on whether the probable cause test was met.” *Cornelio v. Connecticut*, 32 F.4th 160, 179 (2d Cir. 2022) (internal quotation marks and alteration omitted). In other words, the officers are entitled to qualified immunity if the identifications provided arguable probable cause.

No clearly established law required the officers to discount the identifications of Galloway by the victim and the eyewitness in this case. It was not clearly established that the identification procedures were unduly suggestive, and it was not clearly established that an identification by a victim of a nighttime shooting was necessarily unreliable. Accordingly, the officers had at least “arguable probable cause to initiate the prosecution,” and that means the officers are entitled to qualified immunity for the malicious prosecution claim. *Id.* There may be evidence of improper motivations, but “an officer cannot be liable for a vexatious motivation as long as she acts with arguable probable cause.” *Id.* at 180.

The majority opinion complains about a “want of briefing” on this issue—as if the majority were otherwise attentive to the briefing. *Ante* at 17. But qualified immunity on the malicious prosecution claim follows directly from the conclusion that the identifications provided arguable probable cause, and that is the central question in this appeal.

* * *

While conducting the photo arrays and the lineup, Lipson, Ross, and Dluginski did not violate clearly established law. Our cases have specifically held that the procedures at issue in this case were not so impermissibly suggestive as to violate Galloway's constitutional rights. That means the district court erred in denying qualified immunity to the officers with respect to the claims of suggestive procedures and malicious prosecution.

At the same time, I agree with the majority that the other claims should proceed. It was clearly established at the time of the officers' actions that they could not coerce a witness into signing a false statement, and they could not withhold favorable evidence about identification procedures from the prosecutors. Because there remain disputed issues of fact about whether the officers did so, they are not entitled to qualified immunity on the *Brady*, fabrication-of-evidence, and failure-to-intervene claims. For these reasons, I dissent in part and concur in part.