No.

IN THE

Supreme Court of the United States

AUGUSTIN TORRES GONZALEZ, PETITIONER

v.

STEVEN HAHL, NEW YORK STATE POLICE INVESTIGATOR, INDIVIDUALLY, A/K/A STEPHEN HAHL; COUNTY OF DELAWARE; AND CYNTHIA L. BOGDAN-CUMPSTON

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. The Panel found arguable probable cause to arrest and prosecute petitioner for the felony of sexual abuse in the first degree under New York law without addressing whether under State law the arresting officer's admitted deviations from state policy and procedure in investigating this offense vitiated any probable cause to arrest petitioner. Does this result square with the Court's jurisprudence that courts *must* look to the "totality of the circumstances" in assessing probable cause and consider those facts available to the officer at the time of the arrest and immediately before it?

2. Where the issue of a police officer's immunity derives from a common core of operative facts so that review of the State law claims for false arrest and malicious prosecution is necessary to insure meaningful review of the same federal claims, was the Panel obligated to exercise its pendent jurisdiction to address whether under State law the arresting officer's admitted deviations from state policy and procedure in investigating this offense vitiated any probable cause to arrest petitioner?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

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The unpublished Summary Order of the United States Court of Appeals for the Second Circuit in *Agustin Torres Gonzalez v. Steven Hahl et al.*, C.A. No. 20-1415, decided June 21, 2021, and reported at 850 Fed. App'x 127 (2nd Cir. 2021), affirming the District Court's grant of summary judgment to respondent Steven Hahl and its dismissal of petitioner's complaint against respondents County of Delaware and Cynthia L. Bogdan-Cumpston on petitioner's claims under 42 U.S.C. §§ 1983 & 1985, for illegal seizure, false arrest and malicious prosecution, is set forth in the Appendix hereto (App. 1-6).

The unpublished Memorandum-Decision and Order of the United States District Court for the Northern District of New York, in *Agustin Torres Gonzalez v. Delaware County et al.*, Civil Action No. 3:17-CV-373 (LEK/DEP), filed December 4, 2017, and reported at 2017 WL 6001823 (N.D.N.Y. 2017), dismissing petitioner's complaint against respondents Delaware County and Cynthia L. Bogdan-Cumpston under federal and State law for illegal seizure, false arrest and malicious prosecution, is set forth in the Appendix hereto (App. 7-34).

The unpublished Memorandum-Decision and Order of the United States District Court for the Northern District of New York, in *Agustin Torres Gonzalez v. Steven Hahl*, Civil Action No. 3:17-CV-373 (NAM/ML), filed March 31, 2020, and reported at 2020 WL 1530741 (N.D.N.Y. 2020), granting respondent Steven Hahl's motion for summary judgment on petitioner's complaint against him for false arrest and

malicious prosecution, is set forth in the Appendix hereto (App. 35-61).

The unpublished order of the United States Court of Appeals for the Second Circuit in *Augustin Torres Gonzalez v. Steven Hahl et al.*, C.A. No. 20-1415, filed on August 13, 2021, denying petitioner's timely filed petition for rehearing or, in the alternative, for rehearing *en banc*, is set forth in the Appendix hereto (App. 62).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit affirming the District Court's grant of summary judgment to respondent Steven Hahl and its dismissal of petitioner's complaint against respondents County of Delaware and Cynthia L. Bogdan-Cumpston, was entered on June 21, 2021; and its order denying petitioners' timely filed petition for rehearing or, in the alternative, for rehearing *en banc*, was filed on August 13, 2021 (App. 1-6;62).

This petition for writ of certiorari is filed within ninety (90) days of August 13, 2021, the date the court of appeals denied petitioners' timely filed petition for rehearing or, in the alternative, for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment XIV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331 (federal question jurisdiction):

The district courts shall have original jurisdiction of all civil actions arising under the

Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(4) (civil rights jurisdiction):

(a) The district courts shall have original jurisdiction of any civil

action authorized by law to be commenced by any person:

...

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1367(a) (supplemental jurisdiction):

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Civil Rights Act–42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

NY Const art I § 12:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Penal Law § 130.00(3):

"Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

New York Penal Law § 130.65:

Sexual abuse in the first degree

A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact:

1. By forcible compulsion; or
2. When the other person is incapable of consent by reason of being physically helpless; or
3. When the other person is less than eleven years old; or
4. When the other person is less than thirteen years old and the actor is twenty-one years old or older.

Sexual abuse in the first degree is a class D felony.

STATEMENT

In December of 2015, petitioner Agustin Torres Gonzalez ("petitioner") was thirty-eight years old and sharing a home in Fleischmanns, New York, with his extended family which included his sister Cirila, her six-year-old daughter, I.T. (" I.T." or "the child") and I.T.'s older brother. Petitioner, Cirila and her children shared the first floor of a duplex where petitioner had his own bedroom. The family speaks Spanish at home; while I.T. is bilingual, petitioner speaks only limited English but "well enough to get around" (App. 8).

I.T. attended first grade at Margaretville Central School. On the morning of December 17, 2015, school officials received an anonymous report that I.T.'s brother, a nine-year-old, had hit I.T. at home while Cirila was not there. I.T. was brought to the school's guidance counselor, Nancy Millen, who interviewed I.T. without following recommended procedures and without seeking her mother's consent. After the interview, Millen contacted the Delaware County Department of Social Services ("DSS") and reported that I.T. was "a child being left alone" (App. 9).

Respondent Cynthia L. Bogdan-Cumpston ("respondent" or "Cumpston"), a caseworker employed by the County's DSS's Child Protective Services unit, interviewed I.T. that day. Like Millen, Cumpston did not follow recommended protocol while questioning I.T. In fact, Cumpston was untrained to conduct a reliable and trustworthy forensic child abuse interview. Even though I.T. denied that her older brother had hit her, Cumpston did not end the interview but instead continued questioning the child about unrelated subjects such as the use of alcohol or drugs at home, any family misbehavior issues, and whether anyone had touched her "private parts" (9;36).

I.T. responded to Cumpston's last inquiry by stating that petitioner, her uncle, had touched her private parts while she and petitioner were at home; that he did not ask her to touch his private parts; and that he no longer touched her private parts. However, she would not be more specific about what "private parts" petitioner touched, refusing to use the anatomical puppets supplied by Cumpston to show where the touching took place. Remarkably, Cumpston

made no effort to rule out alternate reasons for the alleged touching, i.e., whether it was non-sexual in nature, especially because conduct is evaluated differently if the actor, as here, is a relative or family member where the necessary element of sexual gratification is not as readily inferred as with a non-relative.

After her interview, Cumpston contacted her supervisor who told her to call the New York State Police ("NYSP") to see "if they would like to do the investigation along with [Cumpston]" (App. 37-38). Respondent Steven Hahl ("respondent" or "Hahl"), an NYSP Senior Investigator, came to the school along with Investigator Brian Dengler ("Dengler"). Hahl had completed his mandatory training for conducting child forensic interviews and knew that Cumpston was untrained in conducting such interviews or in the use of anatomical puppets. Together with Cumpston, Hahl interviewed I.T. for a second time because he had to re-confirm personally I.T.'s alleged statements. This time, I.T. denied that petitioner had ever touched her private parts by shaking her head negatively (App. 9-10;38). As Hahl wrote in his incident report, he received "negative results for touching" from I.T. and he abandoned any further efforts to speak with her.

At this point, neither Cumpston nor Hahl had sought or elicited any information from I.T. of alternate, non-sexual reasons for any touching. Nor did I.T. give any information that petitioner was acting in pursuit of his own sexual gratification, a necessary element of the offense of sexual abuse under New York law. That petitioner was I.T.'s uncle and that there may have been a non-sexual explanation for any touching was

ignored by both Cumpston and Hahl in their questioning. This "investigation" could have justifiably ended there.

Cumpston, however, decided to conduct a *third* interview of I.T. alone with no simultaneous note-taker, no audio or visual recording, no safeguards to ensure a culturally competent interview in Spanish, I.T.'s primary home language, and again with no attempt to exclude alternate reasons for any touching by a family member, or to establish that any touching was for sexual gratification. According to Cumpston, I.T. stated during this third interview that petitioner "touched her private part[s] on more than one time" (App. 10;38). When Cumpston asked what private parts petitioner touched, I.T. indicated that he touched her groin area; that she told her uncle to stop but he said no and kept touching her private parts; and that he touched her "on the outside of her pants" (*Id.*).

Hahl, Dengler and Cumpston then visited petitioner's home for a "safety visit" and found nothing unacceptable. Hahl asked petitioner to come to the police barracks to discuss whether Cirila had left I.T. and her older brother alone in the home. Petitioner agreed to this request and drove to the barracks alone in his own vehicle. Once there, petitioner was not offered the aid of an interpreter; and when Hahl first read petitioner his *Miranda* warnings before any questioning, he did not inform him that the subject of this interview was *not* the issue of I.T. being left home alone but rather the allegation that petitioner had touched I.T. inappropriately. The videotaped interview was conducted in a windowless room with Hahl, armed with a gun, sitting by the door.

Once confronted by Hahl with this new issue of inappropriate touching, petitioner denied the allegation stating that "I'm not the kind of person to do that kind of stuff with kids because...we teach kids good stuff" (App. 39). Amid some confusion caused by petitioner's inability to understand in English the nature of "inappropriate" touching as explained by Hahl, petitioner did describe a situation where I.T. was sitting on his lap while he worked on the computer and that to prevent her from falling off, he accidentally "tried to hold her, you know, in order [for her] not [to fall]," and he touched her leg (App. 10;39). I.T. told him to stop touching her at which point petitioner replied that "I was trying to hold you and I'm sorry" (App. 39). Petitioner further responded that he did not remember when this occurred but that it did not happen often, only "once in a while" (*Id.*).

Hahl inquired whether petitioner had ever touched I.T. in her groin area; and petitioner responded that he never touched her in that area because "it's against my own rules" (App. 40). When asked how many times he had touched I.T. "where it could have been inappropriate," petitioner replied "[a] few because basically most of the time...she feels like she needs a father, as well as she sees me as a father figure" (*Id.*). Petitioner then stated that he did not see how this accidental touching was inappropriate "because we pretty much not doing anything and not even grabbing, or rubbing or stuff like that" (*Id.*). He denied again ever touching I.T. inappropriately and he further denied any sexual interest or gratification from touching I.T. (*Id.*). Yet again, Hahl failed in his questioning to rule out any alternate, non-sexual reasons for the touching, especially between family members.

Based on Cumpston's interview of I.T. and his interview of petitioner, Hahl concluded that probable cause existed to arrest petitioner for the felony of sexual abuse in the first degree in violation of New York Penal Law § 130.65 (App. 40-41). He contacted Delaware County Chief Assistant District Attorney John Hubbard ("Hubbard") and told him just enough to ensure that Hubbard would advise him to arrest petitioner. That is, Hahl told Hubbard only that Cumpston reported that I.T. said she was touched "on more than one occasion in a private area;" and that petitioner had "confirmed that inappropriate touching occurred, but stated that the touching was accidental and that he apologized to I.T." (App. 41). With this incomplete information, Hubbard told Hahl there was probable cause to arrest petitioner (*Id.*).

But Hahl *omitted* salient facts which would have negated probable cause: that he (Hahl) had failed to complete his own forensic interview of I.T. or to obtain direct allegations of abuse from this child; that even though he had obtained "negative results" of touching from his own interview of I.T., he allowed Cumpston,, unqualified and untrained to conduct such an interview, to undertake a *third* interview of I.T.; that he lied to petitioner in order to have him submit to questioning at the barracks; that he was unclear in explaining to petitioner in English what "inappropriate" means; that Cumpston was untrained in child forensic interviewing or in using anatomical puppets in her interviews of I.T.; that I.T. was bilingual with a home language of Spanish; that his own incident report contains the inflammatory term "vaginal area" to describe the "private area" petitioner allegedly touched when petitioner never used this term and consistently denied any

inappropriate touching of that area; that neither he nor Cumpston in their questioning of I.T. ruled out any alternate, non-sexual reasons for the touching, especially between family members; and that his interview of petitioner did not produce any proof that he was acting in pursuit of his own sexual gratification, a necessary element of the offense of sexual abuse in the first degree.

On December 17, 2015, Hahl arrested petitioner and filed a complaint against him in the Town of Middletown charging him with sexual abuse in the first degree. Petitioner was released on bail six hours later and ordered to stay away from I.T., Cirila and I.T.'s brother, forcing him to leave his home and have no contact with his family or I.T. for most of the next year (App.10). He was arraigned on December 23, 2015, and he subsequently appeared in town court twice for hearings (App. 41). On September 21, 2016, Hubbard declined to proceed with the case against petitioner and the Town Justice thereupon dismissed all charges against him (App. 11;42).

On March 17, 2017, petitioner began this civil action in New York Supreme Court, Delaware County, against Hahl, Dengler, Cumpston, and respondent Delaware County ("respondent" or "the County") as well as other school district and state defendants for violating his federal and state constitutional rights when they improperly and repeatedly interviewed I.T, his six-year-old niece, before arresting him for the felony of sexual abuse in the first degree. He charged the defendants with violating not only New York law but also 42 U.S.C. §§ 1983 & 1985, when they subjected him to an illegal seizure, false arrest and malicious

prosecution. Petitioner also filed a separate claim against the State of New York in the Court of Claims for malicious prosecution (*T.G. v. State of New York*, Claim No. 130397). On April 4, 2017, the defendants cited petitioner's allegations which invoked original federal jurisdiction and removed this State case to the federal district court for the Northern District of New York pursuant to 28 U.S.C. § 1446.

On May 11, 2017, in three separate motions, the school district, County and state defendants all moved to dismiss petitioner's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim (App. 8). Petitioner opposed the motions and cross moved to file an amended complaint (*Id.*). On December 4, 2017, the district court, Kahn, J., issued a Memorandum-Decision and Order on these pending motions (App. 7-34).

He ruled that the existence of probable cause is a complete defense to a claim of false arrest but at this stage, petitioner's amended complaint alleged sufficient facts to suggest that "neither I.T.'s statements to...Cumpston [on their own] nor [petitioner's] disputed statements to [Hahl and Dengler] provide, necessarily, a reasonable basis for believing that [petitioner] committed sexual abuse in the first degree" (App. 14;16-17;18-19). As he wrote, "'[u]nder no circumstances would the accidental touching of another person's leg on a single occasion constitute sexual abuse in the first degree" (App. 19). The motion judge accordingly refused to dismiss this claim of false arrest against either Hahl or Dengler (App. 21). However, their request for petitioner to answer questions at the police barracks did not amount to an unlawful seizure (App. 25-26).

As for Cumpston, petitioner alleged that her negligent and reckless interviews of I.T. violated the letter and spirit of New York State Social Services Law as well as the professional standards of DSS caseworkers by (1) not using an interpreter; (2) failing to use as a venue for the interview a Child Advocacy Center where a proper forensic interview could be had; (3) asking questions while simultaneously taking notes; (4) failing to audiotape or videotape the interview; (5) using anatomical puppets; and (6) interviewing I.T. multiple times (App. 23). Judge Kahn determined that none of these failures by Cumpston resulted in providing Hahl and Dengler with false information which demonstrates an intent on her part to confine petitioner which is necessary for a false arrest claim (App. 23-24). Nor was Nancy Millen, the school's guidance counselor liable for this claim (App. 25).

As for the claim of malicious prosecution against Hahl and Dengler, the amended complaint alleged sufficient facts, especially Hahl's transmission of allegedly false information to Hubbard about petitioner's "false confession," to survive this motion to dismiss (App. 27-29). However, there were insufficient facts to sustain this claim against either Cumpston or Millen (App. 29). Nor were there sufficient facts alleged to infer from "a disregard of proper procedure" by Hahl, Dengler, Cumpston and/or Millen in conducting their interviews of I.T. a conspiracy to inflict constitutional injury in violation of 42 U.S.C. § 1985 (App. 29-30). Finally, the district judge ruled that petitioner had insufficiently alleged *Monell* claims; that his claims under New York law for false arrest and malicious prosecution survived to the same extent as those under federal law; and that petitioner's amended

complaint be accepted for filing (App. 30-32). With all claims against Cumpston and the County dismissed, Hahl and Dengler remained the only defendants subject to petitioner's amended complaint alleging false arrest and malicious prosecution under both federal and state law.

The ensuing discovery, lasting eighteen months, focused on Cumpston's serial interviews of I.T., Hahl's interview of petitioner, and Hahl's subsequent conversation with Hubbard about prosecuting petitioner. Petitioner obtained the deposition testimony of Cumpston, Millen, Hahl and Dengler (with Dengler being voluntarily dismissed from the suit). In addition, petitioner obtained the expert evidence of Michele Greenburg who helped draft the state-wide child forensic interviewing curriculum which she now teaches to social workers and State Police investigating personnel. She reviewed I.T.'s summary interview notes as well as the official NYSP incident report; and she attended Cumpston's deposition.

Greenburg's expert report concluded that Cumpston's flawed interviews of I.T. along with Hahl's superintendence of same together with his failure to conduct his own interview, were so deficient in reliability and trustworthiness as to be a complete "failure." She opined that Hahl should not have relied on Cumpston's "deficient interview" and should have informed Hubbard of same before seeking his consent to arrest petitioner. In her opinion, both Hahl and Cumpston violated the basic tenets of child forensic interviewing.

Petitioner also obtained the deposition evidence of NYSP's Senior Investigator Joshua Kean about the state-wide protocols entitled "Best Practices—Forensic Interviewing" which are part of NYSP's mandatory training. He testified about these mandatory policies, guidelines, and operating procedures related to child forensic interviewing, standards binding on the NYSP and Hahl, and how Cumpston's serial interviews of I.T. fell short of those standards. Specifically, he testified that Hahl or any NYSP investigator who relied on a third party who is untrained in the use of anatomical dolls/puppets, as Hahl knew Cumpston to be, "deviated" from the training and procedures of the NYSP.

Hahl, the remaining defendant, moved for summary judgment on petitioner's claims for false arrest and malicious prosecution under both federal and state law. Petitioner opposed the motion by adducing petitioner's own affidavit, Greenburg's affidavit and expert opinion, and the deposition testimony of Joshua Kean. The sum and substance of these opposition materials was that *no* reasonable NYSP investigator would conduct a child forensic interview in the manner conducted here and that *no* police officer anywhere else would ever approve of Hahl's investigation as being based on reliable or trustworthy information.

On March 31, 2020, the federal district court, Mordue, J., issued a Memorandum-Decision and Order granting Hahl's motion, dismissing petitioner's complaint and denying as moot petitioner's motion to further amend his amended complaint (App. 35-61). He determined that under New York law, any confinement must be "otherwise privileged"---- or supported by

probable cause----in order to forestall recovery under § 1983 for false arrest (App. 44-45;47). Assessing the totality of circumstances, he concluded that Hahl had sufficient facts available to him at the time of the arrest to support his determination that petitioner had committed a crime and that any breakdown in proper protocol for interviewing I.T. did not alter that conclusion (App. 48-49;60-61). As the motion judge saw it, regardless of Cumpston's failure to adhere to proper procedures for interviewing this child or Hahl's failure to interview I.T. himself, there was no indication that I.T. was induced to allege that petitioner touched her inappropriately or that any language barrier affected her allegation (App.48-50).

In addition, Hahl's interview of petitioner at the police barracks confirmed that the touching occurred more than once; that it took place on a couch; that it could be considered inappropriate; and that I.T. told petitioner to stop touching her (App. 50-51). Nor did the district court regard as believable petitioner's claim that the touching was accidental since an innocent explanation does not negate probable cause (App. 50). Petitioner's other statements could also raise the inference that he touched I.T. for his own sexual gratification (App. 51). All of this led the district court to conclude as a matter of law that there was probable cause to arrest petitioner for sexual abuse (App. 52).

Judge Mordue also rejected petitioner's claim of malicious prosecution because probable cause existed to support Hahl's arrest in the first place (App. 53). That Hahl sought to interview I.T. again during the course of the prosecution in order to confirm her earlier abuse allegations did not indicate any "dissipating" probable

cause in the absence of intervening facts or exculpatory evidence prompting that conduct; and I.T.'s unimpaired prior statements nevertheless still supported probable cause to arrest and prosecute petitioner (App. 53-55). Even if Hahl failed to employ best practices in conducting this investigation, it did not show a reckless disregard of petitioner's rights (App. 56). Finally, assuming that Hahl lacked probable cause to arrest petitioner for sexual abuse, the district judge ruled that he nonetheless had "arguable probable cause" to do so thereby entitling him to assert a claim of qualified immunity from petitioner's § 1983 claims (App. 56;58-59).

Petitioner appealed this summary judgment ruling as well as the district court's earlier dismissal of his complaint against the County and Cumpston. On June 21, 2021, a Panel of the Second Circuit unanimously affirmed both rulings (App. 1-6).

It first ruled that "[w]e need not here decide whether [petitioner's] arrest was supported by probable cause because even if it was not, we conclude that arguable probable cause supported qualified immunity and, therefore, the award of summary judgment to Hahl" (App. 3-4). Given I.T.'s statements to Cumpston over the course of two interviews "that [petitioner] had touched her crotch while they were alone at home together" and that petitioner had told Hahl that he had probably incidentally touched I.T. in an inappropriate area a few times but without having sexual or improper intent, "we cannot conclude that no reasonable police officer could think probable cause supported his arrest," thereby creating arguable probable cause to support petitioner's arrest and

prosecution (App. 4). The Panel failed to address petitioner's pendent claims under New York law that respondents Hahl and Cumpston had deviated substantially from their training and established protocol in conducting their forensic interview of I.T.

It also affirmed the earlier dismissal of petitioner's claims against the County and Cumpston for false arrest and malicious prosecution (App. 5-6). Again without addressing the pendent state claims for Cumpston's breaches of established NYSP protocol for child forensic interviewing, the Panel decided that petitioner's complaint did not plausibly allege that she "took an active role" in his arrest or his prosecution such as giving advice and encouragement or importuning the authorities to act (App. 5). "She merely reported a possible crime to the authorities based on I.T.'s statements to her and played no role in the subsequent investigation or charging decision" (App. 5-6).

On August 13, 2021, the Panel denied petitioner's timely petition for rehearing or, in the alternative, for rehearing *en banc* (App. 62).

REASONS FOR GRANTING THE PETITION

The Panel Fundamentally Mishandled This Court's Probable Cause Jurisprudence (1) By Finding Arguable Probable Cause To Support Petitioner's Arrest And Prosecution Where There Was None On This Record And (2) By Refusing To Exercise It Pendent Jurisdiction To Address Whether Under State Law Respondent's Egregious Deviation From NYSP's Protocol And Procedures In Conducting This Child Forensic Interview Produced Evidence So Unreliable That It Vitiated Any Probable Cause To Arrest and Prosecute Petitioner.

Under New York law, the results of a child forensic interview addressing sexual abuse must be both reliable and trustworthy. Before law enforcement can rely on such out-of-court hearsay statements made by a child to others during such interviews, this information *must* be corroborated. *Schenectady Cnty. Dep't of Soc. Servs. v. Ronald I (In re Isabella I.)*, 180 A.D.3d 1259, 1261 (3rd Dept. 2020) citing Family Ct. Act § 1046[a][vi]; *In re A.G.*, 253 A.D.2d 318, 325 (1st Dept. 1999). Evidence tending to support reliability include medical indications of abuse, expert validation testimony, cross-corroboration by another child's similar statements, marked changes in a child's behavior, or sexual behavior or knowledge beyond a child's years. *Id.* See *Matter of Lee—Ann W. [James U.]*, 151 A.D.3d 1288, 1292 (3rd Dept. 2017).

Petitioner's adduced in opposition to summary judgment the expert evidence of Michele Greenburg who helped draft the state-wide child forensic

interviewing curriculum which she now teaches to social workers and State Police investigating personnel. He also brought forward the uncontradicted deposition testimony of NYSP's Senior Investigator Joshua Kean about the state-wide protocols entitled "Best Practices—Forensic Interviewing" which are part of NYSP's mandatory training, a discipline of behavior which is binding on all NYSP personnel, including Hahl who is certified as trained in these protocols and procedures.

These materials showed that to ensure that its investigators hew to these requirements for reliability and trustworthiness of child forensic interviews, NYSP has instituted mandatory----*not* precatory or elective---- state-wide protocols for its investigators like Hahl which consist of policies, guidelines, and operating procedures related to child forensic interviewing which foster reliability and are binding on every NYSP investigator, including Hahl.

These operating procedures obligated Hahl as a trained Senior Investigator to *not* rely on a third party to conduct the interview like Cumpston who is untrained in child forensic interviewing or in using anatomical puppets; to instead conduct the interview of I.T. himself in order to obtain direct allegations of abuse; to make an audio or visual recording of the interview; to avoid simultaneous note taking; to accommodate the child's primary home language of Spanish; to rule out any alternate, non-sexual reasons for the touching, especially when family members are involved; and to seek proof that petitioner was acting in pursuit of his own sexual gratification, a necessary element of the offense of sexual abuse in the first

degree. See *In re A.G.*, *supra*, 253 A.D.2d at 326 ("to qualify as sexual conduct for purposes of Penal Law § 130.65 and Family Court Act § 1012(e)(iii), the touching must be for the purpose of gratifying sexual desire.") (citations omitted). *People v. Brown*, 114 A.D.3d 1017, 1018 (3rd Dept. 2014) (inference of sexual gratification may be drawn from intimate contact with a child to whom he or she is *not* related).

Hahl, however, employed *none* of these safeguards required by NYSP policy and procedure. After his own interview of I.T. produced negative results for touching, he abandoned any further efforts to speak with her; and his investigation could have ended there. But contrary to his training and operating procedures, he allowed Cumpston who is untrained in the use of anatomical puppets to interview I.T. for the *third* time and then relied on its results to further investigate petitioner. As petitioner's expert (Greenburg) opined, Cumpston's interviews of I.T. violated the basic tenets of child forensic interviewing and were so deficient in reliability and trustworthiness as to be a complete "failure." Senior Investigator Kean concurred. He thought that Hahl's reliance on Cumpston's interview egregiously "deviated" from his training and NYSP's mandatory procedures.

Hahl's ensuing interrogation of petitioner failed to produce the corroboration necessary to cause any "reasonable suspicion" he may have had based on Cumpston's unreliable interviews to mature into probable cause of wrongdoing necessary to support a full-fledged arrest of petitioner. He deceived petitioner about the reason the reason for the interview; he did not offer him an interpreter; and he conducted the

"interview" in a windowless room while armed with a gun, sitting by the door. Petitioner repeatedly denied that he had ever "inappropriately" touched I.T. except for a few times when he accidentally *touched her leg* and then apologized; he also denied or that he had ever done so for sexual gratification. Yet Hahl simply refused to believe him, ignored the absence of a sexual gratification element of the offense, and never considered the potentially exculpatory fact that there were alternate, non-sexual explanations for the touching, especially between family members.

Having formed the intent to arrest petitioner for sexual abuse in the first degree, Hahl's blatant deviation from his training and NYSP's mandatory procedures was highlighted by his refusal to inform Hubbard of *any* of these deficiencies in protocol which negated probable cause when seeking Hubbard's approval to arrest petitioner. Instead, he told Hubbard only that Cumpston reported that I.T. said she was touched "on more than one occasion in a private area;" and that petitioner had "confirmed that inappropriate touching occurred, but stated that the touching was accidental and that he apologized to I.T.," without mentioning that petitioner had *never* confirmed that inappropriate touching of I.T.'s "private area" had taken place, only the touching of her leg (App. 41). In fact, Hahl's own incident report irresponsibly contains the inflammatory term "vaginal area" to describe the "private area" petitioner allegedly touched when petitioner *never* used this term and consistently denied any inappropriate touching of that area.

Without the required corroboration of I.T.'s inherently unreliable statements, without

accommodating any of petitioner's exculpatory non-sexual explanations for the touching as well as his repeated denials of any wrongdoing at all, and without any proof that petitioner had touched I.T. for his own sexual gratification----all of these omissions at odds with NYSP's established protocols for conducting child forensic interviews and child abuse investigations----a reasonable jury could find consistent with Greenburg's uncontradicted opinion and Kean's unrebutted testimony that Hahl's arrest of petitioner was an egregious or "drastic" breach of NYSP's policies and procedures promulgated to insure reliability and trustworthiness which vitiates any probable cause to justify the arrest. *Schenectady Cnty. Dep't of Soc. Servs. v. Ronald I (In re Isabella I.)*, 180 A.D.3d at 1261. *Zahrey v. City of New York*, 2009 WL 54495 at *9 (S.D.N.Y. 2009) (probable cause overcome by egregious deviation from police procedure). *Haynes v. City of New York*, 29 A.D.3d 521, 523 (2d Dept. 2006) ("drastic deviation" from police procedures vitiates any probable cause to support arrest and prosecution). *Hernandez v. State*, 228 A.D.2d 902, 904 (3rd Dept. 1996) (probable cause "overcome"). See *Ferreira v. City of Binghamton*, 975 F.3d 255, 274 (2d Cir. 2020) (City's violation of police practices destroys its claim of immunity).

Yet the Panel's decision ignored all this evidence developed by petitioner on summary judgment showing that Cumpston's serial interviews of I.T. were both unreliable and untrustworthy and that Hahl grossly deviated from NYSP's policies and procedures by abandoning his own interview of I.T. in favor of Cumpston's inherently unreliable interviews to continue the investigation and arrest petitioner. Under New York law, Hahl had egregiously failed to follow

protocol and nothing he elicited from his interview with petitioner cured his failure to obtain reliable and trustworthy evidence of sexual abuse from I.T. in the first instance. There was no inculpatory corroboration of I.T.'s statements and no honest assessment of petitioner's exculpatory non-sexual explanations for the touching or his repeated denials of wrongdoing.

The Panel compounded this error by concluding that it did not have to decide whether probable cause existed for petitioner's arrest because even if it did not exist, there was "arguable probable cause" to support the arrest and Hahl's claim of qualified immunity. That is, according to the Panel, even if Hahl mistakenly concluded that probable cause existed, "we cannot conclude that no reasonable police officer could think probable cause supported arrest" (App. 4).

Petitioner submits that by overlooking substantial parts of the summary judgment record showing that Hahl had so blatantly deviated from protocol and procedure that under New York law it vitiated any probable cause to arrest him----i.e., by ignoring the totality of the circumstances attendant to any reasonable assessment of arguable probable cause-----and then by supposing that on this prejudicially truncated record it could not conclude that no police officer would think probable cause existed, it fundamentally mishandled this Court's "arguable probable cause" standard. When properly applied to include the totality of the circumstances and when viewed in the light most favorable to petitioner, the summary judgment materials allowed a reasonable jury to find that no objectively reasonable police officer could believe in these circumstances that there was

probable cause to arrest and prosecute petitioner for the offense of sexual abuse in the first degree.

By finding arguable probable cause on this record where there was none on this record and by refusing to exercise its pendent jurisdiction to address whether under New York law Hahl's egregious deviation from NYSP's protocol and procedures in conducting the child forensic interview produced evidence which was reliable enough to arrest and prosecute petitioner , the Panel's decision is at odds with this Court's arguable probable cause jurisprudence as well as the Panel's own obligation to exercise its pendent jurisdiction to address and resolve petitioner's claims under New York law which his amended complaint rightly invoked.

The Court should grant certiorari, clarify the Panel's error in failing to accommodate the totality of the circumstances in its arguable probable cause analysis, reverse the judgment below, and remand the matter to the district court for a trial on the merits of petitioner's claims against respondents Hahl, Cumpston and the County for false arrest and malicious prosecution.

The Panel's "Arguable Probable Cause" Ruling.

This Court's definition of probable cause to arrest, like NYSP's policies and procedures about child forensic interviews, is bottomed on notions of reliability and trustworthiness. Probable cause to arrest exists when the police officer has "knowledge or *reasonably trustworthy information* sufficient to warrant a person of reasonable caution in the belief that an offense has

been committed by the person to be arrested." *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979) (emphasis supplied). The relevant question "is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the officer's conduct] to be lawful, in light of clearly established law and the information the...[the] officer[] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The right not to be arrested or prosecuted without probable cause "has, of course, long been a clearly established constitutional right." *Golino v. City of New Haven*, 950 F.2d 864, 870 (2nd Cir. 1991).

Even when probable cause does not exist, an arresting officer like Hahl may still be entitled to qualified immunity from a suit for damages on claims for false arrest or malicious prosecution if he can establish that "arguable probable cause" exists. Such arguable probable cause is present if either (1) it was objectively reasonable for the officer to believe that probable cause existed; or (2) officers of reasonable competence could disagree on whether the probable cause test was met. As the *Anderson* Court recognized, "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials...should not be held personally liable." 483 U.S. at 641 citing *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986).

While the "arguable probable cause" test has been characterized as more favorable to police officers than the one for probable cause, *Ackerson v. City of White Plains*, 702 F.3d 15, 21 (2nd Cir. 2012) quoting *Escalera v. Lunn*, 361 F.3d 737, 743 (2nd Cir. 2004), the

court in *Ackerson* made clear that the test is not "toothless" because "[i]f officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close will not immunize the officer." *Id.* quoting *Jenkins v. City of New York*, 478 F.3d 76, 87 (2nd Cir. 2007). Accord, *Malley*, 475 U.S. at 341 ("Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue....").

In *Jenkins*, the court made the further point that "arguable" probable cause should not be misunderstood to mean "almost" probable cause; and that the essential inquiry in determining whether qualified immunity is available to an officer accused of false arrest is whether it was objectively reasonable for the officer to conclude that probable cause existed; and there "should be no doubt that probable cause remains the relevant standard."478 F.3d at 87.

Just as important, in deciding whether either probable cause or arguable probable cause exists to make an arrest, courts *must* look to the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 233 (1983). In considering the totality of the circumstances, courts must be aware that "probable cause is a fluid concept----turning on the assessment of probabilities in particular factual contexts----not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. In addition, courts "must consider those facts available to the officer at the time of the arrest and immediately before it." *Anderson*, 483 U.S. at 641. See *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

In the fact-specific context of this case and viewed in the light most favorable to petitioner, the party opposing Hahl's summary judgment motion, the "totality of the circumstances" included the facts that Hahl employed none of the required procedural safeguards to Cumpston's untrained and unsupervised forensic interviews of I.T. in order to ensure that its results were reliable. He abandoned his own forensic interview after receiving a negative response by I.T. to the touching allegation; and he then relied on the results of Cumpston's *third* interview to investigate petitioner. According to petitioner's proof, Hahl's reliance on Cumpston's interviews egregiously "deviated" from his training and NYSP's mandatory procedures and violated basic tenets of child forensic interviewing, rendering them a complete "failure." Hahl's subsequent interview of petitioner produced no inculpatory corroboration and no honest assessment of petitioner's exculpatory non-sexual explanations for the touching or his repeated denials of wrongdoing. The sum and substance of petitioner's opposition materials, never addressed by the Panel, thus showed that *no* reasonable NYSP investigator would conduct a child forensic interview in the manner conducted here and that *no* police officer anywhere else would ever approve of Hahl's investigation as being based on reliable or trustworthy information.

Yet the Panel failed to include any of these facts in its assessment of arguable probable cause and by ignoring this crucial evidence, it failed to consider the totality of the circumstances attendant to judging whether Hahl possessed probable cause to arrest petitioner on December 17, 2015. Petitioner submits that by overlooking substantial parts of the summary

judgment record showing that Hahl had so blatantly deviated from protocol and procedure that under New York law it vitiated any probable cause to arrest him----i.e., by ignoring the totality of the circumstances attendant to any reasonable assessment of probable cause----and then by supposing that on this prejudicially truncated record it could not conclude that no police officer would think probable cause existed, it fundamentally mishandled this Court's "arguable probable cause" standard.

When read in its entirety, this summary judgment record would allow a reasonable jury conclude that *no* reasonably competent NYSP officer, trained as he was in the proper procedures and policies in investigating child abuse, would rely on Cumpston's flawed interviews of I.T., abandon his own direct interview of the child which negated any touching, and then use information from the flawed interviews to arrest petitioner while, at the same time, ignoring his denials of wrongdoing, the non-sexual nature of the touching and his disavowal of seeking any sexual gratification for same. *In re A.G.*, *supra*, 253 A.D.2d at 326 ("the consideration of whether the contact was for sexual gratification *must* take into account the nature and circumstances of the act, since the same conduct which constitutes an act of sexual abuse by a stranger could be a mere expression of affection on the part of a parent [or parent figure, like petitioner]") (emphasis supplied). *Greve v. Bass*, 805 Fed. App'x 336, 345;352 (6th Cir. 2020) (a probable cause determination must be founded on *both* inculpatory *and* exculpatory evidence known to the arresting police officer and he "cannot simply turn a blind eye toward potentially exculpatory evidence.").

Because a jury could find from this evidence, unmet by respondents on summary judgment, that *no* reasonably competent NYSP officer would have arrested petitioner in these circumstances, the Panel should have concluded that Hahl had no "arguable probable cause" to arrest and prosecute petitioner or, in the alternative, that it was a jury question on this summary judgment record whether under New York law Hahl acted as a reasonably competent NYSP Investigator in the totality of the circumstances in arresting petitioner.

The Panel's Refusal To Address Pendent State Law Claims.

The Panel failed to reach this conclusion because it refused to exercise pendent jurisdiction to address petitioner's claims of the violations of police procedure under New York law which his amended complaint rightly invoked. Those State claims, buttressed by petitioner's opposition materials including Greenburg's uncontradicted expert opinion and Kean's unrebutted deposition testimony, should have been addressed and resolved by the Panel in deciding *de novo* this summary judgment motion. Had it done so, it would have been obligated to harmonize Hahl's conduct with NYSP's established protocol and policies in deciding whether there were triable fact issues for a jury.

By failing to do so, the Panel not only avoided identifying the genuine issues of material fact created by Hahl's serial violations of NYSP protocol and policies in arresting and prosecuting petitioner but also wrongly refused to exercise its pendent jurisdiction under 28 U.S.C. § 1367(a) to decide these state law

claims legitimately before it. A federal court may decline to decide issues which are neither "inextricably intertwined" nor "necessary to ensure meaningful review" of the qualified immunity question. But when the issue of Hahl's immunity "derive[s] from a common nucleus of operative fact" so that review of the State law claims is necessary to insure meaningful review of the federal claims for false arrest and malicious prosecution, the federal court is bound to exercise its pendent jurisdiction in order to do so. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995). *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 728 (1966). Compare *Vasquez v. City of New York*, 2014 WL 5810111 at *13 (S.D.N.Y. 2014).

The Court has repeatedly held that the federal courts have a "virtually unflagging obligation ...to exercise [this] jurisdiction given them." *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996). *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). The Panel was therefore obligated in its *de novo* review to address petitioner's claims under New York law that Hahl's egregious deviation from NYSP policy and protocol in conducting this child forensic interview produced inherently unreliable results which were insufficient to establish probable cause and which created a triable fact question for a jury whether there was probable cause to arrest and prosecute petitioner in the circumstances.

Thus if a jury could decide that under New York law *no* reasonably competent NYSP officer would have

arrested petitioner given these gross deviations by Hahl in conducting this child forensic interview and the ensuing investigation, the Panel had no basis in law or in fact to conclude that arguable probable cause existed to provide Hahl with immunity under federal law for petitioner's false arrest and malicious prosecution. Its refusal to exercise its pendent jurisdiction and address these pendent State claims was therefore error, an abnegation of the jurisdiction it possessed to decide the claims legitimately before it, and a denial of the process due petitioner as a federal litigant.

CONCLUSION

For all of the reasons identified herein, this Court should grant a writ of certiorari to review and vacate the judgment of the court of appeals; to remand the matter to the district court for a trial on the merits of petitioner's claims against respondents Hahl, Cumpston and the County for false arrest and malicious prosecution; or provide him with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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United States Court of Appeals, Second Circuit.

Agustin Torres GONZALEZ, Plaintiff-Appellant,

v.

Steven HAHL, New York State Police Investigator, Individually aka Stephen Hahl, County of Delaware, Cynthia L. Bogdan-Cumpston, Defendants-Appellees.[1]

20-1415-cv

June 21, 2021

Appeal from the United States District Court for the Northern District of New York (Mordue, *J.*; Kahn, *J.*).

Attorneys and Law Firms

Appearing for Appellant: Jonathan S. Follender, Arkville, N.Y.

Appearing for Appellees: Beezly J. Kiernan, Assistant Solicitor General (Barbara D. Underwood,

Solicitor General, Victor Paladino, Senior Assistant Solicitor General, Jeffrey W. Lang, Deputy Solicitor General, on the brief), for Letitia James, Attorney General for the State of New York, Albany, N.Y., for Steven Hahl.

Charles C. Spagnoli, The Law Firm of Frank W. Miller (Frank W. Miller, on the brief), East Syracuse, N.Y., for County of Delaware and Cynthia L. Bogdan-Cumpston.

Present: ROSEMARY S. POOLER, REENA RAGGI, SUSAN L. CARNEY, Circuit Judges.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Agustin Torres Gonzalez appeals from the March 31, 2020 judgment of the United States District Court for the Northern District of New York (Mordue, *J.*), granting an award of summary judgment to Steven Hahl on Gonzalez's claims of false arrest and malicious prosecution. Gonzalez also appeals the December 4, 2017 order (Kahn, *J.*) dismissing his claims against the County of Delaware and child protective services caseworker Cynthia L. Bogdan-Cumpston. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

"We review the grant of a motion for summary judgment *de novo*, drawing all inferences in the light most favorable to the non-moving party." *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 114 (2d Cir. 1995). "We

[also] review a district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*." *Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019).

"[T]he elements of an action for malicious prosecution are (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice." *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003) (alteration and internal quotation marks omitted). As for "a claim for false arrest ..., a plaintiff must show that (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged." *Id.* at 75 (internal quotation marks omitted). "If there was probable cause for the arrest, then a false arrest claim will fail." *Boyd v. City of New York*, 336 F.3d 72, 75 (2d Cir. 2003). Because the existence of probable cause defeats both causes of action, "[t]he pivotal issue in the present case is the presence, or absence, of probable cause for both the arrest and subsequent prosecution." *Id.* Liability for the state torts also gives rise to liability under 42 U.S.C. § 1983, so to the extent Gonzalez seeks to allege both, the analysis is identical. *See Boyd*, 336 F.3d at 75 (recognizing elements of the claims under Section 1983 and New York state law are "substantially the same" (internal quotation marks omitted)).

Probable cause "exists when the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Id.* at 75-76 (internal quotation marks omitted). It "does not require absolute certainty." *Id.* at 76. Whether probable cause exists is usually a question of law properly determined by a court. *Walczyk*

v. Rio, 496 F.3d 139, 157 (2d Cir. 2007). Nevertheless, where there is factual dispute about the events giving rise to probable cause, the case should proceed to a jury. *See Boyd*, 336 F.3d at 77-78 (reversing in part where the timing of the plaintiff's incriminating statement was in dispute and would affect whether probable cause existed at the time of his arrest).

We need not here decide whether Gonzalez's arrest was supported by probable ***129*** cause because even if it was not, we conclude that arguable probable cause supported qualified immunity and, therefore, the award of summary judgment to Hahl. Our precedent instructs that when "police officers of reasonable competence could disagree as to whether there was probable cause, there is arguable probable cause sufficient to warrant qualified immunity for the defendant officers." *Boyd*, 336 F.3d at 76 (internal quotation marks omitted). Moreover, when police officers "reasonably but mistakenly concluded that probable cause existed, the officer is nonetheless entitled to qualified immunity." *Caldarola v. Calabrese*, 298 F.3d 156, 162 (2d Cir. 2002). Here, Hahl knew that I.T. told Bogdan-Cumpston over the course of two interviews that Gonzalez had touched her crotch while they were alone at home together; and that Gonzalez told Hahl that he had probably incidentally touched I.T. in inappropriate areas a few times, although he repeatedly denied having sexual or improper intent. In these circumstances, whatever other concerns might be raised as to actual probable cause, we cannot conclude that no reasonable police officer could think probable cause supported arrest.

Nor did the district court exceed its discretion by denying Gonzalez's cross-motion to amend his complaint. The court had already addressed and dismissed his

proposed theory of dissipating probable cause. *See Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) (explaining that, at summary judgment, a court may deny a cross-motion to amend as futile when the evidence in support of the plaintiff's proposed modification "creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law").

As for the claims against Bogdan-Cumpston and the County of Delaware, the district court did not err in dismissing them pursuant to Federal Rule 12(b)(6). The municipal claims fail because Gonzalez's complaint does not plausibly allege that a "policy or custom" was "the moving force behind" Gonzalez's arrest and prosecution. *Agosto v. N.Y.C. Dep't of Educ.*, 982 F.3d 86, 97-98 (2d Cir. 2020) (internal quotation marks omitted). The false arrest claim against Bogdan-Cumpston fails because the complaint does not plausibly allege that she "took an active role in the arrest of [Gonzalez], such as giving advice and encouragement or importuning the authorities to act, and that [she] intended to confine [Gonzalez]." *Lowmack v. Eckerd Corp.*, 303 A.D.2d 998, 757 N.Y.S.2d 406, 408 (4th Dep't 2003) (citation, brackets, and internal quotation marks omitted); *see also Raysor v. Port Auth. of N.Y. & N.J.*, 768 F.2d 34, 39 (2d Cir. 1985) (explaining that false arrest claims against non-police defendant require an "unequivocal complaint or request to arrest"). The malicious prosecution claim fails for similar reasons. The complaint does not plausibly allege that Bogdan-Cumpston "play[ed] an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act." *Manganiello v. City of New York*, 612 F.3d 149, 163 (2d Cir. 2010) (internal quotation marks omitted). She merely reported a possible crime to the authorities based

on I.T.'s statements to her and played no role in the subsequent investigation or charging decision. This is insufficient to support a malicious prosecution claim. *See id.*

We have considered the remainder of Gonzalez's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

Footnotes

1The Clerk of Court is directed to amend the caption as above.

United States District Court, N.D. New York.

Agustin Torres GONZALEZ, Plaintiff,

v.

DELAWARE COUNTY, et al., Defendants.

3:17-CV-373 (LEK/DEP)
Signed 12/04/2017

Attorneys and Law Firms

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Maria E. Lisi-Murray, New York State Attorney General, Albany, NY, Joseph F. Romani, New York State Attorney General, Binghamton, NY, for Defendants.

MEMORANDUM-DECISION AND ORDER

Lawrence E. Kahn, U.S. District Judge

I. INTRODUCTION

Plaintiff Agustin Torres Gonzalez commenced this action on March 17, 2017, in New York Supreme Court, Delaware County, against the Margaretville Central School District ("MCSD") and Nancy Millen (collectively, the "MCSD Defendants"); the New York State Child Abuse and Maltreatment Register, Stephen Hahl, and Brian Dengler (collectively, the "State Defendants"); and Delaware County, the Commissioner of the Delaware County Division of Social Services, and Cynthia Bogdan-Cumpston (collectively, the "County

Defendants"). Dkt. No. 3 ("Complaint"). On April 4, 2017, Defendants removed the case to this Court. Dkt. No. 1 ("Notice of Removal").

Plaintiff brings this action under 42 U.S.C. §§ 1983 and 1985 and New York law, alleging that Defendants violated his constitutional rights when they improperly and repeatedly interviewed his six-year-old niece, I.T., which eventually led to his arrest. Compl. On May 11, 2017, Defendants moved to dismiss the Complaint in three separate motions. Dkt. Nos. 14 ("MCSD Motion"), 16 ("State Motion"), 17 ("County Motion") (collectively, the "Motions"). Plaintiff opposed the Motions on June 28, 2017, and also moved for leave to file an amended complaint. Dkt. Nos. 24 ("Cross-Motion"), 24-5 ("Proposed Amended Complaint"). Defendants opposed the Cross-Motion and offered further support for their Motions on July 24, 2017. Dkt. Nos. 27 ("MCSD Opposition"), 29 ("State Opposition"), 30 ("County Opposition").[1] For the reasons stated below, the Cross-Motion is granted, the State Motion is granted in part and denied in part, and the MCSD and County Motions are granted.

II. BACKGROUND[2]

On December 17, 2015, Plaintiff was a resident of Fleischmanns, New York, where he lived in a house with his extended family. PAC ¶¶ 14–15. This family included his sister, Cirila, and her six-year-old daughter, I.T. Id. ¶ 15. Plaintiff, Cirila, and I.T. shared the second floor of the house, and Plaintiff had his own bedroom. Id. The family speaks Spanish at home, though I.T. is bilingual and Plaintiff speaks "English well enough to get around." Id. ¶¶ 17–18.

The sequence of events leading to Plaintiff's arrest began on the morning of December 17th. First, I.T. was brought to the office of Nancy Millen, a guidance counselor at the Margaretville Central School. Id. ¶ 20. Millen asked to see I.T. because she had received an anonymous tip that I.T.'s brother hit I.T. when Cirila worked late. Id. ¶ 22. Millen interviewed I.T. without following recommended procedures and without asking for Cirila's consent. Id. ¶ 24. After the interview, Millen contacted the Delaware County Department of Social Services ("DSS"), reporting "a child being left alone." Id. ¶ 25.

Cynthia L. Bogdan-Cumpston, a caseworker employed by DSS's Child Protective Services unit, responded to Millen's report. Id. Bogdan-Cumpston traveled to Margaretville Central School on December 17th and interviewed I.T. Id. ¶ 26. Like Millen, Bogdan-Cumpston failed to follow recommended procedures while interviewing the child. Id. ¶¶ 26–28. Although I.T. denied that her brother hit her, Bogdan-Cumpston did not end the interview; she also asked I.T. about alcohol and drugs, misbehavior, and whether anyone had touched her "private parts." Id. ¶¶ 31–32. I.T. responded affirmatively that Plaintiff had touched her private parts. Id. ¶ 32. I.T. then received anatomical hand puppets to facilitate further discussion about this touching, but I.T. did not respond positively to additional questions. Id. ¶ 33.

On the advice of her supervisor, Bogdan-Cumpston contacted the New York State Police, which sent Investigators Brian Dengler and Steven Hahl and Trooper Adams to Margaretville Central School. Id. ¶ 35; Dkt. No. 24-3 ("Hearing Transcript") at 131.[3] Bogdan-Cumpston, Millen, Dengler, Hahl, and Adams re-interviewed I.T. in the presence of Cirila. Id. ¶¶ 38–39.

I.T. denied—by shaking her head negatively—that Plaintiff touched her. Id. ¶ 39. Dengler and Hahl described I.T.'s response as "negative results" in their report. Id. ¶ 40; see also Dkt. No. 24-2, Ex. C ("Police Report") at 2. Bogdan-Cumpston then asked I.T. if she would prefer to speak to her alone; I.T. responded, "Yes." Id. ¶ 42. Bogdan-Cumpston re-interviewed I.T., who said that Plaintiff inappropriately touched her sometime between 2014 and early 2015. Id. ¶ 45.

Bogdan-Cumpston, Dengler, and Hahl then visited I.T. and Plaintiff's house. Id. ¶ 48. Bogdan-Cumpston did not find anything unacceptable at the house. Id. ¶ 50. Nevertheless, Dengler and Hahl asked Plaintiff to accompany them to the police station in Margaretville to discuss the accusations against Cirila regarding I.T. being left alone. Id. ¶ 49. At the station, Dengler and Hall interrogated Plaintiff about touching I.T. Id. ¶ 51. Dengler and Hahl did not offer Plaintiff the assistance of an interpreter. Id. Dengler and Hahl allege that Plaintiff said that he accidentally touched I.T.'s private parts on at least one occasion. Id. ¶ 52; Police Report at 3. Plaintiff denies that he made this statement; instead, Plaintiff told the investigators that he accidentally touched I.T.'s leg after I.T. sat on top of Plaintiff's knee. PAC ¶ 52.

Following this interrogation, and upon the advice of Delaware County Acting District Attorney John Hubbard, Police Report at 3, Plaintiff was arrested and charged with felony sexual abuse in the first degree, PAC ¶ 54. Plaintiff was arraigned before a town justice and placed in custody for approximately one hour until his employer posted his bail. Id. ¶¶ 54–56. Due to the order of protection issued in connection with his arrest, Plaintiff could not return to his house, nor could he contact his family by phone. Id. ¶ 57.

*3 On April 13, 2016, a felony hearing was held regarding the charges against Plaintiff in front of Town Justice John R. Fairbairn III. Hr'g Tr. 1. On September 21, 2016, Justice Fairbairn dismissed all charges against Plaintiff. PAC ¶ 63; Dkt. No. 24-2, Ex. D ("Amended Decision") at 1–3.

III. LEGAL STANDARD

A. Motion to Dismiss

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of the plaintiff. Allaire Corp. v. Okumus, 433 F.3d 248, 249–50 (2d Cir. 2006). Plausibility, however, requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." Twombly, 550 U.S. at 556. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. (quoting Twombly, 550 U.S. at 555). Where a court is unable to infer more than the possibility of misconduct based on the pleaded facts, the pleader has not demonstrated that he is entitled to relief, and the action is subject to dismissal. Id. at 678–79. Nevertheless, "[f]act-specific question[s] cannot be

resolved on the pleadings." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012) (second alteration in original) (quoting Todd v. Exxon Corp., 275 F.3d 191, 203 (2d Cir. 2001)). Presented with "two plausible inferences that may be drawn from factual allegations," a court "may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." Id.

B. Motion to Amend

Rule 15 of the Federal Rules of Civil Procedure allows a plaintiff to amend his complaint more than twenty-one days after service of a motion to dismiss "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Courts "should freely give leave when justice so requires." Id. "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' " Foman v. Davis, 371 U.S. 178, 182 (1962). A motion to amend under Rule 15(a) "should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party." Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566, 603–04 (2d Cir. 2005) (quoting Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647, 653 n.6 (2d Cir. 1987)); see also Dunn v. Albany Med. Coll., No. 09-CV-1031, 2010 WL 2326127, at *8 (N.D.N.Y. June 7, 2010) (Kahn, J.) ("Leave to amend a complaint is not

automatic, and a court may deny a motion to amend for good cause 'such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.' " (quoting Foman, 371 U.S. at 182)).

IV. DISCUSSION[4]

Plaintiff has brought this action pursuant to § 1983, which provides a cause of action for anyone subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under the color of state law. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999).

A. False Arrest

1. Applicable Law

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV; accord Garenani v. County of Clinton, 552 F. Supp. 2d 328, 333 (N.D.N.Y. 2008). "The unreasonable seizure of a person in the form of a false arrest and imprisonment is violative of the Fourth Amendment and actionable under § 1983." Garenani, 552 F. Supp. 2d at 333.

"A section 1983 claim for false arrest is substantially the same as a claim for false arrest under New York law." Jenkins v. City of New York, 478 F.3d

76, 84 (2d Cir. 2007) (citing Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996)). To prove the elements of false arrest under New York law, a plaintiff must show that "(1) the defendant intended to confine plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged." Garenani, 552 F. Supp. 2d at 333 (quoting Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994)).

"The existence of probable cause to arrest is a complete defense to a claim of false arrest and imprisonment; in other words, it renders the confinement privileged." Id. (citing Bernard, 25 F.3d at 102 and Weyant, 101 F.3d at 852). "In general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Weyant, 101 F.3d at 852. "A district court must look to the 'totality of the circumstances' in deciding whether probable cause exists to effect an arrest." Caldarola v. Calabrese, 298 F.3d 156, 162 (2d Cir. 2002) (quoting Illinois v. Gates, 462 U.S. 213, 233 (1983)).

Even if there was not probable cause to arrest the plaintiff, the defense of qualified immunity entitles public officials to freedom from suit, as a result of the consequences of the performance of their discretionary duties, when "(1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." Martinez v. Simonetti, 202 F.3d 625, 633–34 (2d Cir. 2000) (quoting Weyant, 101 F.3d at 857). Qualified immunity is an affirmative defense, and, as such, defendants bear the burden of proving that the

privilege of qualified immunity applies. Coolick v. Hughes, 699 F.3d 211, 219 (2d Cir. 2012). In considering a qualified immunity defense, courts should not be "concerned with the correctness of the defendants' conduct, but rather the 'objective reasonableness' of their chosen course of action given the circumstances confronting them at the scene." Martinez, 202 F.3d at 634 (quoting Lennon v. Miller, 66 F.3d 416, 421 (2d Cir. 1995)).

"[I]n the context of a qualified immunity defense to an allegation of false arrest, the defending officer need only show 'arguable' probable cause." Martinez, 202 F.3d at 634 (citing Lee v. Sandberg, 136 F.3d 94, 103 (2d Cir. 1987)). "An officer's determination is objectively reasonable"—and thus, arguable probable cause is demonstrated—when "officers of reasonable competence could disagree on whether the probable cause test was met." Jenkins, 478 F.3d at 87 (quoting Lennon, 66 F.3d at 423–24). As the Second Circuit explained in Jenkins, " '[a]rguable' probable cause should not be misunderstood to mean 'almost' probable cause.... If officers of reasonable competence would have to agree that the information possessed by the officer at the time of the arrest did not add up to probable cause, the fact that it came close does not immunize the officer." Id.

2. Brian Dengler and Steven Hahl

It is undisputed that Investigators Dengler and Hahl (collectively, the "Arresting Officers") were involved in arresting Plaintiff, that he was aware of their actions, and that he did not consent to them. The Arresting Officers argue that they had probable cause to arrest Plaintiff, which is a complete defense to an action for false arrest. Dkt. No. 16-1 ("State Defendants'

Memorandum") at 9–10. Alternatively, they argue that their actions in arresting Plaintiff are shielded by qualified immunity. Id. at 10–13.

Under New York law, and as relevant to Plaintiff's alleged offense, a person is guilty of felony sexual abuse in the first degree when "he or she subjects another person to sexual contact ... when the other person is less than eleven years old." N.Y. Penal Law § 130.65(3). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party." N.Y. Penal Law § 130.00(3). "Because the question of whether a person was seeking sexual gratification is generally a subjective inquiry, it can be inferred from the conduct of the perpetrator." People v. Beecher, 639 N.Y.S.2d 863, 865 (App. Div. 1996).

"The existence of probable cause turns on what information [the Arresting Officers] had at the time of Plaintiff's arrest." Lozada v. Weilminster, 92 F. Supp. 3d 76, 89 (E.D.N.Y. 2015). The Arresting Officers rely on three elements in their argument that probable cause existed at the time of Plaintiff's arrest: (1) I.T.'s statements to Bogdan-Cumpston; (2) Plaintiff's statement to them; and (3) the advice of the A.D.A. Hubbard. State Opp'n at 5. However, at this preliminary stage of the litigation, the Court cannot find that probable cause existed as a matter of law. See Ward v. City of New York, No. 08-CV-7380, 2010 WL 3629536, at *1–2 (S.D.N.Y. Sept. 17, 2010) ("The existence of probable cause depends on the totality of the circumstances, and the full circumstances of [Plaintiff's] arrest are not in the record yet."); Araujo v. City of New York, No. 08-CV-3715, 2010 WL 1049583, at *5 (E.D.N.Y. Mar. 19, 2010) ("Discovery may plausibly reveal that the [officers] lacked a reasonable basis for

believing either (1) that a crime had been committed, or (2) that plaintiff was the perpetrator."). On the record before the Court, neither I.T.'s statements to Bogdan-Cumpston nor Plaintiff's disputed statement to the Arresting Officers provide, necessarily, a reasonable basis for believing that Plaintiff committed sexual abuse in the first degree. The record also does not contain evidence regarding the conversation between the Arresting Officers and Hubbard that occurred prior to Plaintiff's arrest. Therefore, the Court cannot determine whether Hubbard received accurate information before providing his advice.

a. I.T.'s Statements to Bogdan-Cumpston

As a general rule, "a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness, unless the circumstances raise doubt as to the person's veracity." Araujo, 2010 WL 1049583, at *5 (quoting Penetta v. Crowley, 460 F.3d 388, 395 (2d Cir. 2006)). Since I.T. was six years old on December 17, 2015, and she allegedly reported incidents of abuse that occurred eight to twenty-four months earlier, the veracity of her statements is at issue. Simuro v. Shedd, 176 F. Supp. 3d 358, 378 (D. Vt. 2016) ("Police officers must exercise extreme caution in crediting the statements of young children." (citing United States v. Shaw, 464 F.3d 615, 624 (6th Cir. 2006) and Stoot v. City of Everett, 582 F.3d 910, 920 (9th Cir. 2009))); see also N.Y. Crim. Proc. Law § 60.20 (providing special procedure to determine the testimonial capacity of witnesses who are less than nine years old). While courts in this District have found that a teenager's "allegations alone were enough to give rise to probable cause," Jean

v. City of New York, No. 09-CV-801, 2011 WL 4529634, at *4 (E.D.N.Y. Sept. 28, 2011), aff'd, 512 Fed.Appx. 30 (2d Cir. 2013), allegations by six-year-old complainants raise more concern, Simuro, 176 F. Supp. 3d at 378; Araujo, 2010 WL 1049583, at *5; see also Wesley v. Campbell, 779 F.3d 421, 430 (6th Cir. 2015) ("[I]t appears that no federal court of appeals has ever found probable cause based on a child's allegations absent some other evidence to corroborate the child's story.").

In addition, the record before the Court regarding I.T.'s statements lacks significant details. It is unclear whether the Arresting Officers knew when the alleged abuse occurred or for how long Plaintiff allegedly touched her or on how many occasions. Compare Police Report at 3 (describing touching on one occasion), with Hr'g Tr. 185 (describing touching on "a few occasions"). These details are vital in determining whether a reasonable officer could find I.T.'s statements credible and whether a reasonable officer could believe that Plaintiff touched I.T. for sexual gratification. Compare Beecher, 639 N.Y.S.2d at 865 ("[I]t can be inferred that defendant was seeking sexual gratification from his act of placing his hand on the victim's thigh and genitalia, the sexually explicit questions he posed, his request not to tell anyone and his acknowledgment that he knew that what he did was wrong."), with People v. Guerra, 577 N.Y.S.2d 296, 297–98 (App. Div. 1991) (holding that defendant did not touch victim with the intent to obtain sexual gratification, because "[a]ll of the evidence in this case indicates that the defendant's touching of the victim occurred within the context of a game which was not sexual in nature").

On the limited record currently before the Court, no reasonable officer could conclude that I.T.'s statements were sufficient on their own to provide

probable cause to arrest Plaintiff. See Stoot, 582 F.3d at 920 ("In cases involving very young child victims, the courts have repeatedly emphasized the need for some evidence in addition to the statements of the victim to corroborate the allegations and establish probable cause.").

b. Plaintiff's Statement to the Arresting Officers

The parties dispute what Plaintiff said to the Arresting Officers during his questioning at the Margaretville police station. According to Plaintiff, he said that he accidentally touched I.T.'s leg after she sat on top of his knee. PAC ¶ 52. In contrast, according to Hahl, Plaintiff said that he may have accidentally touched I.T.'s private parts once or "on a few occasions" when he removed I.T. from his lap. Police Report at 3; Hr'g Tr. 145; Hr'g Tr. 185.

At this stage of the litigation, the Court must view the facts in the light most favorable to Plaintiff. In turn, Plaintiff's statement to the Arresting Officers cannot be considered a piece of evidence in support of the officers' conclusion that probable cause existed. Cf. Milfort v. Prevete, 922 F. Supp. 2d 398, 406 (S.D.N.Y. 2013) ("If a jury were to credit Plaintiff's version of events, it could conclude that the police lacked probable cause to arrest Plaintiff."). Under no circumstances would the accidental touching of another person's leg on a single occasion constitute sexual abuse in the first degree. Presumably the recording of Plaintiff's statement, which is not currently in the record, will clarify this dispute. See Police Report at 2 (describing video recording of interview); Hr'g Tr. 2 (describing Plaintiff's receipt of the video recording).

c. Advice of A.D.A. Hubbard

Prior to arresting Plaintiff, the Arresting Officers had a conversation with A.D.A. Hubbard. Police Report at 3. Hubbard "advised that an arrest for Sexual Abuse 1st [degree] would be warranted." Id. "[P]olice officers must be able to rely on the advice of prosecutors. The judicial system depends upon this reliance." Dale v. Kelley, 908 F. Supp. 125, 138 (W.D.N.Y. 1995), aff'd, 95 F.3d 2 (2d Cir. 1996); see also Strawn v. Holohan, No. 104-CV-1292, 2008 WL 65586, at *6 (N.D.N.Y. Jan. 4, 2008) ("[T]he fact that Zwingelberg consulted with the District Attorney's office prior to Strawn's arrest, while not dispositive of the issue, is a factor supporting the reasonableness of Holohan's actions.").

However, the record before the Court does not provide the content of this conversation. As described above, Plaintiff disputes that he made the statement attributed to him, which the Arresting Officers may have relayed to Hubbard. Alternatively, the Arresting Officers may have omitted important details of Plaintiff's alleged statement, which would be relevant to any probable cause determination, such as whether Plaintiff touched I.T.'s "private parts" once or more than once and whether such touching was accidental or not. The value of Hubbard's advice depends on the information that the Arresting Officers provided him. See Muhammad v. City of Peekskill, No. 06-CV-1899, 2008 WL 4525367, at *7 (S.D.N.Y. Sept. 30, 2008) (finding that "it is not implausible to believe that with the benefit of discovery Plaintiff might be able to prove that Officer Vazeos told ADA Chartier" incorrect or false information, negating the value of the assistant district attorney's advice); cf. Bermudez v. City of New York, 790 F.3d 368, 375 (2d Cir. 2015) ("[I]f the ADA was simply not informed of the

alleged problems with the evidence, then he could not be a superseding cause of the deprivation of Bermudez's due process rights." (citing Myers v. County of Orange, 157 F.3d 66, 73–74 (2d Cir. 1998))).

In sum, on the record as it exists now, a reasonable fact-finder could conclude that the information upon which the Arresting Officers relied to arrest Plaintiff did not indicate that "a fair probability of criminal activity existed." Fowler v. Robinson, No. 94-CV-836, 1996 WL 67994, at *6 (N.D.N.Y. Feb. 15, 1996). The Court also concludes that these issues of fact preclude a determination that the Arresting Officers possessed arguable probable cause to arrest Plaintiff, and therefore the Court cannot determine at this time whether their actions are protected by qualified immunity. See, e.g., Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994) ("Though '[i]mmunity ordinarily should be decided by the court,' that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required.") (quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991)). As described above, discovery is required to understand the information possessed by the Arresting Officers at the time of Plaintiff's arrest.

Accordingly, the State Motion to dismiss the false arrest claim against the Arresting Officers is denied.

3. Cynthia L. Bogdan-Cumpston

On December 17th, Bogdan-Cumpston was a caseworker employed by DSS. PAC ¶ 25. Specifically, she worked in DSS's Child Protective Services' unit. Id. Plaintiff does not allege that Bogdan-Cumpston directly effected Plaintiff's arrest; rather, he argues that Plaintiff "importuned" the Arresting Officers through her

improper interviews of I.T., and is therefore also responsible for Plaintiff's false arrest. Id. ¶¶ 137–45.

"It is well-established that a successful Section 1983 claimant must prove 'that the defendant caused the deprivation of his or her rights.' " Camac v. Long Beach City Sch. Dist., No. 09-CV-5309, 2011 WL 3030345, at *7 (E.D.N.Y. July 22, 2011) (quoting Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679, 686 (2d Cir. 1998)); see also Soto v. City of New York, 132 F. Supp. 3d 424, 443 (E.D.N.Y. 2015) ("Because a Section 1983 claim is a constitutional tort, the claims are 'guided by common-law principles of tort,' and a plaintiff must establish causation." (quoting Wray v. City of New York, 490 F.3d 189, 193 (2d Cir. 2007))). In the context of a false arrest claim, "[a] civilian complainant, by merely seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charged filed, will not be held liable for false arrest or malicious prosecution." Carmellino v. District 20 of N.Y.C. Dept. of Educ., No. 03-CV-5942, 2006 WL 2583019, at *61 (S.D.N.Y. Sept. 6, 2006) (quoting Levy v. Grandone, 789 N.Y.S.2d 291, 293 (App. Div. 2005), lv. denied, 83 N.E.2d 711 (N.Y. 2005)); see also Lozada, 92 F. Supp. 3d at 91 (holding that informant "cannot be said to have 'instigated' Plaintiff's arrest" because "Trooper Nolan had the opportunity to observe Plaintiff and make his own determination as to whether her behavior warranted arrest."). An officer's independent decision to arrest a suspect normally "severs the causal connection" between the informant and the arrestee. Soto, 132 F. Supp. 3d at 443 (citing Townes v. City of New York, 176 F.3d 138, 145 (2d Cir. 1999)).

However, an informant may be held responsible if she "takes 'an active role in the arrest of the plaintiff,

such as giving advice and encouragement or importuning the authorities to act,' with the intent to confine plaintiff." TADCO Constr. Corp. v. Dormitory Auth. of State of N.Y., 700 F. Supp. 2d 253, 269 (E.D.N.Y. Mar. 19, 2010) (quoting Lowmack v. Eckerd Corp., 757 N.Y.S.2d 406, 408 (App. Div. 2003)). "Such an active role includes the provision of false information leading to an arrest, where the defendants 'lacked reasonable cause for their belief in the plaintiff's culpability.' " Id. (quoting Weintraub v. Bd. of Educ. of City of N.Y., 422 F.Supp. 2d 38, 56 (E.D.N.Y. 2006)).

Here, Plaintiff does not allege that Bogdan-Cumpston insisted or even recommended to the Arresting Officers that Plaintiff be charged. Cf. TADCO Constr. Corp., 700 F. Supp. 2d at 269 (finding that civilian complainant who "demanded" an arrest may be liable for false arrest claim); Fowler, 1996 WL 67994, at *6 (finding that caseworkers may be liable for false arrest since they were "rather insistent that [defendant] be charged"). Nevertheless, Plaintiff has made many allegations regarding the manner in which Bogdan-Cumpston interviewed I.T. Specifically, Plaintiff alleges that Bogdan-Cumpston violated the letter or spirit of the New York Social Services Law and caseworkers' professional standards by (1) interviewing I.T. without an interpreter; (2) failing to interview I.T. at a Child Advocacy Center, which is designed to facilitate the proper forensic interviewing of children; (3) asking I.T. questions while simultaneously taking notes; (4) failing to take audio and/or video recordings of the interviews; (5) using anatomical hand puppets; and (6) interviewing I.T. multiple times. PAC ¶¶ 26–34, 44.

Even viewed in the light most favorable to Plaintiff, the County Defendants are correct that these allegations do not constitute "the provision of false

information" to the Arresting Officers, which would demonstrate an "intent to confine" Plaintiff. County Opp'n at 8; TADCO Constr. Corp., 700 F. Supp. 2d at 269; see also Camac, 2011 WL 3030345, at *8 (finding that false arrest claim was adequately pled against complainant who knowingly provided false information to police). While Plaintiff makes conclusory statements that Bogdan-Cumpston gave "false information to the police," PAC ¶ 139, none of the factual allegations state that Bodgan-Cumpston fabricated evidence or lied about her conversations with I.T.

This Circuit provides "unusual deference in the abuse investigation context" to caseworkers, Wilkinson ex rel. Wilkinson v. Russell, 182 F.3d 89, 104 (2d Cir. 1999), and Plaintiff's allegations regarding Bogdan-Cumpston's "incomplete or inaccurate" investigation do not constitute an independent constitutional violation, Pace v. Montalvo, 186 F. Supp. 2d 90, 99 (D. Conn. 2001); see also Wilkinson, 182 F.3d at 106 ("[A] mere failure to meet local or professional standards, without more, should not generally be elevated to the status of constitutional violation."). Absent allegations of "material perjury or fabricated evidence," this Court cannot hold Bogdan-Cumpston liable for the Arresting Officers' decision to arrest Plaintiff. Cf. Walker v. City of New York, 63 F. Supp. 3d 301, 313–14 (E.D.N.Y. 2014) (holding that caseworkers are entitled to qualified immunity when they instigate a deprivation of liberty absent material perjury or fabricated evidence), aff'd, 621 Fed.Appx. 74 (2d Cir. 2015).

Accordingly, the County Motion to dismiss the false arrest claim is granted.

4. Nancy Millen

Nancy Millen was a guidance counselor at MCSD on December 17, 2015. PAC ¶ 20. Even assuming that Millen acted under the color of state law when she interviewed I.T. and contacted Bogdan-Cumpston, Arum v. Miller, 273 F. Supp. 2d 229, 235 (E.D.N.Y. 2003), it cannot be said that Millen caused Plaintiff's arrest.

Plaintiff alleges that Millen interviewed I.T. after she received a report from a teacher that I.T.'s grades had fallen, and then contacted Bogdan-Cumpston for further investigation. PAC ¶¶ 23–25. While Plaintiff later alleges that Millen "importuned" the Arresting Officers, PAC ¶ 105, he does not present any allegations that Millen provided the police with falsified information or encouraged them to arrest Plaintiff. In fact, Plaintiff does not even allege that Millen spoke to the Arresting Officers about I.T. or Plaintiff. Even if Millen acted improperly in her initial consultation with I.T., PAC ¶ 24, no reasonable fact-finder could conclude that Millen was the "but for" cause of Plaintiff's arrest, Zahrey v. Coffey, 221 F.3d 342, 352 n.8 (2d Cir. 2000).

Accordingly, the MCSD Motion to dismiss the false arrest claim is granted.

B. Illegal Seizure

Plaintiff also claims that he suffered an unreasonable seizure, in violation of the Fourth Amendment, when the Arresting Officers detained him at the police station in Margaretville without probable cause. PAC ¶¶ 49, 73. Defendants argue that Plaintiff voluntarily went to the police station, and therefore he was not detained for purposes of the Fourth

Amendment. E.g. Dkt. No. 17-1 ("County Defendants' Memorandum") at 6.

"A person is seized by the police ... when the officer, by means of physical force or show of authority, terminates or restrains [her] freedom of movement through means intentionally applied." Brendlin v. California, 551 U.S. 249, 254 (2007). "To explain when a sufficient 'show of authority' effects restraint, the Supreme Court has relied on a totality-of-the-circumstances test, asking whether a reasonable person would believe that he was 'not free to leave,' " Salmon, 802 F.3d at 251 (quoting INS v. Delgado, 466 U.S. 210, 215 (1984)), or "would feel free to decline the officers' requests or otherwise terminate the encounter," id. (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)).

Based on the allegations in the PAC, no reasonable person would believe that the Arresting Officers seized Plaintiff upon requesting his presence at the police station for an interview. Plaintiff does not present any allegations that the Arresting Officers acted threateningly or suggested that Plaintiff could not decline their request. If the Arresting Officers' conduct constituted a seizure in this instance, "any person's voluntary visit to a police facility might be enough to render that person seized." Emanuel v. Griffin, No. 13-CV-1806, 2015 WL 1379007, at *12 (S.D.N.Y. Mar. 25, 2015).

Accordingly, the Motions to dismiss the illegal seizure claim are granted.

C. Malicious Prosecution

1. Applicable Law

In order to establish a malicious prosecution claim under § 1983, a plaintiff must demonstrate "(1) that the

defendant initiated a prosecution against plaintiff, (2) that the defendant lacked probable cause to believe the proceeding could succeed, (3) that the defendant acted with [actual] malice, ... (4) that the prosecution terminated in plaintiff's favor, ... [and] (5) a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." Noga v. City of Schenectady Police Officers, 169 F. Supp. 2d 83, 90 (N.D.N.Y. 2001) (quoting Rohman v. N.Y.C. Transit Auth., 215 F.3d 208, 215 (2d Cir. 2000)).

2. Brian Dengler and Steven Hahl

Plaintiff brings a claim for malicious prosecution arising from the charges brought pursuant to his arrest. The State Defendants first argue that the Arresting Officers were not the "but for" cause of Plaintiff's prosecution; instead, Hubbard's decision to bring charges severed the causal link between the officers' decision to arrest Plaintiff and his subsequent prosecution. State Defs.' Mem. at 6–7.

The first element of a malicious prosecution claim, which requires a defendant "to have initiated a prosecution," reaches the issue of causation. "In malicious prosecution cases against police officers, plaintiffs [meet] this first element by showing that officers brought formal charges and had the person arraigned, or filled out complaining and corroborating affidavits, or swore to and signed a felony complaint." Lanning v. City of Glens Falls, No. 116-CV-132, 2017 WL 922058, at *6 (N.D.N.Y. Mar. 8, 2017) (quoting Llerando-Phipps v. City of New York, 390 F. Supp. 2d 372, 382–83 (S.D.N.Y. 2005)). Alternatively, "a defendant may be said to commence or continue a prosecution if that defendant knowingly provides false information or

fabricated evidence that is likely to influence the prosecutors or the grand jury." Id. (quoting Fiedler v. Incandela, 222 F. Supp. 3d 141, 163 (E.D.N.Y. 2016)).

Here, the PAC does not specify the division of labor between the Arresting Officers and Hubbard with regard to Plaintiff's arraignment and prosecution. Thus the Court cannot conclude that the Arresting Officers "brought formal charges and had the person arraigned, or filled out complaining and corroborating affidavits, or swore to and signed a felony complaint." But Plaintiff has alleged that the Arresting Officers knowingly provided false information to Hubbard—in the form of Plaintiff's false confession—that would have likely influenced the prosecution. PAC ¶¶ 52, 72. Therefore, at this stage, Plaintiff has alleged sufficient facts indicating that the Arresting Officers caused Plaintiff's prosecution.

The State Defendants also argue that the malicious prosecution claim must be dismissed because probable cause existed at the time of Plaintiff's arrest, State Defs.' Mem. at 7–8, and because Plaintiff has only provided conclusory allegations that the Arresting Officers acted with malice, id. at 9. As discussed above, however, issues of fact preclude a determination that the Arresting Officers possessed probable cause to arrest Plaintiff on the record currently before the Court.[5] In addition, at this stage in the litigation, "a specific assertion of malice is only required wherein the complaint creates a presumption that there was probable cause for the prosecution...." Donnelly v. Morace, 556 N.Y.S.2d 605, 606–07 (App. Div. 1990); see also Khan v. Ryan, 145 F. Supp. 2d 280, 285 (E.D.N.Y. 2001) ("In most cases ... 'malice may be inferred from the lack of probable cause.' " (quoting Lowth v. Town of Cheektowaga, 82 F.3d 563, 572 (2d Cir. 1996))). Since the Arresting Officers have not demonstrated that probable

cause existed at the time of Plaintiff's arrest as a matter of law, Plaintiff's allegations that the Arresting Officers acted with malice are sufficient to survive the State Motion.

Accordingly, the State Motion to dismiss Plaintiff's malicious prosecution claim is denied.

3. Cynthia L. Bogdan-Cumpston and Nancy Millen

In contrast, Plaintiff has not presented sufficient facts indicating that either Bogdan-Cumpston or Millen initiated Plaintiff's prosecution. As discussed above, neither Bodgan-Cumpston nor Millen can be held responsible for Plaintiff's arrest. Plaintiff has not presented any additional allegations that Bogdan-Cumpston or Millen encouraged Plaintiff's prosecution or knowingly provided Hubbard with false information. Accordingly, the County and MCSD Motions to dismiss the malicious prosecution claims against Bogdan-Cumpston and Millen are granted.

D. Conspiracy to Violate Civil Rights

"To state a claim for a § 1983 conspiracy, a plaintiff must allege '(1) an agreement between two state actors or between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages.' " Magnotta v. Putnam Cnty. Sheriff, No. 13-CV-2752, 2014 WL 705281, at *8 (S.D.N.Y. Feb. 24, 2014) (quoting Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999)). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed. Ciambriello v. County of Nassau, 292 F.3d 325, 325 (2d Cir. 2002); see also Webb v. Goord, 340 F.3d 105, 110–11

(2d Cir. 2003) (holding that the plaintiff "must provide some factual basis supporting a meeting of the minds" to maintain a conspiracy action); Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir. 1983) ("A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."). "[A]lthough a plaintiff does not need to provide detailed factual allegations, the allegations in the complaint must be 'enough to raise a right to relief above the speculative level.' " Flores v. Levy, No. 07-CV-3753, 2008 WL 4394681, at *9 (E.D.N.Y. Sep. 23, 2008) (quoting Twombly, 550 U.S. at 554).

Here, Plaintiff's conspiracy allegations are misdirected. At most, he alleges that the named defendants conspired "to disregard proper procedure" with respect to the third interview of I.T., which in turn caused Plaintiff's constitutional injuries. Cross-Mot. at 23. However, as discussed above, failure to follow local or professional standards does not constitute a constitutional injury, Wilkinson, 182 F.3d at 106, and any agreement to do so would not form the basis of a viable conspiracy claim pursuant to § 1983. Accordingly, Plaintiff's conspiracy claim is dismissed.[6]

E. Monell Claims

In addition to his claims against Bogdan-Cumpston and Millen in their individual capacities, Plaintiff brought suit against their employers—Delaware County and MCSD, respectively. "Municipal entities may be held liable for unconstitutional acts *by their employees* if the challenged actions were performed pursuant to a municipal policy or custom that caused the plaintiff's injury." Hunter v. Town of

Shelburne, No. 10-CV-206, 2011 WL 5562809, at *2 (D. Vt. Nov. 13, 2011) (emphasis added) (citing Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658 (1978)).

Here, Plaintiff has not presented viable claims of unconstitutional acts committed by Delaware County or MCSD's employees. Therefore, Plaintiff's Monell claims against Delaware County and MCSD must be dismissed.

F. State Law Claims

Since some of Plaintiff's claims under federal law survive Defendants' Motions, the Court maintains original jurisdiction over this action and must exercise supplemental jurisdiction over related state law claims. 28 U.S.C. § 1367(a). "The elements of false arrest and malicious prosecution under § 1983 are 'substantially the same' as the elements under New York law." Boyd v. City of New York, 336 F.3d 72, 75 (2d Cir. 2003) (quoting Hygh v. Jacobs, 961 F.2d 359, 366 (2d Cir. 1992)). Therefore, Plaintiff's false arrest and malicious prosecution claims pursuant to New York law survive against the Arresting Officers and are dismissed against Bogdan-Cumpston and Millen. To the extent that Plaintiff has made a state law claim regarding his alleged seizure at the Margaretville police station, that claim is dismissed against all of the individually named defendants for the reasons described above.

G. Motion to Amend

Defendants argue that Plaintiff's Cross-Motion should be denied on futility grounds because the changes proposed in the PAC do not address the purported deficiencies in their Motions. "An amendment is considered futile if the amended pleading fails to state a

claim or would be subject to a successful motion to dismiss on some other basis." Cowles v. Yesford, No. 99-CV-2083, 2001 WL 179928, at *3 (N.D.N.Y. Feb. 22, 2001) (quoting Chan v. Reno, 916 F. Supp. 1289, 1302 (S.D.N.Y. 1996)). Because the Court has determined that the PAC adequately alleges false arrest and malicious prosecution claims against the Arresting Officers, Plaintiff's proposed amendments are not futile. Defendants raise no other reasons why leave to amend should not be granted, and the Court is aware of none. The Court therefore finds that justice requires allowing Plaintiff to amend his Complaint.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Plaintiff's Cross-Motion (Dkt. No. 24) is **GRANTED**; and it is further

ORDERED, that Plaintiff file the Proposed Amended Complaint (Dkt. No. 24-5) within fourteen days of this Memorandum-Decision and Order; and it is further

ORDERED, that the State Motion (Dkt. No. 16) is **GRANTED in part** and **DENIED in part**. The Motion is **GRANTED** as to Plaintiff's § 1983 conspiracy claim, § 1985 claim, and state law illegal seizure claim. The Motion is otherwise **DENIED**; and it is further

ORDERED, that the County Motion (Dkt. No. 17), is **GRANTED**; and it is further

ORDERED, that MCSD Motion (Dkt. No. 14), is **GRANTED**; and it is further

ORDERED, that the Clerk of the Court **TERMINATE** defendants Delaware County, Commissioner of the Delaware County Department of

Social Services, Margaretville Central School District, New York State Child Abuse and Maltreatment Register, Cynthia Bogdan-Cumpston, Nancy Millen, and John or Jane Does; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Footnotes

1Defendants oppose the Cross-Motion on futility grounds, arguing that the PAC does not remedy the purported deficiencies of the Complaint. E.g., County Opp'n at 4. Therefore, the Court will consider Defendants' arguments in light of the PAC.

2Because this case is before the Court on a motion to dismiss for failure to state a claim, the allegations of the PAC are accepted as true and form the basis of this section. E.g., Matson v. Bd. of Educ., 631 F.3d 57, 72 (2d Cir. 2011) (noting that, in addressing a motion to dismiss, a court must view a plaintiff's factual allegations "in a light most favorable to the plaintiff and draw[ ] all reasonable inferences in her favor"). However, Plaintiff also attached additional materials to the PAC. See Dkt. Nos. 24-2 ("State Court Complaint"), 24-3 ("Hearing Transcript"). "Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered [on a motion to dismiss]." Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007). "When allegations contained within the complaint are contradicted by documents attached to the complaint, the documents control, and the Court need not accept the allegations contained within the complaint

as true." Rozsa v. May Davis Grp., Inc., 187 F. Supp. 2d 123, 128 (S.D.N.Y. 2002).

3Trooper Adams is not a defendant in this case, and the PAC does not identify him. However, Hahl testified that Adams was also present at the Margaretville Central School on December 17th. Hr'g Tr. 131.

4The PAC does not assert claims against defendants Commissioner of the Delaware County Department of Social Services, John or Jane Does, or the New York State Child Abuse and Maltreatment Register. Therefore, these defendants are dismissed from this action.

5The Court notes that the probable cause inquiry for false arrest claims often differs from the probable cause inquiry for malicious prosecution claims. E.g., Boyd v. City of New York, 336 F.3d 72, 75–77 (2d Cir. 2003). However, if a plaintiff—as is the case here—"does not allege that there was any difference in the facts known to the police officers between arrest and arraignment," the Court need "analyze only the existence of probable cause at the time of [ ] arrest[ ]." Lanning, 2017 WL 922058, at *6.

6The PAC also indicates that Plaintiff is bringing a conspiracy claim against the named defendants pursuant to § 1985, PAC ¶ 181, though the Cross-Motion does not provide any support for such claim. In any event, the PAC presents no allegations that the named defendants acted with discriminatory animus, which is a required element in a § 1985 claim. See Gagliardi v. Village of Pawling, 18 F.3d 188, 194 (2d Cir. 1994) (dismissing § 1985 claim because "[t]he complaint is devoid of any allegation that the alleged conspiracy was undertaken with any racial or class-based animus"). Therefore, Plaintiff's § 1985 claim is dismissed.

United States District Court, N.D. New York.

Augustin Torres GONZALEZ, Plaintiff,

v.

Steven HAHL, Defendant.

3:17-CV-373 (NAM/ML)
Signed 03/31/2020

Attorneys and Law Firms

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MEMORANDUM-DECISION AND ORDER

Hon. Norman A. Mordue, Senior United States District Court Judge

I. INTRODUCTION

Plaintiff Augustin Torres Gonzalez brings this action under 42 U.S.C. § 1983, the U.S. Constitution, and the Constitution of New York State, asserting claims against Defendant Steven Hahl for false arrest and malicious prosecution. (Dkt. No. 41). Now before the Court is Defendant's motion for summary judgment, (Dkt. Nos. 72, 84), and Plaintiff's papers in opposition, (Dkt. No. 79). For the reasons that follow, Defendant's motion is granted.

II. BACKGROUND[1]

In December 2015 Plaintiff shared a home with his brother, his sister, and both of their families. (Dkt. No. 85, ¶¶ 1–2). Plaintiff's sister's daughter, I.T., was six years old at the time and attending first grade at Margaretville Central School. (*Id.*, ¶ 3).

On December 17, 2015, Delaware County Department of Social Services ("DSS") caseworker Cynthia Bogdan-Cumpston ("Cumpston") was assigned to investigate a report from a classroom teacher that I.T. was being left home alone with her 12-year-old brother, who was hitting her. (*Id.*, ¶ 4). Cumpston went to the school to interview I.T. about the reported abuse. (*Id.*, ¶ 5). The School Guidance Counselor, Nancy Millen ("Millen"), brought I.T. to her office and Cumpston interviewed I.T. there. (*Id.*, ¶¶ 6–7).

During the interview, Cumpston asked I.T. questions about her living situation, including questions about whether there were drugs and alcohol in the home, and if she experienced any physical abuse. (Dkt. No. 72-4, p. 4). With regard to I.T.'s allegations of sexual abuse, Cumpston's interview notes state the following:

> [Cumpston] asked [I.T.] if anyone has touched her private parts. I.T. stated that her uncle has touched her private parts. [Cumpston] asked what her uncle's name is and I.T. stated she doesn't know she just calls him uncle. [Cumpston] asked if she can remember when her uncle touched her private parts. I.T. stated that her uncle touched her private parts when she went into kindergarten. [Cumpston] asked if she can remember how many times her uncle touched her private parts. I.T. stated that her uncle touched

her more than one time but she doesn't remember how many times. [Cumpston] asked who was home when her uncle touched her private parts. I.T. stated that just she and her uncle were at home when he touched her private parts. [Cumpston] asked if her uncle asked her to touch his private parts and stated that he did not. I.T. stated that she never told anyone that her uncle touched her private parts. [Cumpston] asked which of her private parts her uncle touched. I.T. began looking up at the ceiling and ignoring [Cumpston's] question. [Cumpston] was given two hand puppets by Nancy [Millen], one was a female the other was a male. [Cumpston] explained that girls have three different areas that are private areas that nobody is supposed to touch. [Cumpston] pointed to the chest of the female puppet and showed I.T. as this being one of the areas that nobody is supposed to touch. [Cumpston] then pointed to the area of the puppet that would be the vagina as another private area that nobody should touch, and then [Cumpston] turned the puppet over and pointed to the buttock area on the puppet and told I.T. that this is the third place on the body that nobody is supposed to touch. [Cumpston] gave the hand puppets to I.T. and asked her if she could show [Cumpston] where her uncle touched her. I.T. began playing with the puppets however she was not showing [Cumpston] what had happened to her but was just merely clapping her hands together while holding the puppets and was ignoring [Cumpston]. [Cumpston] asked if her uncle is still touching her private parts now and I.T. shook her head indicating no.

(*Id.*, pp. 4–5). After the interview, Cumpston contacted her supervisor at DSS, who instructed her to call the State Police "to find out if they would like to do the investigation along with [Cumpston]." (*Id.*, p. 5).

Defendant, a Senior Investigator with the New York State Police, responded to the school along with Investigator Brian Dengler and Trooper James Adams. (Dkt. No. 78, ¶ 15). Cumpston explained to the officers that "I.T. had disclosed that her uncle touched her private parts," and asked if they would like to accompany her in a follow-up interview with I.T. about the alleged sex abuse. (Dkt. No. 72-4, p. 5). According to Defendant, he tried to interview I.T., but "she would not make any disclosures to me relative to sexual abuse." (Dkt. No. 72-3, ¶ 5). Cumpston suggested that Defendant and his colleagues leave the room, and she then conducted the interview. (*Id.*).

During this interview, I.T. confirmed her earlier statements that Plaintiff "touched her private part on more than one time." (Dkt. No. 72-4, p. 8). When Cumpston asked I.T. which "private part" her uncle touched, I.T. indicated that he had touched her groin area. (*Id.*). I.T. stated that she told her uncle to stop, but he "said no and kept touching her private part." (*Id.*). I.T. also stated that Plaintiff touched her "on the outside of her pants." (*Id.*). Based on that information, the investigators decided that they needed to conduct a home visit to "assess the home for safety and for police to speak with [Plaintiff]." (*Id.*, p. 9).

When the investigators arrived at the home, Cumpston and Trooper Adams went inside to conduct a safety assessment, while Defendant and Investigator Dengler asked to speak with Plaintiff outside. (Dkt. No. 72-4, p. 9). Defendant and Investigator Dengler then asked Plaintiff to go with them to the police barracks for

an interview. (Dkt. No. 85, ¶¶ 29–30). Plaintiff agreed and traveled to the barracks alone in his own vehicle. (Dkt. No. 72-3, ¶ 7).

At the barracks, Defendant told Plaintiff that the purpose of the interview was to follow up on an anonymous report that I.T. and her brother were often left at home by themselves. (Dkt. No. 83-6, p. 2). When Defendant read Plaintiff his *Miranda* warnings, Defendant had not yet informed Plaintiff that he would also be asking about I.T.'s allegations that Plaintiff touched her inappropriately. (*Id.*, pp. 10–11; Dkt. No. 85, ¶ 107). After issuing the *Miranda* warnings, Defendant informed Plaintiff that I.T. told social workers that he had touched her inappropriately on more than one occasion. (Dkt. No. 83-6, pp. 21–22). Defendant denied any inappropriate touching, and stated that "I'm not the type of person to do that kind of stuff with kids because ... we teach kids good stuff. Not that kind of stuff. So I don't do anything wrong to them." (*Id.*, p. 22).

As the interview progressed, Defendant asked Plaintiff whether he could recall any time when he may have touched I.T. inappropriately. (*See id.*, pp. 26–29). In response, Plaintiff stated that he has only ever hugged her, and on occasion, has accidentally touched her leg, at which point he claimed that he immediately apologized. (*Id.*, p. 28). Plaintiff went on to describe a situation where I.T. was sitting on his lap while he worked on the computer. (*Id.*, pp. 30–32). Plaintiff claimed that I.T. "almost fall [sic] like a few times and I tried to hold her, you know, in order not [to fall]." (*Id.*, pp. 31–32). I.T. told him to stop touching her, at which point he told her "I was trying to hold you and I'm sorry." (*Id.*, p. 32). Defendant asked when this happened, and Plaintiff responded that he did not remember, but added that it did not happen often, only "[o]nce in a while." (*Id.*, p. 30).

Plaintiff further stated, "That's the only closest thing I can get to her, but I know it's not right." (*Id.*). When Defendant pushed Plaintiff further on I.T.'s claim that he had touched her groin area, Plaintiff claimed that he never touched her in the groin area and stated: "Nothing like that ... because basically, I don't have time for that, first of all. Second it's against my own rules. Against my own, you know, reputation. My sister is – leaving her with me and she's seven – not even seven." (*Id.*, p. 36).

Defendant then asked Plaintiff: "So, how many times do you think you touched her, where it could have been inappropriate?" (*Id.*, p. 41). Despite his previous denials of any inappropriate touching, Plaintiff responded: "A few because basically most of the time, ... she feels like she needs her father, as well as she sees me as a father figure." (*Id.*). Plaintiff stated that: "I don't see it's inappropriate because we pretty much not doing anything and not even grabbing, or rubbing or stuff like that." (*Id.*, pp. 42–43).

At the end of the interview, Defendant asked Plaintiff about any inappropriate sexual desires towards children, to which Plaintiff responded that he didn't have a girlfriend and stated: "[M]y point is you don't have any action, let's say that, for a while, you have those feelings when pretty much anything moves.... So, if somebody approaching you, you have that feeling like wow this feels so good, so might as well do a little bit of this. I don't think she would mind. That's the way I see it." (*Id.*, pp. 47–48). Plaintiff repeated his denials about ever touching I.T. inappropriately, and he denied any sexual interest in or satisfaction from touching her. (*See id.*, pp. 45–47).

According to Defendant, based on the facts and circumstances known at the time, he concluded that there was probable cause to arrest Plaintiff for sexual abuse in the first degree. (Dkt. No. 72-3, ¶ 10). Defendant

also decided to contact Delaware County Chief Assistant District Attorney John Hubbard to seek further assurance that probable cause existed. (*Id.*, ¶ 11). According to Defendant:

> I told Hubbard that a child in Margaretville told a social services caseworker about inappropriate touching, and that the child would not speak to me at the school. I told [Hubbard] that the caseworker reported that I.T. said she was touched on more than one occasion in a private area. I also told Hubbard that I interviewed [Plaintiff], who confirmed that inappropriate touching occurred, but stated that the touching was accidental and that he apologized to I.T. Hubbard told me that he believed there was probable cause to arrest [Plaintiff].

(*Id.*; *see also* Dkt. No. 83-7, pp. 12–15, 20). On December 18, 2015, Defendant arrested Plaintiff and filed a felony complaint in Town of Middletown court charging him with sexual abuse in the first degree. (Dkt. No. 85, ¶ 46; Dkt. No. 72-12). Approximately five to six hours later, Plaintiff was released on bail, and the court ordered that Plaintiff stay away from I.T., her mother, and her brother. (Dkt. No. 72-9, pp. 3–6; Dkt. No. 85, ¶¶ 47–48).

Plaintiff was arraigned on December 23, 2015, and he appeared in town court on January 27, 2016 and April 13, 2016 for his felony hearing. (Dkt. No. 85, ¶¶ 49–50). On September 21, 2016, the case was dismissed. (*Id.*, ¶ 50). According to Chief ADA Hubbard, his office declined to proceed with the case because I.T.'s mother was "very uncooperative," and told Hubbard that she did not want the case prosecuted. (Dkt. No. 83-7, p. 62). Under those circumstances, Hubbard decided not to

subpoena I.T. because he "wasn't going to put a six-year-old through a preliminary hearing." (*Id.*).

On March 17, 2017, Plaintiff filed the instant action in state court against numerous parties, including Defendant, for alleged illegal seizure, false arrest, and malicious prosecution. (Dkt. No. 3). The case was removed to this Court on April 4, 2017. (Dkt. No. 1).

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment appropriate where the

nonmoving party fails to " 'come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on' an essential element of a claim" (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010))).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250, 106 S.Ct. 2505; *see also Celotex*, 477 U.S. at 323–24, 106 S.Ct. 2548; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (quoting *Quarles v. Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)). Furthermore, "[m]ere conclusory allegations or denials ... cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995)).

IV. DISCUSSION

Following the Court's Order on the Defendants' motion to dismiss, there are two remaining causes of

action against Defendant: (1) false arrest; and (2) malicious prosecution.[2] (*See* Dkt. No. 36). In moving for summary judgment, Defendant argues that: (1) Plaintiff's claims fail because Defendant had probable cause to arrest and initiate the prosecution; and (2) Defendant is otherwise entitled to qualified immunity because there was at least arguable probable cause. (*See generally* Dkt. No. 72-1). The Court will assess each claim in turn.

A. False Arrest

Defendant argues that Plaintiff's false arrest claim must fail because Defendant had probable cause to arrest him based on the totality of the circumstances at the time. (Dkt. No. 72-1, pp. 9–14). In response, Plaintiff contends that there are issues of fact which preclude a finding of probable cause. (Dkt. No. 79, p. 13).

1. Applicable Law

When evaluating Section 1983 claims of false arrest, courts " 'generally look[ ] to the law of the state in which the arrest occurred.' " *Russo v. City of Bridgeport*, 479 F.3d 196, 203 (2d Cir. 2007) (quoting *Davis v. Rodriguez*, 364 F.3d 424, 433 (2d Cir. 2004)). In New York, a claim for false arrest requires the plaintiff to show that: "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement[;] and (4) the confinement was not otherwise privileged." *Ackerson v. City of White Plains*, 702 F.3d 15, 19 (2d Cir. 2012) (quoting *Broughton v. State of New York*, 37 N.Y.2d 451, 456, 373 N.Y.S.2d 87, 335 N.E.2d 310 (1975)).

"To avoid liability for a claim of false arrest, an arresting officer may demonstrate that either (1) he had probable cause for the arrest, or (2) he is protected from liability because he has qualified immunity." *Simpson v. City of New York*, 793 F.3d 259, 265 (2d Cir. 2015). As to probable cause, a police officer "has probable cause to arrest when he or she has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015). In the context of summary judgment, "where there is no dispute as to what facts were relied on to demonstrate probable cause, the existence of probable cause is a question of law for the court." *Walczyk v. Rio*, 496 F. 3d 139, 157 (2d Cir. 2007) (citation omitted).

A court examines each piece of evidence and considers its probative value, and then looks to the totality of the circumstances to evaluate whether there was probable cause to arrest. *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006) (quotation marks omitted). The existence of probable cause at the time of arrest is a complete defense to a claim for false arrest. *Torraco v. Port Auth. of New York and New Jersey*, 615 F.3d 129, 139 (2d Cir. 2010) (quoting *Jaegly v. Couch*, 439 F.3d 149, 152 (2d Cir. 2006)). An officer typically has probable cause to arrest "if he received his information from some person, normally the putative victim or eyewitness, who it seems reasonable to believe is telling the truth." *Miloslavsky v. AES Eng'g Soc., Inc.*, 808 F. Supp. 351, 355 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 1534 (2d Cir. 1993). However, an officer may not rely on such statements if there are "circumstances that raise doubts as to the

victim's veracity." *Mistretta v. Prokesch*, 5 F. Supp. 2d 128, 133 (E.D.N.Y. 1998) (quotation omitted).

2. Arguments

Defendant contends that probable cause was supported by three categories of evidence: (1) I.T.'s statements to Cumpston; (2) Plaintiff's statements to State Police; and (3) communication between State Police and Chief ADA Hubbard. (Dkt. No. 72-1, pp. 9–14). Specifically, Defendant asserts that I.T.'s statements supported probable cause because I.T. claimed that Plaintiff had touched her inappropriately more than one time, and that she told Plaintiff to stop touching her. (*Id.*, pp. 10–11). Defendant further claims that Plaintiff's statements to Defendant also support probable cause because Plaintiff confirmed that he touched I.T. inappropriately and that I.T. told him not to touch her. (*Id.*, p. 12). According to Defendant, Plaintiff's apparent backtracking and minimization of his conduct "would lead any reasonable officer to conclude that I.T. was telling the truth and that [there was] probable cause to arrest." (*Id.*). Finally, Defendant points to his consultation with Chief ADA Hubbard, who, after weighing all of the information that Defendant had collected, also concluded that there was probable cause to arrest. (*Id.*, pp. 13–14). Defendant adds that Plaintiff's focus on alleged deficiencies in Cumpston's interview with I.T. is misplaced because probable cause depends on the totality of the circumstances. (Dkt. No. 84, p. 2).

In response, Plaintiff claims that Defendant's reliance on Cumpston's interview was improper because Cumpston was "untrained in forensic interviewing," and "made no inquiry as to whether the touching involved 'sexual gratification' ...." (Dkt. No. 79, p. 13). Plaintiff

asserts that Defendant erred by relying on Cumpston's "unreliable" interview, and by otherwise failing to corroborate Cumpston's findings through his own interview. (*Id.*, p. 14). Moreover, Plaintiff asserts that Defendant erred by disregarding his training, "which required him to determine a bilingual child's primary language at home and the need for an interpreter no matter how well I.T. spoke English at school." (*Id.*). Plaintiff claims that these alleged deficiencies during I.T.'s interviews with investigators "create genuine factual and material issues of reliability and credibility which must be determined by the trier of fact." (*Id.*, p. 17).

Further, Plaintiff argues that Defendant improperly relied on Plaintiff's statements to police because "Defendant cherry-picks sentences out of the video transcript [from Plaintiff's interview] to inculpate [Plaintiff]." (*Id.*, pp. 18–19). Plaintiff also asserts that Defendant's consultation with ADA Hubbard does not support probable cause because Hubbard "was informed about some of the evidence but not all of the evidence, or lack thereof" and because Defendant "was going to arrest [Plaintiff] even without speaking with the D.A." (*Id.*, pp. 20–22).

3. Analysis

The parties only dispute the fourth element of Plaintiff's false arrest claim, that is, whether his confinement was privileged by probable cause. As relevant here, "a person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact ... when the other person is less than eleven years old." N.Y. Penal Law § 130.65(3). Sexual contact means "any touching of the sexual or other

intimate parts of a person for the purpose of gratifying sexual desire of either party." N.Y. Penal Law § 130.00(3). "It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing...." *Id.* Thus, the question is whether Defendant had probable cause, based on the totality of circumstances, to reasonably believe that Plaintiff had subjected I.T. to sexual contact.

Based on the facts available to Defendant at the time, the Court finds that there was probable cause to arrest Plaintiff. The record shows that Defendant's investigation began with a report from DSS caseworker Cumpston that I.T. had made a credible allegation of sexual abuse. (Dkt. No. 72-3, ¶¶ 3–6; *see also* Dkt. No. 72-4, pp. 3–9). Cumpston conducted two separate interviews with I.T., during which I.T. consistently alleged that: (1) Plaintiff touched her "private parts" on multiple occasions; (2) that only I.T. and Plaintiff were home at the time; (3) the touching occurred when she entered Kindergarten; and (4) her uncle was no longer touching her inappropriately. (*See* Dkt. No. 72-4, pp. 4–5, 8–9; *see also* Dkt. No. 83-2, p. 107). I.T. specified that Plaintiff had touched her groin area on the outside of her pants. (Dkt. No. 72-4, pp. 7–8). Cumpston then informed Defendant of I.T.'s allegations. (Dkt. No. 83-2, pp. 112–13).

I.T.'s allegations support a finding of probable cause because her account describes repeated sexual contact by Plaintiff with a six-year-old. Despite I.T.'s young age, her allegations were specific and consistent across both interviews. Further, Defendant reported that he found I.T. to be "extremely intelligent and extremely articulate from the conversation [he] had with her." (Dkt. No. 83-1, p. 83). Although Plaintiff objects to

the interview techniques used by Cumpston, there is no indication that I.T. was induced to allege that Plaintiff touched her inappropriately, or that any language barrier affected her allegations. (*See generally* Dkt. Nos. 72-4, 83-1, 83-2, 83-8). Nor does Plaintiff raise any doubts that I.T.'s allegations appeared to be credible. (*See* Dkt. No. 79, pp. 12–17). Plaintiff's sexual gratification motive can also be inferred from I.T.'s account. *See People v. Hayes*, 104 A.D.3d 1050, 962 N.Y.S.2d 443, 447 (3d Dep't 2013) (noting that a "defendant's sexual gratification motive can be readily inferred from his conduct in subjecting the young victim to repeated unwanted touching of her intimate parts"). Therefore, the record shows that Defendant reasonably relied on I.T.'s allegations, which supported probable cause to arrest.[3]

To the extent Plaintiff argues that Defendant improperly relied on Cumpston's interview of I.T., as opposed to conducting his own, it is well-established that officers may rely on social workers and school officials, particularly in sensitive cases where, as here, young children are reluctant to share sensitive information with law enforcement. *See, e.g.*, *Brown v. City of New York*, No. 16-CV-1919, 2018 WL 3821620, at *7, 2018 U.S. Dist. LEXIS 135478, at *19(S.D.N.Y. Aug. 10, 2018) ("[I]t is undisputed that, at that time, [Detective] Cardona was aware that a school official—a complaining witness—had filed a report of suspected child abuse with NYSOCFS, which was thereafter referred to the NYPD, noting that E.B. had lacerations/bruises/welts as a result of her father pinching her. This establishes probable cause to arrest Mr. Brown for assault in the third degree, among other things."); *Peterson-Hagendorf v. City of New York*, 146 F. Supp. 3d 483, 485–87 (E.D.N.Y. 2015) (dismissing a false arrest claim at summary judgment upon finding of probable cause to

arrest a teacher for endangering the welfare of a child based upon the school principal's observation of a welt on the child's neck, as well as interviews of the child by several individuals during which the child consistently described the teacher's physical abuse).

The other piece of evidence available to Defendant was Plaintiff's interview at the police barracks, which was video recorded.[4] During the interview, Plaintiff stated that there were "a few" times when he touched I.T. where it could have been inappropriate. (Dkt. No. 83-6, p. 41). Plaintiff asserts that these statements were "cherry picked" from the transcript, but there is no dispute that he admitted to hugging I.T. and touching her leg, and Plaintiff acknowledged that there was at least one occasion where I.T. told him to stop hugging and touching her. (*Id.*, pp. 28, 30–31, 36). Plaintiff's interview is consistent with I.T.'s account on several important points: (1) the touching occurred more than once; (2) the touching occurred on the couch; (3) the touching could have been considered inappropriate; and (4) that I.T. told Plaintiff to stop touching her. (*Compare* Dkt. No. 72-4, pp. 4–5, 7–8, *with* Dkt. No. 83-6, pp. 29–32, 41–42).

Although Plaintiff claims that any inappropriate touching was accidental, it is well-established that "a suspect's denials are insufficient to obviate probable cause," and "the fact that an innocent explanation may be consistent with the facts alleged does not negate probable cause." *Weiner v. McKeefery*, 90 F. Supp. 3d 17, 32 (E.D.N.Y. 2015) (citations omitted). Moreover, "[a]n arresting officer thus does not have a 'duty to investigate exculpatory defenses offered by the person being arrested or to assess the credibility of unverified claims of justification before making an arrest.' " *Yorzinski v. City of New York*, 175 F. Supp. 3d 69, 76 (S.D.N.Y. 2016)

(quoting *Jocks v. Tavernier*, 316 F.3d 128, 135–36 (2d Cir. 2003)). Indeed, Plaintiff's explanation during the interview could be seen as an attempt to minimize and deflect from his wrongdoing. *See Brown*, 2018 WL 3821620, at *8, 2018 U.S. Dist. LEXIS 135478, at *19–20 ("That the Browns or E.B. may have later minimized the pinch as playful 'does not preclude a finding that [the officer] had probable cause' to arrest Mr. Brown, especially in the absence of any reason to doubt the credibility of the unequivocal accounts regarding the interaction and E.B.'s injury.") (citation omitted).

Further, Plaintiff made several statements during the interview that could be fairly interpreted to infer that he touched I.T. for his own sexual gratification. For example, Plaintiff explained that he did not have a girlfriend, and then, despite denying having any inappropriate sexual interests in I.T., stated that "my point is that [if] you don't have any action ... for a while, you have those feelings when pretty much anything moves." (Dkt. No. 83-6, p. 48). He continued on to say: "So, if somebody [is] approaching you, you have that feeling like wow this feels so good, so might as well do a little bit of this. I don't think she would mind. That's the way I see it." (*Id.*). Prior to making those comments, Plaintiff had backtracked on whether he had ever touched I.T. inappropriately, ultimately admitting that there were at least "a few" times where his contact with her could be considered inappropriate, and further acknowledging that I.T. told him directly to stop touching her. (*See generally* Dkt. No. 83-6, pp. 15, 19, 27–32, 35–36, 41–42). Plaintiff also stated that he understood the law, and noted that he would not have touched I.T. inappropriately because: "I know I'll be in trouble. A hundred percent in trouble. I know I can go to the jail and I know I probably be doing fifteen years in jail." (*Id.*,

pp. 24, 39). Putting aside Plaintiff's self-serving denials, his other statements could reasonably be interpreted in the overall context as suggesting that touching I.T. was sexually motivated, thereby adding to the facts supporting probable cause.

Looking at the totality of the circumstances, there is no dispute as to the facts available to Defendant at the time of Plaintiff's arrest. I.T.'s allegations describing sexual contact by Plaintiff supported a finding of probable cause to arrest Plaintiff for sexual abuse, and Plaintiff's interview did not change that. Accordingly, the Court concludes as a matter of law that Defendant had probable cause to arrest Plaintiff for sexual abuse in the first degree. Therefore, Defendant is entitled to summary judgment on Plaintiff's false arrest claims. *See Weiner*, 90 F. Supp. 3d at 28–33 (dismissing the plaintiff's false arrest claim on summary judgment where the arresting officers' probable cause determination relied upon abuse allegations from child witnesses); *see also Callahan v. City of New York*, 90 F. Supp. 3d 60, 68–69 (E.D.N.Y. 2015) (dismissing the plaintiff's false arrest claim on summary judgment where the arresting officers had probable cause to arrest the plaintiff for child endangerment); *Donovan v. Briggs*, 250 F. Supp. 2d 242, 250–53 (W.D.N.Y. 2003) (dismissing the plaintiff's false arrest claim where there was probable cause to arrest the plaintiff for sexual abuse, despite questions about the victim's reliability).

B. Malicious Prosecution

Next, Defendant argues that Plaintiff's malicious prosecution claim fails because the probable cause for Plaintiff's arrest also supported his prosecution. (Dkt. No. 72-1, p. 15). In response, Plaintiff claims that any

probable cause supporting the arrest "dissipated" between the date of the arrest and the felony hearing. (Dkt. No. 79, pp. 22–24).

1. Applicable Law

To prevail on a Section 1983 claim for malicious prosecution, "a plaintiff must show a violation of his rights under the Fourth Amendment ... and must establish the elements of a malicious prosecution claim under state law." *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010) (citations omitted). Under New York law, a plaintiff must establish four elements for a malicious prosecution claim: "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Id.* (quotations and other citations omitted); *see also Dufort v. City of New York*, 874 F.3d 338, 350 (2d Cir. 2017). Because lack of probable cause is an element of the offense, "the existence of probable cause is a complete defense to a claim of malicious prosecution." *Manganiello*, 612 F.3d at 161–62 (quoting *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)).

2. Arguments

In support of summary judgment, Defendant relies on his previous analysis supporting the arrest, and further asserts that the "probable cause analysis is the same in the false arrest and malicious prosecution contexts where the plaintiff does not allege that there was any difference in the facts known to police officers between arrest and arraignment." (Dkt. No. 72-1, p. 15).

Plaintiff counters that probable cause had dissipated because, "by the time of the felony hearing, some four months after [P]laintiff's arrest, [Defendant] was seeking a further interview with I.T. because he needed to 'confirm' the touching, without which he recognized there 'was no case.' " (*Id.*, pp. 23–24). The parties also dispute whether the facts support a finding that Defendant acted with malice in initiating Plaintiff's prosecution. (*See* Dkt. Nos. 72-1, p. 15; 79, pp. 22–24; 84, p. 5).

3. Analysis

As discussed above, the facts at the time of Plaintiff's arrest supported a reasonable finding of probable cause for sexual abuse in the first degree. Although Plaintiff suggests that the probable cause dissipated between his arrest and the felony hearing, he does not identify any intervening facts, besides Defendant's wish to conduct another interview with I.T. However, for probable cause to dissipate, "the groundless nature of the charges must be made apparent by the discovery of some intervening fact." *Kinzer v. Jackson*, 316 F.3d 139, 144 (2d Cir. 2003) (quoting *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 571 (2d Cir. 1996)). Therefore, "the question is whether either the evidence gathered after arrest undermined a finding of probable cause, or whether the [ ] [d]efendants' inquiry into the alleged [crime] so far departed from what a reasonable person would have undertaken as to itself constitute evidence of lack of probable cause." *Rae v. County of Suffolk*, 693 F. Supp. 2d 217, 227 (E.D.N.Y. 2010).

In this case, Plaintiff points to the transcript from Defendant's testimony at the felony hearing, in which Defendant stated that he felt the prosecution needed to

re-confirm I.T.'s statements to move forward. (*See* Dkt. No. 79, pp. 23–24). According to Defendant, he believed that it was necessary for I.T. to re-confirm her earlier abuse allegations for the case to proceed against Plaintiff after his arrest. (Dkt. No. 83-1, pp. 119–22). Regardless of reconfirmation, Defendant still felt there was probable cause because "[I.T.'s] disclosure and certain admissions made by [Plaintiff] forced [investigators] to believe there was sexual conduct, [that] it was for his gratification and the arrest was made." (*Id.*, p. 124).

Significantly, Defendant's opinions on the likely success of the case without reconfirmation had no effect on I.T.'s prior statements, which themselves supported a finding of probable cause. In other words, Defendant's wish to re-confirm I.T.'s allegations does not demonstrate any change in the available evidence regarding Plaintiff's alleged commission of sexual abuse. Thus, Plaintiff has not identified any intervening facts or exculpatory evidence which dissipated or otherwise diminished the probable cause from the time of his arrest. Since there is no evidence of dissipation, the prosecution began with the same facts supporting probable cause from the time of Plaintiff's arrest. Therefore, the Court can conclude as a matter of law that probable cause also supported the prosecution, for the same reasons discussed above. *See Kaskell v. Compagnone*, 664 F. App'x 109, 111–12 (2d Cir. 2016) (affirming the dismissal of a malicious prosecution claim where probable cause for the plaintiff's arrest for child abuse was supported by allegations from the mother of the victims, the arresting officer's experience, and a pediatrician's report of suspected child abuse); *see also Lanning v. City of Glens Falls*, No. 16-CV-132, 2017 WL 922058, at *4, 2017 U.S. Dist. LEXIS 32878, at *11–12 (N.D.N.Y. Mar. 8, 2017) (rejecting the plaintiff's

dissipation theory where there were no new facts learned between the arrest and the arraignment) (citing *Kanderskaya v. City of New York*, 11 F. Supp. 3d 431, 437 (S.D.N.Y. 2014), *aff'd*, 590 F. App'x 112 (2d Cir. 2015)).

Furthermore, there is no evidence in the record to permit a rational inference that Defendant acted with malice in initiating Plaintiff's prosecution. Defendant's alleged failure to follow best practices, even if true, does not demonstrate that he acted with improper or wrongful motives, nor does it show reckless disregard of Plaintiff's rights. And the record shows that, before arresting Plaintiff, Defendant consulted with Chief ADA Hubbard to confirm his opinion that probable cause existed, which vitiates any possible finding of malice. (Dkt. No. 72-3, ¶ 11). *See Cilauro v. Duff*, No. 06-CV-0498, 2009 WL 2259142, at *3–4, 2009 U.S. Dist. LEXIS 67367, at *9–11 (N.D.N.Y. July 29, 2009) (dismissing the plaintiff's malicious prosecution claim where, among other things, the record contained no evidence that the defendant was motivated by malice); *Rizzo v. Edison, Inc.*, 419 F. Supp. 2d 338, 349 (W.D.N.Y. 2005) (same). Accordingly, Defendant is entitled to summary judgment on Plaintiff's malicious prosecution claims.

C. Qualified Immunity

In the alternative, Defendant claims that "even if [Defendant] did not have probable cause to arrest the plaintiff, he is entitled to qualified immunity because he had 'arguable probable cause.' " (Dkt. No. 72-1, pp. 15–17). Plaintiff disagrees. (Dkt. No. 84, p. 6).

1. Applicable Law

Qualified immunity establishes a defense for a government actor acting in his official capacity. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). It "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* In the context of false arrest and malicious prosecution claims, an officer is entitled to qualified immunity if he had "arguable probable cause," which means that "officers of reasonable competence could disagree on whether the probable cause test was met." *Gonzalez v. City of Schenectady*, 728 F.3d 149, 157 (2d Cir. 2013) (quoting *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007)).

2. Arguments

Defendant contends that, at a minimum, reasonable officers could disagree as to whether based on all the facts there was probable cause to believe that Plaintiff committed sexual abuse in the first degree. (Dkt. No. 72-1, pp. 15–17). Defendant adds that any failure by him to comply with "best practices" or training, even if true, "do[es] not automatically negate qualified immunity." (Dkt. No. 84, p. 6).

In response, Plaintiff asserts that Defendant "is not entitled to qualified immunity because there are numerous issues of genuine and material fact," including that Defendant: (1) "erroneously relied on Cumpston's interview results when he knew that she was untrained in forensic interviewing"; and (2) "could not reasonable [sic] rely on Cumpston as a 'fellow officer' because she was a DSS caseworker untrained in the work of a Senior Investigator for the State Police, and because

[Defendant] was called to the scene by Cumpston specifically to take over the investigation....” (Dkt. No. 79, pp. 24–25). Further, Plaintiff asserts that an officer of reasonable competence could not have made the same choice because “[t]he record reveals that [Defendant] disregarded the operating NYSP ‘methodology’ in forensic child interviews contained in his course curriculum,” which Plaintiff claims, “creates at least a genuine factual and material issue as to whether any reasonably competent state police forensic interviewer could rely on the information obtained in this case....” (*Id.*, pp. 25–26).

3. Analysis

As discussed above, the Court finds as a matter of law that based on the information available to Defendant, probable cause existed to arrest Plaintiff and initiate his prosecution. Necessarily it follows that the information available to Defendant also satisfied the lesser standard for arguable probable cause. Furthermore, the fact that Defendant relied on Cumpston's interview with I.T. does not show that he acted unreasonably, as discussed above. And the fact that Defendant sought the advice of Chief ADA Hubbard, and that Hubbard agreed that there was probable cause to arrest Plaintiff, shows that Defendant's actions were reasonable. *See Strawn v. Holohan*, No. 04-CV-1292, 2008 WL 65586, at *6, 2008 U.S. Dist. LEXIS 618, at *18–19 (N.D.N.Y. Jan. 4, 2008) (finding that the arresting officer's consultation with the district attorney's office prior to the arrest “is a factor supporting the reasonableness of [the officer's] actions”); *see also Dale v. Kelley*, 908 F. Supp. 125, 137–38 (W.D.N.Y. 1995) (noting that police officers must be able

to rely on advice of prosecutors and holding that defendant was entitled to qualified immunity where he was "acting at the direction of an Assistant District Attorney"), *aff'd*, 95 F.3d 2 (2d Cir. 1996).

Accordingly, even if the facts available to Defendant fell short of probable cause, there was at least arguable probable cause to arrest Plaintiff for sexual abuse in the first degree and initiate his prosecution. Therefore, Defendant is entitled to qualified immunity on Plaintiff's Section 1983 claims. *See Betts v. Shearman*, 751 F. 3d 78, 83 (2d Cir. 2014) (holding that the existence of arguable probable cause entitled arresting officers to qualified immunity on the plaintiff's malicious prosecution claim); *see also Donovan*, 250 F. Supp. 2d at 253–60 (holding that the defendants were entitled to qualified immunity where there was at least arguable probable cause to arrest the plaintiff); *Fleurimond v. Holder*, 403 F. Supp. 3d 95, 107–111 (E.D.N.Y. 2019) (same).

V. CONCLUSION

For these reasons, it is

ORDERED that Defendant's motion for summary judgment (Dkt. No. 72) is **GRANTED**; and it is further

ORDERED that Plaintiff's Amended Complaint (Dkt. No. 41) is **DISMISSED with prejudice**; and

ORDERED that Plaintiff's request to amend the Amended Complaint is denied as moot; and finally, it is

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Footnotes

1The facts have been drawn from Defendant's statement of material facts, (Dkt. No. 72-2), Plaintiff's response and counterstatement of material facts, (Dkt. No. 78), Defendant's response (Dkt. No. 85), and the parties' attached exhibits, depositions, and declarations (*see generally* Dkt. Nos. 72, 77–85).

2Plaintiff asserts his claims of false arrest and malicious prosecution under both state and federal law. (*See* Dkt. No. 41).

3Rather than attacking the veracity of I.T.'s allegations, Plaintiff primarily argues that the interview techniques that Cumpston employed were improper and contrary to "best practices." (*See* Dkt. No. 79, pp. 12–17; *see also* Dkt. No. 80). Specifically, Plaintiff claims that the interviews were critically flawed because Cumpston: (1) was untrained in forensic interviewing, including the use of anatomical dolls; (2) failed to keep contemporaneous notes during the interview, or otherwise inappropriately discarded them; and (3) failed to question I.T. as to whether the touching involved "sexual gratification," thereby failing to preclude permissible alterative reasons for the touching. (Dkt. No. 79, pp. 13–14). Plaintiff further claims that Defendant erred by improperly relying on Cumpston's flawed interviews, and otherwise disregarded important aspects of his own forensic interview training, such as: (1) determining a bilingual child's primary language to assess the need for an interpreter; (2) corroborating the abuse allegations through his own interview rather than through a third party's interview; and (3) failing to personally observe any of the interviews where I.T. made statements about the nature of the alleged inappropriate touching. (*Id.*, pp. 14–17). Despite these

critiques, it is well-established that the failure to follow alleged "best practices" does not vitiate the existence of probable cause under the circumstances here. *See Panetta*, 460 F.3d at 395–96 (noting that "the fact that an innocent explanation may be consistent with the facts alleged does not negate probable cause," and "[a]lthough a better procedure may be for the officers to investigate plaintiff's version of events more completely, the arresting officer does not have to prove plaintiff's version wrong before arresting him"); *see also Hayes v. City of New York*, No. 12-CV-4370, 2014 WL 4626071, at *10–11, 2014 U.S. Dist. LEXIS 92953, at *29–33 (S.D.N.Y. Sept. 15, 2014) (finding no error in the defendant officer's probable cause finding where, despite purportedly inadequate investigation techniques, there was probable cause for the arrest). The Court finds that none of the critiques posed by Plaintiff raise doubts about the veracity of I.T.'s allegations or the *material* facts supporting probable cause.

4In considering the interview, the Court has reviewed both the video recording and the written transcript. (*See* Dkt. Nos. 72-3, Ex. 1; 83-6).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 13th day of August , two thousand twenty-one.

Agustin Torres Gonzalez, Plaintiff - Appellant,

v.

Steven Hahl, New York State Police Investigator, individually, AKA Stephen Hahl, County of Delaware, Cynthia L. Bogdan-Cumpston, Defendants - Appellees.

ORDER
Docket No: 20-1415

Appellant Agustin Torres Gonzalez, 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.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk