United States Court of Appeals
for the Fifth Circuit

No. 20-50917

TETTUS DAVIS,

Plaintiff—Appellee,

versus

JONATHON HODGKISS, *Individual*,

Defendant—Appellant,

ELIZABETH SAUCEDO,

Plaintiff—Appellee,

versus

JONATHON HODGKISS, *Individual*,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-1113
USDC No. 1:17-CV-1114

(Filed Aug. 25, 2021)

Before KING, DENNIS, and HO, *Circuit Judges*.

PER CURIAM:

This is a consolidated civil rights action, in which plaintiffs-appellees allege that defendant-appellant Sergeant Jonathon Hodgkiss violated their Fourth Amendment rights by using false statements to secure a search warrant. Hodgkiss now appeals the lower court's denial of qualified immunity. For the reasons that follow, we REVERSE and RENDER summary judgment in favor of Hodgkiss.

I.

Many of the relevant facts in this case are in dispute. However, as is explained in greater detail *infra*, the posture of this interlocutory appeal requires that we "accept the truth of the plaintiffs' summary judgment evidence" and deprives us of jurisdiction to "review the genuineness of [the] factual disputes that precluded summary judgment in the district court." *Kinney v. Weaver*, 367 F.3d 337, 341 (5th Cir. 2004) (en banc). Indeed, "[w]here factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the plaintiffs' version of the facts as true." *Id.* at 348.

The case arises out of a criminal investigation into plaintiffs-appellees Elizabeth Saucedo and Tettus Davis by detectives of the Williamson County Sheriff's Office. Defendant-appellant Sergeant Jonathon Hodgkiss claims that he and Detective Jorian Guinn

interviewed a source of information ("SOI") in March of 2015 and alleges that the SOI revealed information about illegal activities involving Davis. Hodgkiss contends that, after a recorded interview, the detectives and the SOI drove through Georgetown while the SOI provided additional information. In particular, the SOI allegedly identified the house—Saucedo's residence—from which Davis conducted illegal activities, including dealing narcotics. Plaintiffs dispute that this drive with the SOI ever occurred and emphasize that the recording of the interview does not include the statements implicating Davis as a drug dealer.

Beyond the information allegedly provided by the SOI, Hodgkiss also learned from other Williamson County deputies that the Saucedo residence was a "suspected drug distribution house due to high traffic going to and coming from the location." Surveillance was conducted at the residence, and Davis was observed there "on numerous occasions" and was seen driving a tan Buick sedan. "[B]ehavior consistent with drug sales" was also observed. A "trash run" was conducted at the residence on June 9, 2015, during which detectives recovered, *inter alia*, plastic baggies containing marijuana residue and cocaine and mail addressed to Saucedo.

Hodgkiss eventually prepared an affidavit for a search warrant of the Saucedo residence, which was signed by Williamson County District Court Judge King in June 2015. The warrant was executed on June 11, 2015, and Davis and Saucedo were subsequently arrested and charged with drug offenses. However, in

May of 2016, a district court judge found that there was no probable cause for the search warrant and granted a motion to suppress all evidence obtained as a result of the search. Specifically, the judge concluded that the recording of Hodgkiss's interview with the SOI did not reflect the information that Hodgkiss claimed to have received from the SOI in his affidavit. Soon thereafter, the State moved to dismiss all charges against Davis and Saucedo.

In November of 2017, Davis and Saucedo each individually filed suit against Hodgkiss for wrongful arrest and malicious prosecution under 42 U.S.C. § 1983. These actions were consolidated for all purposes on September 11, 2018. The case was then reassigned, by consent of the parties, to United States Magistrate Judge Mark Lane on August 8, 2019.

On October 15, 2020, the Magistrate Judge denied Hodgkiss's motion for summary judgment, which was based, in relevant part, on qualified immunity. The Magistrate found that Davis and Saucedo had only pled facts "giving rise to one legally cognizable claim"—a claim under *Franks v. Delaware*, 438 U.S. 154 (1978), based on Hodgkiss allegedly making false statements in his affidavit. With regard to that single claim, the Magistrate concluded both that (1) there was an issue of material fact as to whether Hodgkiss recklessly, knowingly, or intentionally made material misstatements and (2) an affidavit without those misstatements would not have shown probable cause to search the Saucedo residence. The Magistrate Judge

thus denied Hodgkiss's qualified immunity defense. This interlocutory appeal by Hodgkiss followed.

II.

It is necessary first to define the scope of our jurisdiction in this interlocutory appeal. We may exercise jurisdiction over an interlocutory appeal of a denial of summary judgment based on qualified immunity only "to the extent that the denial of summary judgment turns on an issue of law." *Hogan v. Cunningham*, 722 F.3d 725, 730 (5th Cir. 2013) (quoting *Juarez v. Aguilar*, 666 F.3d 325, 331 (5th Cir. 2011)) (cleaned up). Indeed, "[w]henever the district court denies an official's motion for summary judgment predicated upon qualified immunity, the district court can be thought of as making two distinct determinations, even if only implicitly." *Kinney*, 367 F.3d at 346. The first such determination is "that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law." *Id.* The second is "that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct." *Id.* We lack jurisdiction to "review conclusions of the *second* type on interlocutory appeal." *Id.* (emphasis in original). Put another way, we lack jurisdiction to hear challenges to "the district court's assessments regarding the sufficiency of the evidence." *Id.* at 347. However, we may consider the "purely legal question" of "whether a given course of conduct would be objectively unreasonable in light of clearly established law." *Id.*

The qualified immunity inquiry includes two prongs: (1) "whether the officer's alleged conduct has violated a federal right" and (2) "whether the right in question was 'clearly established' at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct." *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019) (en banc), *cert. denied sub nom.*, *Hunter v. Cole*, 141 S. Ct. 111 (2020). The officer will be entitled to qualified immunity if no constitutional violation occurred or if the conduct "did not violate law clearly established at the time." *Id.* We have the "discretion to decide which prong of the qualified-immunity analysis to address first." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Again, in reviewing the district court's determinations on these two prongs, we "lack jurisdiction to resolve the genuineness of any factual disputes" and may only consider "whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Cole*, 935 F.3d at 452 (quoting *Trent v. Wade*, 776 F.3d 368, 376 (5th Cir. 2015)).

III.

We focus our discussion on the first prong of the qualified immunity analysis—whether Hodgkiss's alleged conduct violated a federal right. Plaintiffs have alleged a violation of their Fourth Amendment right, recognized by the Supreme Court in *Franks v. Delaware*, to be free from search pursuant to a warrant that

lacks probable cause due to knowing or reckless misstatements. 438 U.S. at 155–56.

To prove such a claim under *Franks*, plaintiffs must show that (1) the affidavit supporting a warrant contained false statements or material omissions; (2) the affiant made such false statements or omissions knowingly and intentionally, or with reckless disregard for the truth; and (3) the false statements or material omissions were necessary to the finding of probable cause. *See United States v. Kendrick*, 980 F.3d 432, 440 (5th Cir. 2020) (citing *United States v. Ortega*, 854 F.3d 818, 826 (5th Cir. 2017)); *Franks*, 438 U.S. at 155-56. As to the final element, falsehoods will be deemed necessary to the finding of probable cause if the affidavit, "with the . . . false material set to one side," is "insufficient to establish probable cause." *Franks*, 438 U.S. at 156.

Each of the three elements is at issue in this case. The Magistrate Judge found that issues of material fact precluded summary judgment on the first and second elements, and we may not "resolve the genuineness of [those] factual disputes." *Cole*, 935 F.3d at 452 (quoting *Trent*, 776 F.3d at 376). However, as detailed above, the remaining question is whether, "if the false statement is excised, . . . the remaining content in the affidavit fail[s] to establish probable cause." *Kendrick*, 980 F.3d at 440 (quoting *Ortega*, 854 F.3d at 826). And the "ultimate determination of probable cause . . . is a question of law." *United States v. Ho*, 94 F.3d 932, 936 (5th Cir. 1996). "In determining whether probable cause exists without the false statements," we

must make "a practical, common-sense decision as to whether, given all the circumstances set forth in the affidavit [minus the alleged misstatements], there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Froman*, 355 F.3d 882, 889 (5th Cir. 2004) (alteration in original) (quoting *United States v. Byrd*, 31 F.3d 1329, 1340 (5th Cir. 1994)).

The Magistrate Judge concluded that the remaining content in the affidavit was not sufficient to establish probable cause. We disagree.

The Magistrate identified that remaining content as follows: patrol deputies believed that the Saucedo residence was a suspected drug house and that Davis and Saucedo together transported marijuana and other narcotics to and from the residence; patrol deputies routinely observed plaintiffs leave the residence and return after short periods of time and saw multiple vehicles stop at the residence and briefly meet Davis in the street; Davis was routinely observed driving his car around the city and meeting individuals for short periods of time at various locations; Davis was pulled over in April of 2015, and officers located a "medium sized box that contained marijuana residue" and a large amount of currency "in small denominations"; and Davis was observed meeting with an individual who was then on parole for a felony drug conviction. Finally, the June 2015 trash run uncovered plastic baggies containing a substance that field-tested positive for cocaine, plastic baggies containing marijuana residue, mail addressed to Saucedo, Swisher Sweet cigars,

and loose tobacco. The affidavit also recounts Davis's criminal history, which includes multiple narcotics convictions.

We have previously found probable cause based on similar facts. In *United States v. Sibley*, we held that a supporting affidavit based largely on a single trash run sufficiently connected the defendant to the apartment and "the apartment and its occupants to prior drug activity." 448 F.3d 754, 758 (5th Cir. 2006). In that case, the affidavit stated that law enforcement had received information that the apartment's occupants were dealing in drugs, garbage bags were observed being taken to the dumpster by an occupant, and marijuana was found in the bags following a trash run. *Id.*

Here, even after setting aside the allegedly false statements, there are similar facts set forth in the affidavit that establish probable cause to search the Saucedo residence. Notwithstanding the fact that only a single trash run was conducted, the evidence uncovered connected the trash bags and their contents to the Saucedo residence. Those contents included over twenty plastic baggies, many of which tested positive for narcotics. That is in addition to Davis's criminal history of engaging in drug activity, the information received from deputies about plaintiffs' suspected involvement in drug dealing, the suspicious behavior observed at the residence, and the drugs uncovered in the vehicle which Davis drove to and from the residence. Such evidence is sufficient to support probable

cause.[1] *See, e.g.*, *United States v. Sauls*, 192 F. App'x 298, 300 (5th Cir. 2006) ("[The defendant's] arrest three months earlier in the same car that was registered to a resident at [the residence] was sufficient to connect him to that residence," and " [the defendant's] prior arrests on narcotics violations and the evidence discovered in the curbside garbage were sufficient to support a reasonable belief that contraband would be found inside the residence."); *United States v. Reinholz*, 245 F.3d 765, 776 (8th Cir. 2001) (holding that drug paraphernalia and syringes with drug residue found in a single trash run, coupled with occupant's prior drug conviction, was sufficient to establish probable cause for search warrant), *cert. denied*, 534 U.S. 896 (2001).

Accordingly, we find that, with the allegedly "false statement[s] . . . excised," the affidavit's remaining content is enough to establish probable cause. *Kendrick*, 980 F.3d at 440 (quoting *Ortega*, 854 F.3d at 826). We thus conclude that Hodgkiss is entitled to summary judgment on plaintiffs' *Franks* claim as there was no constitutional violation.

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[1] Indeed, though plaintiffs cite a Sixth Circuit opinion holding that a single trash run is not enough, alone, to support probable cause, that same opinion emphasized that the defendant's history of drug charges had been excluded from the supporting affidavit. *See United States v. Abernathy*, 843 F.3d 243, 248 (6th Cir. 2016). Without that "critical missing ingredient," the court held that the remining evidence gathered in the trash run was not enough to support probable cause. *Id.* at 255. We need not decide whether a single trash run may establish probable cause by itself because there are more supporting facts set forth in the affidavit at issue here.

IV.

Based on the foregoing, we REVERSE the Magistrate Judge's order and RENDER summary judgment for defendant-appellant Sergeant Hodgkiss on plaintiffs-appellees' claim of liability under *Franks*.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

ELIZABETH SAUCEDO AND TETTUS DAVIS,	§	
Plaintiffs,	§	**No. 1:17-CV-1114-ML**
v.	§	
JONATHON HODGKISS,	§	
Defendant.	§	

ORDER

(Filed Oct. 15, 2020)

Before the court are Defendant Jonathon Hodgkiss's Motion for Summary Judgment (Dkt. #57) and all related pleadings.[1] After reviewing the pleadings, relevant case law, and the entire record, the undersigned DENIES Defendant's Motion in full.

I. BACKGROUND

In this consolidated civil rights action,[2] Plaintiffs Elizabeth Saucedo and Tettus Davis bring section 1983

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[1] Upon receiving unanimous consent from all named parties in this lawsuit, District Judge Yeakel referred and reassigned the above-styled case to United States Magistrate Judge Mark Lane pursuant to Section 636(c) of Title 28 of the United States Code and Federal Rule of Civil Procedure 73. *See* Dkt. #36.

[2] On September 2, 2019, District Judge Yeakel ordered that Civil Action No. 1:17-CV-1113-LY, styled *Tettus Davis v. Jonathon Hodgkiss*, be consolidated for all purposes with Civil Action

claims of unlawful arrest and malicious prosecution against Defendant Jonathon Hodgkiss in his individual capacity. Dkt. #19 (Amended Complaint). Plaintiffs allege that Sergeant Hodgkiss ("Hodgkiss") violated their Fourth Amendment rights by using false statements to secure a search warrant.

While many of the pertinent facts are in dispute, *see* Dkt. #62 at 2-3, this lawsuit arises out of a criminal investigation into the activities occurring at a house jointly occupied by Elizabeth Saucedo ("Saucedo") and Tettus Davis ("Davis"). Hodgkiss, a detective in the Williamson County Sheriff's Office, alleges that he and Detective Jorian Guinn ("Detective Guinn") interviewed a "Source of Information" ("SOI") in an interview room in March of 2015. Dkt. #57. Hodgkiss alleges that during the course of the interview the SOI revealed information about various illegal activities involving Davis. *Id.* at 9. While hotly contested, Hodgkiss contends that after the formal interview, he, the SOI, and Detective Guinn rode in a vehicle through Georgetown and the SOI provided additional information about Davis, including identifying the house out of which Davis allegedly conducted illegal activities like "dealing in marijuana and narcotics." *Id.* at 9. This house was later identified to be Elizabeth Saucedo's residence (the "Saucedo Residence").

Hodgkiss contends the Williamson County Sheriff's Office obtained additional evidence against Plaintiffs

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No. 1:17-CV-1114-LY, resulting in one lawsuit under Civil Action No. 1:17-CV-1114-LY. *See* Dkt. #15.

during a subsequent investigation predicated on the information received from the SOI. For example, Hodgkiss contends he learned from Williamson County Sergeant John Pokorny ("Sergeant Pokorny") that the Saucedo Residence, in his experience, exhibited "suspicious activity" that was "common drug-related activity." *Id.* Sergeant Pokorny is alleged to be familiar with the Saucedo Residence because his mother-in-law lived across the street. *Id.* Additionally, "[a]fter several weeks of surveillance," Hodgkiss alleges he noticed "unusual suspicious activity from Davis." *Id.* at 10. Based on the above information and investigation, Hodgkiss conducted a "trash run" in which he recovered "[a] significant amount of marijuana, cocaine, and other drug paraphernalia." *Id.*

At an unspecified date, Hodgkiss prepared an affidavit (the "Affidavit") for a search warrant of the Saucedo Residence and presented it to Judge King, who subsequently signed it. Thereafter, on June 11, 2015, Hodgkiss and several other officers executed the search warrant on the Saucedo Residence. Simultaneously, Davis was pulled over by the Round Rock Police Department for two alleged traffic violations, arrested, and taken to the Williamson County jail. Dkt. #19 at 2. Additionally, Saucedo was approached by Williamson County detectives while working as an Information Specialist at the Williamson County District Clerk's Office, placed in a squad car, and transported to the Saucedo Residence for the evidentiary search. *Id.* The search warrant listed both Saucedo and Davis as people in charge of and controlling the home. After the

search was completed, Plaintiffs were arrested and informed that they were being charged with two drug offenses – a second degree felony and a Class A Misdemeanor. *Id.* Saucedo paid a $10,000.00 bond on one charge and a $40,000 bond on the other charge. *Id*. at 2. She also lost her job, and Texas Child Protective Services removed her children from her custody for three months. *Id.* at 3. Davis was incarcerated for almost a year after his arrest. *Id.* at 4. Additionally, while no details have been briefed or provided to the court, both parties seem to acknowledge that a grand jury indicted Plaintiffs following their arrests. *See* Dkt. #57-12; Dkt. #57-13. On May 11, 2016, Williamson County District Court Judge Stacey Mathews found no probable cause for the search warrant. Upon examining the evidence, which included a video of Hodgkiss's interview with the SOI, and conducting a hearing on Davis's motion to suppress, Judge Mathews concluded that the video of the interview "does not reflect what is alleged by [Hodgkiss] in his Affidavit . . . and is inconsistent with his sworn testimony at the hearing." Dkt. #62-1 at 3 (Judge Mathews's Finding of Fact and Conclusions of Law). Specifically, Judge Mathews found that the SOI did not, as Hodgkiss claimed, inform him that Davis "was . . . exchanging property for narcotics . . . [and] selling marijuana from [the Saucedo Residence]." *Id.* Judge Mathews granted Davis's motion to suppress, finding "the information alleged by [Hodgkiss] regarding the information obtained by the SOI to be a reckless disregard for the truth." *Id.* at 4. The next day, on May 12, 2016, the State moved to dismiss the charges against both Plaintiffs. Dkt. #19 at 3.

On November 22, 2017, Plaintiffs individually filed suit against Hodgkiss under 42 U.S.C. § 1983 for wrongful arrest and malicious prosecution. Dkt. #1. Hodgkiss moved to dismiss the two cases in separate but similar motions, claiming the suit was filed more than two years after the arrest. Dkt. #12; *see* 1:17-cv-1 1 13-LY (W.D. Tex. Filed Nov. 22, 2017) (Dkt. #12). Hodgkiss also moved to dismiss Plaintiffs' malicious prosecution claims under the theory that they are not independently cognizable. *Id.* In two report and recommendations that were adopted by District Judge Yeakel, the undersigned recommended the denial of Hodgkiss's Motions to Dismiss. *Id.* As it related to Davis's case, the undersigned clarified that although he stated two claims, one for wrongful arrest and one for malicious prosecution, "Davis has only pleaded facts giving rise to one legally cognizable claim" – a Fourth Amendment malicious prosecution claim predicated on an arrest occurring pursuant to "allegedly fraudulently obtained warrants." *See* 1:17-cv-1113-LY (W.D. Tex. Filed Nov. 22, 2017) (Dkt. #12). Furthermore, the undersigned explicitly concluded that it did not reach the issue of whether Davis can plead a freestanding malicious prosecution claim because "Davis has not pleaded such a claim." *Id.* The undersigned made the same recommendations regarding Saucedo's almost identical case, with the exception that the court found Saucedo's Complaint ambiguous as to whether she sought to proceed with a "'false arrest' type claim, *i.e.*, a claim that the arrest occurred without legal process,"

or a malicious prosecution type claim. *See* Dkt. #12.[3] Nonetheless, the undersigned recommended the denial of Hodgkiss's Motion to Dismiss.

After the District Judge consolidated Davis's and Saucedo's cases on September 12, 2018, Plaintiffs filed their Amended Complaint on November 18, 2018. Notably, despite being given an opportunity to replead and clarify their claims, the claims in Plaintiffs' Amended Complaint are almost identical to those in their original, individual complaints. *Compare* Dkt. #1, *with* Dkt. #19. The Amended Complaint's two counts are as follows:

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[3] The undersigned noted:

> [b]oth parties seem to treat Count 1 as a "false arrest" type claim, *i.e.*, a claim that the arrest occurred without legal process. However, the court analyzes the claim as it is pleaded, not as the parties later characterize it. Unfortunately, the Complaint is ambiguous. Saucedo alleges that on June 11, 2015, she was placed in a squad car, transported to her home, and later arrested. Additionally, her references to Hodgkiss's securement of a warrant are ambiguous, as it is unclear whether she is referring to the search warrant or an arrest warrant. These facts could give rise to a "false arrest" claim, i.e., a claim that the arrest occurred without legal process. . . . However, the pleaded facts supporting the claim also . . . could state a claim for the 'wrongful institution of legal process' not an arrest in the absence of legal process. Such a claim would be for malicious prosecution rather than false arrest.

Dkt. #12 at 7.

COUNT 1: 42 U.S.C. § 1983 UNLAWFUL ARREST CLAIM AGAINST DEFENDANT JONATHON HODGKISS IN INDIVIDUAL CAPACITY

32. Defendant Jonathon Hodgkiss securement of a warrant on the basis of false statements were material to the probable cause determination made by the magistrate judge in signing the warrant.

3.3. Defendant Jonathon Hodgkiss did not act in an objectively reasonable manner by using the false statements to secure a warrant that lacked probable cause.

34. As a result of defendant Jonathan Hodgkiss' reckless disregard for the truth, Plaintiff Saucedo lost her job for two crimes that were later determined by a judge to lack probable cause to arrest and Plaintiff Davis spent almost a year incarcerated for two crimes that were later determined by a judge to lack probable cause to arrest.

COUNT 2: 42 U.S.C. § 1983 MALICIOUS PROSECUTION CLAIM AGAINST DEFENDANT JONATHON HODGKISS IN INDIVIDUAL CAPACITY

3.5. Plaintiffs were arrested and charged with two criminal offenses. Plaintiffs' prosecution was caused by Defendant's actions. After a Motion to Suppress was granted, prosecutions against Plaintiffs were dismissed due to no finding of probable

> cause. Judge found Defendant to be reckless and dishonest. As a result, Plaintiffs suffered irreparable harm. Moreover, the Defendant's reckless disregard for the truth violated Plaintiffs clearly established constitutional rights under the Fourth and Fourteenth Amendments.

Dkt. #19 at 3-4.

Now before the court is Hodgkiss's Motion for Summary Judgment, filed on July 1, 2020. Dkt. #7. Hodgkiss first argues that Plaintiffs' malicious prosecution claim should be dismissed because (1) a state law malicious prosecution claim is barred in this case by the Texas Torts Claim Act, and (2) there is no independently cognizable malicious prosecution cause of action under section 1983. *See id.* at 18. Next, Hodgkiss argues the court must dismiss the entire case under the Independent Intermediary Doctrine. *Id.* at 19, 20. Finally Hodgkiss argues the court should grant summary judgment in its favor because the summary judgment evidence establishes probable cause as a matter of law, and Hodgkiss is entitled to qualified immunity. *Id.* at 22, 24. Plaintiffs have filed a response, Dkt. #61, and Hodgkiss has filed a reply, Dkt. #64.

II. LEGAL STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment

as a matter of law." FED. R. CIV. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Estate of Smith v. United States*, 391 F.3d 621, 625 (5th Cir. 2004).

The court will view the summary judgment evidence in the light most favorable to the nonmovant. *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 221 (5th Cir. 2011). The non-movant must respond to the motion by setting forth particular facts indicating that there is a genuine issue for trial. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Id*.

III. MALICIOUS PROSECUTION AS AN INDEPENDENTLY COGNIZABLE CLAIM

Hodgkiss first argues Plaintiffs' malicious prosecution claims fail because there is no independently cognizable malicious prosecution cause of action under section 1983. *See* Dkt. #57 at 18. In the alternative, Hodgkiss argues Plaintiffs' malicious prosecution claims must fail to the extent Plaintiffs are alleging they are cognizable under Texas state law. *Id.* at 19. In response, Plaintiffs expressly state they are not alleging any state law claims. *See* Dkt. #62 at 6. Further, Plaintiffs contend the issue of malicious prosecution under section 1983 was already decided in the undersigned's previous report and recommendations. *Id.* at 5. Because Plaintiffs concede they are not pursuing any state law claims, the only question remaining is whether Plaintiffs have stated an independently cognizable malicious prosecution claim.

As the undersigned has already stated, *see* Dkt. #12, the Fifth Circuit in *Castellano v. Fragozo*, 352 F.3d 939, 954 (5th Cir. 2003), "extinguished the constitutional malicious-prosecution theory."[4] *Morgan v.*

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[4] In determining there is "no such freestanding constitutional right to be free from malicious prosecution," the *Castellano* court reasoned that "[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection – the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued. Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution

Chapman, 969 F.3d 238, 245 (5th Cir. 2020). In *Castellano*, the Fifth Circuit "explained that claims under [section] 1983 are only 'for violation[s] of rights locatable in constitutional text." *Id.* (citing *Castellano*, 352 F.3d at 953-54). It is undisputed that "people have a constitutional right to be free from unreasonable searches and seizures." *Id.* Accordingly, "[i]n so far as [a] defendant's bad actions (that happen to correspond to the tort of malicious prosecution) result in an unreasonable search or seizure, those claims may be asserted under section 1983 as violations of the Fourth Amendment." *Id.* However, "that makes [these claims] Fourth Amendment claims cognizable under [section] 1983, not malicious prosecution claims." *Id.*; *see Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017) ("If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment"); *see also Winfrey v. Johnson*, 766 F. App'x 66, 72 (5th Cir. 2019) (explaining that "pretrial seizures, even if they follow legal process, can violate the Fourth Amendment if the initial seizure occurred without probable cause"); *Flores v. Rivas*, EP-18-CV-297-KC, 2019 WL 5070182, at *6 (W.D. Tex. Aug. 11, 2019) (in a case based on an arrest made without probable cause, finding the plaintiff's "assertion of malicious

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and labeling them as such only invites confusion." *Castellano*, 352 F.2d at 945. Nonetheless, the Fifth Circuit in *Winfrey v. Rogers* held that an arrestee's claim was "like" a malicious prosecution claim because she alleged "a wrongful institution of legal process – an unlawful arrest *pursuant to* a warrant – instead of a detention with no legal process." 901 F.3d 483, 493 (5th Cir. 2018).

prosecution is simply the wrong characterization of a valid constitution claim for unlawful detention") (internal citations omitted).

Here, the court first notes that it has largely already addressed this issue in its previous report and recommendations, which were subsequently adopted by the District Judge. *See* Dkt. #12; Civil Action No. 1:17-CV-1113-LY (Dkt. #12). Nonetheless, given the consolidation of the Plaintiffs' cases and the filing of their Amended Complaint, the court will briefly readdress this issue here. However, in large part because the Amended Complaint is largely identical to the parties' earlier pleadings, the court's analysis remains the same.

Plaintiffs bring two section 1983 "counts" in their Amended Complaint – unlawful arrest and malicious prosecution. Both counts are predicated on Plaintiffs' arrests that were "caused by [Hodgkiss's] actions" – *i.e.*, Hodgkiss making allegedly false statements in the Affidavit for a search warrant, which circumvented the probable cause requirement. *See* Dkt. #19.[5] Accordingly, although Plaintiffs' first count is titled "Unlawful Arrest Claim," the pleaded facts supporting the claim refer to Hodgkiss's false statements to secure a search

[5] It is now evident at this stage of the proceedings that the "warrant" referenced throughout Plaintiffs' Amended Complaint and briefings is the "search warrant" that Hodgkiss procured through the use of allegedly false testimony. *See* Dkt. #19; *see also* Dkt. #12 at 7 (noting earlier in the cases proceedings that it was "ambiguous" whether Saucedo's reference to Hodgkiss's "securement of a warrant" referenced a search or arrest warrant).

warrant and thus state a claim for the "'wrongful institution of legal process,' not an arrest in the absence of legal process." Dkt. #12 at 7 (citing *Wallace v. Kato*, 549 U.S. 384, 389-90 (2007)). In other words, Plaintiffs' "unlawful arrest" claim contends their arrests, while made with legal process, were unlawful because they were based on an illegal search of the Saucedo Residence – a search made without probable cause due to Hodgkiss's false statements.

The Fifth Circuit has long recognized a Fourth Amendment right to "be free from police arrest without a good faith showing of probable cause." *Winfrey*, 901 F.3d at 494 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)); *Blake v. Lambert*, 921 F.3d 215 (5th Cir. 2019). Notably, Plaintiffs' second count of malicious prosecution is similarly predicated on the same Fourth Amendment right – the right to be free from police arrest without a showing of probable cause. Therefore, although Plaintiffs state two counts, they only plead facts giving rise to one legally cognizable claim – a Fourth Amendment right to be free from police arrest without a good faith showing of probable cause (the "*Franks* Claim"). *See Blake*, 921 F.3d at 222 (referring to a similar Fourth Amendment section 1983 claim as a *Franks* claim). Accordingly, despite how they have titled and framed their claims, Plaintiffs' Amended Complaint asserts only a *Franks* claim against Hodgkiss; this is, a Fourth Amendment claim for an unlawful pretrial detention based on Hodgkiss allegedly making false statements in the Affidavit which led to the deprivation of due process and Plaintiffs' arrests.

See Manuel, 137 S. Ct. at 920 n.8 ("if the proceeding is tainted – as here, by fabricated evidence – and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights").

While not briefed, Plaintiffs assert in their Amended Complaint that "Defendant's reckless disregard for the truth [in the search warrant] violated Plaintiff[s'] clearly established constitutional rights under the Fourth and *Fourteenth Amendment*." Dkt. #19 at 4 (emphasis added). While Plaintiffs have stated a colorable *Franks* claim under the Fourth Amendment as discussed above, the same cannot be said regarding the Fourteenth Amendment. The Fifth Circuit has held that claims based on alleged pretrial deprivations of constitutional rights "should be brought under the Fourth Amendment," not the Fourteenth. *See Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 814 (5th Cir. 2010) ("Cuadra's Fourteenth Amendment claims are based on alleged pretrial deprivations of his constitutional rights and, under the holding in *Albright*, such claims should be brought under the Fourth Amendment."). Because Plaintiffs were not convicted of a crime based on Hodgkiss's allegedly false statements but rather complain of deprivations of their pretrial rights resulting from their arrest, they do not present viable Fourteenth Amendment claims. *See id.* Accordingly, Hodgkiss's motion for summary judgment is GRANTED to the extent Plaintiffs assert any claim other than their section 1983 Fourth Amendment *Franks* claim.

IV. INDEPENDENT INTERMEDIARY DOCTRINE

Hodgkiss next alleges he did not violate any of Plaintiffs' constitutional rights because two intermediaries – Judge King and the grand jury – broke the chain of causation. Dkt. #57 at 20. Specifically, Hodgkiss argues the chain of causation was broken pursuant to the independent intermediary doctrine. *Id.*

The independent intermediary doctrine becomes relevant when, as here, the plaintiffs' claims depend on a lack of probable cause to arrest them. *See Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 553 (5th Cir. 2016); *see also Cuadra*, 626 F.3d at 813 (applying the independent intermediary doctrine to Fourth Amendment claims). Under this doctrine, "even an officer who acted with malice . . . will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party." *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988) (quoting *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982)); *Buehler*, 824 F.3d at 554. Notably, however, this doctrine does not apply under the so-called "taint exception." *See Buehler*, 824 F.3d at 555. "Under this exception, an independent intermediary's probable cause finding does not protect law enforcement officials whose 'malicious motive . . . lead[s] them to withhold any relevant information,' or otherwise 'misdirect[] the magistrate or the grand jury by omission or commission.'" *Id.* (quoting *Cuadra*, 626 F.3d at 813, and *Hand*, 838 F.2d at 1428).

Upon review, the Fifth Circuit's holding in *Winfrey v. Rogers* is instructive in this case. In *Winfrey*, the defendant attempted to shield himself from liability under the independent intermediary doctrine by directing the court to two intermediaries – a grand jury and state judge. *Winfrey*, 901 F.3d at 497. The Fifth Circuit noted that "the record [did] not indicate that the material information, which . . . was omitted from [the defendant's] affidavit, was presented either to the grand jury or the state judge." *Id.* Consequently, the Fifth Circuit held that "because, at best, it is not clear whether 'all the facts [were] presented to the grand jury,' we hold that the independent-intermediary doctrine does not apply." *Id.* (quoting *Cuadra*, 626 F.3d at 81) (citations omitted).[6]

Here, the material information that would "taint" or "misdirect" the intermediary is Hodgkiss's allegedly false statement found in the Affidavit that the SOI informed Hodgkiss about Davis's drug related activities and the location of the Saucedo Residence. The record is devoid of information allowing the court to ascertain whether this material information was presented to the grand jury.[7] In fact, the parties have failed to adequately brief the grand jury indictments and failed to direct the court to any evidence showing what was

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[6] The Fifth Circuit also found the doctrine did not apply as to the state judge because that judge never ruled on the issue of probable cause. *Winfrey*, 901 F.3d at 497

[7] Additionally, it is entirely unclear from the briefing and the parties' record when, in the timeline of this case, the grand jury (or juries) indicted Plaintiffs. *See* Dkt. #19, #57, #62, #64.

presented to the grand jury. *E. G. v. Northside Indep. Sch. Dist.*, CV SA-12-CA-949-FB, 2014 WL 12537177, at *2 (W.D. Tex. Mar. 31, 2014) (Biery, J) ("The Court is not required to sift through the record in search of evidence to support a motion for summary judgment nor opposition thereto."). Accordingly, because, at best, it is not clear whether all the material information was presented to the grand jury, the court holds the independent intermediary doctrine does not apply. *See Winfrey*, 901 F.3d at 497.

Turning to Hodgkiss's second argument, he contends that Judge King – the magistrate judge who initially signed the relevant search warrant – is a sufficient intermediary to provide protections under the independent intermediary doctrine. *See* Dkt. #57 at 10 ("Judge King signed off on the search warrant."). Even assuming, without ruling, that Judge King was a sufficient "intermediary," the court finds that a material fact issue exists as to whether Hodgkiss "tainted Judge King through the allegedly false statements made in the Affidavit. Judge King based his probable cause determination for the search warrant on Hodgkiss's Affidavit – the very document in question that contained Hodgkiss's alleged false statements. Accordingly, summary judgment will not be granted on the basis of the independent intermediary doctrine.

V. GENUINE FACT ISSUE

Hodgkiss also argues "[t]he summary judgment evidence conclusively establishes probable cause, regardless

of what was included in the search warrant or considered by the grand jury, and therefore, the summary judgment evidence negates any claim of a constitutional violation as a matter of law." Dkt. #57 at 22. The undersigned disagrees. In looking at the totality of the circumstances present in this case, a material fact issue exists regarding whether probable cause existed to justify Plaintiffs' arrest. First, Plaintiffs have provided some evidence, namely Judge Mathews's factual determination, that Hodgkiss made false statements in the Affidavit. Based on this evidence, there is a factual dispute regarding whether Hodgkiss made material misrepresentations in the Affidavit by asserting that, "[i]n March of 2015 [Hodgkiss] received information from a[n] [SOI] that [Davis] has been selling marijuana and other narcotics from [the Saucedo Residence]." Dkt. #57-7 at 4. Second, as discussed additionally below and in Judge Mathews's opinion, even if the court struck the allegedly false statements from the Affidavit and considered only the remaining allegations, the Affidavit would not sufficiently allege probable cause. *See* Dkt. #62-1 at 4. Thus, the material fact issues that exist regarding probable cause and the allegedly false statements preclude summary judgment.

VI. QUALIFIED IMMUNITY

Hodgkiss's last contention is that Plaintiffs' section 1983 claim fails because he is entitled to qualified immunity. Dkt. #57 at 24. Citing the seminal case of *Franks v. Delaware*, 438 U.S. 154 (1978), Plaintiffs respond by arguing qualified immunity is not applicable

because (1) Hodgkiss violated their rights by providing false statements with a reckless disregard for their truth in the Affidavit, and (2) the illegality of presenting false statements in an affidavit to support a warrant is clearly established. *See* Dkt. #62 at 8-10.

A. Legal Standard

"When resolving qualified immunity on summary judgment, courts determine (1) whether the facts, taken in the light most favorable to the party asserting the injury, show the officer violated a federal right and (2) whether the right was 'clearly established' when the violation occurred." *Winfrey*, 901 F.3d at 493 (citing *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014)). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The court does not need "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. Clearly established law is not determined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Instead "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 577 U.S. at 12 (quoting *Ashcroft*, 563 U.S. at 742). The inquiry must look at the specific context of the case. *Id*.

The court uses a standard of "objective reasonableness" to define "the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 344 (1986). Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). And it "protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Malley*, 475 U.S. at 341).

B. Analysis

Here, the clearly established constitutional right asserted by Plaintiffs is to be free from police arrest and subsequent detention without a good faith showing of probable cause. *See Winfrey*, 901 F.3d at 494 (analyzing qualified immunity as it is related to the same constitutional right). As noted, Plaintiffs contend this right was violated when Hodgkiss provided false statements in the Affidavit to obtain a search warrant, and the results of that search led to Plaintiffs' arrests. In beginning the qualified immunity analysis, the court notes that "since *Franks v. Delaware*, it has been *clearly established* that a defendant's Fourth Amendment rights *are violated* if (1) the affiant, in support of the warrant, includes 'a false statement knowingly and intentionally, or with reckless disregard for the truth' and (2) 'the allegedly false statement is necessary to the finding of probable cause.' " *Id*. (emphasis added)

(internal citations omitted) (quoting *Franks*, 438 U.S. at 155-56).[8]

"Still, 'negligence alone will not defeat qualified immunity.'" *Winfrey*, 901 F.3d at 949 (quoting *Brewer*, 860 F.3d 819, 825 (5th Cir. 2017)). "A proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product 'of deliberate falsehood or *of reckless disregard for the truth*.'" *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (emphasis added) (quoting *Franks*, 438 U.S. at 171). "Recklessness requires proof that the defendant 'in fact entertained serious doubts as to the truth of the statement.'" *Winfrey*, 901 F.3d at 494 (quoting *Hart v. O'Brien*, 127 F.3d 424, 449 (5th Cir. 1997), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772. 775 (5th Cir. 1999)). Accordingly, this court analyzes whether qualified immunity is present under the factors set forth in *Franks v. Delaware*. *See Winfrey*, 901 F.3d at 494 (applying the two prongs of *Franks* in holding the plaintiff had "satisfied his burden of showing that there [was] an issue of material fact as to whether [the defendant police officer] violated [the plaintiff's] clearly established rights").

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[8] In *Franks*, the Supreme Court observed that the search warrant requirement is meant "to allow the magistrate to make an independent evaluation of the matter." *Franks*, 438 U.S. at 155-56. This requires affiants to "set forth particular facts and circumstances underlying the existence of probable cause," including those that concern the reliability of the information and the credibility of the source to avoid "deliberately or reckless false statement[s]." *Id.*; *Winfrey*, 901 F.3d at 494.

Under the first prong of *Franks*, Plaintiffs must present summary judgment evidence that Hodgkiss, through material omission or otherwise, made "a false statement knowingly and intentionally, or with reckless disregard for the truth." 438 U.S. at 155; *see Winfrey*, 901 F.3d at 494. By way of evidence, Plaintiffs present to the court, and rely almost exclusively upon, Judge Mathews's Finding of Fact and Conclusions of Law (the "Opinion"). Per her Opinion, Judge Mathews, after holding an evidentiary hearing, concluded that there were discrepancies between what the SOI told Hodgkiss during the formal interview and what was stated in the Affidavit. *See* Dkt. #62-1 at 2-3. Namely, Judge Mathews concluded that the Affidavit's assertion that the SOI informed Hodgkiss that Davis had been selling illegal drugs out of the Saucedo Residence was not corroborated in the video recording of the interview. *Id.* Rather, Judge Mathews found that the SOI never mentioned drugs and only vaguely referenced the location of the Saucedo Residence in the 37-second portion of the recorded interview that pertained to Davis.[9] *Id.* Judge Mathews concluded that these discrepancies showed Hodgkiss's Affidavit was made with "a reckless disregard for the truth." *Id.* at 3-4. While Hodgkiss argues Judge Mathews erred in her analysis because she "failed to contemplate that Sergeant Hodgkiss considered his interview with the SOI to" include the alleged "car ride with the SOI," the existence

[9] Regarding the address, Judge Mathews concluded that the SOI did not list the Saucedo Residence's address except for noting that it is near a Jack-in-the-Box. Dkt. #62-1 at 3.

of this "car ride" is a contested question of fact best left for the jury.[10] *See* Dkt. #57 at 10-11; Dkt. #62 at 2-3. Furthermore, if it is determined that Hodgkiss lied in the Affidavit as Plaintiffs claim, it is common sense that Hodgkiss would have either known or should have known that these false statements could lead to an arrest of Plaintiffs without probable cause. Accordingly, the court determines that Plaintiffs have shown that there is an issue of material fact as to whether Hodgkiss acted intentionally, knowingly, or recklessly. In short, "the evidence presented is sufficient to support a finding that [Hodgkiss's] conduct," as argued by Plaintiffs, "was unreasonable in light of the well-established principle requiring probable cause for the issuance of a [search] warrant." *Winfrey*, 494 F.3d at 494.

The second prong of *Franks* is whether "the allegedly false statement is necessary to the finding of probable cause." 438 U.S. at 156; *Winfrey*, 494 F.3d at 494-95. "To determine whether the false statement was necessary for this finding, *Franks* requires [the court] to consider the faulty affidavit as if those errors and omissions were removed. [The court] then must examine the 'corrected affidavit' and determine whether probable cause for the issuance of the warrant survives the deleted false statements and material omissions." *Winfrey*, 494 F.3d at 494-95 (citing *Franks*, 438 U.S. at 156). The false statement is necessary if the corrected affidavit fails to establish probable cause.

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[10] Notably, the "car ride" is not discussed in either the Opinion or the Affidavit.

Before turning to the Affidavit, the court notes that "[p]robable cause requires only 'a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *Winfrey*, 901 F.3d at 495 (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)). The probable cause inquiry requires a court to "make a practical, common-sense decision as to whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found at a particular place." *United States v. Froman*, 355 F.3d 882, 889 (5th Cir. 2004) (citations omitted)

Taking out the allegedly false statements, the "corrected" affidavit would contain the following facts. First, Hodgkiss received information from unnamed "Patrol Deputies" that the Saucedo Residence was a suspected drug house "due to high traffic going to and coming from the location." Dkt. #57-7 at 5. Second, unnamed "Deputies believed that Davis and his girlfriend, identified as [Saucedo] . . . worked together in transporting marijuana and other narcotics to and from the residence." *Id.* Third, Patrol Deputies routinely observed Plaintiffs "leave the residence and return after being gone for short periods of time," and observed multiple vehicles stop at the residence and briefly meet Davis in the street. *Id.* Fourth, Davis was witnessed routinely driving his car around the city and meeting individuals in various locations only for short periods of time. *Id.* at 5-6. Fifth, Davis was pulled over during a traffic stop on April 13, 2015, in which officers located a "medium sized box that contained marijuana

residue" in addition to "a large amount of [currency] all in small denominations." *Id.* at 6. Sixth, Davis was observed meeting with an individual who was on parole for a felony drug conviction. *Id.* And seventh, detectives conducted a trash run on June 9, 2015, and discovered (1) plastic baggies containing a white powdery substance that field tested positive for cocaine, (2) plastic baggies containing marijuana residue, (3) mail addressed to Saucedo, and (4) Swisher Sweet cigars and loose tobacco. *Id.* at 7. Notably, the trash cans were sitting on the curb at the time of the trash run.

In weighing the totality of the circumstances, the corrected affidavit does not contain sufficient information to satisfy the probable-cause requirement. Other than the trash run and traffic stop, the "evidence" depicted in the Affidavit can be summarized as either conclusory statements describing unnamed officers' unsupported suspicions and beliefs, or activities that both do not appear explicitly linked to the Saucedo Residence nor strong indicators themselves of illicit activity. For example, the Affidavit's assertion that "Patrol Deputies with the Williamson County Sheriff Office [informed Hodgkiss] that the [Saucedo Residence] was a suspected drug distribution house due to high traffic going to and from the location" is conclusory, vague, and a far cry from the type of information required for a finding of probable cause.[11] *See*

[11] Furthermore, the Affidavit's assertion that Davis was in his car with an individual and "it appeared [Davis] conducted a drug transaction, as the behavior was consistent with previous surveillance observations," Dkt. #57-7 at 6, is "a conclusory

Illinois, 462 U.S. at 239 ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."). Similarly, the Affidavit's description of Davis meeting briefly with various individuals on the street and at various driven-to locations does not persuasively move the needle in this probable cause inquiry. Put plainly, the Affidavit provides no information "as to what led patrol deputies to suspect illegal activity, no drug transactions were witnessed[,] and the [A]ffidavit is silent as to whether [Davis] exited the house prior to meeting the occupant of vehicles or whether he was already in the street or in a vehicle. The conclusory statements do not provide a magistrate with information to believe illegal narcotics would be found in the [Saucedo Residence]." Dkt. #57-7 at 5.

The two best facts for Hodgkiss are the trash run and the traffic stop. However, these allegations still reveal a lack of probable cause. First, the Affidavit does not describe where Davis was coming from or going in its terse description of the April 13, 2015 traffic stop. *Id.* at 6. Rather, it merely states that "Officer Burrows conducted a traffic stop of [Davis] while he was driving the Buick." *Id.* Based on this brief description, this factual assertion does not lend evidence to whether "contraband or evidence of a crime will be found at [the

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statement upon a conclusory statement," Dkt. #62-1 at 5. This is apparent given that "[n]o activity is described and no illegal narcotics are seen exchanged" and "[n]either [Davis] nor the individual he met with were stopped for further investigation." *Id.*

Saucedo Residence]." *See Froman*, 355 F.3d at 889. Thus, it does not help establish probable cause.[12]

Secondly, the single trash run, taken in totality with the other circumstances depicted in the Affidavit, does not change this court's conclusion. The parties do not direct the court to any law related to trash runs. However, the court in its own research was unable to find a single Fifth Circuit case clarifying whether a single trash run may establish probable cause. That being said, several courts within the Fifth Circuit have found that a single trash run *may* be sufficient to establish probable cause based on the circumstances of the case. *See United States v. Medrano*, No. 4:11CR10(1), 2012 WL 32945, at *3 (E.D. Tex. Jan. 6, 2012) ("There is no magic number of 'trash runs' to be conducted prior to the issuance of a search warrant."), *report and recommendation adopted*, No. 4:11CR10(1), 2012 WL 194392 (E.D. Tex. Jan. 23, 2012); *see also United States v. Hopkins*, No. 3:99-CR-324-D, 2000 WL 20986, at *3 (N.D. Tex. Jan. 13, 2000) ("In some cases the paucity of evidence found in one trash seizure may in fact require more than the single garbage pickup before a warrant may be issued."). Other circuits are split on this issue. *See United States v. Abernathy*, 843 F.3d 243, 255 (6th Cir. 2016) (concluding probable cause did not exist despite finding marijuana roaches and several plastic vacuumed bags with marijuana residue because, in part, "it is impossible to tell when the marijuana roaches and plastic bags were put into the garbage.").

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[12] The court notes that Judge Mathews did not address this factual allegation in her Opinion. *See* Dkt. #57-7.

But see United States v. Thurmond, 782 F.3d 1042, 1045 (8th Cir. 2015) (finding probable cause based on the individual's history with controlled substances and the contraband found in a trash run).

Because the probable cause inquiry requires a judicial officer to take the totality of the circumstances into account, it follows that a single trash run could sufficiently establish probable cause if the circumstances supported it. Here, however, that is not the case. The conclusory assertions throughout the poorly drafted Affidavit dictate that for probable cause to exist, the trash run must *strongly* suggest that contraband would be found at the Saucedo Residence. Here, there is no account of how long the trash bins were on the curb or what size the "baggies" were that contained indications of cocaine. *See United States v. Shaw*, 19-CR-00157-01, 2020 WL 3816312, at *7 (W.D. La. Feb. 21, 2020) (noting bags that tested positive for drug residue found during a trash pull were "capable of containing large amounts of marijuana"), *report and recommendation adopted*, 19-CR-00157-01, 2020 WL 3806297 (W.D. La. July 6, 2020).[13] Accordingly, while the trash run revealed evidence that drugs may *have* been in the Saucedo Residence, it is unclear whether it supported that drugs *would* be found in the Saucedo Residence. Moreover, despite the Affidavit surmising

[13] *Shaw* seems to stand for the proposition that finding large bags with drug residue during a trash run may support that a house is involved in narcotics distribution because the size of the bag indicates a quantity of drugs not feasibly used for short-term, individual consumption.

that "[t]he trash cans were clearly from [the Saucedo Residence]," the only evidence of this is that Hodgkiss "recognized the trash cans [that were on the curb] as the same trash cans previously seen near a chain link fence east of the residence." Dkt. #57-7 at 6. It is unclear from this description whether the trash cans were used by the Saucedo Residence, as "near a chain link fence east of the residence" is not synonymous with the trash can used by the Saucedo Residence. Similarly, it is unclear whether anyone else had access to the trash cans.

Accordingly, weighing the totality of the circumstances presented in the Affidavit, the court concludes that a reasonable magistrate would not have issued a warrant on the basis of the corrected affidavit, because the subtraction of the allegedly false statements would have dissuaded the judge from issuing the search warrant.

In summary, assuming all factual disputes in favor of Plaintiffs, the court holds (1) there is an issue of material fact as to whether Hodgkiss recklessly, knowingly, or intentionally made material misstatements, and (2) a corrected affidavit would not show probable cause to search the Saucedo Residence. Thus, Plaintiffs have satisfied their burden of showing that there is an issue of material fact as to whether Hodgkiss violated their clearly established rights, and they are entitled to present their case before a factfinder. In other words, material fact issues preclude summary judgment for Hodgkiss on his claim of qualified immunity.

VII. ORDER

Based on the foregoing, it is **ORDERED** that Defendant Jonathon Hodgkiss's Motion for Summary Judgment (Dkt. #57) is **GRANTED IN PART AND DENIED IN PART**. Defendant's Motion is GRANTED so far as it seeks dismissal of any claim other than a Fourth Amendment *Franks* claim based on their unlawful arrest caused by Hodgkiss's allegedly false statements made in the Affidavit.

In all other regards, Defendant's Motion is **DENIED**.

SIGNED October 15, 2020. /s/ Mark Lane
MARK LANE
UNITED STATES
MAGISTRATE JUDGE

No. 15-1370-K277

THE STATE OF TEXAS	IN THE 277th JUDICIAL
V.	DISTRICT COURT OF
TETTUS JERMAINE DAVIS	WILLIAMSON COUNTY, TEXAS

Findings of Fact and Conclusions of Law

(Filed May 11, 2016)

Defendant has filed six motions to suppress in the above-referenced ease. Pursuant to those motions, testimony and evidence received, as well as arguments from the parties, the Court enters the following findings of fact and conclusions of law:

On June 1, 2015, Jonathon C. Hodgkiss, a Detective with the Williamson County Sheriff's Department, presented an Affidavit requesting an Evidentiary Search Warrant to the Presiding judge of the 20 District Court. Detective Hodgkiss sought a warrant for a residence located at 911 E. 22nd Street, Georgetown, Texas. The warrant was executed the same day and an arrest warrant for Defendant, Tettus Jermaine Davis, was issued alleging the offense of Possession of a Controlled Substance with the Intent to Deliver.

Defendant has elected to proceed *pro se* in this case. After conducting a hearing, the Court found the Defendant competent, to represent himself and appointed stand-by counsel. Defendant filed numerous motions including the motions to suppress addressed herein.

This case was set for trial and Defendant waived his right to a jury. Defendant was arraigned and pled Not Guilty. The Court heard testimony and reviewed the search warrant affidavit. Defendant argues that the warrant should be suppressed because the Affiant made material, misrepresentations of fact in the search warrant affidavit, the information contained in the warrant was stale; the allegations are conclusory, and the affidavit fails to link Defendant to the residence or to any criminal activity.

As to Defendant's allegation that the indictment contains misrepresentations of facts, the Court reviewed the search warrant, a video offered into evidence by the State, and testimony from the Affiant, Detective Hodgkiss. The search warrant affidavit states in part, "[i]n March of 2015 your Affiant received information from a Source of information (SOI) that Tettus Jermaine Davis has been selling marijuana and other narcotics from his residence at 911 E. 22nd Street, Georgetown, TX. The SOI also informed your Affiant that DAVIS was also selling stolen property at the location as well as exchanging stolen property for narcotics." During a hearing on Defendant's motions to suppress, Detective Hodgkiss testified that in March of 2015 he interviewed Dustin Holder (SOI) who was an inmate in the Williamson County Jail. He testified thither that the SOI told him that Tettus Davis "was selling stolen property as well as exchanging property for narcotics, and he also believed he was selling marijuana from that residence."

Days after the conclusion of the hearing on Defendant's motions to suppress. State produced a video of the interview with the SOI. The conversation between Detective Hodgkiss and the SOI which pertains to Defendant is 37 seconds in length and the SOI does not mention drugs. The SOI stated, " . . . there's a T.J. Davis in Georgetown. The street's called 22nd in the hood. He's dealing stolen property like crazy." The SOI further stated he knows the Defendant's phone number but not the address except that it is near jack-in-the-Box. Clearly, the video does not reflect what is alleged by Detective Hodgkiss in his Affidavit for an Evidentiary Search Warrant and is inconsistent with his sworn testimony at the hearing on Defendant's motions to suppress.

Pursuant to *Franks v, Delaware*, "when an affiant includes a false statement knowingly or intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit." *Franks v. Delaware*, 438 U.S. 154 (1978). Based on the discrepancy between the affidavit and the recording of the interview, the Court finds and concludes the information alleged by Detective Hodgkiss regarding the information obtained by the SOI to be a reckless disregard for the truth and as such, the search warrant "must be voided and the fruits of the search excluded . . . " *Franks*, 438 U.S. 154.

Even assuming that the information contained in the warrant from the SOI was relayed to Detective Hodgkiss, that information would not establish probable cause because the SOI was not establish as a reliable and credible informant. An officer relying on an informant has a duty to establish that the informant is credible and must corroborate the information received from the informant. *State v. Duarte*, 389 S.W.3d 349 (Tex. Crim. App. 2012). In this case, the Source of Information (SOI) was not established to be credible and the Detective did not corroborate any of the alleged information received. In fact, this SOI was never even used as a confidential informant. Therefore, probable cause could not be established based on the SOI, *Id.*

Even if the Court simply struck the false statements from the warrant and considered. only the remaining allegations, without the information regarding the initial "tip," the warrant does not sufficiently allege probable cause. Probable cause to support the issuance of a search warrant exists where the facts are sufficient to justify a conclusion that the object of the search is probably on the premises to be searched at the time the warrant is issued. *Cassias v State*, 719 S.W.2d 585, 587 (Tex. Crim. App. 1986). Conclusory statements, rather than factual allegations, are insufficient to support a finding of probable cause. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). "In determining whether a search warrant is supported by probable cause, the crucial element whether the target of the. search is suspected of a crime, but whether it is reasonable to

believe that. the items to he seized will be found in the place to be searched." *Serrano Slate*, 123 S.W.3d 53, 61 (Tex. App.—Austin 2003). There must be evidence linking the item to be seized – in this ease, illegal narcotics – with the residence.

The State argues that patrol deputies believed that the residents of the house were dealing drugs. The affidavit states, "On numerous occasions since March of 2015 Patrol Deputies have observed DAVIS and SAUCEDO leave the residence and return after being gone for short periods of time. In addition, multiple vehicles commonly stop at the residence with occupants meeting DAVIS in the street and only staying for a short time before leaving. The observation made by the patrol deputies is consistent with behavior associated with open air drug sales from the residence." This information does not state specific facts regarding the dates and time of the surveillance nor does it indicate that the patrol deputies witnessed any illegal activity by Defendant. No information is provided as to what led patrol deputies to suspect illegal activity, no drug transactions were witnessed and the affidavit is silent as to whether Defendant exited the house prior to meeting, the occupants of vehicles or whether he was already in the street or in a vehicle. The conclusory statements do not provide a magistrate with information to believe illegal narcotics would be found in the residence. As discussed above, the mere belief that someone has committed criminal activity is conclusory and. does not support a finding of probable cause. *Gates*, 462 U.S. at 236; *Serrano*, 123 S.W.3d at 61.

Moreover, the affidavit indicates that Detective Hodgkiss conducted surveillance on Defendant between March 24, 2015, and April 10, 2015, and observed Defendant parked. at the residence on "numerous occasions." The affidavit indicates further that Detective Hodgkiss observed Defendant driving around town, making stops and occasionally meeting and talking to other people. The State argues that this activity is consistent with the behavior of a drug dealer. However, it is just as likely to be consistent with someone running errands and is insufficient to support a finding of probable cause. *Gates*, 462 U.S. at 236; *Serrano*, 123 S.W.3d at 61.

Further, the warrant alleges that Detective Hodgkiss saw Defendant leave the residence and meet with two individuals – one of whom was later determined to be on parole – outside the parole office. Affiant concludes that during this meeting "it appeared that DAVIS conducted a drug transaction, as the behavior was consistent with previous surveillance observations." This is a conclusory statement upon a conclusory statement. No activity is described and no illegal narcotics are seen exchanged. Neither Defendant nor the individual he met with were stopped for further investigation. Merely leaving a residence and meeting someone outside an office, without further information, does not provide probable cause that a drug transaction was conducted. *Gates*, 462 U.S. at 236; *Serrano*, 123 S.W.3d at 61.

Finally, according to the search warrant, a single trash run was conducted at the residence. The affidavit

states "On June 8, 2015 conducted surveillance at 911 E. 22nd Street observing DAVIS exiting the Buick and enter the residence. In preparation for collecting of discarded trash, your Affiant observed three green trash cans which had been placed by the curb for collection." According to the affidavit and witness testimony, on the morning of June 9, 2015, Detectives retrieved the discarded trash cans and located baggies containing a white powdery substance that field tested positive for cocaine, plastic baggies containing marijuana residue, mail addressed to SAUCEDO and Swisher Sweet cigars and loose tobacco.

The Third Court of Appeals has addressed the issue of single "trash runs" in two opinions. In *Serrano v. State*, the Third Court held, "[s]tanding alone, the one-time intrusion into a garbage can revealing cocaine residue in one plastic baggie . . . would not justify a. finding of probable cause to search [the residence]," *Serrano v. State*, 123 S.W.3d 53, 63 (Tex. App—Austin 2003). In *Davila v. State*, the Third Court acknowledged its holding in *Serrano* and held further that "the. one-time discovery of a bag of marihuana residue in a garbage can did not establish probable cause to search a residence. *Davila v. State*, 169 S.W.3d 735, 740 (Tex. App.—Austin 2005). The State acknowledges the holdings in both of these cases, but asks the Court to rule contrary to those holdings. However, this Court is bound by precedent from the Third Court Court of Appeals and to stray from that precedent would be an abuse of discretion. Therefore, this Court finds and concludes that because the warrant does not allege any

facts that would support a finding of probable cause, the single "trash run" in this case, standing alone, cannot support such a finding. *Serrano*, 123 S.W.3d at 63; *Davila*, 169 S.W.3d at 740.

For the reasons stated herein, Defendant's motions to suppress are GRANTED. All evidence obtained as a result of the search warrant executed on June 11, 2015 hereby excluded.

SIGNED this the 11th day of May, 2016.

/s/ Stacey Mathews
Stacey Mathews
Presiding Judge
277th District Court of
Williamson County

United States Court of Appeals
for the Fifth Circuit

No. 20-50917

TETTUS DAVIS,

Plaintiff—Appellee,

versus

JONATHON HODGKISS, *Individual*,

Defendant—Appellant,

ELIZABETH SAUCEDO,

Plaintiff—Appellee,

versus

JONATHON HODGKISS, INDIVIDUAL,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-1113
USDC No. 1:17-CV-1114

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 23, 2021)

Before KING, DENNIS, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

42 U.S. Code § 1983 – Civil action for deprivation of rights

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Fourth Amendment

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.

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material

fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; March 2, 1987, eff. Aug. 1, 1987; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009; April 28, 2010, eff. Dec. 1, 2010.