

## List of Appendices

- A. "Opinion" 5th Circuit C.D.A., 8-1-24, No. 23-30661
- B. "Opinion" U.S. Dist. Court, of E. La. 6-26-23, No. 19-13424
- C. Magistrate "Report + Recommendation" 4-29-20, No. 19-13424
- D. "Petition for Rehearing" (Denied) 9-5-24, No. 23-30661
- E. L.R. (12) "Petition to Amend" Doc. # 191, 8-16-23, No. 19-13424
- F. "Order + Reason" (Denied) Rule 59(e), 9-1-23, No. 19-13424
- G. Rule 54(b) "Motion to Reconsider" "Order + Reason" 3-25-22
- H. "Appellants Original Brief" 1-5-24, No. 23-30661
- I. "Memorandum in Support" Rule 59(e), 7-25-23, No. 19-13424
- J. "Affidavit for Arrest" by M. Canepa, 1-11-17, No. 17-00764
- K. "Motion for Summary Judgment" 3-30-23, (Defendant), No. 19-13424
- L. "Deposition to Defendants Motion for S.J." 4-18-23, No. 19-13424
- M. "Plaintiffs Reply in Support of his Motion for S.J." 4-25-23, No. 19-13424

N. "Concise Statement of Material Facts" that Present Genuine Issue

O. "Partial Transcript of M. Canera" (412.2 hearing) 9-11-18, No. 17-00764

P. "Partial Transcript of M. Canera" (La. Trial) 1-9-19, No. 17-00764

Q. "Partial Transcript of K. Gemelli" (ini Report) 1-10-17, No. 17-00764

R. "Partial Transcript of D. Gemelli" (ini Report) 1-10-17, No. 17-00764

S. "Court Orders + Minutes" for Brady Evidence, <sup>12-5-17</sup>~~7-22-19~~, No. 17-00764

T. "Appellants Reply Brief" (24 Pgs) 4-23-24, No. 23-30661

U. "Petition for Rehearing" (18 Pgs) 8-13-24, No. 23-30661

V. "Defendants Brief for M. Canera" No. 23-30661

W. "Defendants Brief for Nicosia, Ward, Morales" No. 23-30661

United States Court of Appeals  
for the Fifth Circuit

---

No. 23-30661  
Summary Calendar

---

United States Court of Appeals  
Fifth Circuit

**FILED**

August 1, 2024

Lyle W. Cayce  
Clerk

TIMOTHY M. GEMELLI,

*Plaintiff—Appellant,*

*versus*

PERRY NICOSIA, *District Attorney, 34th Judicial District Court*; MIKEY  
MORALES, *Assistant District Attorney, 34th Judicial District Court*;  
CHARLES WARD, *Assistant District Attorney, 34th Judicial District Court*;  
MICHELLE CANEPA, *Police Officer,*

*Defendants—Appellees.*

---

Appeal from the United States District Court  
for the Eastern District of Louisiana  
USDC No. 2:19-CV-13424

---

Before DAVIS, STEWART, and SOUTHWICK, *Circuit Judges.*

PER CURIAM:\*

Timothy M. Gemelli appeals from the district court's dismissal of his  
42 U.S.C. § 1983 civil rights action and denial of his Federal Rule of Civil  
Procedure 59(e) motion to alter or amend. Gemelli contends that the district

---

\* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

APPX. A

court erred in dismissing his claim that Louisiana state prosecutors failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and in granting summary judgment in favor of Officer Michelle Canepa and dismissing his claim that the affidavit in support of the warrant for his arrest omitted material information and included misrepresentations. Gemelli does not challenge the district court's dismissal of any other defendant or claim or the denial of his motion to alter or amend; accordingly, he has waived these issues. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). To the extent that he raises additional arguments in his reply brief, we generally do not consider arguments raised for the first time in a reply brief. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994).

As to the *Brady* claim, dismissals under 28 U.S.C. § 1915(e)(2) for failure to state a claim are reviewed in the same way as dismissals under Federal Rule of Civil Procedure 12(b)(6). *Legate v. Livingston*, 822 F.3d 207, 209-10 (5th Cir. 2016). Dismissal is appropriate where a complaint does not "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)).

Gemelli argues that the district court erred in dismissing his claim that prosecutors failed to turn over cellphones and text messages containing exculpatory evidence demonstrating that the victim was retaliating against him because he had told the victim that he would no longer support her financially. Under *Brady*, a defendant's due process rights are violated if the prosecution "withholds evidence that is favorable to the accused and material to the defendant's guilt or punishment." *United States v. Swenson*, 894 F.3d 677, 683 (5th Cir. 2018). "Evidence is not suppressed if the defendant knows or should know of the essential facts that would enable him to take advantage of it." *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002).

Here, the cellphones and text messages containing evidence of the victim's retaliatory motive were not suppressed because the allegedly favorable evidence was brought to the jury's attention through the victim's testimony that she filed criminal charges against Gemelli only nine days after receiving a message from Gemelli stating that he would no longer support her financially. *See id.* Moreover, as any evidence on the cellphones and in the text messages would be cumulative to the victim's testimony, this evidence was not material. *See United States v. Brumfield*, 89 F.4th 506, 514-15 (5th Cir. 2023), *petition for cert. filed* (U.S. June 18, 2024) (No. 23-7746). The district court did not err in dismissing this claim. *See Iqbal*, 556 U.S. at 678.

Gemelli also argues that the district court erred in granting summary judgment in favor of Officer Canepa and dismissing his Fourth Amendment claim as the affidavit filed in support of the arrest warrant contained material omissions and misrepresentations. We review the grant of a motion for summary judgment de novo. *Kohler v. Englade*, 470 F.3d 1104, 1108 (5th Cir. 2006). Summary judgment is appropriate when the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

Pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), notwithstanding the approval of a warrant application by an independent magistrate, a defendant's Fourth Amendment rights are violated if (1) an affiant intentionally, or with reckless disregard for the truth, includes a false statement or omits a material fact and (2) the alleged errors or omissions are necessary to the finding of probable cause. *Reitz v. Woods*, 85 F.4th 780, 793-94 (5th Cir. 2023). To determine whether false statements or omitted facts are material to the determination of probable cause, "courts are to consider the faulty affidavit as if those errors and omissions were removed, meaning we must examine the corrected affidavit and determine whether probable

cause for the issuance of the warrant survives the deleted false statements and material omissions.” *Id.* at 794.

Even assuming that Gemelli’s allegations regarding material omissions in the affidavit are true, the reconstructed affidavit still contains sufficient facts to lead a prudent person to believe that a crime had been committed. *See id.* Under Louisiana law at the time, aggravated incest was defined as engaging in, among other things, sexual intercourse, sexual battery, or any other involvement of a child in sexual activity constituting a crime with a person who is under eighteen years of age and who is related to the offender. LA. STAT. ANN. § 14:78.1. Sexual battery criminalizes “the intentional touching of the anus or genitals of the victim by the offender.” LA. STAT. ANN. § 14:43.1.

Here, the reconstructed affidavit still contained allegations that the victim told Officer Canepa that “her biological father had inappropriately touched her between the ages of four and eight.” “A victim’s accusation identifying an individual as the perpetrator is generally sufficient to establish probable cause.” *Johnson v. Bryant*, No. 94-10661, 1995 WL 29317, 3 (5th Cir. Jan. 17, 1995) (unpublished).<sup>1</sup> Reliance on a purported victim is justified unless there is an “apparent reason” to disbelieve the victim’s account. *See Roy v. City of Monroe*, 950 F.3d 245, 256 (5th Cir. 2020). While Gemelli claims that the victim’s retaliatory motive was a reason for Officer Canepa to disbelieve her account, there is nothing in the record suggesting that Officer Canepa was aware that the victim filed a police report shortly after Gemelli told the victim that he would no longer support her financially.

AFFIRMED.

---

<sup>1</sup> Unpublished opinions issued before January 1, 1996, have precedential value. 5TH CIR. R. 47.5.3.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**TIMOTHY GEMELLI**

**CIVIL ACTION**

**VERSUS**

**NO: 19-13424**

**STATE OF LOUISIANA, ET AL.**

**SECTION "H"**

**ORDER AND REASONS**

Before the Court is Plaintiff's Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) (Doc. 190). For the following reasons, the Motion is **DENIED**.

**BACKGROUND**

This Motion was filed by Plaintiff Timothy Gemelli after the Court denied Plaintiff's Motion for Summary Judgment and granted Defendant Michelle Canepa's Motion for Summary Judgment on June 13, 2023.<sup>1</sup> This case arises out of Plaintiff Gemelli's arrest for aggravated incest of D.G., Plaintiff's daughter, when she was between the ages of four and eight. Plaintiff was tried in St. Bernard Parish in January 2019 and acquitted of all charges.

Plaintiff filed this suit in October 2019 pursuant to 42 U.S.C. § 1983 alleging that Defendant violated his federal and state constitutional rights by arresting and incarcerating him pursuant to an affidavit supporting his arrest warrant ("Affidavit"), which contained material omissions and misstatements of fact. The Affidavit includes Defendant Capena's synopsis of two interviews—

---

<sup>1</sup> Doc. 188.

of D.G. and her mother—and requests the issuance of an arrest warrant for Plaintiff for violations of Louisiana Revised Statutes § 14:78.1. Plaintiff alleged that he was unconstitutionally seized under the Fourth Amendment based upon the Affidavit and incarcerated in the St. Bernard Parish Jail for two years as a result.

On March 30, 2023, Plaintiff and Defendant filed Cross-Motions for Summary Judgment. After considering both parties' motions and oppositions thereto, this Court found that Defendant was entitled to judgment as a matter of law.<sup>2</sup> Viewing the facts in a light most favorable to Plaintiff, this Court found that issuance of the arrest warrant was not tainted, that Defendant was entitled to qualified immunity, and that Plaintiff did not state any claims against Defendant under state law. Thus, this Court granted judgment in favor of Defendant and dismissed Plaintiff Gemelli's claim with prejudice. Plaintiff now moves this Court to reconsider its holding. Defendant opposes.

### **LEGAL STANDARD**

Federal Rule of Civil Procedure 59(e) provides that “[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.” The Rule does not, however, provide any standard for courts to use when determining when timely motions should be granted.<sup>3</sup> Because this Motion was filed within 28 days of the entry of the judgment from which relief is being sought, the motion will be treated as a motion to alter or amend under Rule 59(e).<sup>4</sup>

---

<sup>2</sup> *Id.*

<sup>3</sup> *See* FED. R. CIV. P. 59.

<sup>4</sup> *See* Doc. 189. Judgment was entered on June 27, 2023. *Id.* Twenty-eight days later, the instant Motion was filed, on July 25, 2023. *See* Doc. 190.



In setting forth the applicable standard to determine whether a Rule 59(e) motion should be granted, the Fifth Circuit has held that Rule 59(e) “serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.”<sup>5</sup> “‘Manifest error’ is one that ‘is plain and indisputable, and that amounts to complete disregard of the controlling law.’”<sup>6</sup> “Such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.”<sup>7</sup> Rule 59(e) relief represents “an extraordinary remedy that should be used sparingly.”<sup>8</sup> While district courts have “considerable discretion in deciding whether to grant or deny a motion to alter a judgment,” denial is favored.<sup>9</sup>

### LAW AND ANALYSIS

Plaintiff asserts that this Court’s Order and Reasons granting Defendant’s Motion for Summary Judgment was based upon manifest errors of fact. Specifically, he alleges that this Court erred in finding that “D.G.’s report alone is sufficient to constitute probable cause.”<sup>10</sup> Plaintiff alleges that this finding is manifestly erroneous because the report was “demonstrably false due to inconsistencies in [D.G.’s] statement to Deputy Canepa[] and does not give rise to the presumption of probable cause based on the report alone.”<sup>11</sup>

---

<sup>5</sup> *Edionwe v. Bailey*, 860 F.3d 287, 294 (5th Cir. 2017) (quoting *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004)).

<sup>6</sup> *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (citing *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004)).

<sup>7</sup> *Bailey*, 860 F.3d at 294 (quoting *Templet*, 367 F.3d at 479).

<sup>8</sup> *Id.* (quoting *Templet*, 367 F.3d at 479).

<sup>9</sup> *Hale v. Townley*, 45 F.3d 914, 921 (5th Cir. 1995).

<sup>10</sup> Doc. 188 at 7 (citing *Schambach v. City of Mandeville*, No. CV 20-214, 2022 WL 1773873, at \*12 (E.D. La. June 1, 2022) (“It is settled that probable cause generally exists to arrest a suspect named by an alleged victim of assault.”)).

<sup>11</sup> Doc. 190-1.

In support of this assertion, Plaintiff lists multiple inconsistencies between D.G.'s statement to Deputy Canepa and the Affidavit.<sup>12</sup> Regardless, these alleged inconsistencies do not controvert this Court's application of Fifth Circuit precedent, which holds that a report specifically naming the perpetrator constitutes probable cause to arrest the named individual.<sup>13</sup> While Plaintiff alleges inconsistencies between D.G.'s statement and the Affidavit, he does not demonstrate that D.G.'s statement, identifying the alleged perpetrator as Plaintiff, is itself false.<sup>14</sup> Thus, there is no manifest error of law or fact.

Even after finding that D.G.'s report alone was sufficient for probable cause, this Court examined and dismissed each of Plaintiff's arguments at the Motion for Summary Judgment stage.<sup>15</sup> This Court explained that, even if the Court credited Plaintiff's arguments, "the corrected affidavit would have still included the following facts: (1) D.G. recalls taking showers with her father wherein Plaintiff and D.G. were naked, and he would wash her body, causing her physical discomfort in the vaginal region due to the soap burning her vagina; (2) D.G. stated that Plaintiff would squeeze her nipples causing a white substance to emit; (3) D.G. alleged that over the years, she has learned that Plaintiff had inappropriate behavior with family friends and her half sibling; and (4) as noted above, D.G.'s specific accusation that Plaintiff molested her."<sup>16</sup>

---

<sup>12</sup> See *id.* at 3. See also Doc. 191.

<sup>13</sup> See *Travis v. City of Grand Prairie, Tex.*, 654 F. App'x 161, 165 (5th Cir. 2016). See also Doc. 178-3 at 3 ("I was molested by my daddy").

<sup>14</sup> See *Travis*, 654 F. App'x at 165 (affirming dismissal of the plaintiff's § 1983 claims against defendant-officers because the victim's report of sexual assault alone was sufficient to give the officers probable cause for arrest, and the plaintiff "has pointed to nothing that would show her account to be demonstrably false").

<sup>15</sup> See Doc. 188 at 7-11.

<sup>16</sup> *Id.* at 10-11.

This Court expressly found that the facts clearly support a finding of probable cause as to aggravated incest, and Plaintiff now fails to demonstrate how this Court's findings constitute manifest error of law or fact. Plaintiff simply reasserts the same arguments this Court has already considered and rejected. To the extent that Plaintiff asserts additional inconsistencies between D.G.'s report and the Affidavit, these assertions plainly "rehash[] evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment."<sup>17</sup> Such assertions do not warrant exercise of this Court's discretion to grant a motion to alter or amend judgment.

Plaintiff's disagreements with this Court's opinion do not undermine its ultimate holding—that is, issuance of Plaintiff Gemelli's arrest warrant was supported by probable cause and was not tainted, thereby entitling Defendant Canepa to summary judgment. Accordingly, the extraordinary remedy requested is not warranted.

### **CONCLUSION**

For the foregoing reasons, Plaintiff's Motion is **DENIED**.

New Orleans, Louisiana this 1st day of September, 2023.

A handwritten signature in black ink, appearing to read "Jane Triche Milazzo", written over a horizontal line.

**JANE TRICHE MILAZZO**  
**UNITED STATES DISTRICT JUDGE**

---

<sup>17</sup> *Templet*, 367 F.3d at 478–79 (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

**TIMOTHY GEMELLI**

**CIVIL ACTION**

**VERSUS**

**NO. 19-13424**

**STATE OF LOUISIANA, ET AL.**

**SECTION: H(2)**

**ORDER AND REASONS**

Before the Court are Cross Motions for Summary Judgment. On June 13, 2023, the Court **GRANTED** Defendant Michelle Canepa's Motion for Summary Judgment (Doc. 178) and **DENIED** Plaintiff Timothy M. Gemelli's Motion for Summary Judgment (Doc. 177), for the following reasons.

**BACKGROUND**

This case arises out of Plaintiff Timothy M. Gemelli's arrest for aggravated incest. Plaintiff was arrested in Louisiana on January 11, 2017, based on allegations of multiple acts of aggravated incest of his daughter, D.G. The alleged acts occurred from 2000 to 2004, when D.G. was between the ages of four and eight and during which the Gemelli family lived in both St. Bernard Parish and Colorado. Defendant Michelle Canepa conducted video interviews with D.G. and her mother. D.G. stated that she was molested by her father. Specifically, she explained how she would often sleep in her parents' bed and wake up with Plaintiff's hand inside her underwear, how she would shower with Plaintiff and felt a burning sensation in her crotch when he would wash

her body, and how Plaintiff would touch her nipples and a white substance would emit.<sup>1</sup> D.G. also told Defendant Canepa she learned over the years that Plaintiff had also molested her older half sibling and friends of the family. Based upon this interview, Defendant Canepa executed an affidavit for an arrest warrant ("the Affidavit"). The Affidavit includes a synopsis of both interviews and requests the issuance of an arrest warrant for Plaintiff for violations of Louisiana Revised Statute § 14:78.1 Based upon the Affidavit, Judge Robert A. Buckley issued an arrest warrant for Plaintiff on January 11, 2017. Plaintiff was tried in St. Bernard Parish in January 2019 and acquitted of all charges.

Plaintiff subsequently filed this suit in October 2019 pursuant to 42 U.S.C. § 1983 alleging that that Defendant Michelle Canepa violated his federal and state constitutional rights by arresting and incarcerating him pursuant the Affidavit, which contained material omissions and misstatements of fact.<sup>2</sup> Plaintiff alleges that he was unconstitutionally seized under the Fourth Amendment based upon the Affidavit and incarcerated in the St. Bernard Parish Jail for two years as a result. Plaintiff also alleges that he lost three businesses and his home because of the criminal proceedings.

Now before the Court are Cross Motions for Summary Judgment filed by Plaintiff Timothy M. Gemelli and Defendant Michelle Canepa. Defendant Canepa argues that there are no genuine issues of material fact as to whether

---

<sup>1</sup> Doc. 178-3.

<sup>2</sup> Plaintiff also sued various other Defendants. Defendants the State of Louisiana Office of Attorney General Jeff Landry, St. Bernard Parish President Guy S. McInnis, Judge Jeanne Juneau, District Attorney Perry Nicosia, Assistant District Attorneys Mikey Morales and Charles Ward, the St. Bernard Parish Sheriff's Office, Sheriff James Pohlmann, Clerk of Court Randy Nunez, Melissa M. Evans and Brook Kerrigan have all been dismissed from the case.

probable cause existed to arrest Plaintiff, that she is entitled to qualified immunity, and that Plaintiff has no viable state law claims. Defendant Canepa argues she is entitled to judgment as a matter of law. Plaintiff asserts that there is no genuine issue of material fact as to whether Defendant Canepa violated his Fourth Amendment Rights and requests judgment be granted in his favor on the issue of liability. Both Defendant Canepa and Plaintiff filed oppositions. The Court granted Defendant Canepa's Motion and denied Plaintiff's Motion on June 13, 2023, for the following reasons.

### **LEGAL STANDARD**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>3</sup> A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>4</sup>

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in her favor.<sup>5</sup> "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."<sup>6</sup> Summary judgment is

---

<sup>3</sup> *Sherman v. Hallbauer*, 455 F.2d 1236, 1241 (5th Cir. 1972).

<sup>4</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>5</sup> *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532 (5th Cir. 1997).

<sup>6</sup> *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

appropriate if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case.”<sup>7</sup> “In response to a properly supported motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party’s claim, and such evidence must be sufficient to sustain a finding in favor of the non-movant on all issues as to which the non-movant would bear the burden of proof at trial.”<sup>8</sup> “We do not . . . in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.”<sup>9</sup> Additionally, “[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion.”<sup>10</sup>

### **LAW AND ANALYSIS**

Defendant Canepa moves for summary judgment on Plaintiffs § 1983 claim and all state law claims arguing that there are no material issues of fact as to whether probable cause existed for Plaintiff’s arrest. Furthermore, Defendant Canepa argues that regardless of the Court’s holding on the existence of probable cause, she is entitled to qualified immunity. Plaintiff also moves for summary judgment, asserting that the Affidavit contained misstatements and several omissions of material facts that vitiate probable cause. The Court will address each contention in turn.

#### **I. Fourth Amendment *Franks* Violation**

---

<sup>7</sup> Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

<sup>8</sup> John v. Deep E. Tex. Reg. Narcotics Trafficking Task Force, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

<sup>9</sup> Badon v. R J R Nabisco, Inc., 224 F.3d 382, 394 (5th Cir. 2000) (quoting Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)).

<sup>10</sup> Boudreaux v. Banctec, Inc., 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

Plaintiff argues that Detective Canepa violated his Fourth Amendment rights by arresting him pursuant to a warrant premised on an affidavit containing various material misstatements and omissions of fact.<sup>11</sup>

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."<sup>12</sup>

"Functionally, the holding of *Franks* is an exception to the independent intermediary doctrine, which provides that 'if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party.'" <sup>13</sup> "However, the chain of causation remains intact if 'it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant.'" <sup>14</sup>

"To determine taint, the essential inquiry is whether 'there remains sufficient content in the warrant affidavit to support a finding of probable cause' *after* the 'material that is the subject of the alleged falsity or reckless disregard is set to one side.'" <sup>15</sup>

To determine whether the false statement was necessary for [probable cause], *Franks* requires [courts] to consider the faulty

---

<sup>11</sup> See *Terwilliger v. Reyna*, 4 F.4th 270, 281 (5th Cir. 2021) ("Liability under *Franks* can arise from either material misstatements or material omissions in warrant affidavits.").

<sup>12</sup> *Winfrey v. Rogers*, 901 F.3d 483, 494 (citation omitted) (quoting *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978)). "The *Franks* case arose in the context of a search warrant, but its rationale extends to arrest warrants." *Terwilliger*, 4 F.4th at 282.

<sup>13</sup> *Terwilliger*, 4 F.4th at 281 (quoting *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) (citation and internal quotation marks omitted)).

<sup>14</sup> *Cuadra*, 626 F.3d at 813 (quoting *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988)).

<sup>15</sup> *Terwilliger*, 4 F.4th at 281–82 (quoting *Franks*, 438 U.S. at 171–72).



affidavit as if those errors and omissions were removed. [Courts] 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.<sup>16</sup>

Plaintiff argues that a corrected affidavit in this case would lack probable cause to support an arrest warrant charging him with aggravated incest. Under Louisiana Revised Statute § 14:78.1, aggravated incest is defined as:

A. Aggravated incest is the engaging in any prohibited act enumerated in Subsection B with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece.

B. The following are prohibited acts under this Section:

(1) Sexual intercourse, sexual battery, aggravated sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile, crime against nature, cruelty to juveniles, parent enticing a child into prostitution, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.

(2) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, the offender, or both.

Focusing on the statutory definition and assuming Detective Canepa did omit and misstate the facts Plaintiff argues she did, the Court finds that a

---

<sup>16</sup> *Winfrey*, 901 F.3d at 494–95 (alterations added) (citing *Franks*, 438 U.S. at 156; *United States v. Bankston*, 182 F.3d 296, 305–06 (5th Cir. 1999)).

corrected affidavit would still have reflected sufficient probable cause to support Plaintiff's arrest for aggravated incest. At the outset, this Court notes that D.G. specifically accused Plaintiff of molesting her when she was a child, between the ages of 4 and 8.<sup>17</sup> In *Travis v. City of Grand Prairie*, the Fifth Circuit held that a report specifically naming the perpetrator constitutes probable cause to arrest the named individual.<sup>18</sup> Under this precedent, the Court finds that D.G.'s report alone is sufficient to constitute probable cause.<sup>19</sup> Nevertheless, it will examine each of Plaintiff's arguments in turn.

Specifically, Plaintiff states that Detective Canepa allegedly omitted that (1) Plaintiff was asleep during all the alleged incidents in the parents' bed, and (2) D.G.'s mother stated D.G. would prop herself up on pillows in a sitting position when she slept in her parents' bed due to her acid reflux.<sup>20</sup> Furthermore, Plaintiff alleges that Detective Canepa's statement that Plaintiff had a history of domestic violence was false, as Defendant Canepa testified that she did not find any documented history of domestic violence in the National Crime Information Center ("NCIC"). Plaintiff argues that without

---

<sup>17</sup> Doc. 178-3 at 3 ("I was molested by my daddy").

<sup>18</sup> *Travis v. City of Grand Prairie, Tex.*, 654 F. App'x 161, 165 (5th Cir. 2016) ("Travis was arrested pursuant to Castaldo's report that Travis had sexually assaulted her. This report alone was sufficient to give the officers probable cause for arrest.") (first citing *Fontenot v. Cormier*, 56 F.3d 669, 674 (5th Cir. 1995) (probable cause to arrest perpetrator existed where victim of assault identified perpetrator by name); and then citing *United States v. Simpson*, 484 F.2d 467, 468 (5th Cir. 1973) (assault victim's identification of perpetrator gave rise to probable cause for arrest)).

<sup>19</sup> See also *Schambach v. City of Mandeville*, No. CV 20-214, 2022 WL 1773873, at \*12 (E.D. La. June 1, 2022) ("It is settled that probable cause generally exists to arrest a suspect named by an alleged victim of assault.")

<sup>20</sup> See Doc. 177 at 9–10.

these material omissions and misstatements, the affidavit would lack probable cause to support an arrest warrant for aggravated incest.<sup>21</sup>

“Probable cause exists when all of the facts known by a police officer ‘are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense.’”<sup>22</sup> Courts must examine the totality of the circumstances to decide “whether there is a fair probability that a crime occurred.”<sup>23</sup> A “requisite ‘fair probability’ is something more than a bare suspicion, but need not reach the fifty percent mark.”<sup>24</sup> Importantly, “evidence that the arrestee was innocent of the crime is not necessarily dispositive of whether the officer had probable cause to conduct the arrest because ‘probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.’”<sup>25</sup>

---

<sup>21</sup> It should be noted that Plaintiff was arrested and charged with a violation of Louisiana Revised Statutes § 14:78.1 (aggravated incest), which was the law in effect at the time of the commission of his alleged crimes. This statute, however, was repealed effective June 12, 2014, before Plaintiff was charged. The statute in effect at the time of his arrest, Louisiana Revised Statute § 14:89 (crime against nature), specifically provided that “a conviction for a violation of R.S. 14:89(A)(2) shall be the same as a conviction for the crime of incest (R.S. 14:78) and a conviction for a violation of R.S. 14:89.1(A)(2) shall be the same as a conviction for the crime of aggravated incest (R.S. 14:78.1).” When faced with the same issue, the Louisiana First Circuit Court of Appeal stated that “although LSA-R.S. 14:78.1 was repealed before the defendant was charged with violating that statute, the conduct proscribed therein remained unlawful; state law was simply amended elsewhere to incorporate the proscribed conduct.” *State v. Robinson*, 295 So. 3d 961, 965 (La. App. 1 Cir. 2019). The Court here agrees. Regardless of whether Plaintiff was charged with Louisiana Revised Statutes § 14:78 or 14:89, the proscribed conduct remained unlawful.

<sup>22</sup> *Villarreal v. City of Laredo*, 17 F.4th 532, 543 (5th Cir. 2021) (quoting *Texas v. Kleinert*, 855 F.3d 305, 316 (5th Cir. 2017)).

<sup>23</sup> *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999) (citations omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Deville v. Marcantel*, 567 F.3d 156, 165 (5th Cir. 2009) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)).

Neither omission nor the alleged misstatement are sufficient to eradicate probable cause on their own or in the aggregate. The first alleged omission is that Detective Canepa omitted the fact that Plaintiff “was asleep during every alleged incident in the parents’ bed.”<sup>26</sup> D.G. stated that her “first recollection” of molestation was sleeping in her parents’ bed and waking up with Plaintiff’s hand inside her underwear.<sup>27</sup> When asked about this particular incident, she nodded affirmatively that Plaintiff was asleep. She then stated that this began to occur “almost every night.”<sup>28</sup> Detective Canepa did not omit the fact that Plaintiff was asleep during every incident because D.G. did not state that Plaintiff was asleep during every incident. D.G. stated that during her “first recollection” Plaintiff was asleep, but she did not aver that Plaintiff was asleep every night this occurred. The Court finds this is not an omission.

The next alleged omission is that Defendant Canepa did not include any reference to the fact that D.G. would lay on her mother’s chest due to her acid reflux. The Court fails to understand how this would diminish probable cause, still, it must be noted that her mother stated that D.G. slept on her chest until she was “threeish or so.”<sup>29</sup> D.G. stated that the molestation occurred when she was approximately four, so this does not contradict any information included in the affidavit and thus, does not constitute a material omission.

Lastly, Plaintiff argues that Detective Canepa’s statement discussing his history of domestic violence was a misstatement. Specifically, the Affidavit states that Plaintiff “has a history of domestic violence,” and that both D.G.

---

<sup>26</sup> Doc. 177 at 9.

<sup>27</sup> Doc. 178-3 at 4. D.G. also nodded her head when asked if it was skin to skin touching inside her underwear.

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.* at 9.

and her mother feared for their safety.<sup>30</sup> Detective Canepa does not state that Plaintiff has a *documented* history of domestic violence, only that both D.G. and her mother stated they feared for their safety.<sup>31</sup> Based upon these statements, the Court finds that Detective Canepa was reasonable to include her statement regarding Plaintiff's history of domestic violence, and that there was no misstatement. Moreover, the elements of the crime of aggravated incest do not require any prior documented conviction for domestic violence, so this alleged misstatement is irrelevant to a finding of probable cause for aggravated incest.

Even assuming the Court credits Plaintiff's arguments, which it does not, the corrected affidavit would have still included the following facts: (1) D.G. recalls taking showers with her father in wherein Plaintiff and D.G. were naked, and he would wash her body, causing her physical discomfort in the vaginal region due to the soap burning her vagina;<sup>32</sup> (2) D.G. stated that Plaintiff would squeeze her nipples causing a white substance to emit; (3) D.G.

---

<sup>30</sup> Doc. 178-6 at 2.

<sup>31</sup> Detective Canepa specifically states that she is summarizing the statements given by D.G. and her mother, wherein D.G. stated that Plaintiff was "always angry," and would hit her "every other week." Doc. 178-3 at 22. D.G.'s mother stated that "he [had] gotten physical with [her] a couple of times," and that she had seen Plaintiff "spank [D.G.] . . . a little over the edge." Doc. 178-5 at 6.

<sup>32</sup> Plaintiff also appears to argue that Defendant Canepa's use of the word "vagina" in the Affidavit is relevant to this argument. Doc. 177 at 10. Specifically, in response to an Interrogatory, Plaintiff states that "Detective Canepa omitted that she used her own words in the affidavit to embellish D.G.'s statements," seemingly taking issue with Defendant Canepa's word choice. Doc. 178-8 at 2. While Plaintiff is correct that Defendant Canepa was the first to use the word "vagina" during the interview and that Defendant Canepa used the word "vagina" in the Affidavit, the Court finds it immaterial that Defendant Canepa chose to use anatomically correct terminology. The use of medically correct terminology does not constitute embellishment. During her interview, D.G. used the word "crotch," and it is inconsequential that Defendant Canepa chose to use the anatomical term "vagina" in the Affidavit.

alleged that over the years, she has learned that Plaintiff had inappropriate behavior with family friends and her half sibling; and (4) as noted above, D.G.'s specific accusation that Plaintiff molested her.<sup>33</sup>

The Court finds that these facts are clearly sufficient to support a finding of probable cause as to aggravated incest.<sup>34</sup> Plaintiff's arguments do not even attempt to discredit D.G.'s recollections in the shower which caused her physical discomfort and a burning sensation in her vagina or Plaintiff squeezing her nipples, both of which would constitute probable cause to arrest Plaintiff for aggravated incest. Therefore, Judge Buckley's decision to issue the warrant was not tainted and Detective Canepa is entitled to summary judgment as to Plaintiff's *Franks* claim.

## II. Qualified Immunity

Furthermore, Defendant Canepa argues that, even if there was not probable cause to arrest Plaintiff, she is entitled to qualified immunity. Plaintiff does not address this argument. To overcome qualified immunity, Plaintiff must demonstrate "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct."<sup>35</sup> "To defeat qualified immunity in the false arrest context, the plaintiff must show that 'defendants lacked arguable (that is, reasonable but mistaken) probable cause for the arrest.'"<sup>36</sup> Because this Court finds that there was sufficient probable cause for Plaintiff's arrest and that

---

<sup>33</sup> Doc. 178-3 at 3 ("I was molested by my daddy").

<sup>34</sup> *Schambach*, 2022 WL 1773873, at \*12 ("It is settled that probable cause generally exists to arrest a suspect named by an alleged victim of assault."); *Travis*, 654 Fed. App'x 161, 165 (stating that where a plaintiff could not show the alleged victim's account of sexual assault to be "demonstrably false," probable cause existed to arrest the alleged perpetrator).

<sup>35</sup> *Craig v. Martin*, 26 F.4th 699, 704 (5th Cir. 2022) (citations omitted).

<sup>36</sup> *Schambach*, 2022 WL 1773873, at \*11.

there was no *Franks* violation, Plaintiff cannot demonstrate a constitutional violation. Accordingly, Defendant Canepa is entitled to qualified immunity, and summary judgment is appropriate.

### III. Various State Law Claims

Defendant Canepa also argues that Plaintiff cannot state any claims against her under state law.<sup>37</sup> Defendant Canepa specifically argues Plaintiff cannot state a claim for malicious prosecution or false imprisonment. Plaintiff does not respond to this argument.

#### A. *Malicious Prosecution*

A claim for malicious prosecution requires a plaintiff to prove:

(1) the commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to plaintiff.<sup>38</sup>

The Court's dismissal of Plaintiff's Fourth Amendment claim precludes any possible claim for malicious prosecution. The Court has determined that Defendant Canepa had probable cause to arrest Plaintiff aggravated incest and that any alleged omissions or material misstatements in the Affidavit did not

---

<sup>37</sup> The Report and Recommendations issued by Magistrate Judge Wilkinson on April 29, 2020, only addressed whether Plaintiff stated a claim under the Fourth Amendment and § 1983. Doc. 43. Magistrate Judge Wilkinson's Order does not address whether Plaintiff stated any viable state law claims. Plaintiff does not respond to this portion of Defendant Canepa's Motion for Summary Judgment. Defendant Canepa states that although Plaintiff did not specifically mention any state law claim in his Amended Complaint or in his Motion for Summary Judgment, she has addressed these out of an abundance of caution. Doc. 178-1 at 21.

<sup>38</sup> *Lemoine v. Wolfe*, 167 So. 3d 362, 367 (La. 2015) (quoting *Jones v. Soileau*, 448 So. 2d 1268, 1271 (La. 1984)).

vitiating probable cause. Thus, as Plaintiff must show an absence of probable cause to prove malicious prosecution, his claim is foreclosed.<sup>39</sup>

### *B. False Imprisonment*

Under Louisiana law, “[f]alse arrest and imprisonment occur when one arrests and restrains another against his will without a warrant or other statutory authority.”<sup>40</sup> “The two essential elements are: (1) detention of a person; and (2) the unlawfulness of such detention.”<sup>41</sup> Under Louisiana law, “[i]f a person is arrested pursuant to a valid warrant, there is no false arrest and no false imprisonment.”<sup>42</sup> Plaintiff’s false imprisonment claim, to the extent he has asserted it, must also fail. Because the Court finds that Plaintiff was arrested pursuant to a warrant supporting probable cause, his claim for false imprisonment must also be dismissed.<sup>43</sup>

## **CONCLUSION**

For the foregoing reasons, **IT IS ORDERED** that Defendant’s Motion for Summary Judgment is **GRANTED** and Plaintiff’s Motion for Summary Judgment is **DENIED**.

---

<sup>39</sup> See *Danna v. Purgerson*, 760 F. App’x 275, 280 (5th Cir. 2019) (“Here again, the presence of probable cause to charge Danna with theft dooms her [malicious prosecution] claim.”) (alteration added); *Usea v. Manuel*, No. 19-14704, 2022 WL 2467691 (E.D. La. July 6, 2022) (“The Court’s above disposition of Plaintiff’s *Franks* claim necessarily precludes his malicious prosecution claim.”).

<sup>40</sup> *Kyle v. City of New Orleans*, 353 So. 2d 969, 971 (La. 1977).

<sup>41</sup> *Barry v. Dennis*, 633 So. 2d 806, 808 (La. App. 4 Cir. 1994).

<sup>42</sup> *Jenkins v. Baldwin*, 801 So. 2d 485, 496 (La. App. 4 Cir. 2001).

<sup>43</sup> *Usea*, 2022 WL 2467691 (“Because the Court finds that Plaintiff was arrested pursuant to a valid, untainted warrant supporting probable cause, his claim for false imprisonment fails.”).



**IT IS FURTHER ORDERED** that the remainder of Plaintiff's claims against Defendant Michelle Canepa are **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana this 26th day of June, 2023.

A handwritten signature in black ink, appearing to read "Jane Triche Milazzo", written over a horizontal line.

**JANE TRICHE MILAZZO**  
**UNITED STATES DISTRICT JUDGE**

United States Court of Appeals  
for the Fifth Circuit

---

No. 23-30661

---

United States Court of Appeals  
Fifth Circuit

**FILED**

September 5, 2024

Lyle W. Cayce  
Clerk

TIMOTHY M. GEMELLI,

*Plaintiff—Appellant,*

*versus*

PERRY NICOSIA, *District Attorney, 34th Judicial District Court*; MIKEY  
MORALES, *Assistant District Attorney, 34th Judicial District Court*;  
CHARLES WARD, *Assistant District Attorney, 34th Judicial District Court*;  
MICHELLE CANEPA, *Police Officer,*

*Defendants—Appellees.*

---

Appeal from the United States District Court  
for the Eastern District of Louisiana  
USDC No. 2:19-CV-13424

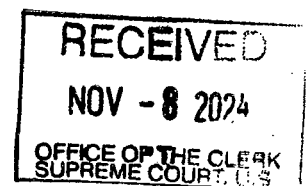
---

ON PETITION FOR REHEARING

Before DAVIS, STEWART, and SOUTHWICK, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.



APPX: D

**Additional material  
from this filing is  
available in the  
Clerk's Office.**