

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO

3 LUIS F. CRUZ-ACEVEDO, et al.,

4 Plaintiffs,

5 v.

6 PEDRO TOLEDO-DÁVILA, et al.,

7 Defendants.

Civil No. 07-2104 (JAF)

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11 **OPINION AND ORDER**

12 Plaintiffs Luis F. Cruz-Acevedo and Manuela V. Cruz-Perocier  
13 move for partial reconsideration, Docket No. 63, of our Opinion and  
14 Order dated December 8, 2008, Docket No. 62. Plaintiffs challenge  
15 our dismissal of their § 1983 claim for violations of the Fourth  
16 Amendment and our treatment of their claims at Commonwealth law.  
17 Docket No. 63. All Defendants, except José Nieves-Soler, oppose the  
18 motion. Docket No. 66.

19 **I.**

20 **Motion for Reconsideration**

21 Pursuant to Federal Rule of Civil Procedure 59(e), we entertain  
22 motions for reconsideration to (1) correct manifest errors of law or  
23 fact, (2) consider newly discovered evidence, (3) incorporate an  
24 intervening change in the law, or (4) otherwise prevent manifest



1           The Fourth Amendment, as applied to the states through the  
2           Fourteenth Amendment, protects "against unreasonable searches and  
3           seizures" by requiring probable cause, as supported by sworn  
4           statements, for the issuance of search warrants. U.S. Const. Amend.  
5           IV. In a claim under 42 U.S.C. § 1983 for an illegal search pursuant  
6           to a warrant issued upon false officer testimony, a plaintiff must  
7           establish that (1) the officer made "a false statement knowingly and  
8           intentionally, or with reckless disregard for the truth" that was  
9           included in the warrant affidavit, and (2) "the false statement is  
10          necessary for a finding of probable cause." See Aponte-Matos v.  
11          Tolédo-Dávila, 135 F.3d 182, 187 (1st Cir. 1998) (applying United  
12          States v. Franks, 438 U.S. 154, 171-72 (1978), to § 1983 claim).

13          As warrant affidavits benefit from an assumption of validity,  
14          "the challenger's attack must be more than conclusory." Franks, 438  
15          U.S. at 171. However, the sufficiency of pleading in a Franks claim  
16          under § 1983 is a novel issue in the First Circuit. Therefore, we  
17          look to decisional law in other jurisdictions for guidance.

18          Other courts have sometimes required the plaintiff to allege the  
19          specific parts of the warrant affidavit that the plaintiff believes  
20          to be false. See Mack v. City of Abilene, 461 F.3d 547, 551 (5th Cir.  
21          2006) (vacating dismissal on other grounds); Dowling v. City of  
22          Barberton, No. 05-2589, 2008 U.S. Dist. LEXIS 73162, at \*14-15 (N.D.  
23          Ohio Sept. 24, 2008); Rutledge v. County of Sonoma, No. 07-4274, 2008  
24          U.S. Dist LEXIS 51313, at \*20-21 (N.D. Cal. July 1, 2008); cf.

1 Johnson v. Hayden, 67 F. App'x 319, 324 (6th Cir. 2003) (reversing  
2 dismissal on basis of specifically alleged false statement).

3 Furthermore, other courts have generally required the plaintiff  
4 to aver that these falsehoods were material to the issuance of the  
5 warrant; that is to say, the magistrate must have relied on the  
6 alleged falsehood and there must be no other basis for a finding of  
7 probable cause. See Johnson, 67 F. App'x at 323-24; Pence v. Zifcak,  
8 No. 04-3396, 2007 U.S. Dist. LEXIS 10172, at \*29-30 (D. Md. Feb. 7,  
9 2007); Saghezi v. Reno, No. 94-8291, 1996 U.S. Dist. LEXIS 13447, at  
10 \*42 (S.D.N.Y. Sept. 12, 1996); see also Aponte-Matos, 135 F.3d at 187  
11 (holding that false statement must be necessary to finding of  
12 probable cause in a claim under Franks).

13 In our prior order, we found that Plaintiffs had baldly accused  
14 Defendants of fraudulently obtaining a search warrant without stating  
15 the manner in which Defendants' underlying statements constituted  
16 perjury.<sup>1</sup> Docket No. 62; see Docket No. 1, at ¶ 3.11. Plaintiffs'  
17 averment of perjury is merely a statement of a legal conclusion.<sup>2</sup> See  
18 Docket No. 1, at ¶ 3.11. Without more facts, specifically, the

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<sup>1</sup> Plaintiffs now direct our attention to evidence in two other cases before this court, in which one Defendant confessed to fabricating testimony to obtain search warrants against innocent persons. Docket No. 63. This evidence has no bearing on Defendants' alleged perjury in the instant case, see Docket No. 1, which Plaintiffs must explain more fully to survive dismissal under Rule 12(b)(6), see Docket No. 62.

<sup>2</sup> Perjury is "the willful assertion as to a matter of fact . . . by a witness in a judicial proceeding" where the statement is material to the proceeding and "known to such witness to be false." Black's Law Dictionary 1139 (6th ed. 1990).

1 existence of an underlying falsehood, the affiant's intent to lie,  
2 and the materiality of the falsehood to the magistrate's  
3 determination of probable cause, we cannot deduce the existence of  
4 perjury vel non from the face of the complaint. See Docket No. 1, at  
5 ¶ 3.11. Therefore, we cannot read the complaint to imply a deliberate  
6 falsehood that was necessary to the magistrate's finding of probable  
7 cause, such that the search warrant and the subsequent search were  
8 devoid of legal authority.

9 Although Plaintiffs' complaint alleges that the officers who  
10 executed the search falsely claimed to have had evidence against  
11 Cruz-Acevedo, the complaint does not state that this falsehood was  
12 included in, or a necessary basis for, the search warrant. See Docket  
13 No. 1, at ¶¶ 3.10-3.11. As Plaintiffs neither alleged that Nieves-  
14 Soler had intentionally or recklessly provided false statements in  
15 his warrant testimony to the magistrate, nor averred that the  
16 magistrate lacked other grounds for his determination of probable  
17 cause, see id., our prior dismissal of their Franks claim was not  
18 manifest error of law, see Aponte-Matos, 135 F.3d at 187.

1           **2.    Warrantless Arrest**

2           Upon reviewing Plaintiffs' complaint, however, we find that it  
3           sufficiently alleges a § 1983 claim for a warrantless arrest without  
4           probable cause. See Docket No. 1. Under the Fourth Amendment,  
5           warrantless arrests must be based upon probable cause. Valente v.  
6           Wallace, 332 F.3d 30, 32 (1st Cir. 2003). Probable cause requires  
7           police to find evidence that "would warrant a man of reasonable  
8           caution in believing that a crime has been committed and committed by  
9           the person to be arrested." Id. (internal citation omitted).

10           Plaintiffs aver in their complaint that Defendant Miguel Arocho  
11           "claimed falsely to have found a red bag they claimed contained [sic]  
12           marihuana." Docket No. 1, at ¶ 3.19. This allegedly false evidence  
13           appears to have been the basis for Plaintiff Cruz-Acevedo's arrest.  
14           See id. If Arocho knew that the bag contained no contraband, he could  
15           not have believed that it was evidence of a crime perpetrated by  
16           Cruz-Acevedo. Thus, Arocho lacked probable cause to arrest Cruz-  
17           Acevedo, see Valente, 332 F.3d at 32, and a claim colorably exists  
18           against Defendants under the Fourth Amendment, see Cabrera-Negrón v.  
19           Municipality of Bayamón, 419 F. Supp. 2d 49, 55-56 (D.P.R. 2006).

20           Although we previously dismissed Plaintiffs' claim under the  
21           Fourth Amendment for an illegal search pursuant to a fraudulently  
22           obtained warrant, we did not address this separate claim of a  
23           warrantless arrest without probable cause. See Docket No. 62.  
24           Defendants did not address this alternate claim specifically in their

1 motion to dismiss, see Docket No. 11, or in their opposition to  
2 Plaintiffs' motion for reconsideration, see Docket No. 66. We, thus,  
3 restore Plaintiff Cruz-Acevedo's claim under the Fourth Amendment.

### 4 **3. Leave to Amend Complaint**

5 While we deny reconsideration of Plaintiffs' Franks claim, our  
6 present order resurrects Cruz-Acevedo's claim for a warrantless  
7 arrest under the Fourth Amendment. See supra, Part II.A.2. We  
8 recognize that the question of sufficiency of pleadings in a Franks  
9 claim is a novel issue in the First Circuit, see supra, Part II.A.1,  
10 and that Plaintiffs appear to have enough facts in their possession  
11 to plead a case under Franks, see Docket No. 1. Therefore, we take  
12 this opportunity to encourage Plaintiffs to amend their complaint to  
13 explicate their causes of action under the Fourth Amendment.<sup>3</sup>

14 If Plaintiffs wish to reassert their § 1983 claim under Franks,  
15 they must truthfully plead specific facts indicating how the warrant  
16 affidavit was false, and that there was insufficient basis otherwise  
17 for a magistrate's determination of probable cause.<sup>4</sup> See Aponte-Matos,

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<sup>3</sup> We note that Plaintiffs' complaint is hardly a paragon of clarity. See Docket No. 62, at 5 n.1. Plaintiffs' counsel has made a laundry list of the United States Constitution, failing to furnish any theories under which Plaintiffs pursue their several claims under § 1983. See Docket No. 1. We strongly urge counsel to charge each defendant with specific constitutional violations and sketch the theory for each alleged violation.

<sup>4</sup> Plaintiffs' opposition to dismissal, Docket No. 25, and motion for reconsideration, Docket No. 63, omit reference to probable cause. If Plaintiffs wish to prevail on their Fourth Amendment claims, their counsel is well advised to cite relevant law on probable cause. See Aponte-Matos, 135 F.3d at 187; Valente, 332 F.3d at 32.

1 135 F.3d at 187; see also Rutledge, 2008 U.S. Dist LEXIS, at \*21  
2 (permitting plaintiff to amend complaint if he could truthfully  
3 allege falsehood that was material to finding of probable cause).

4 **B. Claims at Commonwealth Law**

5 Plaintiffs also move for reconsideration of our supposed refusal  
6 to exercise supplemental jurisdiction over their claims at  
7 Commonwealth law. Docket No. 63. A careful reading of our last order  
8 should reveal that we have indeed retained Cruz-Acevedo's claims  
9 under the laws of Puerto Rico, albeit against eight of ten Defendants  
10 in their personal capacities, rather than in their official  
11 capacities as part of the Commonwealth. See Docket No. 62. As we  
12 rescind our earlier dismissal of Cruz-Acevedo's claim under the  
13 Fourth Amendment, however, we now exercise supplemental jurisdiction  
14 over his Commonwealth claims against Defendants González-Pérez and  
15 Pérez-Rodríguez in their personal capacities.

16 **III.**

17 **Conclusion**

18 Accordingly, we hereby **GRANT IN PART** and **DENY IN PART**  
19 Plaintiffs' motion for partial reconsideration, Docket No. 63. We  
20 amend our prior order of partial dismissal, Docket No. 62, to  
21 reinstate Plaintiff Cruz-Acevedo's claim under the Fourth Amendment  
22 for a warrantless arrest without probable cause, and extend our  
23 exercise of supplemental jurisdiction to his claims at Commonwealth  
24 law against Defendants González-Pérez and Pérez-Rodríguez in their



1 personal capacities. We hereby **DENY** reconsideration as to Plaintiffs'  
2 claim for a fraudulently obtained search warrant, but **GRANT**  
3 Plaintiffs **LEAVE TO AMEND** their complaint by **March 13, 2009**.

4 **IT IS SO ORDERED.**

5 San Juan, Puerto Rico, this 26<sup>th</sup> day of February, 2009.

6 S/José Antonio Fusté  
7 JOSE ANTONIO FUSTE  
8 Chief U.S. District Judge