

**FILED**

**NOT FOR PUBLICATION**  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JUN 13 2025

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ARDIT FERIZI,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 23-16195

D.C. No. 3:23-cv-02250-WHA

MEMORANDUM\*

Appeal from the United States District Court  
for the Northern District of California  
William H. Alsup, District Judge, Presiding

Argued and Submitted December 2, 2024  
San Francisco, California

Before: COLLINS, VANDYKE, and MENDOZA, Circuit Judges.

Plaintiff Ardit Ferizi brought this suit under the Federal Tort Claims Act (“FTCA”), asserting tort claims arising from federal charges that were filed against him in January 2021 but that were later dropped in March 2022.<sup>1</sup> The district court dismissed the suit as barred by the FTCA’s discretionary function exception, 28 U.S.C. § 2680(a), and Ferizi has timely appealed. We have jurisdiction under 28

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

<sup>1</sup> We grant Ferizi’s unopposed request to take judicial notice of the dockets and filings associated with those proceedings. *See* Dkt. No. 9. We also grant Ferizi’s unopposed motion to file certain documents under seal. *See* Dkt. No. 8.

U.S.C. § 1291. Reviewing *de novo*, see *Myles v. United States*, 47 F.4th 1005, 1010 (9th Cir. 2022), we affirm.

As relevant here, the discretionary function exception bars liability against the United States for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). Ferizi does not contest that his tort claims are all ultimately based on the decision to file charges against him and that such charging decisions are *typically* discretionary functions. See *General Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (“The decision whether or not to prosecute a given individual is a discretionary function for which the United States is immune from liability.” (citation omitted)). But he argues that, because the investigating agent submitted a false and misleading search warrant affidavit in violation of *Franks v. Delaware*, 438 U.S. 154 (1978), the decision to prosecute him in this case falls outside the discretionary function exception. The parties vigorously dispute whether, under the applicable test governing the discretionary function exception, the alleged *Franks* violation here, if established, would be sufficient to defeat that exception.<sup>2</sup> We need not resolve these issues, because we conclude that Ferizi has failed to allege a predicate *Franks* violation.

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<sup>2</sup> “Under that test, the exception applies if (1) the act or omission on which the

“The probable cause standard for a search warrant is whether, based on common sense considerations, there was a fair probability that contraband or evidence of a crime would be found in a particular place.” *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014) (simplified). “To prevail on a claim that the police procured a warrant through deception, the party challenging the warrant must show that the affiant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause.” *Id.* Where, as here, the contention is that facts were improperly omitted, “the court determines whether the affidavit, once corrected and supplemented, establishes probable cause.” *Id.* (citation omitted). “If probable cause remains after amendment, then no constitutional error has occurred.” *Id.* (citation omitted). In the absence of a hearing on an alleged *Franks* violation, the party challenging the warrant need only

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claim is based involves an element of judgment or choice; and (2) that judgment is of the kind that the discretionary function exception was designed to shield.” *Miller v. United States*, 992 F.3d 878, 885 (9th Cir. 2021) (simplified). According to Ferizi, neither element is met if there was a *Franks* violation, given that (1) there is no element of judgment or choice, “because federal officials do not possess discretion to violate constitutional rights,” *Xi v. Haugen*, 68 F.4th 824, 838 (3d Cir. 2023) (simplified); and (2) “decisions to knowingly lie under oath, tamper with witnesses, or fabricate evidence” do not involve “the sort of legislative or administrative decision[s] grounded in social, economic, or political policy that Congress sought to shield with the discretionary function exception,” *Myles*, 47 F.4th at 1012 (simplified). In response, the Government argues that this case lacks the sort of clear constitutional violation alleged in *Xi* and *Myles* and that, in the context of the *omissions*-based *Franks* violation alleged here, the discretionary function exception applies so long as the prosecutor deciding whether to file charges could reasonably conclude that there was no *Franks* violation.

make a “substantial preliminary showing” that a violation occurred under these standards. *Franks*, 438 U.S. at 155–56. We conclude that Ferizi has failed to plead facts establishing such a showing.

Ferizi contends that the investigating agent improperly omitted information detracting from the credibility of a key witness, who was another inmate at the prison where Ferizi was then being held after a conviction on previous charges. Specifically, the agent omitted (1) the additional detail that the inmate was serving a sentence for fraud, a crime involving dishonesty; and (2) certain additional details undermining the inmate’s allegation that a Bureau of Prisons (“BOP”) employee had given Ferizi a cellphone. We conclude that, in the context of the affidavit as a whole, the omissions were not material. The affidavit contained many statements that did not depend upon the inmate’s credibility, and it explained why the agent concluded that certain other statements made by the inmate had been at least partially and indirectly corroborated. Moreover, the affidavit did disclose (1) that the inmate was serving a more-than-20-year sentence and (2) that the BOP employee had reported, in an interview, that the BOP had investigated the inmate’s cellphone claim and had found no evidence to support it. Construing the affidavit as a whole, we conclude that, even with the marginal addition of the further impeaching information that Ferizi cites, the affidavit still establishes probable cause. Because “probable cause remains after amendment, . . . no constitutional

error has occurred.” *Ruiz*, 758 F.3d at 1148 (citation omitted).

Given that Ferizi’s arguments for defeating the discretionary function exception rest on his predicate assertion of a *Franks* violation, that exception applies and bars his tort claims. And because Ferizi’s proffered amendments would not address his underlying failure to plead a *Franks* violation, leave to amend would be futile. *See Webb v. Trader Joe’s Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021). We therefore affirm the dismissal of this action with prejudice.

**AFFIRMED.**