

No. 17-

IN THE
Supreme Court of the United States

JOHN R. ZIMMERMAN,

Petitioner,

v.

THOMAS W. CORBETT; LINDA L. KELLY; FRANK
G. FINA; K. KENNETH BROWN, II; MICHAEL A.
SPROW; ANTHONY J. FIORE; GARY E. SPEAKS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two questions presented:

1. Should the circuit courts be permitted to continue to apply “probable cause” standards that differ from each other and that deviate from the “probable cause” standard espoused by the Court in Beck v. State of Ohio, 379 U.S. 89, 91 (1964)?
2. Does an officer have “probable cause” to arrest, or just “reasonable suspicion,” when the officer possesses evidence indicating that a person is one of a number of persons who had the opportunity to commit a crime but no evidence indicating that the particular person (as opposed to the other persons) committed the crime?

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
OPINION BELOW.....	1
STATEMENT OF JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF THE WRIT....	6
I. REVIEW IS NEEDED TO CLARIFY THE “PROBABLE CAUSE” STANDARD, SO THAT UNIFORMITY IS RETURNED TO THE CIRCUIT COURTS.....	6
II. REVIEW IS NEEDED TO CLARIFY THE DISTINCTION BETWEEN “REASONABLE SUSPICION” AND “PROBABLE CAUSE.”.....	9
CONCLUSION	10

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED OCTOBER 16, 2017	1a
APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED OCTOBER 16, 2017.....	11a
APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED JULY 15, 2016	13a
APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED JULY 15, 2016.....	26a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES:	
<i>Beck v. State of Ohio</i> , 379 U.S. 89 (1964)	6, 9
<i>Culver v. Armstrong</i> , 832 F.3d 1213 (10th Cir. 2016)	8
<i>Diaz-Nieves v. United States</i> , 858 F.3d 678 (1st Cir. 2017)	7
<i>Farrell v. Macy’s Retail Holdings, Inc.</i> , 645 Fed. Appx. 246 (4th Cir. 2016)	7
<i>Fish v. Brown</i> , 838 F.3d 1153 (11th Cir. 2016)	9
<i>Joseph v. Allen</i> , 712 F.3d 1222 (8th Cir. 2013)	8
<i>Navarro v. City of San Juan</i> , 624 Fed. Appx. 174 (5th Cir. 2015)	7
<i>Pitt v. District of Columbia</i> , 491 F.3d 494 (D.C. Cir. 2007)	7
<i>United States v. Gagnon</i> , 373 F.3d 230 (2d Cir. 2004)	7
<i>United States v. Lopez</i> , 482 F.3d 1067 (9th Cir. 2007)	8

Cited Authorities

	<i>Page</i>
<i>United States v. Pate</i> , 665 Fed. Appx. 464 (6th Cir. 2016)	8
<i>Woods v. City of Chicago et al.</i> , 234 F.3d 979 (7th Cir. 2000)	8
<i>Zimmerman v. Corbett, et al.</i> , 16-3384 (3d Cir. 2017)	1, 6
STATUTES & OTHER AUTHORITIES:	
28 U.S.C. § 1254(1).	1

OPINION BELOW

The Precedential Opinion of the United States Court of Appeals for the Third Circuit was issued on October 16, 2017, and is reported at *Zimmerman v. Corbett, et al.*, 16-3384 (3d Cir. 2017). *See* Appendix A. The Third Circuit reversed the July 15, 2016, decision of the United States District Court for the Middle District of Pennsylvania. *See* Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Precedential Opinion of the United States Court of Appeals for the Third Circuit was issued on October 16, 2017, and is reported at *Zimmerman v. Corbett, et al.*, 16-3384 (3d Cir. 2017). *See* Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983

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

Constitution of the United States, Amendment IV

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

Constitution of the United States, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. On November 12, 2009, Corbett announced the grand jury presentments and the filing of criminal charges against 10 ranking Republicans, including John M. Perzel, and Perzel's staff, which included the Petitioner, John R.

Zimmerman. These prosecutions have become known as “Computergate” and “Boxgate.” Zimmerman’s criminal charges related solely to “Boxgate” – the alleged cover up, regarding the movement of boxes that allegedly contained campaign material (three year old blank campaign letterhead and envelopes) from the Capital, and telephone calls related to same. On November 17, 2011, all criminal charges against Zimmerman were voluntarily dismissed by the Commonwealth.

2. On May 7, 2014, Petitioner filed an Amended Complaint in the United States District Court for the Middle District of Pennsylvania, in which he asserted, in addition to a state law claim, a malicious prosecution claim pursuant to the Fourth and Fourteenth Amendments. The Respondents filed a motion to dismiss, which the District Court granted in part and denied in part. The Respondents filed an Answer followed by a motion for judgment on the pleadings, which the District Court denied. The Respondents filed an interlocutory appeal to the Third Circuit, challenging the District Court’s denial of qualified immunity. The Third Circuit declined to address the immunity question. Instead, in a precedential opinion, the Third Circuit reversed the District Court’s decision, concluding “that there was probable cause to initiate those criminal proceedings and that Zimmerman can therefore not establish a prima facie case of malicious prosecution.”

3. In his Amended Complaint, the Petitioner explained in detail the inculpatory and exculpatory facts known to the Defendants at the time when the criminal charges were filed. See Amended Complaint at ¶¶ 41-129. The Third Circuit, however, focused only on the following facts:

Zimmerman does not dispute any of the following: (1) a man called the HRCC from Zimmerman's phone line and told the HRCC to expect a delivery of boxes of campaign material; (2) Zimmerman was usually at his desk; or (3) boxes containing campaign material were moved to the HRCC as promised in the call from Zimmerman's phone line. Instead, he claims that many others had access to his phone, he "was not present when the boxes were moved, and had no knowledge of the same." He also argues that Room 414, where the boxes were taken, was commonly referred to as "Perzel's Office" and that this room "actually consisted of a cluster of eight rooms and the woman's restroom. Both Perzel's and Representative Sandra J. Major's offices were located [there]." The door to this space was left open during business hours, and "anyone in the Capital could walk into [that room]." When seated at his desk, Zimmerman "could not see the front door to Room 414 or the conference room." Zimmerman further argues that Appellants "knew that [his] phone line was on numerous phones within [that room], not just on [his] phone, and could have been utilized by almost anyone." In sum, Zimmerman argues that because anyone could have moved the subpoenaed materials to Room 414 and anyone could have used "[his] phone line" to call the HRCC, Appellants did not have probable cause to arrest him.

However, given the uncontested facts, while Zimmerman's arguments may well have been

sufficient to raise a reasonable doubt that would have resulted in an acquittal at trial, they do not negate the fact that Appellants had probable cause to prosecute him. There is no dispute that Zimmerman was normally at his desk, that a male conspirator called from Zimmerman's office desk phone line to tell the HRCC to expect a delivery of boxes of campaign material, or that boxes of campaign material were then moved to a location controlled by the HRCC. Moreover, the fact that Perzel's office consisted of several rooms, and there was "unfettered access to Room 414," does not negate the **possibility** that Zimmerman was the person who called the HRCC in an effort to conceal evidence. Accordingly, even assuming that Zimmerman's allegations are true, Appellants still had probable cause to prosecute Zimmerman for concealing or destroying the evidence that was the subject of the grand jury subpoena.

See Appendix A (footnotes omitted) (emphasis added).

4. Room 414 of the Capital was commonly referred to as "Perzel's Office." Despite being referred to as "Perzel's Office," or a "Room," Room 414 actually consisted of a cluster of eight rooms and the woman's restroom. Both Perzel's and Representative Sandra J. Major's offices were located in Room 414. During business hours, the door to Room 414 stood wide open. Essentially, anyone in the Capital could walk into Room 414. (Amended Complaint, ¶¶ 43-47). The Defendants knew that "Plaintiff's phone line" was on numerous phones within Room 414, not just

on Plaintiff's phone, and could have been utilized by almost anyone. (Amended Complaint, ¶147(c)).

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS NEEDED TO CLARIFY THE "PROBABLE CAUSE" STANDARD, SO THAT UNIFORMITY IS RETURNED TO THE CIRCUIT COURTS.

1. In *Beck v. State of Ohio*, this Court articulated the "probable cause" standard as follows: "Whether that arrest was constitutionally valid depends, in turn, upon whether, at the moment the arrest was made, the officers had probable cause to make it -- whether, at that moment, the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing ***that the petitioner*** had committed or was committing ***an offense***." *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964) (emphasis added).

2. In *Zimmerman v. Corbett, et al.*, however, the Third Circuit articulated the "probable cause" standard as follows: "Probable cause exists if 'the facts and circumstances within [the Officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that a crime had been committed." *Zimmerman*, 16-3384 (3d Cir. 2017) (*quoting Beck*, 379 U.S. at 91).

3. Other federal circuit courts have articulated the "probable cause" standard as follows:

D.C. Circuit: “[P]robable cause is defined as the existence of facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper.” *Pitt v. District of Columbia*, 491 F.3d 494, 501 (D.C. Cir. 2007) (citations and quotations removed).

First Circuit: “[A] suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.” *Diaz-Nieves v. United States*, 858 F.3d 678, 688 (1st Cir. 2017) (citations and quotations removed).

Second Circuit: “Probable cause exists if a law enforcement official, on the basis of the totality of the circumstances, has sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing that an offense has been or is being committed by the person to be arrested.” *United States v. Gagnon*, 373 F.3d 230, 237 (2nd Cir. 2004).

Fourth Circuit: “[Probable cause] is defined in terms of facts and circumstances sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense.” *Farrell v. Macy’s Retail Holdings, Inc.*, 645 Fed.Appx. 246, 247 (4th Cir. 2016).

Fifth Circuit: “The Supreme Court has defined probable cause as the facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.” *Navarro v. City of San Juan*, 624 Fed.Appx. 174, 179 (5th Cir. 2015).

Sixth Circuit: “Probable cause is defined as reasonable grounds for belief, support by less than prima facie proof but more than mere suspicion.” *United States v. Pate*, 665 Fed.Appx. 464, 469 (6th Cir. 2016) (citations and quotations removed).

Seventh Circuit: “The determination of whether an arresting officer has probable cause to arrest an alleged offender turns on whether a reasonable person in the officer’s position would have probable cause to believe that an offense has been committed.” *Woods v City of Chicago et al.*, 234 F.3d 979, 987 (7th Cir. 2000)

Eighth Circuit: “Probable cause to arrest exists when the arresting officer’s knowledge of the particular facts and circumstances is sufficient to warrant a prudent person’s belief that a suspect has committed an offense.” *Joseph v. Allen*, 712 F.3d 1222, 1228 (8th Cir. 2013) (citations and quotations removed).

Ninth Circuit: “Alternatively, this court has defined probable cause as follows: when under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.” *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (citations and quotations removed).

Tenth Circuit: “[F]acts and circumstances sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing a [] [criminal] offense.” *Culver v. Armstrong*, 832 F.3d 1213, 1218 (10th Cir. 2016) (citations and quotations removed).

Eleventh Circuit: “Probable cause is defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.” *Fish v. Brown*, 838 F.3d 1153, 1167 (11th Cir. 2016).

4. This Court’s guidance in clarifying the “probable cause” standard is necessary to return uniformity to the circuit courts.

II. REVIEW IS NEEDED TO CLARIFY THE DISTINCTION BETWEEN “REASONABLE SUSPICION” AND “PROBABLE CAUSE.”

1. A person should not be selected for criminal prosecution merely because he is one of a number of persons who had an opportunity to commit a crime. Rather, a person should only be subject to a criminal prosecution when there exists “reasonably trustworthy information . . . sufficient to warrant a prudent man in believing *that the petitioner* had committed or was committing *an offense*.” *Beck*, 379 U.S. at 91.

2. This Court’s guidance in explaining the difference between “reasonable suspicion” and “probable cause” is necessary to protect persons from an unlawful deprivation of liberty.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED OCTOBER 16, 2017**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3384

JOHN R. ZIMMERMAN

v.

THOMAS W. CORBETT; LINDA L. KELLY; FRANK
G. FINA; K. KENNETH BROWN, II; MICHAEL A.
SPROW; ANTHONY J. FIORE; GARY E. SPEAKS,

Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA.

(No. 1-13-cv-02788).

District Judge: Honorable Yvette Kane.

Argued
February 7, 2017

Before: McKEE, COWEN, and FUENTES, *Circuit Judges*.

Opinion Filed: October 16, 2017

*Appendix A***OPINION OF THE COURT**

McKEE, *Circuit Judge*.

I. INTRODUCTION

Appellants are current and former high ranking officials of the Commonwealth of Pennsylvania, including a former Attorney General who subsequently became Governor.¹ They appeal the District Court's partial denial of their motion for judgment on the pleadings in an action that John Zimmerman, a former employee of the state legislature, filed against them under 42 U.S.C. § 1983. Zimmerman alleged that Appellants were all involved in bringing criminal charges against him and that those charges amounted to malicious prosecution in violation of both the Fourth and Fourteenth Amendments of the United States Constitution and Pennsylvania law.²

1. Specifically, they are: Thomas W. Corbett, former Attorney General and Governor of Pennsylvania, Frank G. Fina, Chief Deputy Attorney General in the Office of Attorney General for the Commonwealth of Pennsylvania, K. Kenneth Brown, II, a Senior Deputy Attorney General in the Office of Attorney General for the Commonwealth of Pennsylvania, Michael A. Sprow, a Senior Deputy Attorney General in the Office of Attorney General for the Commonwealth of Pennsylvania, Anthony J. Fiore, a Special Agent in the Office of Attorney General for the Commonwealth of Pennsylvania and Director of the Bureau of Investigations for the Office of Inspector General for the Commonwealth of Pennsylvania, and Gary E. Speaks, a Special Agent in the Office of Attorney General of the Commonwealth of Pennsylvania. Each of them was a defendant in the suit Zimmerman filed. For the sake of clarity, we will collectively refer to them as the "Appellants."

2. The District Court dismissed all claims against Defendant Linda L. Kelly, former Attorney General of Pennsylvania.

Appendix A

For the reasons that follow, we conclude that there was probable cause to initiate those criminal proceedings and that Zimmerman can therefore not establish a prima facie case of malicious prosecution. We will therefore reverse the District Court's order insofar as it denied Appellants' motion for judgment on the pleadings.³

II. FACTS AND PROCEDURAL HISTORY

This case stems from criminal charges filed against Zimmerman, who was a member of the staff of John M. Perzel. Perzel was a member of the Pennsylvania General Assembly representing the 172nd Legislative District in the Pennsylvania House of Representatives. Corbett, then Attorney General of Pennsylvania, conducted an investigation after receiving information "that members of the Democratic caucus received bonuses for campaign related work performed on state time."⁴ Zimmerman, Perzel, and Corbett were all Republicans. In September 2007, Perzel asked Zimmerman to arrange a meeting with Corbett.⁵ "Corbett wanted Perzel to back him for

3. The District Court's order denying Appellants' motion for judgment on the pleadings is immediately appealable because it denied Appellants' assertion of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Because we conclude that the uncontested facts do not establish the elements of malicious prosecution, we do not need to reach the issue of qualified immunity.

4. 55a ¶¶ 15-16.

5. 55a ¶¶ 17.

Appendix A

Governor. . . .”⁶ but Perzel refused.⁷ At the time, both Corbett and Perzel intended to run for Governor in 2010.⁸

In November 2009, Corbett announced grand jury presentments resulting in criminal charges against ten ranking Republicans including “Perzel and his staff (one legislator and nine staff members), in what is now commonly referred to as [the] ‘Computergate’ [scandal].”⁹ Pursuant to that investigation, the grand jury subpoenaed on the House Republican Campaign Committee (the “HRCC”) seeking production of campaign material.¹⁰

Zimmerman was one of the nine staff members arrested pursuant to this investigation.¹¹ Zimmerman was charged with intentionally hindering an investigation “by concealing or destroying evidence of a crime.”¹² Those charges arose from allegations that he caused boxes containing campaign material that was the subject of a grand jury subpoena to be moved from their original location to a location controlled by the HRCC to prevent the grand jury from finding them. Appellants claimed that a male conspirator telephoned the HRCC from

6. 56a ¶ 22.

7. 56a ¶ 24.

8. 55a ¶ 22.

9. 57a ¶ 32.

10. Appellant Br. at 11; *see also* 222a.

11. 57a ¶ 33.

12. 77a ¶ 122.

Appendix A

Zimmerman's desk phone and warned that boxes of campaign material would be delivered to the HRCC. Appellants also alleged that Zimmerman was typically at his desk, and that campaign material was actually moved to the HRCC after the call.¹³

Based on evidence of that phone call from Zimmerman's line, Zimmerman was charged with (1) Hindering Apprehension or Prosecution; (2) Obstructing Administration of Law or Other Governmental Function; (3) Criminal Conspiracy for Hindering Apprehension or Prosecution; and (4) Criminal Conspiracy for Obstructing Administration of Law or Other Governmental Function.¹⁴ Appellants subsequently dismissed the charges against Zimmerman.

Subsequently, Zimmerman filed the instant complaint. He alleged that Appellants maliciously prosecuted him in violation of the Fourth and Fourteenth Amendments as well as Pennsylvania law.

Appellants moved to dismiss Zimmerman's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court concluded *inter alia* that Appellants were not entitled to qualified immunity on claims arising from allegations that (1) they manufactured witness testimony and intimidated witnesses prior to the grand jury proceedings; (2) they destroyed exculpatory evidence; and (3) Fiore signed a criminal complaint and affidavit

13. Appellant Br. at 11; 81a ¶ 146; 62a ¶ 69.

14. 76a ¶ 120.

Appendix A

of probable cause that contained false and misleading statements. This appeal followed.

III. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331. Our jurisdiction is based upon 28 U.S.C. § 1291. We review a denial of a motion for judgment on the pleadings de novo.¹⁵ “A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion.”¹⁶ A motion for judgment on the pleadings should be granted if the movant establishes that “there are no material issues of fact, and he is entitled to judgment as a matter of law.”¹⁷ In considering a motion for judgment on the pleadings, a court must accept all of the allegations in the pleadings of the party against whom the motion is addressed as true and draw all reasonable inferences in favor of the non-moving party.¹⁸

IV. DISCUSSION

Appellants advance several arguments, including arguments that the District Court erred in denying their

15. *Allah v. Al-Hafeez*, 226 F.3d 247, 249 (3d Cir. 2000).

16. *Revell v. Port Auth. of NY, NJ*, 598 F.3d 128, 134 (3d Cir. 2010).

17. *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005) (citing *Soc’y Hill Civic Ass’n v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980)).

18. *See Allah*, 226 F.3d at 249.

Appendix A

claim of qualified immunity. However, our resolution of this appeal begins and ends with Zimmerman’s failure to establish a prima facie case of malicious prosecution.

To prevail on his malicious prosecution claim under § 1983, Zimmerman must establish that “(1) the defendant[s] initiated a criminal proceeding; (2) the criminal proceeding ended in [his] favor; (3) the defendant[s] initiated the proceeding without probable cause; (4) the defendant[s] acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) [he] suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.”¹⁹ Similarly, to prove a malicious prosecution claim under Pennsylvania law, a plaintiff must show that the defendant “instituted proceedings against the plaintiff 1) without probable cause, 2) with malice, and 3) the proceedings must have terminated in favor of the plaintiff.”²⁰

Probable cause exists if “the facts and circumstances within [the Officer’s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing” that a crime had been committed.²¹ “Probable cause . . . requires more

19. 34a (citing *Halsey v. Pfeiffer*, 750 F.3d 273, 296-97 (3d Cir. 2014) (quoting *Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007))).

20. *Kelley v. Gen. Teamsters, Chauffeurs & Helpers, Local Union 249*, 518 Pa. 517, 544 A.2d 940, 941 (Pa. 1988).

21. *Beck v. State of Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

Appendix A

than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt.”²²

The criminal proceeding against Zimmerman did end in his favor, and Zimmerman contends (as he must) that Appellants initiated the prosecution without probable cause. However, Zimmerman does not dispute any of the following: (1) a man called the HRCC from Zimmerman’s phone line and told the HRCC to expect a delivery of boxes of campaign material; (2) Zimmerman was usually at his desk; or (3) boxes containing campaign material were moved to the HRCC as promised in the call from Zimmerman’s phone line. Instead, he claims that many others had access to his phone, he “was not present when the boxes were moved, and had no knowledge of the same.”²³ He also argues that Room 414, where the boxes were taken, was commonly referred to as “Perzel’s Office” and that this room “actually consisted of a cluster of eight rooms and the woman’s restroom. Both Perzel’s and Representative Sandra J. Major’s offices were located [there].”²⁴ The door to this space was left open during business hours, and “anyone in the Capital could walk

22. *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482-83 (3d Cir. 1995).

23. 63a ¶ 72.

24. Appellee Br. at 14; *see also* 59a ¶ 43-45; 75a ¶ 115(f)(vi) (“The Defendants withheld from the grand jury the fact that Locketto’s and Zimmerman’s presence or absence from the Capital could have been tracked, at least in part, through the access card system for the parking garage.”).

Appendix A

into [that room].”²⁵ When seated at his desk, Zimmerman “could not see the front door to Room 414 or the conference room.”²⁶ Zimmerman further argues that Appellants “knew that [his] phone line was on numerous phones within [that room], not just on [his] phone, and could have been utilized by almost anyone.”²⁷ In sum, Zimmerman argues that because anyone could have moved the subpoenaed materials to Room 414 and anyone could have used “[his] phone line” to call the HRCC, Appellants did not have probable cause to arrest him.

However, given the uncontested facts, while Zimmerman’s arguments may well have been sufficient to raise a reasonable doubt that would have resulted in an acquittal at trial, they do not negate the fact that Appellants had probable cause to prosecute him.²⁸ There is no dispute that Zimmerman was

25. Appellee Br. at 14-15; *see also* 59a ¶ 47; 75a ¶ 115(f)(ii) (“The Defendants withheld from the grand jury the fact that literally anyone in the Capital building (including but not limited to, capital police, the cleaning crew, Sandra Majors’ staff of three, and a receptionist), had unfettered access to Room 414 and could have placed the call to the HRCC from multiple phones using Zimmerman’s telephone line, and could have moved the boxes in question.”).

26. 60a ¶ 51; *see also* 75a ¶ 115(f)(v).

27. Appellee Br. at 15; 74a-75a ¶ 115(f)(i), (iii) (“The Defendants withheld from the grand jury the fact that Zimmerman’s telephone line could be accessed on the receptionist’s and [others’] telephones, and likely on other telephones in Room 414. . . . The Defendants withheld from the grand jury the fact that the call was likely placed by [Mark] Miller[, the Director of Messenger Services,] during his special trip to Room 414 as noted in the messenger log.”).

28. *See Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) (“[T]he Constitution permits an officer to

Appendix A

normally at his desk, that a male conspirator called from Zimmerman's office desk phone line to tell the HRCC to expect a delivery of boxes of campaign material, or that boxes of campaign material were then moved to a location controlled by the HRCC. Moreover, the fact that Perzel's office consisted of several rooms, and there was "unfettered access to Room 414,"²⁹ does not negate the possibility that Zimmerman was the person who called the HRCC in an effort to conceal evidence. Accordingly, even assuming that Zimmerman's allegations are true, Appellants still had probable cause to prosecute Zimmerman for concealing or destroying the evidence that was the subject of the grand jury subpoena. Thus, Appellants are entitled to a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).³⁰

V. CONCLUSION

For the foregoing reasons, we reverse the District Court's decision denying Appellants' motion for judgment on the pleadings.³¹

arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. . . . [T]he mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest.").

29. 75a ¶ 115(f)(ii).

30. Zimmerman asks this Court to issue appropriate sanctions against Appellants. We find no need to discuss or impose sanctions.

31. Because we conclude that Appellants had probable cause to initiate this prosecution, we need not address Zimmerman's remaining arguments since he cannot establish the underlying claim of malicious prosecution.

11a

**APPENDIX B — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED OCTOBER 16, 2017**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3384

JOHN R. ZIMMERMAN,

v.

THOMAS W. CORBETT; LINDA L. KELLY; FRANK
G. FINA; K. KENNETH BROWN, II; MICHAEL A.
SPROW; ANTHONY J. FIORE; GARY E. SPEAKS,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

(No. 1-13-cv-02788)

District Judge: Honorable Yvette Kane

Argued
February 7, 2017

Before: McKEE, COWEN, and FUENTES,
Circuit Judges

JUDGMENT

12a

Appendix B

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on February 7, 2017.

On consideration whereof, it is hereby ORDERED and ADJUDGED by this court that the District Court's order entered on July 15, 2016 be REVERSED. All of the above in accordance with the opinion of this court.

Each Party to bear its own costs.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: October 16, 2017

**APPENDIX C — MEMORANDUM OF THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA,
FILED JULY 15, 2016**

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 1:13-cv-02788

JOHN R. ZIMMERMAN,

Plaintiff

v.

THOMAS W. CORBETT, *et al.*,

Defendants

(Judge Kane)

MEMORANDUM

Before the Court is Defendants' motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 47.) For the following reasons, the Court will deny Defendants' motion.

I. BACKGROUND

The above-captioned case stems from criminal charges filed against Plaintiff John R. Zimmerman and

Appendix C

nine other Republican employees of the Pennsylvania House of Representatives on November 12, 2009. (Doc. No. 1 ¶¶ 32-34, 116, 120.) The charges followed an investigation of public corruption (*see id.* at ¶¶ 29-30), later characterized and reported as “Boxgate” and “Computergate” (*id.* ¶ 34). Plaintiff maintains that he was charged in the “Boxgate” conspiracy, described as the movement of boxes that contained “three year old blank campaign letterhead” and envelopes. (*Id.* ¶¶ 35-36.) Plaintiff alleges that then-Attorney General Thomas W. Corbett filed criminal charges against Zimmerman and the nine other Republicans in response to criticism that Corbett engaged in partisan politics in the exercise of prosecutorial discretion. (*Id.* ¶¶ 26, 28, 32-33, 39.) Plaintiff also alleges that the criminal charges were initiated without probable cause. (*See id.* ¶¶ 27-35, 39, 89, 168, 172-73, 178-79.) The charges filed against Plaintiff were voluntarily dismissed on November 17, 2011. (*Id.* ¶¶ 38, 164, 172.)

On November 14, 2013, Plaintiff Zimmerman filed a complaint in this Court pursuant to 42 U.S.C. § 1983, alleging that Defendants Thomas W. Corbett, Linda L. Kelly, Frank G. Fina, K. Kenneth Brown, II, Michael A. Sprow, Anthony J. Fiore, and Gary E. Speaks maliciously prosecuted him in violation of the Fourth and Fourteenth Amendments to the United States Constitution. (Doc. No. 1.) In an amended complaint, filed on May 7, 2014, Plaintiff repleaded his malicious prosecution claim under the Fourth and Fourteenth Amendments and added a malicious prosecution claim under Pennsylvania law. (Doc. No. 20.)

Appendix C

On May 21, 2014, Defendants filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 21.) On February 10, 2015, the Court granted in part and denied in part Defendants' Rule 12(b)(6) motion to dismiss. (Doc. Nos. 29, 30.) The Court dismissed Linda L. Kelly from the suit because Plaintiff failed to adequately allege her involvement. (Doc. Nos. 29 at 19; 30.) The Court also dismissed numerous allegations against the remaining Defendants as barred by absolute immunity. (Doc. No. 29 at 11-15, 17). However, the Court denied the motion to dismiss Plaintiff's malicious prosecution claims — under either the Fourth and Fourteenth Amendments or Pennsylvania law — to the extent that the claims are premised on allegations that:

(1) the Defendants manufactured witness testimony and intimidated witnesses prior to the grand jury proceedings, (2) the Defendants destroyed exculpatory evidence, and (3) that Defendant Fiore signed a criminal complaint and affidavit of probable cause that contained false and misleading statements.

(Doc. No. 30.) In the accompanying order, the Court stated that “Defendants may raise their immunity arguments at summary judgment, following development of the factual record in this case.” (*Id.*)

On March 12, 2015, Defendants filed an answer to the amended complaint, and Plaintiff submitted an amended joint case management plan. (Doc. Nos. 32, 33.) Close of fact discovery was scheduled for December 22,

Appendix C

2015. (Doc. No. 36.) On November 30, 2015, Defendants filed the present motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 47.) The motion for judgment on the pleadings urges the Court to grant Defendants qualified immunity on the remaining claims. (*Id.*) Plaintiff filed a brief in opposition to the pending motion on January 26, 2016 (Doc. No. 55), and Defendant filed a reply brief thereto on February 9, 2016 (Doc. No. 56). The present motion is now ripe for disposition.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed but within such time as to not delay the trial. Fed. R. Civ. P. 12(c). A Rule 12(c) motion is proper only “when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” *Inst. for Sci. Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc.*, 931 F.2d 1002, 1005 (3d Cir. 1991) (internal citation omitted). “A court will grant a motion for judgment on the pleadings if the movant establishes that there are no issues of material fact, and that he is entitled to judgment as a matter of law.” *Allstate Prop. & Cas. Ins. Co. v. Squires*, 667 F.3d 388, 390 (3d Cir. 2012) (internal citations and quotations omitted). “In considering a motion for judgment on the pleadings, a court must accept all of the allegations in the pleadings of the party against whom the motion is addressed as true and draw all reasonable inferences in favor of the non-moving party.” *Id.*

*Appendix C***III. DISCUSSION**

Defendants move the Court to grant the present motion on the basis of qualified immunity. (Doc. No. 47 ¶ 4.) Plaintiff opposes the motion on the grounds that material facts remain disputed and that the motion prematurely claims immunity. (*See* Doc. No. 55 at 2, 6-8.) The Court addresses the following in turn: (1) the doctrine of qualified immunity; (2) whether Plaintiff’s allegations in the amended complaint make out a constitutional violation; (3) Defendants’ efforts to frame the right at issue; and (4) whether Defendants Anthony J. Fiore and Gary E. Speaks are presumptively entitled to qualified immunity.

The doctrine of qualified immunity protects “government officials performing discretionary functions” by “shield[ing them] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). To determine whether qualified immunity applies, a district court undertakes the following two-pronged inquiry:

First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. ... Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was ‘clearly established’ at the time of defendant’s alleged misconduct.

Appendix C

Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Pearson v. Callahan, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing *Saucier*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272).

The Court will begin its qualified immunity analysis with the first prong. The Court must decide whether the facts Plaintiff Zimmerman has alleged — accepting the allegations as true and drawing all reasonable inferences in his favor — make out a violation of a constitutional right. As explained below, Plaintiff has alleged a Fourth Amendments malicious prosecution claim. (Doc. No. 20 ¶ 183.) Accordingly, the Court will decide whether Plaintiff's allegations make out a Fourth Amendment malicious prosecution claim.

A. Whether Plaintiff alleged a violation of a constitutional right

Defendants challenge whether Plaintiff Zimmerman has adequately pleaded his malicious prosecution claim under the Fourth Amendment. In particular, Defendants contend that Plaintiff fails to adequately allege a Fourth Amendment seizure. (Doc. Nos. 47 ¶ 9; 49 at 24-25.)

“To prevail on a Fourth Amendment malicious prosecution claim under section 1983, a plaintiff must establish that: (1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in [the

Appendix C

plaintiff's] favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." *Halsey v. Pfeiffer*, 750 F.3d 273, 296-97 (3d Cir. 2014) (quoting *Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007)).

"Where the malicious prosecution claim sounds in the Fourth Amendment, the plaintiff 'must show some deprivation of liberty consistent with the concept of 'seizure.'" *Johnson v. Knorr*, 477 F.3d 75, 85 n.14 (3d Cir. 2007) (citing *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998)). In making this determination, courts consider whether a plaintiff was physically detained, faced travel restrictions, posted bail, or was subjected to "mandatory pretrial services check-ins." *Perkins v. Staskiewicz*, No. 08-1651, 2010 U.S. Dist. LEXIS 60094, 2010 WL 2510191, at *4 (M.D. Pa. June 17, 2010) (collecting cases).

Here, the amended complaint alleges that Plaintiff was handcuffed and fingerprinted at the police station, subjected to a perp walk, surrendered his passport, was arraigned, was subject to a "\$1,000 unsecured bail," and "suffered an ongoing deprivation of liberty ... as a consequence of being subject to bail conditions and having his passport confiscated." (Doc. No. 20 ¶¶ 126, 130-136, 181.) At this stage, accepting all of the allegations in the amended complaint as true, the Court is persuaded that Plaintiff adequately alleges a Fourth Amendment seizure.

Appendix C

See DiBella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005) (“Pretrial custody and some onerous types of pretrial, non-custodial restrictions constitute a Fourth Amendment seizure”); *cf. Perkins*, 2010 U.S. Dist. LEXIS 60094, 2010 WL 2510191, at *4.

Accordingly, in light of this determination as well as the prior order denying Defendants’ Rule 12(b)(6) motion (Doc. Nos. 29, 30),¹ the Court finds that — at this stage in the proceedings — Plaintiff’s amended complaint makes out a violation of a constitutional right. *Saucier*, 533 U.S. at 200-01. Accordingly, the Court turns to the second prong of the qualified immunity analysis.

B. Whether the right at issue is clearly established

Having determined that Plaintiff alleged a constitutional violation, the Court turns the second prong of the qualified immunity analysis. At this stage, the

1. In large part, Defendants attack the adequacy of Plaintiff’s pleadings by urging the Court to reconsider arguments previously rejected in the Rule 12(b)(6) motion as meritless or premature. (Doc. Nos. 29, 49.) For example, Defendants argue that “the prosecutors are absolutely immune for all claims of evidence fabrication” (*see* Doc. Nos. 29 at 17; 49 at 31), challenge whether Plaintiff stated a claim against Defendant Corbett (Doc. Nos. 24 at 19; 29 at 18-19; 49 at 31-32), and contest whether Plaintiff “plausibly plead[ed] that [Agent Fiore] misled the prosecutors into taking the case” (Doc. Nos. 24; 29 at 19-21; 47 ¶ 8; 49 at 29), or adequately alleged that Defendants intimidated witnesses prior to the grand jury proceedings (Doc. Nos. 29 at 15-16; 47 ¶ 7). At this stage and absent further development of the factual record, the Court declines to reconsider Defendants’ previously adjudicated arguments.

Appendix C

court “must decide whether the *right at issue* was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson*, 555 U.S. at 232 (emphasis added).

“To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015) (internal citations and quotations omitted). A case “directly on point” is not required, though “existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* Here, Defendants bear the burden of persuasion that a reasonable official “would not have known, under the circumstances, that the conduct was illegal.” Model Civ. Jury Instr. 3rd Cir. 4.2 (2015); *see Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014); *Burns v. PA Dep’t of Corr.*, 642 F.3d 163, 176 (3d Cir. 2011).

However, prior to deciding whether a right was “clearly established,” this Court must identify the *right at issue*. *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 638 (3d Cir. 2015). The Third Circuit has suggested that courts frame the right at issue in a “particularized” and “relevant[] sense,” considering “the case’s specific context, not as a broad general proposition.” *Id.* (internal citations and quotations omitted). Accordingly, the Court begins by addressing Defendants’ efforts to frame the right at issue.

1. Framing the constitutional right at issue

Defendants challenge, *inter alia*, whether it is clear that *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10

Appendix C

L. Ed. 2d 215 (1963), applies without a trial and conviction and whether the destruction of proffer notes in accordance with policy violates clearly established law. (Doc. No. 47 ¶¶ 5-6; *see* Doc. No. 49 at 14-24, 28-29.) Plaintiff responds that he did not assert a *Brady* claim or a procedural due process claim. (Doc. No. 55 at 3, 6-9.) As explained below, the Court finds that Defendants' *Brady* arguments fail to address the constitutional right at issue.

Here, the amended complaint alleges a malicious prosecution claim under the Fourth and Fourteenth Amendments and a malicious prosecution claim under Pennsylvania law.² As a general matter, the "constitutional right at issue in the context of a § 1983 malicious prosecution claim is the Fourth Amendment right to be free from unreasonable seizures." *Boydston v. Isom*, 224 F. App'x 810, 814 (10th Cir. 2007). A *Brady* claim is distinct from a malicious prosecution claim, *see Poventud v. City of New York*, 750 F.3d 121, 137 & n.20 (2d Cir. 2014), as it involves "different constitutional rights and, critically, [entails] different elements of recovery," *Mazzetti v. Bellino*, 57 F. Supp. 3d 1262, 1269 (E.D. Cal. 2014) (internal citations omitted). Therefore, even without defining the proper scope and contours of the Fourth Amendment right at issue, the Court disagrees that the right at issue directly implicates *Brady v. Maryland*. *See Golodner*, 770 F.3d at 206. Plaintiff's passing reference to *Brady* in the complaint does not change the analysis. (Doc. No. 20 ¶ 114.)

2. Although this Court dismissed numerous allegations in the complaint pursuant to absolute immunity, the Court declined to dismiss Plaintiff's malicious prosecution claims, *inter alia*, to the extent that they were premised on "Defendants' alleged destruction of exculpatory evidence." (*See* Doc. No. 29 at 10, 17-18, 23.)

Appendix C

Defendants’ efforts to define the right allegedly violated as a due process right are unpersuasive.³ (Doc. No. 49 at 14-24.) As such, the Court declines to decide whether the purported *Brady* or due process right was “clearly established” at the time of the alleged misconduct. Instead, the Court turns to Defendants’ qualified immunity arguments concerning Defendants Anthony J. Fiore and Gary E. Speaks.

2. Whether Fiore and Speaks are presumptively entitled to qualified immunity

Defendants also contend that Anthony J. Fiore and Gary E. Speaks are entitled to qualified immunity because “any reasonable agent would have believed probable cause existed.” (See Doc. Nos. 47 ¶ 8; 49 at

3. In the alternative, were the Court to construe Defendants’ *Brady* arguments as challenging the “malice” element of Plaintiff’s malicious prosecution claims, the Court remains unpersuaded. Defendants appear to argue, in the alternative, that Plaintiff cannot prove an element of his malicious prosecution claims — i.e., malice — because it is not clearly established that destruction of exculpatory evidence violates *Brady v. Maryland* under the circumstances. (Doc. No. 56 at 2-3 & n.1; see Doc. No. 55 at 3 & n.2.) A Rule 12(c) motion is properly granted only “when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” *Inst. for Sci. Info., Inc.*, 931 F.2d at 1005. Here, the Court declines to resolve “question[s] of fact as to malice” at this preliminary stage, see *Cameron v. City of New York*, 598 F.3d 50, 69 (2d Cir. 2010), particularly where Defendants summarily deny Plaintiff’s allegation that Defendants destroyed exculpatory evidence. (Doc. Nos. 20 ¶ 114; 33 ¶ 114). 4

Appendix C

26-28, 29-30.) Specifically, Defendants argue that Agents Fiore and Speaks are presumptively entitled to qualified immunity under the Third Circuit’s *Kelly v. Borough of Carlisle* decision.⁴ (See Doc. Nos. 49 at 29-30; 49-7 at 1.) Plaintiff responds that Agents Fiore and Speaks cannot “rely on legal advice that is based on their destruction of exculpatory evidence, fabrication of evidence, and provision of misleading or false statements in sworn filings.” (Doc. No. 55 at 13-14.)

In *Kelly v. Borough of Carlisle*, the Third Circuit held that a “police officer who relies in good faith on a prosecutor’s legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause.” 622 F.3d 248, 255-56 (3d Cir. 2010). “That reliance must itself be objectively reasonable, however, because a wave of the prosecutor’s wand cannot magically transform an unreasonable probable cause determination into a reasonable one.” *Id.* at 256 (internal citations omitted).

Here, as this Court previously noted, the Court construes the amended complaint as “alleging that both Fiore and Speaks were involved in the alleged fabrication of evidence prior to the grand jury proceedings, and with the alleged destruction of exculpatory evidence.” (Doc. No. 29 at 20.) Again, without defining the exact scope and

4. Defendants also contend that their probable cause basis was “confirmed” when Judge Wenner declined to dismiss the case against Zimmerman at a preliminary hearing. (See Doc. Nos. 49 at 29-30; 49-7 at 1.)

Appendix C

contours of the right at issue, the Court concludes that Defendants have not satisfied their burden of persuasion that Fiore and Speaks are entitled to qualified immunity. *Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014). The Court is guided by Third Circuit’s conclusion in *Halsey v. Pfeiffer* that a reasonable investigator would have understood that “knowingly us[ing] fabricated evidence to bring about [a] prosecution or to help secure [a] conviction, particularly if the investigators themselves had fabricated the evidence,” would violate a defendant’s constitutional rights. *Id.* at 295-96.

Therefore, accepting as true Plaintiff’s allegations, the Court is not persuaded that a reasonable officer would not have known that the alleged conduct was illegal. *See Dix v. City of Phila.*, No. 15-532, 2015 U.S. Dist. LEXIS 101457, 2015 WL 4624248, at *6 (E.D. Pa. Aug. 3, 2015) (rejecting defendants’ qualified immunity argument where defendants allegedly “manufactured probable cause to arrest and prosecute plaintiff”). Defendants have not met their burden of showing that Defendants Fiore and Speaks are entitled to qualified immunity. *Burns*, 642 F.3d at 176.

IV. CONCLUSION

For the reasons stated above, the Court will deny Defendants’ motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 47.) As the Court previously stated in its February 10, 2015 memorandum and order, Defendants may reassert their immunity arguments at summary judgment.

**APPENDIX D — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA, FILED
JULY 15, 2016**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

No. 1:13-cv-02788

JOHN R. ZIMMERMAN,

Plaintiff,

v.

THOMAS W. CORBETT, *et al.*,

Defendants.

(Judge Kane)

ORDER

AND NOW, on this 15th day of July 2016, **IT IS
HEREBY ORDERED THAT** Defendants' motion for
judgment on the pleadings pursuant to Federal Rule
of Civil Procedure 12(c) (Doc. No. 47), is **DENIED
WITHOUT PREJUDICE**. Defendants may raise their
immunity arguments at summary judgment, following
development of the factual record in this case.

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED OCTOBER 16, 2017**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3384

JOHN R. ZIMMERMAN

v.

THOMAS W. CORBETT; LINDA L. KELLY; FRANK
G. FINA; K. KENNETH BROWN, II; MICHAEL A.
SPROW; ANTHONY J. FIORE; GARY E. SPEAKS,

Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA.

(No. 1-13-cv-02788).

District Judge: Honorable Yvette Kane.

Argued
February 7, 2017

Before: McKEE, COWEN, and FUENTES, *Circuit Judges*.

Opinion Filed: October 16, 2017

*Appendix A***OPINION OF THE COURT**

McKEE, *Circuit Judge*.

I. INTRODUCTION

Appellants are current and former high ranking officials of the Commonwealth of Pennsylvania, including a former Attorney General who subsequently became Governor.¹ They appeal the District Court's partial denial of their motion for judgment on the pleadings in an action that John Zimmerman, a former employee of the state legislature, filed against them under 42 U.S.C. § 1983. Zimmerman alleged that Appellants were all involved in bringing criminal charges against him and that those charges amounted to malicious prosecution in violation of both the Fourth and Fourteenth Amendments of the United States Constitution and Pennsylvania law.²

1. Specifically, they are: Thomas W. Corbett, former Attorney General and Governor of Pennsylvania, Frank G. Fina, Chief Deputy Attorney General in the Office of Attorney General for the Commonwealth of Pennsylvania, K. Kenneth Brown, II, a Senior Deputy Attorney General in the Office of Attorney General for the Commonwealth of Pennsylvania, Michael A. Sprow, a Senior Deputy Attorney General in the Office of Attorney General for the Commonwealth of Pennsylvania, Anthony J. Fiore, a Special Agent in the Office of Attorney General for the Commonwealth of Pennsylvania and Director of the Bureau of Investigations for the Office of Inspector General for the Commonwealth of Pennsylvania, and Gary E. Speaks, a Special Agent in the Office of Attorney General of the Commonwealth of Pennsylvania. Each of them was a defendant in the suit Zimmerman filed. For the sake of clarity, we will collectively refer to them as the "Appellants."

2. The District Court dismissed all claims against Defendant Linda L. Kelly, former Attorney General of Pennsylvania.

Appendix A

For the reasons that follow, we conclude that there was probable cause to initiate those criminal proceedings and that Zimmerman can therefore not establish a prima facie case of malicious prosecution. We will therefore reverse the District Court's order insofar as it denied Appellants' motion for judgment on the pleadings.³

II. FACTS AND PROCEDURAL HISTORY

This case stems from criminal charges filed against Zimmerman, who was a member of the staff of John M. Perzel. Perzel was a member of the Pennsylvania General Assembly representing the 172nd Legislative District in the Pennsylvania House of Representatives. Corbett, then Attorney General of Pennsylvania, conducted an investigation after receiving information "that members of the Democratic caucus received bonuses for campaign related work performed on state time."⁴ Zimmerman, Perzel, and Corbett were all Republicans. In September 2007, Perzel asked Zimmerman to arrange a meeting with Corbett.⁵ "Corbett wanted Perzel to back him for

3. The District Court's order denying Appellants' motion for judgment on the pleadings is immediately appealable because it denied Appellants' assertion of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Because we conclude that the uncontested facts do not establish the elements of malicious prosecution, we do not need to reach the issue of qualified immunity.

4. 55a ¶¶ 15-16.

5. 55a ¶¶ 17.

Appendix A

Governor. . . .[.]”⁶ but Perzel refused.⁷ At the time, both Corbett and Perzel intended to run for Governor in 2010.⁸

In November 2009, Corbett announced grand jury presentments resulting in criminal charges against ten ranking Republicans including “Perzel and his staff (one legislator and nine staff members), in what is now commonly referred to as [the] ‘Computergate’ [scandal].”⁹ Pursuant to that investigation, the grand jury subpoenaed on the House Republican Campaign Committee (the “HRCC”) seeking production of campaign material.¹⁰

Zimmerman was one of the nine staff members arrested pursuant to this investigation.¹¹ Zimmerman was charged with intentionally hindering an investigation “by concealing or destroying evidence of a crime.”¹² Those charges arose from allegations that he caused boxes containing campaign material that was the subject of a grand jury subpoena to be moved from their original location to a location controlled by the HRCC to prevent the grand jury from finding them. Appellants claimed that a male conspirator telephoned the HRCC from

6. 56a ¶ 22.

7. 56a ¶ 24.

8. 55a ¶ 22.

9. 57a ¶ 32.

10. Appellant Br. at 11; *see also* 222a.

11. 57a ¶ 33.

12. 77a ¶ 122.

Appendix A

Zimmerman's desk phone and warned that boxes of campaign material would be delivered to the HRCC. Appellants also alleged that Zimmerman was typically at his desk, and that campaign material was actually moved to the HRCC after the call.¹³

Based on evidence of that phone call from Zimmerman's line, Zimmerman was charged with (1) Hindering Apprehension or Prosecution; (2) Obstructing Administration of Law or Other Governmental Function; (3) Criminal Conspiracy for Hindering Apprehension or Prosecution; and (4) Criminal Conspiracy for Obstructing Administration of Law or Other Governmental Function.¹⁴ Appellants subsequently dismissed the charges against Zimmerman.

Subsequently, Zimmerman filed the instant complaint. He alleged that Appellants maliciously prosecuted him in violation of the Fourth and Fourteenth Amendments as well as Pennsylvania law.

Appellants moved to dismiss Zimmerman's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court concluded *inter alia* that Appellants were not entitled to qualified immunity on claims arising from allegations that (1) they manufactured witness testimony and intimidated witnesses prior to the grand jury proceedings; (2) they destroyed exculpatory evidence; and (3) Fiore signed a criminal complaint and affidavit

13. Appellant Br. at 11; 81a ¶ 146; 62a ¶ 69.

14. 76a ¶ 120.

Appendix A

of probable cause that contained false and misleading statements. This appeal followed.

III. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331. Our jurisdiction is based upon 28 U.S.C. § 1291. We review a denial of a motion for judgment on the pleadings *de novo*.¹⁵ “A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion.”¹⁶ A motion for judgment on the pleadings should be granted if the movant establishes that “there are no material issues of fact, and he is entitled to judgment as a matter of law.”¹⁷ In considering a motion for judgment on the pleadings, a court must accept all of the allegations in the pleadings of the party against whom the motion is addressed as true and draw all reasonable inferences in favor of the non-moving party.¹⁸

IV. DISCUSSION

Appellants advance several arguments, including arguments that the District Court erred in denying their

15. *Allah v. Al-Hafeez*, 226 F.3d 247, 249 (3d Cir. 2000).

16. *Revell v. Port Auth. of NY, NJ*, 598 F.3d 128, 134 (3d Cir. 2010).

17. *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005) (citing *Soc’y Hill Civic Ass’n v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980)).

18. *See Allah*, 226 F.3d at 249.

Appendix A

claim of qualified immunity. However, our resolution of this appeal begins and ends with Zimmerman’s failure to establish a prima facie case of malicious prosecution.

To prevail on his malicious prosecution claim under § 1983, Zimmerman must establish that “(1) the defendant[s] initiated a criminal proceeding; (2) the criminal proceeding ended in [his] favor; (3) the defendant[s] initiated the proceeding without probable cause; (4) the defendant[s] acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) [he] suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.”¹⁹ Similarly, to prove a malicious prosecution claim under Pennsylvania law, a plaintiff must show that the defendant “instituted proceedings against the plaintiff 1) without probable cause, 2) with malice, and 3) the proceedings must have terminated in favor of the plaintiff.”²⁰

Probable cause exists if “the facts and circumstances within [the Officer’s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing” that a crime had been committed.²¹ “Probable cause . . . requires more

19. 34a (citing *Halsey v. Pfeiffer*, 750 F.3d 273, 296-97 (3d Cir. 2014) (quoting *Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007))).

20. *Kelley v. Gen. Teamsters, Chauffeurs & Helpers, Local Union 249*, 518 Pa. 517, 544 A.2d 940, 941 (Pa. 1988).

21. *Beck v. State of Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).

Appendix A

than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt.”²²

The criminal proceeding against Zimmerman did end in his favor, and Zimmerman contends (as he must) that Appellants initiated the prosecution without probable cause. However, Zimmerman does not dispute any of the following: (1) a man called the HRCC from Zimmerman’s phone line and told the HRCC to expect a delivery of boxes of campaign material; (2) Zimmerman was usually at his desk; or (3) boxes containing campaign material were moved to the HRCC as promised in the call from Zimmerman’s phone line. Instead, he claims that many others had access to his phone, he “was not present when the boxes were moved, and had no knowledge of the same.”²³ He also argues that Room 414, where the boxes were taken, was commonly referred to as “Perzel’s Office” and that this room “actually consisted of a cluster of eight rooms and the woman’s restroom. Both Perzel’s and Representative Sandra J. Major’s offices were located [there].”²⁴ The door to this space was left open during business hours, and “anyone in the Capital could walk

22. *Orsatti v. New Jersey State Police*, 71 F.3d 480, 482-83 (3d Cir. 1995).

23. 63a ¶ 72.

24. Appellee Br. at 14; *see also* 59a ¶ 43-45; 75a ¶ 115(f)(vi) (“The Defendants withheld from the grand jury the fact that Lochetto’s and Zimmerman’s presence or absence from the Capital could have been tracked, at least in part, through the access card system for the parking garage.”).

Appendix A

into [that room].”²⁵ When seated at his desk, Zimmerman “could not see the front door to Room 414 or the conference room.”²⁶ Zimmerman further argues that Appellants “knew that [his] phone line was on numerous phones within [that room], not just on [his] phone, and could have been utilized by almost anyone.”²⁷ In sum, Zimmerman argues that because anyone could have moved the subpoenaed materials to Room 414 and anyone could have used “[his] phone line” to call the HRCC, Appellants did not have probable cause to arrest him.

However, given the uncontested facts, while Zimmerman’s arguments may well have been sufficient to raise a reasonable doubt that would have resulted in an acquittal at trial, they do not negate the fact that Appellants had probable cause to prosecute him.²⁸ There is no dispute that Zimmerman was

25. Appellee Br. at 14-15; *see also* 59a ¶ 47; 75a ¶ 115(f)(ii) (“The Defendants withheld from the grand jury the fact that literally anyone in the Capital building (including but not limited to, capital police, the cleaning crew, Sandra Majors’ staff of three, and a receptionist), had unfettered access to Room 414 and could have placed the call to the HRCC from multiple phones using Zimmerman’s telephone line, and could have moved the boxes in question.”).

26. 60a ¶ 51; *see also* 75a ¶ 115(f)(v).

27. Appellee Br. at 15; 74a-75a ¶ 115(f)(i), (iii) (“The Defendants withheld from the grand jury the fact that Zimmerman’s telephone line could be accessed on the receptionist’s and [others’] telephones, and likely on other telephones in Room 414. . . . The Defendants withheld from the grand jury the fact that the call was likely placed by [Mark] Miller[, the Director of Messenger Services,] during his special trip to Room 414 as noted in the messenger log.”).

28. *See Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) (“[T]he Constitution permits an officer to

Appendix A

normally at his desk, that a male conspirator called from Zimmerman's office desk phone line to tell the HRCC to expect a delivery of boxes of campaign material, or that boxes of campaign material were then moved to a location controlled by the HRCC. Moreover, the fact that Perzel's office consisted of several rooms, and there was "unfettered access to Room 414,"²⁹ does not negate the possibility that Zimmerman was the person who called the HRCC in an effort to conceal evidence. Accordingly, even assuming that Zimmerman's allegations are true, Appellants still had probable cause to prosecute Zimmerman for concealing or destroying the evidence that was the subject of the grand jury subpoena. Thus, Appellants are entitled to a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).³⁰

V. CONCLUSION

For the foregoing reasons, we reverse the District Court's decision denying Appellants' motion for judgment on the pleadings.³¹

arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. . . . [T]he mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest.").

29. 75a ¶ 115(f)(ii).

30. Zimmerman asks this Court to issue appropriate sanctions against Appellants. We find no need to discuss or impose sanctions.

31. Because we conclude that Appellants had probable cause to initiate this prosecution, we need not address Zimmerman's remaining arguments since he cannot establish the underlying claim of malicious prosecution.

11a

**APPENDIX B — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT, FILED OCTOBER 16, 2017**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3384

JOHN R. ZIMMERMAN,

v.

THOMAS W. CORBETT; LINDA L. KELLY; FRANK
G. FINA; K. KENNETH BROWN, II; MICHAEL A.
SPROW; ANTHONY J. FIORE; GARY E. SPEAKS,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA
(No. 1-13-cv-02788)
District Judge: Honorable Yvette Kane

Argued
February 7, 2017

Before: McKEE, COWEN, and FUENTES,
Circuit Judges

JUDGMENT

12a

Appendix B

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on February 7, 2017.

On consideration whereof, it is hereby ORDERED and ADJUDGED by this court that the District Court's order entered on July 15, 2016 be REVERSED. All of the above in accordance with the opinion of this court.

Each Party to bear its own costs.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: October 16, 2017

**APPENDIX C — MEMORANDUM OF THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA,
FILED JULY 15, 2016**

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 1:13-cv-02788

JOHN R. ZIMMERMAN,

Plaintiff

v.

THOMAS W. CORBETT, *et al.*,

Defendants

(Judge Kane)

MEMORANDUM

Before the Court is Defendants' motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 47.) For the following reasons, the Court will deny Defendants' motion.

I. BACKGROUND

The above-captioned case stems from criminal charges filed against Plaintiff John R. Zimmerman and

Appendix C

nine other Republican employees of the Pennsylvania House of Representatives on November 12, 2009. (Doc. No. 1 ¶¶ 32-34, 116, 120.) The charges followed an investigation of public corruption (*see id.* at ¶¶ 29-30), later characterized and reported as “Boxgate” and “Computergate” (*id.* ¶ 34). Plaintiff maintains that he was charged in the “Boxgate” conspiracy, described as the movement of boxes that contained “three year old blank campaign letterhead” and envelopes. (*Id.* ¶¶ 35-36.) Plaintiff alleges that then-Attorney General Thomas W. Corbett filed criminal charges against Zimmerman and the nine other Republicans in response to criticism that Corbett engaged in partisan politics in the exercise of prosecutorial discretion. (*Id.* ¶¶ 26, 28, 32-33, 39.) Plaintiff also alleges that the criminal charges were initiated without probable cause. (*See id.* ¶¶ 27-35, 39, 89, 168, 172-73, 178-79.) The charges filed against Plaintiff were voluntarily dismissed on November 17, 2011. (*Id.* ¶¶ 38, 164, 172.)

On November 14, 2013, Plaintiff Zimmerman filed a complaint in this Court pursuant to 42 U.S.C. § 1983, alleging that Defendants Thomas W. Corbett, Linda L. Kelly, Frank G. Fina, K. Kenneth Brown, II, Michael A. Sprow, Anthony J. Fiore, and Gary E. Speaks maliciously prosecuted him in violation of the Fourth and Fourteenth Amendments to the United States Constitution. (Doc. No. 1.) In an amended complaint, filed on May 7, 2014, Plaintiff repleaded his malicious prosecution claim under the Fourth and Fourteenth Amendments and added a malicious prosecution claim under Pennsylvania law. (Doc. No. 20.)

Appendix C

On May 21, 2014, Defendants filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 21.) On February 10, 2015, the Court granted in part and denied in part Defendants' Rule 12(b)(6) motion to dismiss. (Doc. Nos. 29, 30.) The Court dismissed Linda L. Kelly from the suit because Plaintiff failed to adequately allege her involvement. (Doc. Nos. 29 at 19; 30.) The Court also dismissed numerous allegations against the remaining Defendants as barred by absolute immunity. (Doc. No. 29 at 11-15, 17). However, the Court denied the motion to dismiss Plaintiff's malicious prosecution claims — under either the Fourth and Fourteenth Amendments or Pennsylvania law — to the extent that the claims are premised on allegations that:

(1) the Defendants manufactured witness testimony and intimidated witnesses prior to the grand jury proceedings, (2) the Defendants destroyed exculpatory evidence, and (3) that Defendant Fiore signed a criminal complaint and affidavit of probable cause that contained false and misleading statements.

(Doc. No. 30.) In the accompanying order, the Court stated that “Defendants may raise their immunity arguments at summary judgment, following development of the factual record in this case.” (*Id.*)

On March 12, 2015, Defendants filed an answer to the amended complaint, and Plaintiff submitted an amended joint case management plan. (Doc. Nos. 32, 33.) Close of fact discovery was scheduled for December 22,

Appendix C

2015. (Doc. No. 36.) On November 30, 2015, Defendants filed the present motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 47.) The motion for judgment on the pleadings urges the Court to grant Defendants qualified immunity on the remaining claims. (*Id.*) Plaintiff filed a brief in opposition to the pending motion on January 26, 2016 (Doc. No. 55), and Defendant filed a reply brief thereto on February 9, 2016 (Doc. No. 56). The present motion is now ripe for disposition.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed but within such time as to not delay the trial. Fed. R. Civ. P. 12(c). A Rule 12(c) motion is proper only “when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” *Inst. for Sci. Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc.*, 931 F.2d 1002, 1005 (3d Cir. 1991) (internal citation omitted). “A court will grant a motion for judgment on the pleadings if the movant establishes that there are no issues of material fact, and that he is entitled to judgment as a matter of law.” *Allstate Prop. & Cas. Ins. Co. v. Squires*, 667 F.3d 388, 390 (3d Cir. 2012) (internal citations and quotations omitted). “In considering a motion for judgment on the pleadings, a court must accept all of the allegations in the pleadings of the party against whom the motion is addressed as true and draw all reasonable inferences in favor of the non-moving party.” *Id.*

*Appendix C***III. DISCUSSION**

Defendants move the Court to grant the present motion on the basis of qualified immunity. (Doc. No. 47 ¶ 4.) Plaintiff opposes the motion on the grounds that material facts remain disputed and that the motion prematurely claims immunity. (*See* Doc. No. 55 at 2, 6-8.) The Court addresses the following in turn: (1) the doctrine of qualified immunity; (2) whether Plaintiff's allegations in the amended complaint make out a constitutional violation; (3) Defendants' efforts to frame the right at issue; and (4) whether Defendants Anthony J. Fiore and Gary E. Speaks are presumptively entitled to qualified immunity.

The doctrine of qualified immunity protects "government officials performing discretionary functions" by "shield[ing them] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). To determine whether qualified immunity applies, a district court undertakes the following two-pronged inquiry:

First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. ... Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct.

Appendix C

Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Pearson v. Callahan, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (citing *Saucier*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272).

The Court will begin its qualified immunity analysis with the first prong. The Court must decide whether the facts Plaintiff Zimmerman has alleged — accepting the allegations as true and drawing all reasonable inferences in his favor — make out a violation of a constitutional right. As explained below, Plaintiff has alleged a Fourth Amendments malicious prosecution claim. (Doc. No. 20 ¶ 183.) Accordingly, the Court will decide whether Plaintiff's allegations make out a Fourth Amendment malicious prosecution claim.

A. Whether Plaintiff alleged a violation of a constitutional right

Defendants challenge whether Plaintiff Zimmerman has adequately pleaded his malicious prosecution claim under the Fourth Amendment. In particular, Defendants contend that Plaintiff fails to adequately allege a Fourth Amendment seizure. (Doc. Nos. 47 ¶ 9; 49 at 24-25.)

“To prevail on a Fourth Amendment malicious prosecution claim under section 1983, a plaintiff must establish that: (1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in [the

Appendix C

plaintiff's] favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." *Halsey v. Pfeiffer*, 750 F.3d 273, 296-97 (3d Cir. 2014) (quoting *Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007)).

"Where the malicious prosecution claim sounds in the Fourth Amendment, the plaintiff 'must show some deprivation of liberty consistent with the concept of 'seizure.'" *Johnson v. Knorr*, 477 F.3d 75, 85 n.14 (3d Cir. 2007) (citing *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998)). In making this determination, courts consider whether a plaintiff was physically detained, faced travel restrictions, posted bail, or was subjected to "mandatory pretrial services check-ins." *Perkins v. Staskiewicz*, No. 08-1651, 2010 U.S. Dist. LEXIS 60094, 2010 WL 2510191, at *4 (M.D. Pa. June 17, 2010) (collecting cases).

Here, the amended complaint alleges that Plaintiff was handcuffed and fingerprinted at the police station, subjected to a perp walk, surrendered his passport, was arraigned, was subject to a "\$1,000 unsecured bail," and "suffered an ongoing deprivation of liberty ... as a consequence of being subject to bail conditions and having his passport confiscated." (Doc. No. 20 ¶¶ 126, 130-136, 181.) At this stage, accepting all of the allegations in the amended complaint as true, the Court is persuaded that Plaintiff adequately alleges a Fourth Amendment seizure.

Appendix C

See DiBella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005) (“Pretrial custody and some onerous types of pretrial, non-custodial restrictions constitute a Fourth Amendment seizure”); *cf. Perkins*, 2010 U.S. Dist. LEXIS 60094, 2010 WL 2510191, at *4.

Accordingly, in light of this determination as well as the prior order denying Defendants’ Rule 12(b)(6) motion (Doc. Nos. 29, 30),¹ the Court finds that — at this stage in the proceedings — Plaintiff’s amended complaint makes out a violation of a constitutional right. *Saucier*, 533 U.S. at 200-01. Accordingly, the Court turns to the second prong of the qualified immunity analysis.

B. Whether the right at issue is clearly established

Having determined that Plaintiff alleged a constitutional violation, the Court turns the second prong of the qualified immunity analysis. At this stage, the

1. In large part, Defendants attack the adequacy of Plaintiff’s pleadings by urging the Court to reconsider arguments previously rejected in the Rule 12(b)(6) motion as meritless or premature. (Doc. Nos. 29, 49.) For example, Defendants argue that “the prosecutors are absolutely immune for all claims of evidence fabrication” (*see* Doc. Nos. 29 at 17; 49 at 31), challenge whether Plaintiff stated a claim against Defendant Corbett (Doc. Nos. 24 at 19; 29 at 18-19; 49 at 31-32), and contest whether Plaintiff “plausibly plead[ed] that [Agent Fiore] misled the prosecutors into taking the case” (Doc. Nos. 24; 29 at 19-21; 47 ¶ 8; 49 at 29), or adequately alleged that Defendants intimidated witnesses prior to the grand jury proceedings (Doc. Nos. 29 at 15-16; 47 ¶ 7). At this stage and absent further development of the factual record, the Court declines to reconsider Defendants’ previously adjudicated arguments.

Appendix C

court “must decide whether the *right at issue* was ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson*, 555 U.S. at 232 (emphasis added).

“To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015) (internal citations and quotations omitted). A case “directly on point” is not required, though “existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* Here, Defendants bear the burden of persuasion that a reasonable official “would not have known, under the circumstances, that the conduct was illegal.” Model Civ. Jury Instr. 3rd Cir. 4.2 (2015); *see Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014); *Burns v. PA Dep’t of Corr.*, 642 F.3d 163, 176 (3d Cir. 2011).

However, prior to deciding whether a right was “clearly established,” this Court must identify the *right at issue*. *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 638 (3d Cir. 2015). The Third Circuit has suggested that courts frame the right at issue in a “particularized” and “relevant[] sense,” considering “the case’s specific context, not as a broad general proposition.” *Id.* (internal citations and quotations omitted). Accordingly, the Court begins by addressing Defendants’ efforts to frame the right at issue.

1. Framing the constitutional right at issue

Defendants challenge, *inter alia*, whether it is clear that *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10

Appendix C

L. Ed. 2d 215 (1963), applies without a trial and conviction and whether the destruction of proffer notes in accordance with policy violates clearly established law. (Doc. No. 47 ¶¶ 5-6; *see* Doc. No. 49 at 14-24, 28-29.) Plaintiff responds that he did not assert a *Brady* claim or a procedural due process claim. (Doc. No. 55 at 3, 6-9.) As explained below, the Court finds that Defendants' *Brady* arguments fail to address the constitutional right at issue.

Here, the amended complaint alleges a malicious prosecution claim under the Fourth and Fourteenth Amendments and a malicious prosecution claim under Pennsylvania law.² As a general matter, the “constitutional right at issue in the context of a § 1983 malicious prosecution claim is the Fourth Amendment right to be free from unreasonable seizures.” *Boydston v. Isom*, 224 F. App'x 810, 814 (10th Cir. 2007). A *Brady* claim is distinct from a malicious prosecution claim, *see Poventud v. City of New York*, 750 F.3d 121, 137 & n.20 (2d Cir. 2014), as it involves “different constitutional rights and, critically, [entails] different elements of recovery,” *Mazzetti v. Bellino*, 57 F. Supp. 3d 1262, 1269 (E.D. Cal. 2014) (internal citations omitted). Therefore, even without defining the proper scope and contours of the Fourth Amendment right at issue, the Court disagrees that the right at issue directly implicates *Brady v. Maryland*. *See Golodner*, 770 F.3d at 206. Plaintiff's passing reference to *Brady* in the complaint does not change the analysis. (Doc. No. 20 ¶ 114.)

2. Although this Court dismissed numerous allegations in the complaint pursuant to absolute immunity, the Court declined to dismiss Plaintiff's malicious prosecution claims, *inter alia*, to the extent that they were premised on “Defendants' alleged destruction of exculpatory evidence.” (*See* Doc. No. 29 at 10, 17-18, 23.)

Appendix C

Defendants' efforts to define the right allegedly violated as a due process right are unpersuasive.³ (Doc. No. 49 at 14-24.) As such, the Court declines to decide whether the purported *Brady* or due process right was "clearly established" at the time of the alleged misconduct. Instead, the Court turns to Defendants' qualified immunity arguments concerning Defendants Anthony J. Fiore and Gary E. Speaks.

2. Whether Fiore and Speaks are presumptively entitled to qualified immunity

Defendants also contend that Anthony J. Fiore and Gary E. Speaks are entitled to qualified immunity because "any reasonable agent would have believed probable cause existed." (*See* Doc. Nos. 47 ¶ 8; 49 at

3. In the alternative, were the Court to construe Defendants' *Brady* arguments as challenging the "malice" element of Plaintiff's malicious prosecution claims, the Court remains unpersuaded. Defendants appear to argue, in the alternative, that Plaintiff cannot prove an element of his malicious prosecution claims — i.e., malice — because it is not clearly established that destruction of exculpatory evidence violates *Brady v. Maryland* under the circumstances. (Doc. No. 56 at 2-3 & n.1; *see* Doc. No. 55 at 3 & n.2.) A Rule 12(c) motion is properly granted only "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Inst. for Sci. Info., Inc.*, 931 F.2d at 1005. Here, the Court declines to resolve "question[s] of fact as to malice" at this preliminary stage, *see Cameron v. City of New York*, 598 F.3d 50, 69 (2d Cir. 2010), particularly where Defendants summarily deny Plaintiff's allegation that Defendants destroyed exculpatory evidence. (Doc. Nos. 20 ¶ 114; 33 ¶ 114). 4

Appendix C

26-28, 29-30.) Specifically, Defendants argue that Agents Fiore and Speaks are presumptively entitled to qualified immunity under the Third Circuit’s *Kelly v. Borough of Carlisle* decision.⁴ (See Doc. Nos. 49 at 29-30; 49-7 at 1.) Plaintiff responds that Agents Fiore and Speaks cannot “rely on legal advice that is based on their destruction of exculpatory evidence, fabrication of evidence, and provision of misleading or false statements in sworn filings.” (Doc. No. 55 at 13-14.)

In *Kelly v. Borough of Carlisle*, the Third Circuit held that a “police officer who relies in good faith on a prosecutor’s legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause.” 622 F.3d 248, 255-56 (3d Cir. 2010). “That reliance must itself be objectively reasonable, however, because a wave of the prosecutor’s wand cannot magically transform an unreasonable probable cause determination into a reasonable one.” *Id.* at 256 (internal citations omitted).

Here, as this Court previously noted, the Court construes the amended complaint as “alleging that both Fiore and Speaks were involved in the alleged fabrication of evidence prior to the grand jury proceedings, and with the alleged destruction of exculpatory evidence.” (Doc. No. 29 at 20.) Again, without defining the exact scope and

4. Defendants also contend that their probable cause basis was “confirmed” when Judge Wenner declined to dismiss the case against Zimmerman at a preliminary hearing. (See Doc. Nos. 49 at 29-30; 49-7 at 1.)

Appendix C

contours of the right at issue, the Court concludes that Defendants have not satisfied their burden of persuasion that Fiore and Speaks are entitled to qualified immunity. *Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014). The Court is guided by Third Circuit’s conclusion in *Halsey v. Pfeiffer* that a reasonable investigator would have understood that “knowingly us[ing] fabricated evidence to bring about [a] prosecution or to help secure [a] conviction, particularly if the investigators themselves had fabricated the evidence,” would violate a defendant’s constitutional rights. *Id.* at 295-96.

Therefore, accepting as true Plaintiff’s allegations, the Court is not persuaded that a reasonable officer would not have known that the alleged conduct was illegal. *See Dix v. City of Phila.*, No. 15-532, 2015 U.S. Dist. LEXIS 101457, 2015 WL 4624248, at *6 (E.D. Pa. Aug. 3, 2015) (rejecting defendants’ qualified immunity argument where defendants allegedly “manufactured probable cause to arrest and prosecute plaintiff”). Defendants have not met their burden of showing that Defendants Fiore and Speaks are entitled to qualified immunity. *Burns*, 642 F.3d at 176.

IV. CONCLUSION

For the reasons stated above, the Court will deny Defendants’ motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (Doc. No. 47.) As the Court previously stated in its February 10, 2015 memorandum and order, Defendants may reassert their immunity arguments at summary judgment.

**APPENDIX D — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA, FILED
JULY 15, 2016**

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA**

No. 1:13-cv-02788

JOHN R. ZIMMERMAN,

Plaintiff,

v.

THOMAS W. CORBETT, *et al.*,

Defendants.

(Judge Kane)

ORDER

AND NOW, on this 15th day of July 2016, **IT IS
HEREBY ORDERED THAT** Defendants' motion for
judgment on the pleadings pursuant to Federal Rule
of Civil Procedure 12(c) (Doc. No. 47), is **DENIED
WITHOUT PREJUDICE**. Defendants may raise their
immunity arguments at summary judgment, following
development of the factual record in this case.