17-2230

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JARVIS ELDER,

Plaintiff-Appellant,

—against—

J. MCCARTHY, SERGEANT, T. MACINTYRE, CORRECTION OFFICER, KEN KLING, HEARING OFFICER/VOC. SUPR, ALBERT PRACK, DIRECTOR OF SPECIAL HOUSING, MARK L. BRADT, SUPERINTENDENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

While incarcerated at Attica Correctional Facility, Jarvis Elder was charged with forging disbursement forms to steal money from the account of another inmate, Reginald Lawrence. Elder was brought before a disciplinary hearing without adequate notice of the charges against him, and with virtually no assistance in preparing his defense. Both before and at the hearing, Elder asked to call as witnesses the corrections officers who had approved the disbursement forms and, therefore, had verified the identity of the inmate who submitted them. But the hearing officer declined to call them, claiming he did not know who they were, even though he could easily have identified them using prison records. And even though the hearing record contained no evidence that anyone had stolen anything from Lawrence, the hearing officer decided that the handwriting on the forms looked like Elder's, and he found Elder guilty on that basis. As a result, Elder was sentenced to six months in the Special Housing Unit ("SHU").

Elder challenged the decision, and after being rubber-stamped through the prison appeals process, it was reversed by the Fourth Department. The court found that there was "no evidence" that "the other inmate claimed that it was not his signature on the forms"; that Elder "was denied meaningful employee assistance and was prejudiced by the inadequate assistance he received"; and that the hearing officer did not make "any efforts" to identify Elder's requested witnesses. The

court annulled the hearing officer's decision and expunged it from Elder's record, but by that time, Elder had already served his six-month sentence in the SHU.

Elder filed a federal civil rights action. In his *pro se* complaint, Elder alleged violations of his Fourteenth Amendment due process rights—in particular, his right to call witnesses, to receive adequate assistance in preparing his defense, to receive adequate notice of the charges, and to be disciplined based only on reliable evidence of guilt. Elder further alleged that his conditions of confinement in the SHU were unsanitary and unconstitutional. The district court dismissed this Eighth Amendment claim at the pleading stage, without even affording Elder leave to amend. And on summary judgment, the district court dismissed the action, holding that prison officials had given Elder all the process he was due.

The district court's rulings are unsupportable. The district court disregarded this Court's clear and unequivocal decisions concerning both the constitutional rights of prisoners charged with disciplinary violations and the procedural requirements for dismissing a prisoner's claims. It also ignored Elder's arguments, made factual findings with no basis in the record, and construed the evidence against Elder in order to grant summary judgment for the defendants.

First, Elder is entitled to summary judgment on his claim that the hearing officer, Defendant Ken Kling, violated his right to call witnesses. This Court has held that prison officials must take reasonable steps to identify witnesses requested

by an inmate, and Elder presented compelling, unrebutted proof that Kling could easily have identified the witnesses by consulting prison logs. The defendants did not even *mention* this evidence, let alone rebut it. The district court nevertheless held, without any explanation, that due process did not require Kling to review any records to identify the witnesses.

Second, Elder is entitled to a trial on his inadequate-assistance claim. Defendant Trevor MacIntyre, the officer assigned to assist Elder, failed to interview any of the witnesses or gather any of the documents that Elder had requested. In holding that this was acceptable, the district court misconstrued the constitutional obligations of an assistant, made assumptions about facts not in evidence, ruled on issues that the parties had not even briefed, and applied a harmless-error analysis that was both wrong and irrelevant.

Third, Elder is entitled to summary judgment on his claim of inadequate notice. Elder was forced to defend himself at the hearing even though he had no idea how many documents he was charged with forging or when he supposedly forged them. The district court was able to dismiss his claim only by misconstruing it as a state-law claim, ignoring the Second Circuit precedent that both parties had cited, and again misapplying the concept of harmless error.

Fourth, Elder is entitled to summary judgment on his claim that the disciplinary decision was not supported by reliable evidence. Both Kling and the

district court assumed that someone had stolen money from Lawrence and, based on that assumption, decided that Elder was the likely culprit. But as the Fourth Department determined, the hearing record contained no evidence of the underlying crime, and the decision to punish Elder was arbitrary.

Fifth, the district court erred in dismissing Elder's Eighth Amendment claim without granting him leave to replead. Elder was a *pro se* litigant, and his claim based on unsanitary conditions of confinement was potentially viable. He was entitled to at least one opportunity to add the allegations necessary to state a claim.

The judgment should therefore be reversed with instructions to grant summary judgment in Elder's favor on several of his claims and to conduct further proceedings on the others.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Judgment was entered on June 23, 2017. (SPA-44).[1] Elder timely filed a notice of appeal on July 17, 2017. (A-388-89). This Court has jurisdiction under 28 U.S.C. § 1291.

[1] "A" refers to the Joint Appendix. "SPA" refers to the Special Appendix. "Dkt." refers to documents on the district court docket (W.D.N.Y. No. 14-cv-6216).

ISSUES PRESENTED

1. Whether the district court erred in holding that Kling was not required to consult easily accessible records to identify the witnesses that Elder had requested for his disciplinary hearing.

2. Whether the district court erred in holding that MacIntyre could refuse to locate witnesses or provide copies of documents that Elder had requested without providing any valid reason.

3. Whether the district court erred in holding that Elder had adequate notice of the charges against him even though he had no information concerning the time period during which he allegedly forged disbursement forms or the number of forms he allegedly forged.

4. Whether the district court erred in holding that Kling could find Elder guilty of forging disbursement forms and stealing from Lawrence even though the record contained no evidence that Lawrence was the victim of any crime.

5. Whether the district court erred in dismissing Elder's Eighth Amendment claim without granting him leave to amend even though he was proceeding *pro se* and it was possible that he could have pled a viable claim.

STATEMENT OF THE CASE

A. Procedural History

Plaintiff Jarvis Elder is a New York State inmate at Wende Correctional Facility. (A-12 ¶ 7). On May 1, 2014, Elder filed a complaint in the United States District Court for the Western District of New York against Defendants, corrections officers and prison officials, for violations of his civil rights while he was incarcerated at Attica Correctional Facility. (A-2). Elder subsequently filed an amended complaint, which pled claims under 42 U.S.C. § 1983 for violations of his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual conditions of confinement, as well as claims under New York law. (A-11).[2]

Defendants moved to dismiss certain of Elder's federal claims pursuant to Rule 12(b)(6). On September 9, 2015, the district court (Siragusa, J.), granted the motion in part, dismissing Elder's claim for violations of the Eighth Amendment. *See Elder v. McCarthy*, No. 14-cv-6216 (CJS), 2015 WL 5254290 (W.D.N.Y. Sept. 9, 2015). (SPA-1-15).

[2] As Elder's amended complaint is sworn under penalty of perjury (A-38), it is the equivalent of an affidavit for purposes of summary judgment. *See Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995); *Franco v. Kelly*, 854 F.2d 584, 587 (2d Cir. 1988).

The parties filed cross-motions for summary judgment shortly thereafter. On June 23, 2017, the district court denied Elder's motion and granted Defendants' motion in part, dismissing Elder's federal claims with prejudice and his state-law claims without prejudice for lack of jurisdiction. *See Elder v. McCarthy*, No. 14-cv-6216 (CJS), 2017 WL 2720007 (W.D.N.Y. June 23, 2017). (SPA-16-43). That day, the district court entered a civil judgment closing the action. (SPA-44).

Elder moved for reconsideration on July 5, 2017, and filed a notice of appeal from the judgment on July 19, 2017. (A-9, 388). The district court denied Elder's motion on July 20, 2017, and Elder filed a notice of appeal from that order. (SPA-45-47; A-9). On October 18, 2017, this Court dismissed the latter appeal and, in the former appeal, appointed counsel to "brief, among any other issues, whether prison officials denied [Elder's] due process right to call witnesses at his disciplinary hearing." *Elder v. McCarthy*, No. 17-2230, 2017 WL 5185312, at *1 (2d Cir. Oct. 18, 2017) (citing *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 31 (2d Cir. 1991)) (Order, ECF No. 22).

B. Factual Background

1. *The parties*

In September 2012, Elder was an inmate at Attica Correctional Facility, a prison operated by the New York State Department of Corrections and Community Supervision ("DOCCS"). (SPA-16). Several of the Defendants were employed at

Attica: Defendant John McCarthy was a Corrections Sergeant; Defendant Trevor MacIntyre was a Corrections Officer; Defendant Ken Kling was a Vocational Supervisor and Hearing Officer; and Defendant Mark Bradt was Superintendent. (*Id.*). At that time, Defendant Albert Prack was Director of Special Housing/Inmate Disciplinary Programs for DOCCS. (SPA-24).

2. *McCarthy filed a misbehavior report accusing Elder of stealing and forgery, but failing to specify key facts*

On September 1, 2012, while Elder was away from his cell for the afternoon meal, the contents of his cell were set on fire. (A-15 ¶ 17). As a result, Elder was placed "on [k]eep lock"—that is, confined to another cell—pending the investigation of the fire. (A-260-61 Tr. 27-29; A-317, 363).

On September 10, 2012, Defendant McCarthy completed an "Inmate Misbehavior Report" charging Elder with "forgery" and "stealing." (A-297). The misbehavior report identified the "location of [the] incident" as "A-Block 1 company" and the "incident date" as September 10, 2012. (*Id.*). McCarthy wrote that he was issuing the misbehavior report "due to an investigation [he] rec[ei]ved on 9/4/12 of Inmate Lawrence . . . pertaining to possible disbursement forgeries against his account." (*Id.*). According to McCarthy, on that same day, he learned that Elder's cell had been set on fire by an unknown inmate, and he received "reliable confidential information" that Lawrence was involved in "possible drug activity" as well as the arson of Elder's cell. (*Id.*). A search of Lawrence's cell

revealed an address list, a list of phone numbers, and a completed disbursement form authorizing a payment from Elder's inmate account. (*Id.*). The next day, McCarthy interviewed Elder, who confirmed that those items belonged to him and that he had filled out the disbursement form. (A-298).

In his report, McCarthy opined that "the hand writing on Inmate Elder's personal [disbursement] form matche[d] all of the [disbursement] forms with Inmate Lawrence's name and number on it that [we]re in question in the investigation," and that as a result, "it [wa]s [McCarthy's] belief that Inmate Elder forged all the [disbursement] forms with Inmate Lawrence's name on [them,] totaling $630.00." (*Id.*). "[A]ll evidence was bagged, tagged and placed in the contraband office by . . . McCarthy." (*Id.*). The misbehavior report did not include copies of the disbursement forms that McCarthy accused Elder of forging. Nor did it identify the number of forms, the dates on the forms, the amounts on each form, or the intended recipients of the funds.

The misbehavior report also did not explain the impetus for McCarthy's "investigation." As McCarthy admitted in response to Elder's requests for admission, "[t]here is no indication in the [m]isbehavior [r]eport that [he] showed Inmate Lawrence the [d]isbursement forms o[r] that Inmate Lawrence claimed that it was not his signature on the questioned forms." (A-106; *see also* A-17 ¶ 20; A-352 ¶ 5). Only later, in his declaration in support of summary judgment, did

McCarthy assert that "Lawrence claimed he had not authorized" payments "related to" those disbursement forms. (A-245 ¶¶ 8-9).

Elder was served with a copy of the misbehavior report on September 11, 2012 (A-315-16), and he remained on keep lock pending his disciplinary hearing. (A-297, 363).

3. *MacIntyre was selected as Elder's assistant, but he refused nearly all of Elder's requests and provided no real assistance*

Due to his confinement, Elder was entitled to request an officer assistant to help him prepare his defense. By regulation, the "role" of an assistant is "to ensure that the inmate understands the charges, interview potential witnesses identified by the inmate, and report the results of [those] efforts to the inmate." (A-300). An assistant "may also be requested to obtain relevant documentary evidence to assist in the preparation of the inmate's defense to the charges." (*Id.*). Elder selected three names from a list of candidates, and Defendant MacIntyre was assigned to be his assistant. (A-299-300).

On September 13, 2012, MacIntyre came to Elder's cell to discuss the assistance that Elder required to prepare for his hearing. Elder asked MacIntyre to gather documents, interview witnesses, and ensure the presence of those witnesses at the hearing. Among other documents, Elder requested copies of the allegedly forged disbursement forms and "Chapter V," the regulations governing disciplinary proceedings. Elder also asked MacIntyre to speak to several

witnesses: McCarthy, Lawrence, a handwriting specialist, and the officers who had signed the disbursement forms he was accused of forging. (A-17-18 ¶¶ 22-23; A-262-65 Tr. 35, 38-47; A-319; A-354 ¶¶ 29, 32).

The last request was particularly important. An inmate who wishes to authorize a payment from his inmate account must present a completed, signed disbursement form to an officer for approval. The officer then must verify the inmate's identification, and countersign the form to indicate approval. (A-140, 306-12, 318-20, 322-23, 329; SPA-17).

MacIntyre recorded only certain of Elder's requests on his "assistant form." (A-263-64 Tr. 38-41; A-300). He claims that Elder did not request the disbursement forms or Chapter V, and that although Elder asked for the officers who signed the forms to be present at the hearing, he did not ask MacIntyre to interview them. (A-240-41 ¶¶ 12-13, 18).

After Elder relayed his requests, MacIntyre left to speak to Lawrence. He returned about twenty minutes later and told Elder that Lawrence refused to testify. (A-263 Tr. 38-40). MacIntyre also told Elder that Elder would have to wait for the hearing to see the documents he had requested. (A-18 ¶ 23; A-263 Tr. 38-40; A-265 Tr. 45). When Elder asked whether MacIntyre had spoken to any of the other witnesses, MacIntyre told him that he could not identify the witnesses without their names, and that Elder would have to wait for the hearing for any further assistance.

(A-265 Tr. 45-46). True to his word, MacIntyre did not give Elder any of the requested documents, nor did he interview any witnesses. (A-18 ¶ 23; A-112-13; A-241 ¶ 18; A-264-65 Tr. 42-46).

4. *Kling presided over the disciplinary hearing and found Elder guilty even though he failed to call Elder's witnesses*

On September 14, 2012, Elder was brought before Defendant Kling for a disciplinary hearing on the charges set forth in the misbehavior report. (A-315). At the beginning of the hearing, Kling reviewed the list of witnesses Elder had requested, including the officers who had signed the disbursement forms in question. (A-316). When asked, Elder confirmed that he "still want[ed] these witnesses." (*Id.*). Kling explained that he could not compel Lawrence to testify; that McCarthy was not available that day; and that he would need more information to identify the other officer witnesses. (*Id.*). Kling read the misbehavior report into the record, and Elder pled not guilty to the charges. (A-316-18).

Kling then stated that he would adjourn the hearing, and that he planned to reconvene once McCarthy was back on duty. (A-318). Elder told Kling that he did not have the names of the officers who had signed the disbursement forms, and that it was crucial to identify them because "they have to check ID." (*Id.*). Kling said he "underst[oo]d," and that he would "see what [h]e c[ould] do," but that he could not read the officers' signatures. (A-319). Elder also complained that he

'never got . . . copies of any of the evidence," since his "assistan[t] didn't bring" it to him, and that as a result, Elder "ha[d] no copy of what [he was] accused of," including the relevant "dates and times." (*Id.*). Nevertheless, Kling adjourned the hearing. (*Id.*).

The hearing resumed one week later, on September 21, 2012. (*Id.*). After reviewing the charges and Elder's pleas of not guilty, Kling invited Elder to make a statement. (*Id.*). Elder testified that he "didn't steal nothing from [Lawrence]" and "didn't forge any" of the disbursement forms. Furthermore, he could not have forged them because "it is a policy [to] check [the] inmate[']s name and ID number prior to . . . taking disbursement forms." (A-320-21). Elder explained that he and Lawrence knew each other, and that he had previously "helped [Lawrence] out" with some dealings involving money and artwork or art supplies. (A-319; *see also* A-326). Elder expressed concern that Lawrence had somehow ended up with Elder's address and phone list, and he suggested that Lawrence might be "trying to pull a sca[m] to get money" by imitating Elder's handwriting in order to frame him. (A-319-20; *see also* A-324).

After Elder's statement, Kling called McCarthy as a witness. Kling did not ask McCarthy any questions about the basis for his investigation, or why he believed that money had been stolen from Lawrence's account. Rather, Kling "start[ed] off by asking" McCarthy "what le[d] [him] to believe that Inmate Elder

was the person who committed [the] forgery." (A-321). McCarthy testified that he had found documents belonging to Elder in a search of Lawrence's cell, and that the handwriting on those documents was similar to the handwriting on the supposedly forged forms. (*Id.*).

Kling then asked if McCarthy could identify the officers who had signed the disbursement forms, noting that Kling had "asked on the block" "with different officers" but was unable to identify them. (A-321-22). McCarthy said he could not. (A-322).

Elder was permitted to cross-examine McCarthy. Under questioning, McCarthy conceded that (a) he was not a handwriting specialist; (b) it is a policy for corrections officers to check inmates' names and identification numbers before accepting certain forms; and (c) he did not know any officer who could testify that Elder had submitted a disbursement form with Lawrence's information. (A-322-23).

After excusing McCarthy from the hearing, Kling again told Elder that he could not read the officers' signatures on the disbursement forms, and Elder again objected to the absence of the witnesses and reiterated that he was innocent. (A-324-26). Kling then "close[d]" the record and announced that he would "make a written disposition." (A-326). A mere sixteen minutes later, Kling read that disposition into the record. (*Id.*).

Kling found Elder guilty on both charges and imposed several penalties: 6 months in the SHU, $630 in restitution, and 6 months' loss of recreation, packages, and commissary. (A-326, 328). In describing the "evidence relied on," Kling wrote: "In this case I relied upon the verbal testimony given by Sgt. McCarthy in addition to the written misbehavior report. The visual evidence of the signature was compelling in the similarities. It would appear to me that some officers may have been lax in verifying I.D. I also felt that no credible defense was given." (A-329).

Although Kling did not refer to them in his disposition, he had several other documents in his possession at the hearing. (A-318). Kling claims that the hearing record included the allegedly forged disbursement forms, Elder's disbursement form, and several documents that Kling apparently did not consult in reaching his decision, including Elder's address and phone lists, mail receipts, and an endorsed check. (A-233 ¶¶ 19-20; A-302-12, 343-47). All of the disbursement forms that listed "Reginald Lawerence [*sic*]" as the payor had been signed by corrections officers within a one-month period between July 31, 2012 and August 23, 2012. (A-306-12).

During the hearing, however, Elder "didn't see" the disbursement forms and "d[id]n't know" what they contained. (A-265-66 Tr. 48-49; A-269 Tr. 62). Kling "flipp[ed] through" the forms and "showed" them to Elder from where Kling was

seated, but Kling "h[eld]" onto the forms, kept them by "his side," and "wouldn't give" them to Elder to take a good "look at [them]." (*Id.*; *see also* A-19 ¶ 25; A-25 ¶¶ 29-30 & n.1; A-28 ¶ 32).

5. *Bradt and Prack affirmed Kling's disciplinary decision, ignoring Elder's claims of error*

Elder appealed Kling's decision to Bradt and Prack, who were, respectively, the Superintendent of Attica and the DOCCS Director of Special Housing/Inmate Disciplinary Programs. (A-67-70, A-74). Although Elder argued that his due process rights were violated and that he was innocent of the charges, both Bradt and Prack affirmed the convictions without providing any analysis. (A-72, A-75).

6. *The Fourth Department annulled the disciplinary determination after Elder had already spent 180 days in the Special Housing Unit*

Elder then filed an Article 78 proceeding in state court to challenge the disciplinary decision. The proceeding was transferred to the Appellate Division, Fourth Department, which "unanimously" ruled in Elder's favor. *Elder v. Fischer*, 115 A.D.3d 1177, 1177 (4th Dep't 2014).

The court first held that Kling's decision was "not supported by substantial evidence." *Id.* at 1177. It observed that "there is no indication in the misbehavior report that [McCarthy] showed [Lawrence] the disbursement forms or that [Lawrence] claimed that it was not his signature on the forms," and "[t]here likewise was no evidence to that effect presented at the hearing." *Id.* at 1178. The

court noted that although Elder had "requested that th[e] correction officers" who signed the disbursement forms "be called as witnesses at the hearing," Kling did not make "any efforts" to identify those witnesses beyond speaking to a few "officers in the block." *Id.*

The court further held that Elder "was denied meaningful employee assistance and was prejudiced by the inadequate assistance he received." *Id.* According to the court, "[w]hen the inmate is unable to provide names of potential witnesses, but provides sufficient information to allow the employee [assistant] to locate the witnesses without great difficulty[,] failure to make any effort to do so constitutes a violation of the meaningful assistance requirement." *Id.* (internal quotation marks omitted). Because there was no evidence that MacIntyre made *any* efforts "to ascertain the names of the correction officers who signed the disbursement forms" or "to secure their presence at the hearing," "it c[ould]not be said that reasonable efforts were made to locate [Elder's] witnesses." *Id.* (internal quotation marks omitted).

Accordingly, the court "annul[led] the [disciplinary] determination" and "direct[ed] that all references to the matter be expunged from [Elder's] record." *Id.* at 1177. By that time, however, Elder had already served his 180-day sentence in the SHU. (A-33 ¶ 50; SPA-4).

7. *Elder filed this action to vindicate his civil rights*

Elder's victory in the Fourth Department was meaningful, but it could not compensate him for the six months of suffering he had endured while in the SHU. On May 1, 2014, Elder filed a civil rights action in the United States District Court for the Western District of New York, naming McCarthy, MacIntyre, Kling, Bradt, and Prack as defendants. (A-2). Elder amplified his claims in an amended complaint, which became the operative pleading. (A-11). Pursuant to 42 U.S.C. § 1983, Elder sought compensatory and punitive damages, a declaratory judgment, and attorneys' fees for Defendants' violations of his rights under the Eighth and Fourteenth Amendments. (A-11 ¶ 1; A-38).

Among other due process claims, Elder alleged that (1) McCarthy filed a false misbehavior report against him; (2) MacIntyre failed to interview the witnesses or gather the documents Elder had requested, in violation of Elder's right to adequate assistance; (3) Elder did not have adequate notice of the charges, as the misbehavior report was insufficiently specific, and he was not given copies of the disbursement forms until well after his hearing; (4) Kling failed to give Elder the documents he requested or call the officer witnesses he requested, even though Kling easily could have identified the officers by checking the A-Block log book or the roster of assigned posts to determine which offers were present in A-Block on the dates the disbursement forms were approved; (5) Kling's decision at the

hearing was arbitrary and capricious and was not based on reliable evidence; and (6) Bradt and Prack failed to act even after Elder brought these constitutional violations to their attention. (A-17-35).

As to his Eighth Amendment claim, Elder alleged that during his 180 days in the SHU, he was confined for 23 hours a day in a cell that was "often dirty . . . with barely any cleaning supplies[,] making keeping the cell clean difficult and almost impossible." (A-30-31 ¶¶ 39-40). Exacerbating these unsanitary conditions, Elder was permitted to shower only "2-3 times a week" and had to "alternate stepping in an[d] out of the shower with [his] cell mate['s] def[e]cation." (A-30 ¶ 40). Elder also experienced "sleep-deprivation" from the lights "left on in the cell," and suffered from serious anxiety and depression. (A-30-31 ¶¶ 39, 41).

During discovery, Elder requested, and Defendants produced, the A-Block log book and staffing charts for many of the dates on the allegedly forged disbursement forms. (A-96-97, 129, 189, 153-213). The staffing charts list the officers assigned to each post for each shift (A-153-87), and the log book contains daily records of the activity in A-Block, including a list of officers present for each shift (A-192-213).

Discovery also revealed evidence casting doubt on the theory that Elder stole money from Lawrence. In August 2012, an employee in Inmate Accounts wrote to a corrections officer concerning complaints from Lawrence about unauthorized

withdrawals from his account. She wrote, "I think this inmate may be trying to scam us," because she had returned two of the disbursement forms to him several weeks earlier, and "[h]e didn't question it then." (A-359). In addition, "[t]he disbursements he claims tipped him off" had incomplete addresses, but his complaint apparently showed that he knew the correct address. (*Id.*).

Defendants also produced several letters that Lawrence wrote to Elder's girlfriend, in which Lawrence told her of his strong romantic interest in her and tried to persuade her to leave Elder for him. He wrote, "I've seen pictures of you and must admit, you have it going on. But the question is why are you wasting your good looks on [Elder]." He explained that he was "a good man looking for a good woman," and that she "deserve[d] better" than Elder, who "didn't appreciate" her and had "nothing on [Lawrence], mentally, physically, or financially." (A-372-73). While he claimed that Elder had stolen money from his account, he also "admit[ted] [that he] dealt with the dude" and had helped Elder out because he was "broke." (A-376).

Other evidence supported Lawrence's allegations against Elder. One of the checks drawn from Lawrence's account was endorsed by two people: Chris Brinson, who was the payee on the allegedly forged disbursement forms, and Winifred Pike. At his deposition, Elder stated that Winifred Pike is his mother, and that he knows a few people named Chris Brinson. (SPA 17-18).

However, other than the check, none of this information was part of the record at the disciplinary hearing. (A-315-27; SPA-23 n.20). According to Kling, the hearing record consisted of testimony from McCarthy and Elder; the misbehavior report; the allegedly forged disbursement forms; Elder's completed disbursement form, address and phone lists, and mail receipts; and the endorsed check. (A-233, 329).

C. The District Court's Decisions

In a decision dated September 9, 2015, the district court dismissed Elder's Eighth Amendment claim for failure to state a claim. (SPA-1, 14-15). "[A]ssuming *arguendo*" that Elder's allegations of unsanitary conditions in the SHU satisfied the "objective prong of an Eighth Amendment claim," the court found that Elder had "not included plausible allegations that any Defendant had the required knowledge of, and deliberate indifference to, his particular living conditions." (SPA-14). The court did not grant Elder leave to amend; rather, upon dismissing the claim, the court directed Defendants to file and serve an answer to the remainder of the amended complaint. (SPA-15).

In a decision dated June 23, 2017, the district court denied Elder's motion for summary judgment, granted Defendants' motion for summary judgment, and dismissed the action on the ground that none of the Defendants had committed any due process violation. (SPA-16). As to Elder's claim of inadequate notice, the

court characterized Elder as arguing that "McCarthy's misbehavior report did not comply with procedural requirements imposed by New York State regulations," and it held that held that "violation of such procedures does not amount to a federal due process violation." (SPA-29 n.24). As to MacIntyre, the court held that while he "admittedly did very little for [Elder]" in his role as Elder's assistant, "no constitutional violation occurred," either because the witnesses and documents that Elder had requested "w[ere] unavailable, or because the failure was harmless error." (SPA-30-36). As to Kling, the court held that the disciplinary decision was "supported by reliable evidence"; that Kling's failure to "examine[] the facility log books" to identify the officer witnesses Elder had requested "did not violate due process"; and that Kling's failure to give Elder "copies of the forged disbursements" was not required by due process and was, in any event, harmless. (SPA-36-42).

Based solely on these rulings, the court dismissed the claims against the remaining Defendants. The court dismissed Elder's claim that McCarthy had filed a false misbehavior report on the ground that Elder ultimately received due process at his disciplinary hearing. (SPA-29-30). And the court dismissed the claims against Bradt and Prack because they were premised on violations of due process by the other Defendants. (SPA-30).

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, "affirming only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Proctor v. LeClaire*, 846 F.3d 597, 607 (2d Cir. 2017) (internal quotation marks omitted). Because the Court "construe[s] the evidence and draw[s] all reasonable inferences in the light most favorable to the non-moving party," summary judgment is "inappropriate when the admissible materials in the record make it arguable that the claim has merit." *Id.* (internal quotation marks omitted). The Court may not make credibility determinations, which is the function of the jury. *See id.* at 608.

On the other hand, "[w]here there are no material issues of fact in dispute, an appellate court reviewing the dismissal of a complaint can, upon reversal, also remand with directions to grant summary judgment on appellant's previously denied cross motion." *Kingsbrook Jewish Med. Ctr. v. Richardson*, 486 F.2d 663, 670 n.21 (2d Cir. 1973), *abrogated on other grounds by Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993).

Where a "complaint alleges civil rights violations and [the plaintiff] proceeded *pro se* in the district court, [this Court] must construe [the] complaint with particular generosity." *Davis v. Goord*, 320 F.3d 346, 350 (2d Cir. 2003) (internal quotation marks omitted).

ARGUMENT

I. ELDER IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM THAT DEFENDANTS VIOLATED HIS DUE PROCESS RIGHT TO CALL WITNESSES

The district court erred in granting summary judgment to Defendants on Elder's claim that he was denied the right to call witnesses. Elder presented compelling, unrebutted evidence that his hearing officer, Kling, could easily have identified the officers who signed the disbursement forms. Defendants offered no response whatsoever, and the district court dismissed Elder's evidence in a single, conclusory sentence that completely ignored the decisions of this Court explaining why that evidence was relevant. Elder is entitled to summary judgment on this claim.

A. Due Process Requires Hearing Officers To Take Reasonable Steps To Identify And Call The Witnesses Requested By A Prisoner

"[C]ertain due process protections must be observed before an inmate may be subject to confinement in the SHU," including "advance written notice of the charges; a fair and impartial hearing officer; a reasonable opportunity to call witnesses and present documentary evidence; and a written statement of the disposition, including supporting facts and reasons for the action taken." *Smith v. Fischer*, 803 F.3d 124, 127 (2d Cir. 2015) (internal quotation marks omitted); *accord Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

"Chief among the[se] due process minima . . . [i]s the right of an inmate to call and present witnesses . . . in his defense before the disciplinary board." *Ponte v. Real*, 471 U.S. 491, 495 (1985). An inmate's request for witnesses may be denied because of "irrelevance or lack of necessity," or where "granting the request would be unduly hazardous to institutional safety or correctional goals." *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30 (2d Cir. 1991). However, "[t]he burden is not upon the inmate to prove the official's conduct was arbitrary and capricious, but upon the official to prove the rationality of the position." *Id.* at 30-31.

The rationality requirement does not permit blind deference to prison officials. The most obvious violation of due process may be the "summary denial" of a request for witnesses without any reason, *Walker v. Bates*, 23 F.3d 652, 656, 658-59 (2d Cir. 1994), but it is not the only one. Due process is also violated where the hearing officer neglects to call the requested witness "as a result of an oversight," *Ayers v. Ryan*, 152 F.3d 77, 81 (2d Cir. 1998), or where the "proffered reason" for failing to call the witness is "invalid" or "irrelevant," *Fox v. Coughlin*, 893 F.2d 475, 478 (2d Cir. 1990). Lame excuses will not do; there is no "'best of their ability' defense to a procedural due process claim." *Rosales v. Kikendall*, 605 F. App'x 12, 14 (2d Cir. 2015). Accordingly, an officer is liable for failing to take reasonable steps to identify the inmate's requested witnesses. *See id.*; *Kingsley*, 937 F.2d at 31.

Kingsley is the decision that controls this case, as this Court has recognized. *See Elder*, 2017 WL 5185312, at *1. In *Kingsley*, the inmate was charged with refusing to provide a urine specimen for a random drug test. He claimed that he did not refuse; he was simply nervous and unable to urinate within the time allotted. He asked the hearing officer to call as witnesses the other inmates present during the drug test, who might have been able to corroborate his explanation. The hearing officer declined because the accused inmate "could not identify [the witnesses] by name," 937 F.2d at 28, and he found the inmate guilty.

As it turned out, "[p]rison officials had a list of the 36 inmates" who were selected for the test. *Id.* Consequently, on appeal from the dismissal of the inmate's lawsuit, this Court found that his due process rights had been violated. The Court held that while "prison officials can normally insist that a prisoner identify the names of his prospective witnesses, it was arbitrary to insist on this requirement here where the need for the witnesses was especially compelling, their identities were readily available to the prison officials, and [the inmate's] inability to identify them by name was understandable." *Id.* at 31 (footnote omitted).

B. Kling Failed To Take Obvious Steps To Identify The Witnesses Elder Requested

It was equally arbitrary for Kling to hold a disciplinary hearing and find Elder guilty without calling any of the officer witnesses he requested. Kling claimed that he was unable to identify the officers who signed the disbursement

forms after reviewing the forms, attempting to find more legible copies, and "talk[ing] to approximately 5 officers in A Block." (A-232 ¶¶ 12-15). However, Kling inexplicably chose not to consult the most obvious sources of information: the A-Block log book and facility staffing charts, which identify the officers on duty on the dates in question. (A-19 ¶ 25; A-24-25; A-153-213).

It is undisputed that Kling easily could have identified the relevant officers had he bothered to look at these records. Defendants produced them in response to Elder's discovery requests. (A-96-97, 129). In his summary judgment motion, Elder clearly argued that the "officers involved in the signed disbursement forms could have be[en] located by [consulting] the staffing charts" for A-Block and the "A-Block Log Book," which were attached as exhibits to his submission. (Dkt. 80 at pp. 15-16 of 111; *see also* A-153-213). Tellingly, Defendants had no response whatsoever. They did not explain why they failed to consult the log book or staffing charts to identify the relevant officers on duty. In fact, they did not mention these documents *at all*. They simply asserted, without acknowledging Elder's evidence, that the officers "could not be identified." (Dkt. 82-7 at 19). Their total "failure to address the . . . issue borders on a concession." *Franklin Cty. Employment & Training Admin. v. Donovan*, 707 F.2d 41, 44 (2d Cir. 1983).

The district court granted summary judgment to Defendants despite their failure to rebut or even dispute Elder's showing. The court did not explain how

Defendants had demonstrated their entitlement to judgment as a matter of law. Instead, the court disposed of Elder's argument in a single sentence: "Although Plaintiff contends that Kling should have gone further, and examined the facility log books, his failure to do so did not violate due process." (SPA-39). The court did not cite any authority for this proposition, and it did not mention *Kingsley*, which flatly contradicts it.

On the undisputed facts, Kling violated Elder's due process rights by failing to call the witnesses he requested. This Court should therefore reverse the district court's grant of summary judgment to Defendants and remand with directions to enter summary judgment in Elder's favor on Kling's liability. *See Kingsley*, 937 F.2d at 31 (remanding with directions to enter judgment in inmate's favor on witness claim).[3] The remand should include further proceedings on the liability of the other defendants, which the district court did not reach, and the applicable remedies.

[3] *See also Kingsbrook Jewish Med. Ctr. v. Richardson*, 486 F.2d 663, 670 n.21 (2d Cir. 1973)("[A]n appellate court reviewing the dismissal of a complaint can, upon reversal, also remand with directions to grant summary judgment on appellant's previously denied cross motion."), *abrogated on other grounds by Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *see, e.g., Brabender v. N. Assur. Co. of Am.*, 65 F.3d 269, 273–74 (2d Cir. 1995); *Mut. Exp. Corp. v. Westpac Banking Corp.*, 983 F.2d 420, 423 (2d Cir. 1993).

II. ELDER IS ENTITLED TO A TRIAL ON HIS CLAIM THAT DEFENDANTS VIOLATED HIS DUE PROCESS RIGHT TO ADEQUATE ASSISTANCE

Elder did not merely ask for the officer witnesses to be present at the hearing. He also asked his officer assistant, MacIntyre, to interview those witnesses in advance of the hearing. Furthermore, he asked MacIntyre to provide him with copies of the supposedly forged disbursement forms and Chapter V, the regulations that governed the hearing. The district court held that MacIntyre could refuse all of these requests without offending due process, and it granted summary judgment to Defendants on this basis. According to the district court, while "MacIntyre admittedly did very little for Plaintiff," it was more than "*nothing*," and that was good enough. (SPA-36). This ruling contravened this Court's precedents.

A. Due Process Requires Officer Assistants To Interview Witnesses And Gather Documents Requested By A Prisoner

"Prison authorities have a constitutional obligation to provide assistance to an inmate in marshaling evidence and presenting a defense when he is faced with disciplinary charges." *Eng v. Coughlin*, 858 F.2d 889, 897 (2d Cir. 1988). "When the inmate is disabled" by confinement pending the hearing, "the duty of assistance is greater because the inmate's ability to help himself is reduced." *Id.*; *see also id.* at 898 (Due Process Clause guarantees "inmates disabled by confinement" the "right to substantive assistance"). "[S]uch help certainly should include gathering

evidence, obtaining documents and relevant tapes, and interviewing witnesses." *Id.* at 898.

The "failure to . . . interview an inmate's requested witnesses without assigning a valid reason" is a violation of the constitutional obligation to "provide an inmate assistance in preparing a defense." *Fox*, 893 F.2d at 478. As with a hearing officer's failure to call witnesses, "[t]he burden is not upon the inmate to prove the [assistant's] conduct was arbitrary and capricious, but upon the [assistant] to prove the rationality of his position." *Id.*; *see also Ayers*, 152 F.3d at 80-82; *Rosales*, 605 F. App'x at 14-15. In addition, the "assistance must be provided in good faith and in the best interests of the inmate." *Eng*, 858 F.2d at 898. "For example, an assistant . . . who is requested to interview a group of prisoners too numerous to interview" cannot simply refuse, but instead "must attempt to determine independently who the most relevant witnesses might be and to interview them." *Id.*

B. MacIntyre Refused Elder's Reasonable Request That He Interview Witnesses

The parties dispute whether Elder had asked MacIntyre to interview the officers who had signed the disbursement forms, and the district court properly

credited Elder's version of events in deciding Defendants' motion. (SPA-32).[4] The district court erred, however, in concluding that MacIntyre had no constitutional obligation "to check the security staff's 'log books' for the seven dates in question . . . to ascertain which officers were working, and to then check with those officers to see if they could identify the signatures and initials." (SPA-33). The district court provided three reasons, none of which is valid.

1. The district court's primary rationale was that officer assistants are obligated to do only what inmates would be able to do themselves, and because "it cannot be plausibly maintained that facility rules would have permitted Plaintiff, an inmate, to inspect the corrections officers' log books in order to prepare for his hearing," MacIntyre had no obligation to do this either. (*Id.*).

The district court's legal premise—that MacIntyre had no obligation to do what Elder was not permitted to do as an inmate—was wrong. The court cited *Silva v. Casey*, 992 F.2d 20 (2d Cir. 1993), for the proposition that the purpose of an assistant is "to do what the inmate would have done were he able" and not confined pending the hearing. *Id.* at 22. But *Silva* did not involve an assistant who

[4] Although Elder and MacIntyre disagree about whether Elder asked MacIntyre to interview these witnesses, it arguably does not matter. The "Assistant Form" shown to inmates says that the "role" of an assistant includes "interview[ing] potential witnesses identified by the inmate, and report[ing] the results of [those] efforts to the inmate." (A-300). An inmate could therefore reasonably understand that by requesting a witness for his hearing, he has also requested that the assistant interview that witness.

was asked to do something the inmate could not have done himself. *Silva* simply held that an assistant has "no constitutional duty to go beyond the bounds of [the inmate's] specific instructions," *id.*, and rejected the inmate's argument that his assistant should have interviewed witnesses the inmate had never asked him to interview, *see id.*; *Silva v. Coughlin*, No. 89 Civ. 8584 (MBM), 1992 WL 116744, at *7 (S.D.N.Y. May 18, 1992). Here, whether Elder asked MacIntyre to interview the officer witnesses is a disputed fact.

Silva's reference to tasks that "the inmate would have done were he able" does not set a ceiling on an assistant's constitutional duty of assistance. In at least one other case, this Court found that an assistant violated due process by failing to interview a witness who had been transferred to another facility and thus may have been difficult for the inmate to locate and interview. *See Ayers*, 152 F.3d at 79. Moreover, failing to take reasonable steps to interview witnesses simply because they are unavailable to the inmate would violate the assistant's obligation to act "in good faith and in the best interests of the inmate." *Eng*, 858 F.2d at 898. An inmate is not entitled to the equivalent of legal counsel, *see Silva*, 992 F.2d at 22, but he is entitled to an assistant who does not refuse to interview witnesses "without assigning a valid reason," *Fox*, 893 F.2d at 478. Here, there was no valid reason for MacIntyre to ignore Elder's requests.

Moreover, the court's factual premise—that Elder could not have asked to see the log books—was both unsupported and irrelevant. While the court's assertion about "facility rules" might seem plausible, the court pulled it out of thin air. Defendants did not make that argument, and there was no evidence in the record to support it. In other words, the district court granted summary judgment, *sua sponte*, based on facts that it assumed to be true. This was patently improper and is, by itself, a reason to vacate the court's decision. *See, e.g.*, *Proctor v. LeClaire*, 846 F.3d 597, 614-15 (2d Cir. 2017) (vacating district court's *sua sponte* grant of summary judgment against prisoner for court's failure to comply with Fed. R. Civ. P. 56(f)); *Willey v. Kirkpatrick*, 801 F.3d 51, 62-63 (2d Cir. 2015) (same); *Bacon v. Wood*, 616 F. App'x 601, 602, 603 n.2 (4th Cir. 2015) (vacating grant of summary judgment against prisoner where district court "presum[ed] the existence of evidence favorable to Defendants that was not in the record," such as "the prison's policies or procedures for removing a prisoner's handcuffs while he is in his cell," which the district court assumed the prisoner had violated).

Whether Elder could have reviewed the log books himself is also beside the point. Had he not been confined pending his hearing, Elder could have attempted to speak to as many officers (and inmates) as possible to find out whether any of them recognized the signatures on the disbursement forms or recalled the dates in question. Thus, even if he could not have used the means that were readily

available to MacIntyre, he may have been able to achieve the same result. MacIntyre's failure to use the far more efficient route available to him does him no credit.

2. Next, the district court held that even if Elder could have gained access to the log books to identify the officer witnesses, MacIntyre was not obligated to do the same, since the court "believe[d] that [this] . . . would have been unduly burdensome." (SPA-33). Again, Defendants never claimed that it would have been burdensome to consult the log books; Defendants produced them in discovery, and they did not discuss the log books at all in their moving papers. There is no evidence in the record to support the district court's "belie[f]," and its judgment cannot be sustained. *See Proctor*, 846 F.3d at 614-15; *Willey*, 801 F.3d at 62-63; *Bacon*, 616 F. App'x at 602, 603 n.2. Moreover, assistants are required to undertake tasks that entail some burden, which is inherent to the role of assisting an inmate in preparing his defense. *See Ayers*, 152 F.3d at 79 (interview transferred inmate and locate other inmate who might not be in the same facility); *Eng*, 858 F.2d at 898 ("attempt to determine independently who the most relevant witnesses might be and to interview them").

3. Finally, the district court held that "MacIntyre's failure to conduct an investigation into the officers' identities was mitigated by Kling's attempt to identify the officers." (SPA-33). This makes no sense. As discussed above, Kling

never really tried to identify the officers. It was not a meaningful "attempt," and it did not "mitigate" anything. Even if he had identified them, MacIntyre's failure to interview them *before* the hearing would have deprived Elder of information he could have used to prepare his defense.

C. MacIntyre Refused Elder's Reasonable Request For Documents

It was also improper for the district court to grant summary judgment on Elder's claim that MacIntyre should have given him copies of the disbursement forms and Chapter V. The court recognized that there was a factual dispute over whether Elder had requested these materials, but it held that even if Elder had requested them, MacIntyre's failure to obtain them was "harmless error" because they could not have affected the outcome of the hearing. (SPA-34-36).

The court skipped to an analysis of "harmless error" because Elder's version of the facts established a due process violation: MacIntyre offered no reason whatsoever for refusing to give Elder the documents, which Elder could have used to help prepare his defense, and therefore violated Elder's right to adequate assistance. *See Fox*, 893 F.2d at 478; *Eng*, 858 F.2d at 898. As explained in detail below, a valid due process claim cannot be dismissed for "harmless error"—at most, harmless error is relevant to whether the plaintiff can obtain compensatory damages—and here, the error could not possibly have been harmless. *See* Point III.B *infra*. The fact that MacIntyre did virtually "nothing" to assist Elder is, by

itself, enough to preclude summary judgment, *Eng*, 858 F.2d at 898, and Elder is entitled to a trial on this claim.

III. ELDER IS ENTITLED TO SUMMARY JUDGMENT BECAUSE DEFENDANTS VIOLATED HIS DUE PROCESS RIGHT TO ADEQUATE NOTICE

A. Elder Was Disciplined Without Adequate Notice

Elder was disciplined without having received adequate notice of the charges against him. "Due process requires that prison officials give an accused inmate written notice of the charges against him twenty-four hours prior to conducting a disciplinary hearing." *Sira v. Morton*, 380 F.3d 57, 70 (2d Cir. 2004). This notice requirement is "no empty formality." *Id.* Rather, it "compel[s] the charging officer to be sufficiently specific as to the misconduct with which the inmate is charged to inform the inmate of what he is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague charges set out in a misbehavior report." *Id.* (internal quotation marks and brackets omitted) (quoting *Taylor v. Rodriguez*, 238 F.3d 188, 192-93 (2d Cir. 2001)).

The misbehavior report served on Elder charged him with "forgery" and "stealing" and listed the "incident date" as September 10, 2012. (A-297). This was the date that McCarthy completed the report, but none of the charged forgeries or thefts occurred on that date. (A-306-12). The report stated that McCarthy investigated "possible disbursement forgeries" against Lawrence on September 4

and 5, 2012, and that McCarthy believed "the handwriting on Inmate Elder's personal [disbursement] form matche[d] all of the [disbursement] forms" that he suspected were forged. (A-297-98). The report did not, however, include copies of the allegedly forged forms, list the dates on the forms, or describe the forms in any other way. Elder was not shown the forms before the hearing, and even then, he did not have a meaningful opportunity to review them. (*E.g.*, A-263 Tr. 38-40; A-265-66 Tr. 48-49; A-269 Tr. 62; *see also* Dkt. 82-7 at 18).

This was grossly inadequate. Elder was forced to defend himself against theft and forgery charges at a disciplinary hearing without knowing which disbursement forms he was accused of forging. He did not even know the *number* of forms he allegedly forged, let alone the dates on which he supposedly submitted them, the individual amounts that were allegedly stolen, or the recipients of those funds. Indeed, at the hearing, Elder complained that "all[] I have is the misbehavior report," since MacIntyre had not provided "copies of any of the evidence," so "I have no copy of what I am accused of," including the "dates and times" of the misconduct. (A-319).

This case is similar to *Sira v. Morton*, where this Court held that an inmate disciplined for attempting to organize a strike had "presented a viable due process claim of inadequate notice." 380 F.3d at 72. The inmate received a misbehavior report that identified the rules he was charged with violating and alleged that he

had urged or threatened other inmates to participate in a work stoppage that had been planned for January 1, 2000. *See id.* at 61-62. The report did not identify the other inmates or state where or when he had engaged in this conduct. In the portion of the form identifying the incident date, the corrections officer had written January 19, 2000, but this was merely the date the officer filed the charges and served the report on the inmate. *See id.* at 61-62, 70-71.

The Court held that this report did not provide sufficient notice, largely because it failed to identify the time period or extent of the alleged misconduct. The listed incident date was "misleading," since it "correspond[ed] to [the officer's] filing of the disciplinary charges, not to any particular misconduct by [the inmate]." *Id.* at 71. The planned date of the strike was inadequate as well, since it did not "give notice as to whether [the inmate's] charged conduct allegedly occurred before or after [that date], or whether his actions spanned a day, week, month, or longer." *Id.* In addition, the inmate "could only guess whether he was being charged with making a single objectionable statement to one inmate or a host of statements to groups of inmates." *Id.* at 71.

Here, too, Elder could only guess how many disbursement forms he was charged with forging; when he supposedly forged them, including whether he was accused of submitting these forms on a single day or over the course of several months; and where he allegedly sent this money. The misbehavior report provided

none of that information, and Elder did not see the forms themselves at any point before the hearing. Accordingly, on these undisputed facts, Elder was entitled to summary judgment.

B. The District Court's Findings To The Contrary Were Erroneous

As Elder was not given adequate notice of the charges against him, the district court erred in dismissing his claim. In reaching its decision, the district court clearly misunderstood Elder's arguments, the contents of the record, and the applicable law.

1. The misbehavior report.

The district court did not address whether the misbehavior report was adequately specific, even though the parties briefed the issue. (Dkt. 80 at p. 15 of 111; Dkt. 82-7 at 14; Dkt. 84 at pp. 13-14 of 30; Dkt. 85 at 4-5). Nor did the court so much as mention *Sira v. Morton*, even though both sides cited the case. (Dkt. 82-7 at 17-18; Dkt. 84 at p. 13 of 30). Rather, the court latched onto Elder's citation of 7 NYCRR 251-3.1—a state regulation that requires misbehavior reports to specify certain facts, including the date of the incident—and held that the "violation of such [state] procedures does not amount to a federal due process violation." (SPA-29 n.24). But Elder had made clear that the misbehavior report violated federal due process requirements as well (Dkt. 84 at pp. 13-16 of 30), and Defendants argued that the misbehavior report satisfied those requirements (Dkt.

85 at 4-5). As explained above, Elder was correct, and the district court improperly ignored his argument in order to dismiss his claim.[5]

2. The disbursement forms

The district court did address one issue related to pre-hearing notice: it held that Elder had no due process claim based on Defendants' failure to give him copies of the allegedly forged disbursement forms in advance of the hearing. According to the district court, this was at worst "harmless error" because (1) Elder was "able to view, if not hold, the documents at the hearing," and (2) he "ha[d] not shown how the outcome of the hearing might have been different if he had possessed actual copies of the [allegedly] forged documents beforehand." (SPA-34). On this basis, the court dismissed Elder's claim with prejudice. (SPA-43). This was error for several reasons.

a. Elder's opportunity to "view" the disbursement forms was both meaningless and irrelevant. *First*, Elder testified that he "didn't see" the forms "at the hearing" and "d[id]n't know" what they contained. (A-265-66 Tr. 48-49; A-269 Tr. 62). While Kling may have "flipp[ed] through" the forms and "show[n]" them to Elder from where Kling was seated, Kling kept the forms by "his side," did

[5] Thus, even if Elder had not established his entitlement to summary judgment (*but see* Point III.A *supra*), this Court would at a minimum remand the action to the district court for consideration of Elder's argument. *See Henriquez v. Starwood Hotel Resorts Worldwide Inc.*, 549 F. App'x 37, 38 (2d Cir. 2014).

not let Elder handle them, and thereby prevented Elder from taking a good "look at [them]." (*Id.*; *see also* A-19 ¶ 25; A-25 ¶¶ 29-30 & n.1; A-28 ¶ 32). Even if Elder was briefly able to see that the signatures on the forms were obscured by a stamp, as the district court believed (SPA-34 n.30), that would not demonstrate that he had a meaningful opportunity to review the forms. In granting summary judgment against Elder, the court improperly resolved factual disputes against him, and its decision cannot be sustained on this ground.

Second, even if Elder had been allowed to examine the disbursement forms at the hearing, that would not have cured the notice problem. A prisoner is entitled to receive adequate notice at least "twenty-four hours *prior to* conducting a disciplinary hearing." *Sira*, 380 F.3d at 70 (emphasis added); *accord Benitez v. Wolff*, 985 F.2d 662, 665 (2d Cir. 1993); *Franco v. Kelly*, 854 F.2d 584, 587-88 (2d Cir. 1988). Furthermore, "the inmate must be allowed to *retain* for 24 hours the written notice given him," so that he may have "a fair chance to prepare his defenses" without relying only "on his memory" of the charges." *Benitez*, 985 F.2d at 665 (emphasis added). Here, it is undisputed that Elder was not given the disbursement forms in advance of the hearing, let alone twenty-four hours before the hearing. Any purported "curative disclosures" at the hearing were therefore "insufficient"—even more so because Elder was not "afforded [a] meaningful opportunity to prepare a response to the new information." *Sira*, 380 F.3d at 72.

b. Nor was it proper for the court to dismiss Elder's claim because it believed that adequate notice would not have changed the result of the hearing. *First*, a § 1983 claim cannot be dismissed simply because the due process violation was "harmless." The "right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). As a result, the Supreme Court has "clearly established" that a prisoner is "entitle[d] to recover at least nominal damages under § 1983 if he proves" that "the procedures [used to deprive him of liberty] were wrong," regardless of whether "the result" of the disciplinary process was wrong "as a substantive matter." *Edwards v. Balisok*, 520 U.S. 641, 645 (1997); *accord Hughes v. Rowe*, 449 U.S. 5, 13 n.12 (1980) (quoting *Carey*'s holding that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury"); *Patterson v. Coughlin*, 905 F.2d 564, 568 (2d Cir. 1990) ("It is clear that where there has been a denial of due process, the victim is entitled at least to nominal damages," even if he "would have been found guilty" absent the violation.); *McCann v. Coughlin*, 698 F.2d 112, 126-27 (2d Cir. 1983) (a plaintiff "unable to prove" that the "constitutional deprivation caused him some actual injury" is entitled to "nominal damages" but not "compensatory damages"); *see also Warren v. Pataki*, 823 F.3d 125, 140-41 (2d Cir. 2016) (same), *cert. denied sub nom. Brooks v. Pataki*, 137 S. Ct. 380 (2016);

Toliver v. City of New York, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (prisoner may be awarded "nominal and punitive damages" even if not entitled to compensatory damages).

The district court did not consider any of this authority. The only Second Circuit case the district court cited to justify dismissal on "harmless error" grounds was *Powell v. Coughlin*, 953 F.2d 744 (2d Cir. 1991). But *Powell* involved the expungement of disciplinary records, not a § 1983 claim for damages. The Court held only that it is "inappropriate to *overturn the outcome* of a prison disciplinary proceeding because of a procedural error without making the normal appellate assessment as to whether the error was harmless or prejudicial." *Id.* at 750 (emphasis added). Just as an appellate court will not reverse convictions for harmless error, "the conditions of confinement of a sentenced prisoner may be made temporarily more severe as discipline for a prison rules infraction despite a harmless error in adjudicating the violation." *Id.* The prisoner does, however, have a valid § 1983 claim. *See, e.g.*, *Patterson*, 905 F.2d at 568.[6]

[6] In a single case involving a § 1983 claim for damages, this Court suggested that "violations of [the] right" to adequate "assistance . . . in advance of a prison disciplinary hearing" are "reviewed for 'harmless error.'" *Pilgrim v. Luther*, 571 F.3d 201, 206 (2d Cir. 2009) (quoting *Powell*, 953 F.2d at 750). There, however, the plaintiff "fail[ed] to identify any relevant testimony that was excluded as a result" of his assistant's inaction, and he "deci[ded] not to call witnesses when given the opportunity." *Id.* As a result, there arguably was no due process violation in the first place. *See Bedoya v. Coughlin*, 91 F.3d 349, 353 (2d Cir.

Second, as explained below, the evidence at the hearing was not strong enough for any procedural violations to be "harmless." Indeed, as the Fourth Department unanimously held, the evidence was not even strong enough to support the convictions as a substantive matter. *See Elder*, 115 A.D.3d at 1177-78. Elder's claim of inadequate notice therefore should be reinstated for judgment on liability and a trial on causation and damages.

IV. ELDER IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM THAT DEFENDANTS VIOLATED HIS DUE PROCESS RIGHT TO A DECISION SUPPORTED BY SOME RELIABLE EVIDENCE

The district court erred in dismissing Elder's claim that he was disciplined based on inadequate evidence. The record at the hearing was entirely bare on one crucial issue, and nothing Defendants say now can forestall summary judgment in Elder's favor.

"[D]ue process" permits prison officials to discipline a prisoner only if there is some "reliable evidence" of guilt. *Sira*, 380 F.3d 81; *see also id.* at 77-78; *Luna v. Pico*, 356 F.3d 481, 488 (2d Cir. 2004). In applying this standard, the Court reviews the "record of the disciplinary proceeding," *Zavaro v. Coughlin*, 970 F.2d

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1996) (no due process violation where plaintiff waived request for witness); *Kingsley*, 937 F.2d at 30 (witness request can be denied for "irrelevance"). Moreover, *Pilgrim* could not overrule either the decisions of the Supreme Court or the prior decisions of this Court establishing that "harmless error" affects only damages, not liability. It does not appear that the *pro se* appellant in *Pilgrim* brought these decisions to the panel's attention. Regardless, by its terms, *Pilgrim* covers only the right to assistance, not the right to adequate notice at issue here.

1148, 1149 (2d Cir. 1992), and assesses the evidence that the hearing officer actually considered, *see Taylor*, 238 F.3d at 194; *Shabazz v. Bezio*, 511 F. App'x 28, 32 (2d Cir. 2013). The sufficiency of the evidence is "an issue of law subject to . . . plenary review." *Sira*, 380 F.3d at 76.

The district court rejected Elder's sufficiency challenge on the ground that Kling could properly rely on the similarities that he and McCarthy perceived between the handwriting on the disbursement forms and the handwriting on Elder's documents, as well as the possibility that the officers who signed the forms may have been "lax in verifying I.D." (SPA-36-38). But even if this was reliable proof—which is not self-evident—there was a critical element missing from Kling's analysis that completely undermines the finding of guilt.

Kling conducted the proceeding on the assumption that someone had forged disbursement forms and stolen money from Lawrence. There was, however, no reliable evidence that any crime had occurred. In its recitation of the purportedly "undisputed" facts, the district court stated that "[t]he misbehavior report indicated that . . . Lawrence . . . had complained to McCarthy that someone had, on multiple occasions, stolen funds from his inmate account by forging his signature on disbursement request forms." (SPA-16-17). The misbehavior report, however, says no such thing. The misbehavior form says only that McCarthy had "rec[ei]ved" an "investigation . . . of Inmate Lawrence . . . pertaining to possible

disbursement forgeries against his account." (A-297). As McCarthy later admitted, "[t]here is no indication in the [m]isbehavior [r]eport that [he] showed Inmate Lawrence the [d]isbursement forms o[r] that Inmate Lawrence claimed that it was not his signature on the questioned forms." (A-106).

At the hearing, McCarthy did not clarify the cryptic reference to an "investigation" in his misbehavior report or explain why he believed anyone had been forging disbursement forms. In fact, Kling began his examination of McCarthy with a question that presupposed that the disbursement forms were forged. (A-321 ("let me start off by asking you . . . what le[d] you to believe that Inmate Elder was the person who committed [the] forgery")).

This was improper. "Due process does not permit a hearing officer simply to ratify the bald conclusions of others[,] . . . even when the conclusion is that of . . . [a] person of general reliability." *Sira*, 380 F.3d at 80; *accord Zavaro*, 970 F.2d at 1152-53. The conclusion that someone was stealing money from Lawrence was not supported by any evidence in the record. Without that missing link, the handwriting "analysis," if credited, established only that whoever filled out the forms had handwriting like Elder's. That person could have been Lawrence himself, or someone who was authorized by Lawrence to submit the form.

This is precisely why the Fourth Department annulled the disciplinary ruling and expunged it from Elder's record. That court held that Kling's "determination

[wa]s not supported by substantial evidence" because "there [wa]s no indication in the misbehavior report that . . . [Lawrence] claimed that it was not his signature on the forms," and "[t]here was likewise no evidence to that effect presented at the hearing." *Elder*, 115 A.D.3d at 1177-78.

In support of Defendants' motion for summary judgment, McCarthy claimed that "Lawrence had complained of unauthorized disbursements." (A-245 ¶ 9). But the hearing record contains no such evidence, and *post hoc* offers of proof do not make Kling's determination any less arbitrary. *See supra* at 44-45. *Cf. Figueroa v. Mazza*, 825 F.3d 89, 99 n.8 (2d Cir. 2016) ("Evidence kept hidden under a bushel, never brought out to enlighten the factfinder, does not figure in the calculus.").[7]

The record simply does not support Kling's decision, and nothing more is required for summary judgment in Elder's favor.

V. THE COURT SHOULD GRANT ELDER LEAVE TO REPLEAD HIS EIGHTH AMENDMENT CLAIM

Elder pled an Eighth Amendment claim with potential merit, and he should have leave to replead it. In his amended complaint, Elder alleged that during his time in the SHU, he was subject to unconstitutional conditions of confinement.

[7] Even if McCarthy had testified about Lawrence's complaints, Lawrence refused to testify, and Kling would have been required to make some independent assessment of Lawrence's credibility in order for the hearsay to qualify as reliable evidence. *See Luna*, 356 F.3d at 489.

For 180 days, Elder was confined for 23 hours a day in his cell, which was "often dirty . . . with barely any cleaning supplies[,] making keeping the cell clean difficult and almost impossible." (A-30-31 ¶¶ 39-40). Among other things, Elder alleged that he was permitted to shower only "2-3 times a week" and had to "alternate stepping in an[d] out of the shower with [his] cell mate['s] def[e]cation." (*Id.*).

The district court granted Defendants' motion to dismiss Elder's Eighth Amendment claim. The court acknowledged that Elder's allegations of unsanitary conditions were his "most compelling" support for the claim, but ultimately concluded that he had not plausibly alleged that any Defendant knew about or was deliberately indifferent to those conditions. (SPA-14). As a result, the court dismissed the Eighth Amendment claim, evidently without leave to amend, as the court directed Defendants to file an answer the remainder of the amended complaint. (SPA-14-15).

The district court erred in dismissing Elder's claim—on Defendants' first and only motion to dismiss—without providing him an opportunity to amend. As the district court recognized, Elder's allegation that he was subject to unsanitary conditions of confinement for a half-year raised the possibility that he could state a violation of the Eighth Amendment. *See Darnell v. Pineiro*, 849 F.3d 17, 30–31

(2d Cir. 2017); *Willey*, 801 F.3d at 68; *Walker v. Schult*, 717 F.3d 119, 127 (2d Cir. 2013).

While Elder did not sufficiently plead that any named Defendant should be held responsible, he was a *pro se* litigant, and there was a chance he could supply the necessary allegations. Where the court "cannot rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," a *pro se* prisoner should be afforded "at least" one opportunity to replead the "personal involvement" of "named and unnamed" officers in "alleged Eighth Amendment violations." *Shomo v. City of New York*, 579 F.3d 176, 183-84 (2d Cir. 2009) (internal quotation marks omitted); *see also Willey*, 801 F.3d at 71-72 (remanding so that *pro se* prisoner could identify the officers responsible for Eighth Amendment violation). This Court should therefore vacate the dismissal and remand to provide Elder another chance to further justify his claim.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to (1) enter summary judgment for Elder on his claims for violations of the right to call witnesses, to adequate notice, and to a decision based on reliable evidence; (2) grant Elder leave to replead his Eighth Amendment claim; and (3) conduct further proceedings on all claims.

Dated: New York, New York
April 13, 2018

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Plaintiff-Appellant certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 11,674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2016.

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Dated: April 13, 2018

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JARVIS ELDER,

Plaintiff,

DECISION AND ORDER

-vs-

14-CV-6216 CJS

J. McCARTHY, Sergeant, T. MacINTYRE, Corrections Officer, KEN KLING, Hearing Officer/ Voc. Supr., ALBERT PRACK, Dir. of Special Housing, and MARK L. BRADT, Superintendent,

Defendants.

INTRODUCTION

This is an action under 42 U.S.C. § 1983 brought by Jarvis Elder ("Plaintiff"), a prison inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). Now before the Court is Defendants' motion (Docket No. [#48]) to partially dismiss the Amended Complaint. The application is granted in part and denied in part.

BACKGROUND

The facts in the Amended Complaint [#41] are accepted as true for purposes of this Decision and Order. In September 2012, Plaintiff was housed at Attica Correctional Facility ("Attica"), where Defendant J. McCarthy ("McCarthy") was a Corrections Sergeant, Defendant T. MacIntyre ("MacIntyre") was a Corrections Officer, Defendant Ken Kling ("Kling") was a Vocational Supervisor and Hearing Officer, and Defendant Mark Bradt ("Bradt") was Superintendent. On September 11, 2012, McCarthy issued Plaintiff a misbehavior report, charging him with, *inter alia*, forging disbursement requests from the

account of an inmate named Lawrence ("Lawrence"). McCarthy purportedly based the misbehavior report on confidential information concerning criminal activity by Lawrence, his discovery of certain property belong to Plaintiff in Lawrence's cell, and his examination of handwriting on disbursement forms found in Lawrence's cell. Although it is not clearly spelled out, it appears that McCarthy surmised that Lawrence learned that Plaintiff had forged his signature, and that Lawrence retaliated by taking items of personal property from Plaintiff's cell and setting Plaintiff's cell on fire.[1] In any event, Plaintiff maintains that McCarthy's misbehavior report was procedurally deficient, because it failed to comply with New York State Regulations, 7 NYCRR § 251-3.1, and was factually inaccurate.

In preparation for his disciplinary hearing, Plaintiff selected MacIntyre as his employee assistant, and asked him to arrange to have certain witnesses and documentary evidence at the hearing. In brief, Plaintiff wanted MacIntyre to obtain copies of the supposedly-forged disbursement forms, and to interview Lawrence and the corrections officers who were supposed to have verified the identity of the person submitting the forms. Plaintiff maintains, however, that MacIntyre failed to provide him with the requested evidence and did not interview potential witnesses. In particular, MacIntyre indicated that he could not identify the corrections officers who had signed the disbursement forms, because the handwriting was illegible, and that Lawrence refused to testify.

On September 14, 2012, Plaintiff appeared for his disciplinary hearing before Kling, who had been assigned as the hearing officer by Superintendent Bradt. Plaintiff contends

[1]As discussed further below, the hearing officer, Defendant Kling, subsequently found Plaintiff guilty, and as part of his decision, alluded to the fact that Lawrence had taken retaliatory action against Plaintiff. ("The severity of a charge of this nature can and may have already set off retaliation which is disruptive to the smooth operation of a facility and puts both inmates and staff in harm's way.").

that Kling refused to assist him in obtaining copies of the alleged forged disbursement forms, and failed to identify the corrections officers who had signed the disbursement forms. At the hearing, Plaintiff testified that he was innocent, though his exact explanation of what happened is unclear. *See*, Hearing Transcript. More specifically, Plaintiff vaguely indicated that there was some type of financial dealings between himself and Lawrence, involving the purchase of art supplies, but he denied stealing from Lawrence. *See*, Hearing Transcript at p. 5 ("[H]e had some money coming in so I helped the man out I did some art work I got art supplies of [sic] crafts too so I did a lot of art work for the guy so therefore he knew these moneys [sic] was going to his address only thing I don't understand is that how did he end up with my personal information."). Plaintiff further argued that McCarthy was not qualified to analyze handwriting. McCarthy admitted that he was not an expert in handwriting, and that the only real basis for the misbehavior report was his belief that the handwriting on the allegedly-forged disbursement forms was Plaintiff's. Nevertheless, Kling indicated that he found McCarthy credible, found Plaintiff guilty of the misbehavior charges, and imposed a sentence consisting of, *inter alia*, six months in the Special Housing Unit ("SHU") and $630 in restitution. Plaintiff contends, though, that Kling's ruling was arbitrary and capricious, since there was no credible evidence of his guilt.

On September 22, 2012, Plaintiff filed an appeal to Bradt, Attica's Superintendent, asserting that his "Fourteenth Amendment" rights were violated in the following ways: 1) the misbehavior report was "not in compliance with [DOCCS] standards"; 2) his employee assistant (MacIntyre) did not bring him documents or interview witnesses; and 3) the hearing officer (Kling) did not explore why an inmate witness, who had declined to testify, was unwilling to testify. On September 26, 2012, Bradt affirmed Kling's determination,

stating only, "After review, I find no reason to modify the disposition rendered." Amended Complaint [#41] at p. 86.

Subsequently, on or about October 16, 2012, Plaintiff appealed to Defendant Albert Prack ("Prack") in his capacity as DOCC's Director of Special Housing/Inmate Disciplinary Programs. In the appeal, Plaintiff asserted that his "Fourteenth Amendment" rights were violated in the following ways: 1) McCarthy did not perform a proper investigation; 2) MacIntyre did not provide proper assistance prior to the hearing; 2) Kling did not provide a fair hearing; 3) he was denied a handwriting expert witness; 4) there was no testimony from the corrections officers who would have signed off on the allegedly-forged disbursement forms; and 5) there was insufficient evidence of guilt. On December 6, 2012, Prack issued a form notice, affirming Plaintiff's disciplinary conviction. Amended Complaint [#41] at p. 62.

Subsequently, Plaintiff commenced an Article 78 Proceeding challenging the conviction. On March 21, 2014, the New York State Supreme Court, Appellate Division, Fourth Department, reversed the conviction, finding that it was not supported by substantial evidence, that MacIntyre had not provided appropriate assistance, and that Plaintiff was denied the right to call witnesses. However, by that time Plaintiff had already served 180 days in SHU.

On May 1, 2014, Plaintiff commenced this action. The Amended Complaint contends that Plaintiff was innocent of the misbehavior charge, and that Defendants violated his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution, by falsely charging and convicting him of the infraction.

The pleading contends that Plaintiff's time in SHU was a "significant and atypical

hardship," for the following reasons: 1) he was confined to his cell for 23 hours per day, with one hour of exercise; 2) he could not sleep well because the lights were left on his cell; 3) he was uncomfortable and hyper-vigilant because he was placed with an unfamiliar cell mate; 4) he had no privacy when using the toilet; 5) he was restricted to taking two showers per week; 6) he could not receive phone calls and could have only one visitor per week; 7) he could not participate in activities such as religious services, drug counseling, or vocational training; 8) he could not receive packages in the mail or purchase items from the commissary; and 9) his cell was "often dirty" and he was provided "barely any cleaning supplies." Amended Complaint ¶ ¶ 39-41.

Further, the pleading alleges that Bradt and Prack failed to properly train or supervise McCarthy, MacIntyre and Kling, with regard to the filing, investigation and hearing of disciplinary charges. The pleading also seems to allege that Kling failed to supervise McCarthy and MacIntyre, although it does not appear that he was in a supervisory position over them.

The pleading purports to assert three types of claim: 1) a Fourteenth Amendment Procedural Due Process claim; 2) a "cruel and unusual punishment" claim under the Eighth Amendment, based on Plaintiff's living conditions while he was confined in the SHU; and 3) "common law claims of excessive wrongful confinement and cruel and unusual punishment under New York Law." Amended Complaint ¶ 1.

On May 11, 2015, Defendants filed the subject motion to dismiss, pursuant to Rule 12(b)(6). The motion is directed at the § 1983 claims,[2] and has two parts: First,

[2]Defendants did not move against Plaintiff's state-law claims. *See*, Amended Complaint [#41] at ¶ 1 ("Plaintiff alleges the Common Law Claims of ["]EXCESSIVE WRONGFUL CONFINEMENT" AND "Cruel and Unusual Punishment" under New York Law." [sic]).

Defendants contend that the Amended Complaint fails to state an Eighth Amendment claim against any defendant, since Plaintiff's housing conditions in the SHU were typical of such confinement, which has already been determined to be constitutionally adequate; and second, Bradt and Prack maintain that the pleading fails to allege that they were personally involved in the alleged procedural due process violation, since it merely contends that they affirmed Plaintiff's disciplinary conviction.

On May 26, 2015, Plaintiff filed responding papers [#51].[3] With regard to the claims against Bradt and Prack, Plaintiff contends that he has adequately pleaded their personal involvement, since his appeal papers informed Bradt and Prack of constitutional violations, which Bradt and Prack failed to remedy.

Defendants filed a reply, reiterating the points in their initial brief.

DISCUSSION

Plaintiff's *Pro Se* Status

Since Plaintiff is proceeding *pro se*, the Court has construed his submissions liberally, "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994).

Motions to Dismiss Pursuant to FRCP 12(b)(6)

The general legal principles concerning motions under FRCP 12(b)(6) are well settled:

> Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. While a complaint attacked by a Rule 12(b)(6) motion to

[3]A duplicate was inadvertently filed on June 3, 2015, as docket entry [#65].

> dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007); *see also, ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) ("To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' ") (*quoting Bell Atl. Corp. v. Twombly*) (footnote omitted).

When applying this "plausibility standard," the Court is guided by "two working principles":

> First, although a court must accept as true all of the allegations contained in a complaint,[4] that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss, and determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (citations and internal quotation marks omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 1950

[4]The Court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir.1999), *cert. den.* 531 U.S. 1052, 121 S.Ct. 657 (2000).

(2009) (citation omitted). "The application of this 'plausibility' standard to particular cases is 'context-specific,' and requires assessing the allegations of the complaint as a whole." *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan v. Morgan Stanley Inv. Management Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (citation and internal quotation marks omitted).

Section 1983

Plaintiff is suing pursuant to 42 U.S.C. § 1983, and the legal principles generally applicable to such claims are well settled:

> In order to establish individual liability under § 1983, a plaintiff must show (a) that the defendant is a "person" acting "under the color of state law," and (b) that the defendant caused the plaintiff to be deprived of a federal right. See, *e.g., Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Additionally, "[i]n this Circuit personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir.1977).
>
> ***
>
> An individual cannot be held liable for damages under § 1983 "merely because he held a high position of authority," but can be held liable if he was personally involved in the alleged deprivation. *See Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir.1996). Personal involvement can be shown by: evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference ... by failing to act on information indicating that unconstitutional acts were occurring. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995).

Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 122, 127 (2d Cir. 2004).

Personal Involvement of Bradt and Prack

With regard to the § 1983 claims, the Amended Complaint asserts that Bradt and Prack should be deemed to be "personally involved" in the alleged constitutional violations,

under at least two of the *Colon* factors set forth above, namely, that Bradt and Prack were notified of the constitutional violation by reading Plaintiff's appeals but failed to remedy the situation (*Colon* factor (2)and possibly also (5)), and that Bradt and Prack were grossly negligent in training and supervising their subordinates (*Colon* factor (4)). Bradt and Prack contend, however, that the pleading fails to plausibly plead that they were personally involved in any alleged constitutional violation.

With regard to *Colon* factor four, the Court agrees that the Amended Complaint fails to plausibly allege that Bradt or Prack were grossly negligent in training or supervising McCarthy, MacIntyre or Kling. There are no factual allegations to support such a theory. Instead, the pleading merely makes factual allegations concerning alleged wrongdoing by McCarthy, MacIntyre and Kling, and then makes a conclusory and unsupported allegation that Bradt and Prack are therefore guilty of negligent training and/or supervision. Accordingly, the Amended Complaint fails to plead personal involvement by Bradt or Prack under *Colon* factor four.

With regard to *Colon* factors two and five, Defendants cite decisions by other district courts in the Western District, for the proposition that "merely affirming a hearing officer's determination is not sufficient to establish personal involvement." Def. Memo of Law at p. 9 (*citing Abdur-Raheem v. Selsky*, 598 F.Supp.2d 367, 370 (W.D.N.Y. 2009)). However, presently there is some disagreement in this Circuit as to whether a DOCCS official becomes "personally involved" in an inmate's procedural due process claim, merely by affirming a prison disciplinary conviction. *See, e.g., Ellerbe v. Jasion*, No. 3:12–cv–00580 (MPS), 2015 WL 1064739 at *7 (D.Conn. Mar. 11, 2015) ("[D]istrict courts in this circuit are split over whether and to what extent a supervisor's denial of an administrative appeal

constitutes personal involvement.").

The Second Circuit recently alluded to the unsettled nature of this question. *See, Jamison v. Fischer*, — Fed.Appx. — , 2015 WL 3953399 at *2, n. 1 (2d Cir. Jun. 30, 2015) ("*Jamison*"). In *Jamison*, the Circuit Court declined to reach the issue of whether the supervisor who affirmed the inmate's disciplinary conviction was "personally involved," since the supervisor was entitled to qualified immunity:

> Jamison's claim that Bezio violated due process by affirming the disciplinary action on administrative appeal is necessarily derivative of his claim against Tokarz. For the reasons stated as to Tokarz, then, Bezio also was entitled to qualified immunity.
>
> ***
>
> *In light of this conclusion, we need not address whether the district court correctly dismissed the complaint against Bezio for lack of personal involvement. See Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir.2013) (noting that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) "may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations" but declining to decide issue).

Jamison, 2015 WL 3953399 at *2 & n.1 (emphasis added). Such statement, with its reference to the *Grullon* decision, suggests the unsettled nature of the issue. However, *Grullon* suggests that, at the pleading stage, a prison supervisory official who actually receives a letter or appeal referencing an ongoing constitutional violation will be deemed to be personally involved in the underlying violation, unless it is clear that he took "appropriate action" to address the violation:

> At the pleading stage, even if [inmate] Grullon had no knowledge or information as to what became of his Letter after he sent it, he would be entitled to have the court draw the reasonable inference—if his amended complaint contained factual allegations indicating that the Letter was sent to

> the Warden at an appropriate address and by appropriate means—that the Warden in fact received the Letter, read it, and thereby became aware of the alleged conditions of which Grullon complained. It is of course possible that the Warden read the Letter and took appropriate action or that an administrative procedure was in place by which the Warden himself would not have received the Letter addressed to him; but those are potential factual issues as to personal involvement that likely cannot be resolved without development of a factual record.

Grullon v, City of New Haven, 720 F.3d at 141; *see also, Griffin v. Goord*, 66 Fed. Appx. 245, 246 (2d Cir. May 1, 2003) (Indicating that DOCCS Commissioner and Deputy Commissioner could have personal involvement in procedural due process violation, if they affirmed the inmate's disciplinary conviction).

The Court finds that the Amended Complaint adequately pleads personal involvement by Bradt and Prack. In that regard, following Plaintiff's conviction at the prison disciplinary hearing, and while he was still serving his SHU sentence, he filed written appeals with both Bradt and Prack, asserting that McCarthy, McIntyre and Kling violated his right to procedural due process at the hearing. Bradt and Prack subsequently issued written decisions affirming the conviction, thereby indicating that they had reviewed Plaintiff's appeal. Such facts are sufficient to demonstrate, at the pleading stage, that Bradt and Prack were made aware that a constitutional violation was occurring, and that they failed to remedy the violation. Accordingly, Bradt and Prack's motion to dismiss the § 1983 claims against them, for lack of personal involvement, is denied.

Eighth Amendment Conditions of Confinement Claim

Plaintiff maintains that the conditions in the SHU, where he spent 180 days as part of his disciplinary sentence, violated his Eighth Amendment rights. Plaintiff, though, has

confused the requirements of an Eighth Amendment claim with the requirements of a Fourteenth Amendment Procedural Due Process claim. That is, while the Amended Complaint asserts that Plaintiff experienced "significant and atypical conditions of confinement" sufficient to support a due process claim, it does not adequately plead that his living conditions in the SHU amounted to cruel and unusual punishment.

With regard to the former type of claim, "[a]n inmate has a liberty interest protected by procedural due process when his confinement subjects him to 'atypical and significant hardship in relation to the ordinary incidents of prison life.'" *Fludd v. Fischer*, 568 Fed.Appx. 70, 72 (2d Cir. Jun. 6, 2014) (citations and internal quotation marks omitted). Lengthy disciplinary sentences in the SHU may or may not satisfy the "atypical and significant" requirement, depending upon the particular facts of a case. *See, e.g., Kalwasinski v. Morse*, 201 F.3d 103, 106 (2d Cir. 1999) ("[W]e have consistently reminded the district courts that in order to determine whether a liberty interest has been affected, district courts are required to examine the circumstances of a confinement and to identify with specificity the facts upon which their conclusions are based.") (citations and internal quotation marks omitted). In Defendants' instant motion, they have not challenged Plaintiff's contention that his 180-day SHU sentence amounted to an atypical and significant hardship in relation to the ordinary incidents of prison life, sufficient to establish a liberty interest in connection with his procedural due process claim. *See, J.S. v. T'Kach*, 714 F.3d 99, 106 (2d Cir. 2013) ("In the absence of factual findings to the contrary, [SHU] confinement of 188 days is a significant enough hardship to trigger *Sandin*.").

The standard for an Eighth Amendment conditions-of-confinement claim is different, however. *See, Booker v. Maly*, No. 9:12–CV–246 (NAM/ATB), 2014 WL 1289579 at *17

(N.D.N.Y. Mar. 31, 2014) ("[A]typical and significant conditions, compared to the ordinary incidents of prison life, may be sufficient to create a liberty interest, but do not establish an Eighth Amendment violation."), *affirmed*, 590 Fed.Appx. 82 (2d Cir. Jan. 14, 2015).

> The Eighth Amendment does not mandate comfortable prisons, but prisons nevertheless must provide humane conditions of confinement. A claim under for violations of the Eighth Amendment requires (1) an objectively, sufficiently serious denial of the minimal civilized measure of life's necessities and (2) a sufficiently culpable state of mind on the part of the responsible official.

Willey v. Kirkpatrick, — F.3d — , 2015 WL 5059377 at *13 (2d Cir. Aug. 28, 2015) (citations and internal quotation marks omitted). In other words,

> [t]o demonstrate that the conditions of his confinement constitute cruel and unusual punishment, the plaintiff must satisfy both an objective test and a subjective test. First, the plaintiff must demonstrate that the conditions of his confinement result in unquestioned and serious deprivations of basic human needs. Second, the plaintiff must demonstrate that the defendants imposed those conditions with deliberate indifference.

Jolly v. Coughlin, 76 F.3d 468, 480 (2d Cir. 1996) (citations and internal quotation marks omitted).

Here, the Amended Complaint describes the conditions that Plaintiff experienced in SHU, and maintains that he was extremely bothered by them. However, the conditions about which Plaintiff complains, such as having to share a cell with an unfamiliar bunkmate, having to use the toilet without privacy, and having to go without certain privileges and social activities, do not violate the objective prong of the Eighth Amendment analysis set forth above. *See, Horne v. Coughlin*, 155 F.3d 26, 31 (2d Cir. 1998) (Six-month SHU detention, without more, did not violate the Eighth Amendment); *see also,*

Booker v. Maly, 2014 WL 1289579 at *16 ("Restrictive SHU conditions on their own do not *per se* rise to the level of cruel and unusual punishment.").

Plaintiff's most compelling allegation, concerning the conditions of his confinement in SHU, is that his cell was "often dirty" and he was provided "barely any cleaning supplies." Amended Complaint ¶ ¶ 39-41. However, even assuming *arguendo* that such a vague assertion was sufficient to plausibly plead the objective prong of an Eighth Amendment claim, which the Court doubts, Plaintiff's claim would nevertheless fail because he has not included plausible allegations that any Defendant had the required knowledge of, and deliberate indifference to, his particular living conditions.[5] *See, Booker v. Maly*, 2014 WL 1289579 at *16 ("[T]o the extent that plaintiff blames defendants Maly, Smith, Prack, and Fischer for the SHU conditions only to the extent that they were involved in the disciplinary hearing at or its review, any Eighth Amendment claim regarding the subsequent SHU conditions may be dismissed because there is no allegation that any of the three defendants were personally involved in maintaining the conditions in SHU or expected plaintiff to be subjected to anything more than the 'normal' conditions in SHU.") (footnotes and citations omitted). Consequently, the Amended Complaint fails to plead an actionable Eighth Amendment claim.

CONCLUSION

Defendants' application for partial dismissal [#48] is granted in part and denied in part. The Eighth Amendment claim is dismissed, but Defendants' application is otherwise

[5]Similarly, even assuming that the particulars concerning Plaintiff's complaint about the lights being left on in the SHU satisfy the Eight Amendment's objective prong, *see, Booker v. Maly*, 2014 WL 1289579 at *18 (collecting cases discussing whether "nightime cell illumination" violates the 8th Amendment), he has not alleged that any Defendant was deliberately indifferent to that situation.

denied. Defendants are directed to file and serve an answer to the Amended Complaint within twenty days of the date of this Decision and Order. Defendants' counsel is also directed to contact the chambers of the Honorable Jonathan W. Feldman, the United States Magistrate Judge to whom this case has been referred for all non-dispositive pretrial matters, and request a new scheduling order.

So Ordered.

Dated: Rochester, New York
September 8, 2015

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JARVIS ELDER,

Plaintiff,

-vs-

J. McCARTHY, Sergeant, T. MacINTYRE, Corrections Officer, KEN KLING, Hearing Officer/ Voc. Supr., ALBERT PRACK, Dir. of Special Housing, and MARK L. BRADT, Superintendent,

Defendants.

DECISION AND ORDER

14-CV-6216 CJS

INTRODUCTION

This is an action under 42 U.S.C. § 1983 brought by Jarvis Elder ("Plaintiff"), a prison inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). Now before the Court are Plaintiff's motion for summary judgment (Docket No. [#80]) and Defendants' cross-motion for summary judgment [#82]. Plaintiff's application is denied, Defendants' application is granted in part, and this action is dismissed.

BACKGROUND

Unless otherwise noted, the following are the undisputed facts of this case. In September 2012, Plaintiff was housed at Attica Correctional Facility ("Attica"), where Defendant J. McCarthy ("McCarthy") was a Corrections Sergeant, Defendant T. MacIntyre ("MacIntyre") was a Corrections Officer, Defendant Ken Kling ("Kling") was a Vocational Supervisor and Hearing Officer, and Defendant Mark Bradt ("Bradt") was Superintendent.

On September 11, 2012, McCarthy issued Plaintiff a misbehavior report, charging him with two infractions: "forgery" and "stealing." The misbehavior report indicated that a week earlier, on September 4, 2012, an inmate named Reginald Lawrence ("Lawrence") had complained to McCarthy that someone had, on multiple occasions, stolen funds from his inmate account by forging his signature on disbursement request forms. While investigating that claim, McCarthy obtained copies of seven forged disbursement forms, which had been used to debit a total of $630 from Lawrence's account, as well as other documents relating to payments that were made after the disbursement forms were processed.[1] Although some portions of the disbursement forms are not legible, it appears that Lawrence's name is misspelled as "Lawerance" on all of them, though Lawrence's inmate identification number is correctly set forth.

Pursuant to facility rules, the disbursement forms bore not only Lawrence's purported signature, but were also purportedly countersigned or initialed by corrections officers who had verified that Lawrence was the person submitting the disbursement form.

All seven of the forged disbursement forms directed that payment be made to the same person: "Chris Brinson." Plaintiff admits that he knows "a few Chris Brinsons," but contends that they do not spell their last names exactly as set forth on the disbursement forms.[2] McCarthy also obtained a copy of a cleared check that had been issued by Attica, pursuant to one of the forged disbursement forms, directing funds from Lawrence's

[1]McCarthy Affidavit at ¶ ¶ 6-8 & Ex. A.
[2]Pl. Dep. at pp. 63-64. After initially indicating that he knew "a few Chris Brinsons," Plaintiff apparently changed his testimony, stating, "I know an Arthur Chris Brinson, but not no just straight Chris Brinson." *Id.* at p. 64.

account to be paid to "Chris Brinson." The back of the check was endorsed by two people: "Chris Brinson" and "Winifred Pike." Winifred Pike happens to be the name of Plaintiff's mother.[3]

The same day that Lawrence complained to McCarthy about the forgeries, a fire destroyed the contents of Plaintiff's cell, which was located near Lawrence's cell. Later that day, McCarthy received confidential information that Lawrence was "involved in possible drug activity," and that he had set the fire in Plaintiff's cell. McCarthy searched Lawrence's cell and discovered items of property belonging to Plaintiff, including an address list, a phone list, and three disbursement forms bearing Plaintiff's name. Two of the disbursement forms directed payment to "W. Pike," and the reader will recall that "Winifred Pike" is both the name of Plaintiff's mother and one of the names endorsed on the check drawn on Lawrence's inmate account.

The following day, September 5, 2012, McCarthy showed Plaintiff the documents that he had found in Lawrence's cell. Plaintiff indicated that the documents were his, and that it was his handwriting on the disbursement forms. Plaintiff told McCarthy that he did not know how his papers had ended up in Lawrence's possession.

McCarthy then noticed that the handwriting on Plaintiff's disbursement forms was similar to the writing on the forged disbursement forms that had been used to debit Lawrence's account. Based upon the similarity of the handwriting, McCarthy charged Plaintiff with forgery and stealing.

[3]Pl. Deposition at pp. 29, 61. At his deposition, Plaintiff was asked if the "Winifred Pike" signature on the check belonged to his mother, but he indicated that he was not familiar with his mother's signature. *Id*. at 103.

Upon being charged with these disciplinary infractions, Plaintiff was placed in keeplock (confined to a cell) in a different cell block while awaiting a Tier 3 disciplinary hearing. Consequently, defendant MacIntyre was assigned to act as Plaintiff's assistant to help him prepare for the hearing, pursuant to 7 N.Y.C.R.R. § § 251-4 & 253.4. Plaintiff maintains that he asked MacIntyre to do the following things to prepare for the hearing: 1) arrange to have the officers who verified the signatures on the allegedly-forged disbursement forms present at the hearing; 2) arrange to have a handwriting specialist compare Plaintiff's handwriting to the handwriting on the allegedly-forged disbursement forms; 3) provide a copy of "Chapter V," apparently referring to 7 N.Y.C.R.R., Chapter V, which concerns, *inter alia*, procedures for disciplinary hearings;[4] 4) arrange to have Sergeant McCarthy present at the hearing; 5) arrange to have inmate Lawrence testify at the hearing; 6) provide a copy of the "forgery directive"; and 7) provide copies of the allegedly-forged disbursement forms. Plaintiff contends that MacIntyre returned after about twenty minutes and told him that he was unable to identify the officers who had verified the disbursement form signatures; that Lawrence was unwilling to testify; that Plaintiff had to wait until the hearing to see copies of the allegedly-forged documents; that there was no directive concerning forgery; and that Plaintiff would need to arrange with the hearing officer to have McCarthy testify. MacIntyre also apparently did not give Plaintiff a copy of "Chapter V," though the Amended Complaint suggests that MacIntyre understood Plaintiff to be requesting a "directive" concerning Chapter V, which does not exist.[5]

[4]*See*, Pl. Dep. at p. 44.
[5]Amended Complaint ¶ 23.

On September 14, 2012, Plaintiff appeared for his disciplinary hearing before Kling. Kling reviewed with Plaintiff the charges against him and the documentary evidence supporting the misbehavior report.[6] In that regard, Plaintiff contends that Kling displayed the allegedly-forged disbursement forms to him, but did not allow him to personally handle them.[7] Plaintiff acknowledged that he had been served with a copy of the misbehavior report, and pleaded not guilty to both charges. Kling also reviewed with Plaintiff some of the requests that he had made to MacIntyre, which had been written on an "assistant form" that MacIntyre had filled out, and which Plaintiff had signed. Kling reiterated that inmate Lawrence was unwilling to testify. Plaintiff asked Kling if Lawrence had given a reason for his unwillingness to testify, and Kling responded, "[A]ll he wrote [is that he] does not want to testify."[8] Kling stated that he could not force Lawrence to testify. Kling further told Plaintiff that he would need to be "more specific" about the corrections officers that he wanted to have testify, since he could not identify the officers who had signed the forged disbursement forms by their handwriting, which was illegible.[9] Plaintiff agreed that the signatures were illegible.[10] Plaintiff complained that MacIntyre had not given him copies of the "evidence against him," apparently referring to copies of the forged disbursement forms. Kling did not specifically respond to that statement, although, as already noted, he had already displayed the forms to Plaintiff. Kling then adjourned the

[6]Hearing Transcript at pp. 3-4 (In response to Plaintiff's objection, Kling indicated that at that moment he was placing on the record the charges against Plaintiff and the evidence, and that he would consider Plaintiff's objections when he began taking testimony: "Kling: . . . [T]his is just a matter of putting the charges into the record along with the evidence. Um the – in Lawrence['s] cell are included [sic] in the evidence right here is the outside of the envelope the disbursement form the address list and — then the 7 pages of disbursement – of inmate Lawrence['s] name these were the one that were under investigation then 2 mail receipts and the back of a check and part of a check made out to Chris Brunson[.] [sic]").

[7]Pl. Dep. at pp. 49, 62.

[8]Hearing Transcript at p. 2.

[9]Hearing Transcript at p. 2.

[10]Hearing Transcript at p. 4.

hearing because McCarthy was unable to testify that day.

On September 21, 2012, Kling resumed the hearing. Kling began by reviewing what had already occurred during the hearing, and then asked Plaintiff if he wanted to testify. Plaintiff testified, in pertinent part, that he "did not steal" anything from Lawrence and did not forge the disbursement forms. [11] Plaintiff also stated that he did not know how his personal papers had ended up in Lawrence's cell, and he speculated that Lawrence might have "t[aken] some of [his] stuff out of [his] cell and made it look like [his] handwriting." Plaintiff further indicated that he could not have forged the forms because corrections officers were required to verify the signatures of the persons submitting the forms. Plaintiff also suggested that Lawrence was "trying to pull a scam to get money."

Plaintiff acknowledged that he had some type of relationship with Lawrence involving money, but he was extremely vague about the details. Plaintiff repeatedly referred to Lawrence as "the kid," which seems odd, since, according to DOCCS records, Lawrence is almost nine years older than Plaintiff.[12] In any event, Plaintiff stated that he had become acquainted with Lawrence and had "helped him out." Plaintiff stated that Lawrence "had some money coming in," and that Plaintiff had done "some art work," and had obtained "art supplies" and "crafts" for Lawrence, and that Lawrence "knew these moneys was going to his address [sic]."[13] Plaintiff further stated that Lawrence had "a little stand - trying to get money but based on conversation that [k]new this money was going to this address [sic]."). Plaintiff did not explain these cryptic statements, even

[11]Hearing Transcript at pp. 5-7.
[12]At deposition Plaintiff indicated that he was born in 1980, Deposition at p. 9, while DOCCS records indicate that Lawrence, DIN #97-A-7376, was born in 1971. http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ1/WINQ000
[13]Hearing Transcript at p. 5.

though Kling gave him the opportunity to do so.[14]

Kling then took testimony from McCarthy, who described his investigation, and explained how he had concluded that Plaintiff was responsible for the forgeries, based upon the similarity of the handwriting. McCarthy indicated that he could not identify the officers who had apparently verified the signatures on the forged disbursement forms, and Kling interjected that he had also unsuccessfully attempted to identify the signatures by showing them to "different officers" "in the block."[15] McCarthy acknowledged that it was facility policy for officers to verify inmates' identities when handing out mail and when taking disbursement forms, and stated that he "wouldn't be able to tell" how or why officers might have signed the forged forms. Lastly, McCarthy acknowledged that he was not a specialist in handwriting analysis.

Kling then reviewed with Plaintiff the additional items that Plaintiff had requested. Kling told Plaintiff that he did not have access to a handwriting expert, and therefore could not provide one. Kling further indicated that there was no DOCCS "directive" concerning forgery.[16] Kling reiterated that it was impossible to identify or take testimony from the officers who had signed the disbursement forms, since their signatures were illegible, and Plaintiff responded that even though they could not identify the officers, the fact that the officers had signed the forms indicated that no forgery had occurred.[17] Kling asked Plaintiff if he wanted to submit any further evidence, and Plaintiff essentially made a

[14]Hearing Transcript at pp. 6-7.
[15]Hearing Transcript at p. 8.
[16]Plaintiff responded that MacIntyre must have made a mistake in indicating that Plaintiff had requested such a directive, because he had asked MacIntyre for a directive concerning "timeliness," not forgery. Kling did not directly respond to that statement.
[17]Hearing Transcript at p. 11.

closing argument, indicating that he had a good disciplinary record, but had "got[ten] involved with the wrong guy [Lawrence] who got [him] in trouble."[18] Again, Plaintiff did not explain what he meant by having "gotten involved" with Lawrence. Kling asked Plaintiff if he had "any procedural objections [to] the way [he had conducted the hearing]," and Plaintiff responded, "Um, I can say that you [were] pretty much fair you can only do so much you know so – I already object to it that is basically it [sic]."[19]

After a brief adjournment, Kling announced that he had found Plaintiff guilty of both forgery and stealing, noting the "compelling similarity" between Plaintiff's handwriting and the writing on the forged disbursement forms.[20] Kling indicated that he credited McCarthy's testimony, and noted that Plaintiff had not offered a "credible defense." Kling indicated that the officers' signatures on the forms did not disprove forgery, stating, "some officers may have been lax in verifying IDs." Kling sentenced Plaintiff principally to six months in the Special Housing Unit ("SHU"). In that regard, Kling indicated that he considered the infraction to be severe from a security standpoint, particularly since the forgery and theft seemed to have precipitated dangerous retaliation, in the form of the arson to Plaintiff's cell.

[18]Hearing Transcript at p. 12.
[19]Hearing Transcript at p. 12.
[20]That Plaintiff knows "a few Chris Brinsons, and that his mother's name is Winifred Pike, are facts that came out during discovery in this action. There is no indication that Kling was aware of them when he issued his decision.

Plaintiff appealed his conviction to Bradt, the facility superintendent.[21] Bradt issued a form denial of the appeal, which gave no explanation other than a boilerplate statement that, "After review, I find no reason to modify the disposition rendered."

Plaintiff next filed an appeal with defendant Albert Prack ("Prack"), Director of DOCCS's SHU/Inmate Disciplinary Program.[22] On December 6, 2012, Prack issued a form decision, denying the appeal, and explaining only that the hearing "ha[d] been reviewed and affirmed."

Plaintiff next filed an Article 78 Proceeding in New York State Supreme Court, Wyoming County, which was transferred to the New York State Supreme Court, Appellate Division Fourth Department. On March 21, 2014, the court issued a Memorandum and Order, reversing the disciplinary conviction. However, by that time, Plaintiff had already served his SHU sentence.

On May 1, 2014, Plaintiff commenced this action. In pertinent part the Amended Complaint contends that Plaintiff was innocent of the misbehavior charge, and that

[21]Curiously, the record contains ***three*** different versions of such appeal, which discrepancy is not explained as far as the Court is aware. More specifically, Exhibit H to the original Complaint in this action is a handwritten letter of appeal addressed to Bradt, asserting the following points: 1) Plaintiff's 14th Amendment rights were violated at the hearing; 2) the assistant (MacIntyre) failed to provide requested documents and did not identify the officers who countersigned the disbursement forms; 3) Kling failed to find out why Lawrence was unwilling to testify; and 4) the hearing did not comply with New York State regulations. A second version of this appeal is attached as Exhibit H to the Amended Complaint. This version is essentially similar to the aforementioned version, except that it is typed. Finally, Defendants have submitted a third version of the appeal, attached as Exhibit 14 to the Sheehan Affidavit [#82-6]. This version contains far less information than the versions submitted by Plaintiff; for example, this version does not expressly refer to any constitutional violation, nor does it detail any specific failings by either MacIntyre or Kling. Rather, this version merely indicates that the sentence imposed was "harsh" and "unjustified," and asks Bradt to "look into the matter." Incidentally, the version submitted by Defendants is the only version which is stamped as having been received by the Attica Superintendent's office. However, for purposes of the instant Decision and Order, the Court will assume that the most-detailed version of the appeal is the one that Plaintiff actually sent to Bradt.

[22]Docket No. [#82-6], Sheehan declaration, Ex. 16. This appeal specifically alleged that Plaintiff's "Fourteen[th] Amendment Constitutional Rights" had been violated, and essentially listed all of the aforementioned actions by McCarthy, MacIntyre and Kling. For example, the appeal asserted that McCarthy had failed to conduct a proper investigation, that MacIntyre had failed to help Plaintiff prepare for the hearing, and that Kling had failed to conduct a proper hearing.

Defendants violated his due process rights under the Fourteenth Amendment to the U.S. Constitution, by falsely charging and convicting him of the infractions. On October 5, 2015, Plaintiff filed the subject motion for summary judgment [#80], and on November 16, 2015, Defendants filed the subject cross-motion for summary judgment [#82]. On December 16, 2015, Plaintiff filed a response [#84],[23] and on January 29, 2016, Defendants filed a reply [#85].

DISCUSSION

Plaintiff's *Pro Se* Status

Since Plaintiff is proceeding *pro se*, the Court has construed his submissions liberally, "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994).

Rule 56

The parties have moved for summary judgment pursuant to Fed. R. Civ. P. 56. Summary judgment may not be granted unless "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 Moore's Federal Practice, § 56.11[1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial,

[23]Plaintiff asserts, in pertinent part, that Defendants' counsel "forged" their signatures on their affidavits, and that their sworn statements are not evidence. *See*, Jarvis Declaration [#84].

the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir.1996) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)), *cert denied*, 517 U.S. 1190 (1996).

The burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To do this, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir.1993).

Section 1983

Plaintiff is suing pursuant to 42 U.S.C. § 1983, and the legal principles generally applicable to such claims are well settled:

> In order to establish individual liability under § 1983, a plaintiff must show (a) that the defendant is a "person" acting "under the color of state law," and (b) that the defendant caused the plaintiff to be deprived of a federal right. See, *e.g., Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Additionally, "[i]n this Circuit personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir.1977).
>
> ***
>
> An individual cannot be held liable for damages under § 1983 "merely because he held a high position of authority," but can be held liable if he was personally involved in the alleged deprivation. *See Black v. Coughlin*,

> 76 F.3d 72, 74 (2d Cir.1996). Personal involvement can be shown by: evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference ... by failing to act on information indicating that unconstitutional acts were occurring. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995).

Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 122, 127 (2d Cir. 2004).

14th Amendment Procedural Due Process in Prison Disciplinary Hearings

Plaintiff contends that Defendants violated his 14th Amendment procedural due process rights. In general, "[t]o prevail on a section 1983 due process claim arising out of a disciplinary hearing, a plaintiff must show that he both (1) possessed an actual liberty interest and (2) was deprived of that interest without being afforded sufficient process." *Liao v. Malik*, No. 913CV1497GTSDEP, 2016 WL 1128245, at *4 (N.D.N.Y. Feb. 26, 2016) (citations omitted), report and recommendation adopted, No. 913CV1497GTSDEP, 2016 WL 1122069 (N.D.N.Y. Mar. 22, 2016). Here, Defendants do not dispute that Plaintiff possessed a liberty interest in avoiding confinement in the SHU for six months.

Instead, Defendants contend that Plaintiff received due process. The legal principles on this point are clear:

> The procedural safeguards to which a prison inmate is entitled before being deprived of a constitutionally cognizable liberty interest are well established under *Wolff v. McDonnell*, 418 U.S. 539 (1974). In its decision in *Wolff*, the Court held that the constitutionally mandated due process requirements include (1) written notice of the charges to the inmate; (2) the opportunity to appear at a disciplinary hearing and a reasonable opportunity to present witnesses and evidence in support of his defense, subject to a prison

> facility's legitimate safety and penological concerns; (3) a written statement by the hearing officer explaining his decision and the reasons for the action being taken; and (4) in some circumstances, the right to assistance in preparing a defense. *Wolff*, 418 U.S. at 564–69; *see also Luna v. Pico*, 356 F.3d 481, 487 (2d Cir. 2004). To pass muster under the Fourteenth Amendment, it is also required that a hearing officer's disciplinary determination garners the support of at least "some evidence." *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985); *Luna*, 356 F.3d at 487–88.

Liao v. Malik, 2016 WL 1128245 at * 5. "In addition, to establish a procedural due process claim in connection with a prison disciplinary hearing, an inmate must show that he was prejudiced by the alleged procedural errors, in the sense that the errors affected the outcome of the hearing." *Eleby v. Selsky*, 682 F. Supp. 2d 289, 292 (W.D.N.Y. 2010) (*citing Powell v. Coughlin*, 953 F.2d 744, 750 (2d Cir. 1991) and *Clark v. Dannheim*, 590 F.Supp.2d 426, 429-31 (W.D.N.Y. 2008)).

Where, as in the instant case, the inmate is entitled to assistance in preparing a defense, the failure to provide it may violate the 14th Amendment. Such assistance

> should include gathering evidence, obtaining documents and relevant tapes, and interviewing witnesses. At a minimum, an assistant should perform the investigatory tasks which the inmate, were he able, could perform for himself.

Eng v. Coughlin, 858 F.2d 889, 898 (2d Cir. 1988). However,

> [t]he scope of the assistance that must be provided to an accused inmate, as contemplated under *Wolff* and *Eng*, is not unlimited, and clearly does not require the assignment of counsel or of the functional equivalent of a private investigator. The assigned assistant is required only to perform those functions that the plaintiff would have, had he not been hampered through SHU confinement, and need not go beyond the inmate's instructions. [Again, though,] any claim of deprivation of assistance is reviewed for

harmless error.

Liao v. Malik, 2016 WL 1128245, at *6 (citations omitted).

The Alleged Violations

Here Plaintiff has sued five defendants: McCarthy, MacIntyre, Kling, Bradt and Prack. However, the § 1983 claims against McCarthy, Bradt and Prack are not actionable unless Plaintiff actually suffered a due process violation as a result of the actions or omissions of MacIntyre and/or Kling. In that regard, the Amended Complaint contends that McCarthy violated Plaintiff's rights by conducting a deficient investigation and then filing a misbehavior report that was false. Plaintiff maintains that McCarthy conducted a shoddy investigation, which resulted in him filing a "false" misbehavior report.[24]

A prison inmate generally has no constitutional right to avoid having a false misbehavior report filed against him. *Willey v. Kirkpatrick*, 801 F.3d 51, 63 (2d Cir. 2015) ("[A] prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest.") (citation omitted). However, there are at least

> two exceptions to this rule: when an inmate is able to show either (1) that he was disciplined without adequate due process as a result of the report; or (2) that the report was issued in retaliation for exercising a constitutionally protected right.

Id. (citations and internal quotation marks); *see also, Williams v. Dubray*, 557 F. App'x 84,

[24]Plaintiff also contends that McCarthy's misbehavior report did not comply with procedural requirements imposed by New York State regulations. However, it is well settled that violation of such procedures does not amount to a federal due process violation. *See, Holcomb v. Lykens*, 337 F.3d 217, 224 (2d Cir. 2003) ("Although state laws may in certain circumstances create a constitutionally protected entitlement to substantive liberty interests, *see, e.g., Sandin v. Conner*, 515 U.S. 472, 483-84, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995); *Tracy v. Salamack*, 572 F.2d 393, 396 & n. 9 (2d Cir.1978) (per curiam), state statutes do not create federally protected due process entitlements to specific state-mandated procedures.").

87 (2d Cir. Feb. 26, 2014) ("[T]he inmate must show *something more, such as* that he was deprived of due process during the resulting disciplinary hearing, or that the misbehavior report was filed in retaliation for the inmate's exercise of his constitutional rights.") (emphasis added).

Here, there is no evidence that McCarthy issued the misbehavior report in retaliation for Plaintiff's exercise of a constitutionally protected right. Plaintiff does not contend that McCarthy had any personal animus toward him in that regard, and indeed, Plaintiff acknowledges that he and McCarthy had no interaction prior to this incident.[25] Consequently, Plaintiff's claim against McCarthy is only actionable if he was deprived of due process at the hearing, that is, if he was deprived of due process by MacIntyre and/or Kling.

Similarly, Plaintiff's claims against Bradt and Prack are premised on the theory that they failed to train and supervise Kling and/or failed to correct constitutional violations committed by MacIntyre and Kling, after being notified of them by Plaintiff.[26] Accordingly, Plaintiff's claims against Bradt and Prack are only actionable if he was first deprived of due process by MacIntyre and/or Kling. As discussed below, however, the Court finds as a matter of law that neither MacIntyre nor Kling violated Plaintiff's federal due process rights.

MacIntyre Did Not Commit A Due Process Violation

Plaintiff contends that MacIntyre failed to provide assistance, and violated his due process rights, in the following ways: 1) he did not ascertain why Lawrence was unwilling

[25]Pl. Dep. at p. 21.
[26]Amended Complaint at ¶ ¶ 11, 12.

to testify at the hearing; 2) he did not investigate the identities of the officers who had countersigned the seven forged disbursement forms; 3) he did not provide Plaintiff with copies of the forged disbursement forms, but rather, told Plaintiff that he could get them at the hearing; 4) he did not arrange for a handwriting expert to testify; and 5) he did not provide Plaintiff with copies of "Chapter V" or the directive on forgery. The Court will examine each of these claims in turn.

At the outset, the Court notes that to the extent that MacIntyre failed to do what Plaintiff asked, there is no indication that he did so maliciously or in bad faith. *See, Silva v. Casey*, 992 F.2d 20, 22 (2d Cir. 1993) (Assistant's failure to provide assistance purposefully or in bad faith may raise constitutional issue). For example, Plaintiff does not suggest that he had any prior negative interactions with MacIntyre, or that their interactions were contentious.

Further, the Court does not agree that MacIntyre violated Plaintiff's rights by failing to ascertain exactly why Lawrence was unwilling to testify. In that regard, the record indicates that on September 13, 2012, Lawrence indicated his unwillingness to testify, by signing a "refusal to testify" form, witnessed by MacIntyre. MacIntyre reported on the form, "does not want to testify." Plaintiff maintains that MacIntyre had a duty to elicit a further explanation from Lawrence. (Plaintiff does not dispute that Lawrence actually refused to testify). However, on the present record, which gives no indication that anyone was pressuring Lawrence not to testify, the Court disagrees. *See, Sowell v. Bullis*, No. 913CV1482GLSDJS, 2016 WL 1696454, at *10 (N.D.N.Y. Mar. 25, 2016) ("Courts in the Second Circuit have indicated that where a witness indicates their refusal to testify, hearing officers are not obligated to inquire into the reason for such refusal unless there

is evidence of intimidation by prison officials.") (collecting cases), report and recommendation adopted, No. 913CV1482GLSDJS, 2016 WL 1700410 (N.D.N.Y. Apr. 27, 2016).

Nor does the Court agree that MacIntyre had an obligation to figure out the identities of the officers who countersigned the seven forged disbursement forms. In that regard, although Plaintiff admits that the signatures on the forms are illegible, he contends that MacIntyre should have gained access to the facility's log books, checked the entries for the dates on which the forms were countersigned, and then checked with the officers who were working those days in the relevant areas of the prison, to see whether they recognized the signatures. MacIntyre denies that Plaintiff asked him to ascertain the identities of the officers, or to interview them. Rather, MacIntyre indicates that Plaintiff merely asked him to arrange to have the officers at the hearing, and that he related that request to hearing officer Kling, who was responsible for arranging for staff to testify. MacIntyre's version of events is supported by the assistance form, which Plaintiff signed, and which states that Plaintiff requested to have "officers who signed the disbur. forms present @ hearing."[27]

However, crediting Plaintiff's version of events, as the Court must, it nevertheless finds that MacIntyre did not commit a constitutional violation, even assuming that Plaintiff specifically requested him to identify and interview the officers who had signed the disbursement forms. In that regard, it is undisputed that the officers' signatures and initials on the disbursement forms are illegible, and that the officers' identifies are

[27]MacIntyre Aff., Ex. A.

therefore not readily ascertainable. Indeed, Plaintiff contends that in order to discover the officers' identities, it would have been necessary to check the security staff's "log books" for the seven dates in question (a period spanning two months)[28] to ascertain which officers were working, and to then check with those officers to see if they could identify the signatures and initials. However, that type of investigation goes beyond what is required of a hearing assistant, because it is not something that Plaintiff could have done for himself. *See, Silva v. Casey*, 992 F.2d at 22 (When circumstances require it, "an assistant must be assigned to the inmate to act as his *surrogate*-to do what the inmate would have done were he able.") (emphasis in original). On this point, it cannot be plausibly maintained that facility rules would have permitted Plaintiff, an inmate, to inspect the corrections officers' log books in order to prepare for his hearing. However, even if that were possible, a hearing assistant is not "the functional equivalent of a private investigator," *Liao v. Malik*, 2016 WL 1128245, at *6, and the Court believes that the investigatory procedures, which Plaintiff maintains MacIntyre should have followed, would have been unduly burdensome. And finally, MacIntyre's failure to conduct an investigation into the officers' identities was mitigated by Kling's attempt to identify the officers, even though, as discussed below, Kling had no duty to do so.

Additionally, the Court finds that MacIntyre did not violate Plaintiff's due process rights by failing to provide copies of the forged disbursement forms, and instead telling Plaintiff that he could get them at the hearing. MacIntyre denies that Plaintiff asked him to provide copies of the forged disbursements, and, again, this version of events is

[28]The dates of the forged disbursement forms are: July 3, 2012, August 2, 2012, August 7, 2012, August 9, 2012, August 17, 2012, August 20, 2012 and August 24, 2012.

supported by the "assistant form," which Plaintiff signed.[29] Nevertheless, the Court must assume that Plaintiff asked MacIntyre for the documents.

Assuming *arguendo* that MacIntyre failed to obtain copies of the forged disbursement forms as requested, such failure was harmless error, because Plaintiff was able to view, if not hold, the documents at the hearing.[30] Even more significantly, Plaintiff has not shown how the outcome of the hearing might have been different if he had possessed actual copies of the forged documents beforehand.[31] On this point, Plaintiff's defense was simply that he had nothing to do with forging the forms. Plaintiff did not argue then, nor does he argue now, that the handwriting on the forms is not *in fact similar* to his own handwriting.[32] Rather, Plaintiff vaguely contends that if he had possessed the forged forms prior to the hearing, he might have been able to ask "more question[s]," or might have been able to figure out the identities of the officers who signed the forms.[33] However, Plaintiff does not indicate what questions he would have asked, nor has he ever been able to identify any officer from the signatures, despite having been provided copies of the disbursement forms during the Article 78 proceeding. Accordingly, any error by MacIntyre in this regard was harmless. For all of these reasons, MacIntyre's failure to

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[29]MacIntyre Aff., Ex. A.

[30]Pl. Dep. at pp. 48-49, 62. At the deposition, Plaintiff indicated that Kling had not really allowed him to have a clear look at the documents. However, the hearing transcript indicates that Plaintiff had viewed the forged forms. For example, Plaintiff commented on the fact that some of the officers' signatures had a stamp over them. Hearing Transcript at p. 10; *see also, id*. at p. 11 (Plaintiff commented that all of the evidence was "in front of [him]."); *see also, id.* (Kling stated, without objection, that "we have gone over the misbehavior report [and] the disbursement forms[.]").

[31]At his deposition, Plaintiff speculated that if he'd had the forged forms, he might have recognized the countersigning officers' signatures or initials. Pl. Dep. at p. 46. However, Plaintiff has now had the documents in his possession for quite awhile, and has not offered any opinion as to the identities of the officers.

[32]Plaintiff implicitly acknowledged the similarities when he speculated, at the hearing, that Lawrence might have attempted to frame him by "ma[king] it look like [his] hand writing." Hearing transcript at p. 6.

[33]Deposition Transcript at pp. 43, 46.

provide Plaintiff with copies of the forged disbursement forms did not deprive Plaintiff of due process.

Additionally, MacIntyre did not deprive Plaintiff of due process by failing to arrange for a handwriting expert to testify at the hearing. In that regard, the record indicates that MacIntyre failed to provide a "handwriting specialist," after Plaintiff requested one.[34] However, MacIntyre was not required to do what Plaintiff would not have been able to do for himself if he was not in keeplock. Plaintiff has neither alleged nor shown that there was such an expert available for MacIntyre to produce at the hearing. Rather, as discussed further below, it is undisputed that no such expert was available to either MacIntyre or Kling. MacIntyre was not required to act as Plaintiff's attorney or as a private investigator. MacIntyre's failure to arrange for the testimony of a handwriting expert does not amount to a constitutional violation.

Finally, MacIntyre did not violate Plaintiff's constitutional rights by failing to provide him with copies of "Chapter V" or the directive on forgery. To begin with, Plaintiff testified at the hearing that he never asked MacIntyre for a directive on forgery, though he now claims that he did.[35] However, even assuming that Plaintiff asked MacIntyre for the DOCCS directive on forgery, Defendants contend that no such directive exists, and Plaintiff has not shown otherwise. As for whether MacIntyre failed to provide Plaintiff with a copy of 7 NYCRR, Chapter V, Plaintiff contends that he wanted the information so that he could understand, generally, how disciplinary hearings were run, even though he

[34]Sheehan Decl. Ex. B (Deposition exhibit 5).

[35]Hearing transcript at p. 11 ("He [MacIntyre] wrote down the wrong thing. I said [that I wanted] the directive on the timeliness of the misbehavior report when it is served. I don't know why he put [that I asked him for the directive on] forgery so that is he misprinted the wrong thing.").

admits that he had already been through multiple disciplinary hearings.[36] MacIntyre indicates that Plaintiff never asked him to provide Chapter V, and, again, such request is *not* set forth on the assistant form that Plaintiff signed. Nevertheless, assuming, as the Court must, that Plaintiff actually made such a request, MacIntyre's failure to provide Chapter V was harmless error, since Plaintiff has not shown how the outcome of the disciplinary hearing would have been any different if he had been given the information.

The Court is aware that in *Eng v. Coughlin*, the Second Circuit indicated that "an assigned assistant who does *nothing*" to assist a prisoner "has failed to accord the prisoner his limited constitutional due process right of assistance." *Id*., 858 F.2d at 898 (emphasis added). Here, MacIntyre admittedly did very little for Plaintiff, apart from notifying him that Lawrence was unwilling to testify. However, insofar as MacIntyre failed to provide further assistance, no constitutional violation occurred, either because what Plaintiff had requested was unavailable, or because the failure was harmless error. Accordingly, MacIntyre is entitled to summary judgment on the § 1983 claim.

Kling Did Not Commit A Due Process Violation

As mentioned earlier, in the context of a prison disciplinary hearing, due process requires a written statement by the hearing officer explaining his decision and the reasons for the action being taken, which must be supported by at least "some evidence." *Liao v. Malik*, 2016 WL 1128245 at * 5. Plaintiff contends that Kling's decision is deficient in this regard, since it is based on the opinion of McCarthy, who was not trained in handwriting analysis. However, the "some evidence" standard may be satisfied where a hearing

[36]Deposition transcript at p. 44.

officer relies on a corrections officer's testimony concerning the similarity of handwriting samples. *Lewis v. Johnson*, No. 9:08-CV-482 TJM/ATB, 2010 WL 3785771, at *11 (N.D.N.Y. Aug. 5, 2010) (collecting cases), report and recommendation adopted, No. 08-CV-0482, 2010 WL 3762016 (N.D.N.Y. Sept. 20, 2010); *Woodard v. Shanley*, No. 10-CV-1121 DNH/DRH, 2011 WL 6845772, at *4, 5 (N.D.N.Y. Dec. 7, 2011) (collecting cases), report and recommendation adopted, No. 9:10-CV-1121, 2011 WL 6845771 (N.D.N.Y. Dec. 29, 2011), *aff'd*, 505 F. App'x 55 (2d Cir. 2012).

Moreover, Kling did not rely solely on McCarthy's testimony, but rather, he indicated his own finding of a "compelling similarity" between Plaintiff's handwriting and the writing on the forged disbursement forms. This finding is supported by reliable evidence, as there clearly are striking similarities between the handwriting on Plaintiff's disbursement form and the writing on the forged forms.[37]

Liberally construing Plaintiff's papers, the Court further understands him to allege that Kling's decision did not adequately explain how he could have submitted the forged disbursement forms for payment, since the forms were required to be countersigned by corrections officers, who were responsible for verifying the inmate's identity. However, the Court again disagrees. Kling stated that the officers who signed the forms "may have been "lax in verifying I.D.," and that conclusion seems reasonable given the compelling similarity between Plaintiff's handwriting and the handwriting on the forged disbursement forms. In other words, it is reasonable to believe that the officers must have been lax, since there was strong evidence that Plaintiff in fact committed the forgery. The Court

[37]*See*, Kling Aff., Ex. A, Deposition Ex. 8 (D000010) & Deposition Ex. 10 (D000015, D000019-24).

would further note that such laxity by the officers in "verifying I.D." is also suggested by the fact that the officers signed the forms even though Lawrence's name was clearly misspelled on them. Accordingly, Plaintiff's contention, that Kling's decision is unsupported by sufficient evidence, lacks merit.

Plaintiff further contends that Kling failed to adequately explore why Lawrence was unwilling to testify. However, a hearing officer has no authority to compel a witness to testify. *See, Silva v. Casey*, 992 F.2d 20, 21-22 (2d Cir. 1993) Nor does a hearing officer have a general duty to evaluate a witness's reason for declining to testify. *See, Smith v. Prack*, No. 9:12-CV-1474 GTS/DEP, 2015 WL 5512951, at *7 (N.D.N.Y. Sept. 14, 2015) ("[A] hearing officer is under no obligation to make an independent evaluation of the basis for the refusal to testify.") (citations and internal quotation marks omitted), *aff'd sub nom. Smith v. Graham*, No. 15-3414, 2017 WL 1103467 (2d Cir. Mar. 22, 2017). Moreover, a hearing officer is entitled to rely upon a "refusal form" prepared by someone else when deciding whether it would be futile to attempt to have a witness testify. *See, Jamison v. Fischer*, No. 14–805–pr, 617 F.App'x 25, 27 (2d Cir. Jun. 30, 2015) (Stating, as part of a discussion on qualified immunity, that a hearing officer may reasonably conclude that it would be futile to attempt to have a witness testify, based upon a "refusal form" completed by a corrections officer).

Plaintiff also maintains that Kling did not make a sufficient effort to identify the officers who countersigned the disbursement forms. However, it is undisputed that Kling attempted to learn the officers' identities, by showing the disbursement forms to other officers. Although Kling was ultimately not able to identify the officers, such failure does not amount to a due process violation. *See, Dixon v. Goord*, 224 F. Supp. 2d 739, 746

(S.D.N.Y. 2002) ("[Hearing Officer] Schneider's failure to call a witness identified by Dixon only as "Latino" did not violate Dixon's due process rights. . . . Schneider has given a logical reason for not providing the witness requested by Dixon, namely that he could not identify the officer based on Dixon's description."); *see also, Williams v. Wright*, No. 93 CIV. 0207 (KTD), 1995 WL 225640, at *3 (S.D.N.Y. Apr. 17, 1995) ("The fact that Plaintiff was denied the opportunity to call witnesses whom he could not or would not name does not constitute a constitutional violation."). Although Plaintiff contends that Kling should have gone further, and examined the facility log books, his failure to do so did not violate due process.

Plaintiff further contends that Kling should have taken testimony from a handwriting analysis expert. Kling denied Plaintiff's request for such an expert, stating, "We don't have access to that so I am going to deny that [request]."[38] The Court is not aware of any authority giving an inmate an absolute procedural due process right to call witnesses from outside of the prison to testify in a prison disciplinary hearing. Rather, it is clear that an inmate's ability to call witnesses at a prison disciplinary hearing is "subject to the mutual accommodation between institutional needs and objectives and the provisions of the Constitution." *Ponte v. Real*, 471 U.S. 491, 495, 105 S.Ct. 2192, 2195 (1985) (citation and internal quotation marks omitted). "[P]rison officials may be required to explain, in a limited manner, the reason why witnesses were not allowed to testify, . . . but so long as the reasons are logically related to preventing undue hazards to 'institutional safety or correctional goals,' the explanation should meet the due process requirements as outlined

[38]Hearing Transcript at p. 10.

in *Wolff*." *Ponte v Real*, 471 U.S. at 497, 105 S.Ct. at 2196.

Moreover, an inmate has no "due process right to have the prison find, retain, and present an expert witness on the prisoner's behalf." *Garrett v. Smith*, 180 F. App'x 379, 381 (3d Cir. 2006) (agreeing with the decision of the 8th Circuit, in *Spence v. Farrier*, 807 F.2d 753, 755-56 (8th Cir. 1986), in which the court stated that, "To allow prisoners to present expert testimony in regard to [drug testing] reliability would seriously interfere with the institutional goal of drug deterrence and prompt resolution of drug related infractions."); *see also, Mackley v. Napel*, No. 2:14-CV-46, 2014 WL 4700229, at *4 (W.D. Mich. Sept. 19, 2014) ("Due process also does not require prison officials to find and retain an expert in handwriting analysis.") (citing *Spence v. Farrier* and *Garrett v. Smith*). Accordingly, Kling did not violate due process by failing to have a handwriting expert testify at the hearing.

Plaintiff further contends that Kling violated due process by failing to provide him with personal copies of the forged disbursements and 7 NYCRR "Chapter V." "Due process considerations entitle an inmate to view evidence critical to his guilt or innocence of disciplinary charges." *Carlson v. Parry*, No. 06-CV-6621P, 2012 WL 1067866, at *12 (W.D.N.Y. Mar. 29, 2012). However, due process does not always require that an inmate be provided with copies of the evidence against him. *See, Monserrate v. New York State Senate*, 599 F.3d 148, 159-160 (2d Cir. 2010) (Appellant received adequate process, despite his complaint that he was not "given copies of the materials considered" at the hearing). Moreover, for the reasons already discussed, any error in that regard was harmless.

Finally, Plaintiff now asserts that Kling was biased, even though he stated at the hearing that Kling was "pretty much fair."

> Due process requires that prison disciplinary hearings be conducted by a fair and impartial hearing officer. However, prison adjudicators are presumed to be unbiased and the degree of impartiality required of prison officials does not rise to the level of that required of judges generally. Because of the special characteristics of the prison environment, it is permissible for the impartiality of such officials to be encumbered by various conflicts of interest that, in other contexts, would be adjudged of sufficient magnitude to violate due process.

Shabazz v. Bezio, 669 F. App'x 592, 593 (2d Cir. 2016) (citations and internal quotation marks omitted).

As evidence of Kling's bias, the Amended Complaint alleges that Kling "chose to use deception during the hearing and make it appear that he gave Plaintiff the disbursement forms and checks for review."[39] Apparently, Plaintiff is referring to Kling's comment during the hearing that he "went through the evidence" with Plaintiff.[40] However, Kling never stated that he had handed the documents to Plaintiff. Rather, as the Court has already discussed, Kling showed the disbursement forms and other documents to Plaintiff, but did not allow him to hold them in his hands. Accordingly, the Court cannot see how Kling "used deception." Plaintiff also now claims that he "d[id]n't really know what [he was] looking at because there[was] so much paperwork being placed in [his] face."[41] However, Plaintiff never alerted Kling to this problem during the hearing, therefore, such fact, even if true, does not call Kling's impartiality into question.

[39]Amended Complaint at p. 15.
[40]Hearing Transcript at p. 5.
[41]Pl. Deposition at p. 48.

In sum, Plaintiff has not raised a triable issue of fact as to whether Kling was biased against him.

For all of the foregoing reasons, Plaintiff cannot establish a federal due process violation against any of the Defendants.

Plaintiff's State Law Claims Are Barred by New York Correction Law § 24

The Amended Complaint [#41] also purports to assert state-law claims against the Defendants, for "excessive wrongful confinement." Plaintiff has sued all of the Defendants in their individual capacities. Defendants maintain that such claims are barred by New York Corrections Law § 24, which "bars federal suit on state-law claims against officers in their individual or personal capacities." *Gill v. Tuttle*, 93 F. App'x 301, 302 (2d Cir. 2004) (*citing Baker v. Coughlin*, 77 F.3d 12, 14-15 (2d Cir.1996)). In particular, "a federal court is without jurisdiction over such a claim. Under New York State Corrections Law § 24, tort claims against prison officials can only be brought in the Court of Claims for the State of New York." *Parker v. Miller*, 199 F.3d 1323 (table), 1999 WL 1024108 at *2 (2d Cir. Oct. 27, 1999).

Plaintiff responds that Correction Law § 24 is inapplicable here, because Defendants were acting outside the scope of their employment. On this point, Corrections Law § 24 expressly pertains to lawsuits "arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee." However, such argument lacks merit, as Plaintiff cannot point to any evidence indicating that Defendants were acting outside the scope of their employment. Rather, Plaintiff just baldly asserts that MacIntyre and Kling were "not doing

[their] employers' work,"[42] which is insufficient to raise a triable issue of fact. Accordingly, the Court lacks jurisdiction over the state-law claims. *See, Parker v. Miller*, 1999 WL 1024108 at *2 ("Because Plaintiffs have failed to advance any claim that the officials in this case acted beyond their authority, this Court is without jurisdiction over Plaintiffs' wrongful death claim.").

CONCLUSION

Plaintiff's motion for summary judgment [#80] is denied and Defendants' cross-motion for summary judgment [#82] is granted in part, with respect to the federal claims under 42 U.S.C. § 1983, which are dismissed with prejudice. The state law claims are dismissed without prejudice pursuant to Correction Law § 24. The Clerk of the Court is directed to close this action. The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

So Ordered.

Dated: Rochester, New York
June 23, 2017

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

[42]Pl. Response [#84], Memo of Law at p. 16.

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of New York

JARVIS ELDER
Plaintiff
v.
J. MCCARTHY, Sergeant, et al.
Defendant

Civil Action No. 14-CV-6216

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

❒ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

❒ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☒ other: the action is closed.

This action was *(check one)*:

❒ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

❒ tried by Judge _____ without a jury and the above decision was reached.

☒ decided by Judge Charles J. Siragusa on a motion for summary judgment.

Date: Jun 23, 2017

CLERK OF COURT

s/Mary C. Lowenguth

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JARVIS ELDER,

Plaintiff,

-vs- DECISION AND ORDER

J. McCARTHY, Sergeant, et al., 14-CV-6216 CJS

Defendants.

INTRODUCTION

This was an action under 42 U.S.C. § 1983 brought by Jarvis Elder ("Plaintiff"), a prison inmate in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). On June 23, 2017, the Court dismissed the action. Now before the Court is Plaintiff's motion for reconsideration. The application is denied.

BACKGROUND

The reader is presumed to be familiar with the facts of this case, which were set forth in detail in the Court's prior Decision and Order [#94]. It is sufficient to note that Plaintiff had claimed that his due process rights were violated in connection with a prison disciplinary hearing, at which he was found guilty of forgery and stealing. In particular, Plaintiff was found guilty of forging disbursement forms in the name of a fellow inmate, Reginald Lawrence ("Lawrence"), in order to steal funds from Lawrence's inmate account. By Decision and Order [#94] filed on June 23, 2017, the Court denied Plaintiff's motion for summary judgment, granted Defendants' cross-motion for summary judgment in part as to Plaintiff's federal claims, and dismissed the remaining state law claims.

On July 5, 2017, Plaintiff filed the subject motion for reconsideration, "pursuant to Rule 59 of the Federal Rules of Civil Procedure." Attached to the motion is a 12-page

declaration from Plaintiff, in which he reiterates that he was innocent of the disciplinary charges, restates his earlier arguments, and refers to "newly discovered evidence." The newly discovered evidence consists of various documents dating from 2012, such as a memo from a prison administrator questioning whether Lawrence was attempting to conduct a "scam," and letters that Lawrence wrote to Plaintiff's girlfriend. In one of those letters, Lawrence admitted to having burned items in Plaintiff's cell.

DISCUSSION

Since Plaintiff is proceeding *pro se*, the Court has construed his submissions liberally, "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994). Plaintiff brings the instant motion under Rule 59. With regard to this rule,

> [w]hile there are no formal guidelines, courts have recognized four basic grounds on which a judgment may be altered or amended pursuant to Rule 59(e): the need to prevent manifest injustice, the need to correct errors of law or fact, the availability of new evidence, or an intervening change in controlling law. Reconsideration of a court's prior order is an extraordinary remedy to be employed sparingly in the interest of finality. In a motion for reconsideration, a party may not advance new facts, issues or arguments not previously presented to the Court.

Maksymowicz v. Weisman & Calderon, LLP, No. 14 Civ. 1125(JGK), 2014 WL 1760319 at *1 (S.D.N.Y. Feb. 2, 2014) (citations and internal quotation marks omitted).

Plaintiff first claims that the Court should have disregarded the affirmations (Docket Nos. [#82-3, -4, -5 and -6]) filed by Defendants in support of their cross-motion for summary judgment, because they did not bear "original signatures." Plaintiff also contends that the affirmations are deficient because they were not notarized. However, Plaintiff is clearly

incorrect on both of these points, as Defendants followed the procedures set forth in the Court's Administrative Procedures Guide for Electronic Filing, § 2(g) and 28 U.S.C. § 1746. Plaintiff's remaining points have even less merit, and consist of re-statements of arguments that the Court already considered in connection with its prior Decision and order. Moreover, the so-called newly discovered evidence is irrelevant to the Court's determination. For example, the fact that Lawrence told Plaintiff's girlfriend that he set Plaintiff's cell on fire has no bearing upon Plaintiff's guilt or innocence of the disciplinary charges, or upon whether he received due process at the hearing. Indeed, the original record suggested that Lawrence had burned Plaintiff's cell in retaliation for Plaintiff stealing from Lawrence. In sum, Plaintiff has not shown that he is entitled to any relief.

CONCLUSION

Elder's motion for reconsideration [#96] is denied. The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

So Ordered.

Dated: Rochester, New York
July 20, 2017

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge