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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

ALEXANDRA A.E. SHAPIRO
FABIEN M. THAYAMBALLI
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

INTRODUCTION

Elder served six months in the SHU after a disciplinary hearing that fell far short of what due process requires. Elder was charged with forging disbursement forms to steal from another inmate's account, but he had no idea when he supposedly did this or for how long. He asked his assigned assistant to interview witnesses and collect documents before the hearing, but the assistant did virtually nothing and told him he had to wait to see the evidence at the hearing. The witnesses were critical, since Elder wanted to question the officers who had signed the allegedly forged forms after verifying the identification of the inmate who submitted them. Elder asked the hearing officer to help him identify these witnesses, but the hearing officer told him it was impossible, even though he could easily have identified them from prison staffing records. The hearing officer then convicted Elder based on his belief that the handwriting of the signatures on the forms matched Elder's. But he simply jumped to the conclusion of guilt, since there was no evidence at the hearing that the purported victim had even claimed the forms were forged. Based on these due process violations and the lack of evidence, the Fourth Department annulled Elder's convictions and expunged them from his record.

Faced with these facts, Defendants cannot escape the conclusion that Elder was entitled to summary judgment or at least a trial on his constitutional claims.

They barely try to defend the district court's opinion, which went out of its way to grant judgment to Defendants on grounds they did not even raise and that had no basis in law or fact. Instead, Defendants advance a host of new arguments that they waived by failing to raise below, as well as other contentions that contradict this Court's binding precedents and totally disregard the key evidence in the record. Their efforts are unavailing. The district court's judgment is indefensible, and it must be reversed.

ARGUMENT

I. ELDER IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM THAT HE WAS DENIED THE RIGHT TO CALL WITNESSES

A. Elder Did Not Waive His Claim

Defendants first contend that Elder waived any violation of his right to call the officer witnesses. (D.Br.25-26).[1] But Defendants waived *their* waiver argument because they never raised it before the district court. *See Medforms, Inc. v. Healthcare Mgmt. Sols., Inc.*, 290 F.3d 98, 109 (2d Cir. 2002) (appellees waived waiver by failing to argue it below); *United States v. Ortiz*, 621 F.3d 82, 85-86 (2d Cir. 2010) (collecting "waive-the-waiver" cases).

Regardless, Defendants' argument is meritless. Defendants rely on *Bedoya v. Coughlin*, 91 F.3d 349 (2d Cir. 1996), but there the inmate declined to call any

[1] "JE.Br." refers to Elder's brief, and "D.Br." refers to Defendants' brief.

witnesses when the hearing officer gave him the opportunity to do so. *See id.* at 350-53. Here, Elder repeatedly confirmed that he wanted to call the officer witnesses at the hearing. (A-316, 318). Kling told Elder that he would try to locate those witnesses and later reported that he was unsuccessful. (A-319, 321-25). Elder continued to object when Kling claimed he could not identify the officers (A-324) and when Kling asked Elder whether "all the witnesses which [he] want[ed] to call [had] been heard" (A-325). Kling evidently understood these objections: he told Elder he had "tried" and was "being honest," and he asked Elder whether "the witnesses that *could* be obtained" had "all been heard," because he "really c[ould]n't get any others that [Elder] had mentioned." (A-325 (emphasis added)). This case is therefore nothing like *Bedoya*.[2]

Defendants fault Elder for failing to tell Kling to consult the staff grid and logbook that identified the officer witnesses. However, to preserve his due process claim, an inmate need only object to the failure to procure the witnesses he requested. *See Ayers v. Ryan*, 152 F.3d 77, 81-82 (2d Cir. 1998). The inmate is

[2] Nor is it like the (non-binding) state-court cases Defendants cite. In *Harriott v. Koenigsmann*, 149 A.D.3d 1440, 1442 (3d Dep't 2017), the inmate suggested using logbooks to identify a witness, but the court did not say this was required to avoid waiver. And in both *Pabon v. Goord*, 6 A.D.3d 833, 834 (3d Dep't 2004), and *Lebron v. Coughlin*, 169 A.D.2d 859, 860 (3d Dep't 1991), the inmate made no objection at the hearing to the hearing officer's failure to procure the witness.

not obligated to suggest that the hearing officer take specific steps to correct that failure. *See id.*

Nor could Elder reasonably have been expected to make such a suggestion. *First*, Defendants point to no evidence that Elder knew the staffing records existed at the time of the hearing. *Second*, Elder requested these witnesses well before the hearing and relied on prison officials to find them. He would not have anticipated that if he failed to propose a plan to locate them at the hearing, he would forever waive his rights. *Third*, Kling repeatedly insisted that he had done everything possible to locate the witnesses. This was "sufficiently discouraging that [Elder] could not have been expected" to press the issue further. *Bedoya*, 91 F.3d at 352.

Simply put, Elder "waived nothing." *Ayers*, 152 F.3d at 82.

B. Kling Violated Elder's Right To Call Witnesses

Defendants' arguments fare no better on the merits. As Defendants acknowledge, Kling had the burden of proving that his failure to call the officer witnesses was justified. (D.Br.24). Kling could not satisfy his burden if, despite claiming that he was unable to identify the officers, he failed to use a readily available means of doing so. (JE.Br.25-26) (citing, *e.g.*, *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30-31 (2d Cir. 1991)). Defendants do not appear to dispute this. (D.Br.23-25). Elder is therefore entitled to summary judgment because (1) Defendants conceded below that Kling could easily have identified the officers

with staffing records and (2) in any event, the evidence in the record confirms this, proving that Kling did not make meaningful efforts to identify the officers.

1. *Defendants effectively conceded that Elder was entitled to summary judgment.* In his amended complaint, Elder averred that Kling failed to consult the "roster" of "assigned post[s]" or the A-Block "Log Book" and that these records would have given him "the names of the Officers/Hall Captains[] wh[o] verified the Disbursement Forms." (A-19, 24-25). Elder reiterated the argument twice on summary judgment, attaching the records as exhibits. (Dkt. 80 at pp. 15-16, 25-27 of 111; A-152-213). In response, Defendants merely asserted that Kling could not identify the witnesses. They did not address Elder's argument or even *mention* the records. This was, in effect, a concession that Elder was right. (JE.Br.27).

On that basis, alone, the judgment is indefensible. The district court rejected Elder's argument—without any analysis—even though it was not permitted to grant summary judgment against Elder "on grounds that appeared nowhere in the defendants' moving papers" without notice and time to respond. *Willey v. Kirkpatrick*, 801 F.3d 51, 63 (2d Cir. 2015). For this reason, at a minimum, vacatur is required. *See id.*; *ING Bank N.V. v. M/V TEMARA*, 892 F.3d 511, 523-24 (2d Cir. 2018); *Lawson v. Homenuk*, 710 F. App'x 460, 466-67 (2d Cir. 2017).

The undisputed facts also entitle Elder to summary judgment. (JE.Br.28 & n.3). Elder argued that Kling could have identified the officers by consulting the

staffing records; he submitted an affidavit to that effect[3]; and he provided the records as evidence. It was Defendants' burden to prove that Kling's failure to consult those records was justifiable. *See Ayers*, 152 F.3d at 81; *Kingsley*, 937 F.2d at 30-31. Instead, they ignored that burden, entitling Elder to summary judgment. And because Defendants chose not to argue the point below, they have waived the new arguments they now make on appeal. *See, e.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 38 n.17 (2d Cir. 2017).

Defendants cannot evade this conclusion. They contend that because Elder alleged in his complaint that Kling "failed to make *any* inquiries" concerning the officers, once Kling presented evidence of *some* efforts, the burden "shifted" to Elder. (D.Br.30). This makes no sense. The allegation that Defendants cite says very clearly that Kling failed to "check the . . . roster of Officers' assigned post[s]" (A-19), as Defendants concede elsewhere in their brief (D.Br.15). The staffing records were at issue since the pleading stage, and Defendants ignored that issue even though they had the ultimate burden. *See, e.g.*, *Ayers*, 152 F.3d at 81.

[3] Elder's complaint was verified and therefore served as an affidavit on summary judgment. (JE.Br.6 n.2).

Defendants complain that Elder did not discuss the staffing records in his Rule 56 statements (D.Br.31), but they do not explain why this matters.[4] Elder emphasized the records in his brief and submitted them as exhibits (*id.*), and the district court understood his argument. (SPA-39). Defendants could have made the factual arguments they now make on appeal concerning the records (D.Br.28-31), but they chose not to. Furthermore, Elder presented evidence, not "bald assertions" with no weight. (D.Br.31-32). Having "failed to contest the sufficiency of th[at] evidence" below, Defendants cannot do so now. *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 896-97 (2d Cir. 2015); *cf. Chem. Bank v. Dana*, 4 F. App'x 1, 4, 5 n.3 (2d Cir. 2001).

2. *In any event, Defendants' new arguments have no merit.* Purporting to distinguish *Kingsley*, Defendants contend that it would have been burdensome to identify the officers using staffing records. (D.Br.28-31). This is entirely false. The disbursement forms were stamped by "hall captains," the corrections officers who countersigned the forms. (A-307, 309-12, 319, 322-24).[5] The names of the

[4] The district court's local rules provide for Rule 56 statements, but Defendants do not argue that Elder violated those rules, and any such argument would be futile. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001).

[5] The stamps indicate that "inmate identification [was] verified" and designate the location ("A," presumably for A-Block) and the role of the countersigning officer ("Hall Capt."). (A-307, 309-12). *See also Elder v. Fischer*, 115 A.D.3d 1177, 1178 (4th Dep't 2014).

corrections officers serving as hall captains appear in both the A-Block logbook and the staff planning grid: Ratajczak and Steck on July 31, 2012 (A-212-13; A-184); Buchheit and Jaworski on August 2 (A-209-10; A-179-80); Bell and Jaworski on August 17 (A-204; A-168, 171); and Penkalski and Jaworski on August 20 (A-201-02; A-164, 166).[6] In other words, Kling could have spoken to six hall captains to get to the bottom of these disbursements,[7] rather than rolling the dice with five random officers out of the many dozens assigned to A-Block.

---

[6] In the logbook, the hall captains are labeled "HC" or with the number "1." In the grid, they are similarly labeled "A-Block #1." (*Compare* A-200 *with* A-158; A-201 *with* A-164). The number "1" presumably refers to their position or location. *See Gill v. Erickson*, No. 03CV98, 2007 WL 642593, at *2 (W.D.N.Y. Feb. 26, 2007) ("Hall Captain" is "first officer"); *Small v. New York*, No. 12-CV-1236S, 2017 WL 1176032, at *1 (W.D.N.Y. Mar. 30, 2017) ("Hall Captain" is "first floor officer"); *Woodward v. Mann*, No. 09-CV-0451, Dkt. 114-2 ¶ 12 (hall captains sit at "first floor" desk). In one instance, the officer who served as hall captain (according to the logbook, A-213) differed from the assigned captain (on the grid, A-187). In addition, the day-shift captains listed in the logbook appear in the staffing grid's "daily relief" column, rather than the main column, where officer Ziolkowski is listed. (A-166, 171, 180, 184). Whether these officers served instead of or in addition to Ziolkowski does not materially change the number of officers.

[7] For the other three forms, the staffing records requested and produced in discovery correspond to the dates at the top of the forms, rather than the dates the forms were countersigned (August 7, 9, and 23). But Defendants do not deny that the correct records exist, and at most, assuming no overlap, Kling would have had to speak to six additional captains to investigate those forms (day and evening shift for each date).

It is therefore not true that Kling would have had to interview "up to 40 officers" in A-Block to locate the signatories. (D.Br.29). Regardless, this would not have been unduly time-consuming, since all Kling had to do was show the officers a few signatures. At the bare minimum, the records would have allowed Kling to speak to a subset of the officers who were on duty on the dates in question. Alternatively, as suggested in *Kingsley*, Kling "could have provided [Elder] with the names" of the 40 officers to see if Elder could narrow down the list. 937 F.2d at 31 n.6. The information critical to Elder's request was "readily available," and Kling is at fault for ignoring it. *Id.* at 31; *accord Harriott*, 149 A.D.3d at 1442 (hearing officer should have "reviewed the logbooks" to locate a witness).[8]

Defendants claim there is no evidence that Kling knew or should have known about the records, noting that Kling "was a vocational supervisor and not a correction officer." (D.Br.29). This is disingenuous, as Kling was also a *hearing officer* tasked with locating witnesses.[9] He plainly knew that the prison kept staffing records, and he should have bothered to access them—which he finally did

[8] This case is therefore nothing like *Dixon v. Goord*, 224 F. Supp. 2d 739 (S.D.N.Y. 2002) (cited at D.Br.24, 28), where the witness was identified "only as 'Latino.'" *Id.* at 746.

[9] A Westlaw search for "vocational supervisor" reveals that vocational supervisors routinely serve as hearing officers in New York prisons.

when Elder demanded the records in discovery. (A-129). Moreover, Kling had ample opportunity to deny knowledge of the records in his declaration, but he did not, even though it was his burden to do so. (A-230-37). It would have made no difference, however, since at a minimum, he should have known about the records. *See Ayers*, 152 F.3d at 81 (hearing officer liable for "oversight"); *Kingsley*, 937 F.2d at 28, 31 (hearing officer should have consulted records kept by unspecified "prison officials").

Defendants also argue that Kling tried to locate the witnesses, unlike the officer in *Kingsley*. (D.Br.24-25, 28). But Kling claims only that he spoke to five officers in Elder's cell block and looked for other copies of the disbursement forms. (D.Br.24). Defendants offered no evidence concerning the amount of time Kling spent on these tasks or whether Kling made any serious effort to obtain information from the five officers.[10] And looking for other copies of the forms was a hollow gesture. The signatures were visible on every form, and all were stylized or abstract to the point of being illegible. (A-306-12, 324). Other "copies" were not necessary; Kling needed to find someone who recognized the signatures.

[10] In his declaration, Kling simply said he "talked to" the officers, without revealing what he asked or whether he showed them the forms. (A-232). Nor did he make this clear at Elder's hearing. (A-322, 325).

Kling's purported efforts were unimpressive by themselves, and they were meaningless given that Kling *would have found* the witnesses had he bothered to look at the staffing records. While Defendants claim that Kling did more than "insist that Elder identify the requested witnesses" (D.Br.28), that is precisely what Kling did at the beginning of the hearing. (A-316 (telling Elder to "get more specific about who you want")). And it is essentially what Kling did when his token efforts turned up nothing. (A-325). Regardless, nothing in *Kingsley* suggests that a hearing officer may escape liability merely by claiming he "tried" to find witnesses. *See Rosales v. Kikendall*, 605 F. App'x 12, 14 (2d Cir. 2015) (there is no "'best of [my] ability' defense" to a due process claim).

Accordingly, this Court should reverse the district court's ruling and direct the entry of summary judgment in Elder's favor.

II. ELDER IS ENTITLED TO A TRIAL ON HIS CLAIM THAT HE WAS DENIED THE RIGHT TO ADEQUATE ASSISTANCE

A. MacIntyre Improperly Refused To Interview Witnesses

Defendants barely attempt to justify MacIntyre's refusal to interview the officer witnesses. They argue that "Elder received 'some' assistance" because MacIntyre spoke to Lawrence for a few minutes (D.Br.40-41), but this plainly was not a "valid reason" for MacIntyre to refuse to interview the officer witnesses, whose testimony was important for other reasons. *Fox v. Coughlin*, 893 F.2d 475, 478 (2d Cir. 1990). Nor did Kling "cure" the deficiency in MacIntyre's assistance

by trying to find the officer witnesses. (D.Br.41). We already refuted this argument (JE.Br.34-35), and Defendants evidently have no response. Kling cured nothing, since he did not find the officers (or seriously attempt to do so). Even if he had, this would not have cured MacIntyre's failure to interview the officers *before* the hearing, which Defendants concede could have deprived Elder of relevant information. (JE.Br.35).[11]

MacIntyre could easily have identified the officer witnesses using the staffing records and was obligated to interview those witnesses. (JE.Br.29-35; *see* Point I.B.2 *supra*). Defendants argue that Elder would not have thought to consult these records even if he had not been confined pending the hearing (D.Br.41-42), but they do not explain why that exonerates MacIntyre. The case they cite for that point expressly declines to set any limits on an assistant's obligations, so it does not help them. *See Eng v. Coughlin*, 858 F.2d 889, 898 (2d Cir. 1988). Regardless, (1) Defendants waived this new argument by failing to make it below; (2) Defendants concede that Elder could have found the officer witnesses by other means had he not been confined pending his hearing (JE.Br.33-34), *see also Eng*,

[11] Defendants cite district court cases about "curing" assistant error but fail to explain why they are persuasive or applicable. (D.Br.40). In virtually all of them, the inmate received the evidence he requested at the hearing (unlike here) and was given time to make effective use of it (unlike here).

858 F.2d at 898; and (3) Elder eventually learned that staffing records existed, which might have happened sooner had he not been confined.

Defendants do not even try to defend the grounds relied on by the district court, which Elder never had a chance to address. (JE.Br.31-34). The judgment for MacIntyre must therefore be vacated as to Elder's witness request.

B. MacIntyre Improperly Deprived Elder Of Documents

Defendants are also unable to justify MacIntyre's failure to provide Elder with copies of the disbursement forms and the Chapter V rules of hearing procedure. (D.Br.42-43). Defendants claim that Elder had access to the disbursement forms at the hearing, but Elder disputes this, and the issue cannot be resolved against him on summary judgment. (JE.Br.15-16, 40-41; *see* Point III.B *infra*). Regardless, MacIntyre's failure to give Elder copies of the forms before the hearing was inexcusable. Defendants argue that the forms would not have helped Elder identify the officer witnesses, but Elder might have recognized the signatures, and in any event, the forms were indisputably "relevant." *Eng*, 858 F.2d at 898. As Defendants argue elsewhere (D.Br.45-47), the forms were the key evidence against Elder. Moreover, the forms would have given Elder notice of the time and extent of his alleged misconduct. (*See* Point III *infra*). He was entitled to see them before the hearing.

Elder also requested Chapter V, but Defendants appear to conflate this with his separate request for the directive on timeliness. (D.Br.42-43; SPA-35-36; A-17-18; A-264, 266 Tr. 44, 49). Having a copy of the Chapter V procedural rules would undoubtedly have helped Elder understand and defend his rights at the hearing, and Defendants do not argue otherwise. To the extent they contend that Elder waived his request for Chapter V, their failure to raise the argument below precludes them from raising it now. (Dkt. 82-7 at 17; *see* Point I.A *supra*).

It is plain, as the Fourth Department found, that Elder "was denied meaningful employee assistance and was prejudiced by the inadequate assistance he received." *Elder*, 115 A.D.3d at 1178. This Court should vacate the judgment on Elder's assistance claim and remand for trial.

III. ELDER IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM THAT HE WAS DENIED THE RIGHT TO ADEQUATE NOTICE

A. The Misbehavior Report Was Inadequate

The notice given to Elder did not satisfy due process.[12] The misbehavior report was the only pre-hearing notice Elder received, and it was grossly inadequate. As Defendants acknowledge, the report did not disclose the number of

[12] While Defendants suggest otherwise (D.Br.32), Elder squarely raised this claim (JE.Br.39-40), and Defendants do not explain why this Court should care how he did so. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998) (appellee who "mentions" a procedural issue "in passing" but "attributes no significance to [it]" has "waived" it).

forged disbursement forms, the recipients of the funds, or—most critically—the dates on which Elder allegedly submitted the forms. (JE.Br.36-39).

Defendants contend that "the inclusion of 'all facts relevant to date'" is unnecessary if "there is sufficient information to allow the inmate to identify the conduct at issue." (D.Br.35). But the report provided virtually *no facts* relevant to date, even though Defendants knew *all* the dates on which the disbursement forms were submitted. Other than disclosing that McCarthy's investigation began on September 4, 2012, Defendants did not narrow down the timeframe at all. (A-297). This was a violation of due process, which requires, at a bare minimum, that the inmate "be given any general information regarding the relevant time and place that is known to the authorities." *Sira v. Morton*, 380 F.3d 57, 72 (2d Cir. 2004).

This violation was exacerbated by the report's failure to specify the number of forms Elder had allegedly submitted. As Defendants apparently concede, Elder could only guess whether he was accused of submitting a few forms within a short period or submitting many forms over several months. (JE.Br.38). This is precisely the sort of vagueness that this Court has found unconstitutional. *See Sira*, 380 F.3d at 71-72. While Defendants point to other information in the report, they do not explain how any of it cured or even mitigated this problem. (D.Br.33-34).

Similarly, although Defendants repeatedly claim that Elder understood the charges against him (D.Br.33-36), they offer no support for this assertion. To the

contrary, Elder complained at the hearing that he "ha[d] no copy of what [he was] accused of" or the "dates and times" of the charged misconduct. (A-319). That he then *tried* to defend himself as best he could does not prove that he had all the necessary information. Defendants observe that Elder did not present "an alibi defense where the precise dates of the alleged misconduct would have been important" (D.Br.36), but this gets things backwards. Inmates are entitled to date information in part so they can determine whether they have an alibi or similar defense. Elder's failure to present such a defense is thus entirely consistent with the fact that he received inadequate notice. And even if it turned out that he had no such defense, prison officials cannot justify inadequate notice by claiming the inmate would have been convicted anyway. (JE.Br.42-43; D.Br.38 n.8).

The cases Defendants cite are nothing like this one. In *Ayers v. Selsky*, 467 F. App'x 45 (2d Cir. 2012), the report identified the single, specific incident underlying the charges—the inmate's submission of a document to prison officials—and the inmate clearly knew "the date that incident took place." *Id.* at 47.[13] In *Mohamed v. Phelix*, No. 9:14-CV-01389, 2017 WL 4326660 (N.D.N.Y. June 13, 2017), the report identified the key date, and in defending against the charges, the inmate showed that he knew this was the key date. *Id.* at *10-11. In

[13] *Ayers* also acknowledges that "it [i]s error for [a] Misbehavior Report to give the 'date of incident' as the date the Report was filed, instead of the date of the events giving rise to the charge." *Id.* That is precisely what happened here. (A-297).

Hinton v. Prack, No. 9:12-CV-1844, 2014 WL 4627120 (N.D.N.Y. Sept. 11, 2014), the inmate apparently did not contest the adequacy of notice, and there was no indication prison officials knew the relevant dates. *Id.* at *6-7 & n.6. Thus, even if these cases were binding (which they are not), they could not change the conclusion that the notice served on Elder was fatally deficient.

B. Defendants Did Not Cure The Deficiency At Elder's Hearing

Defendants contend that Elder received adequate notice because he was "given access to" the disbursement forms at the hearing and the hearing was then adjourned for a week. (D.Br.36-38). However, an "inmate must be allowed to retain for 24 hours the written notice given him" so that he need not rely "on his memory" of the charges." *Benitez v. Wolff*, 985 F.2d 662, 665 (2d Cir. 1993). Contrary to Defendants' assertions, this 24-hour rule does not apply only "where the charges against an inmate are complicated or large in number." (D.Br.37). In *Benitez*, the Court held that the rule was "fairly inferred" from *Wolff v. McDonnell*, 418 U.S. 539 (1974), which applies generally to prison disciplinary proceedings. 985 F.2d at 665. Compliance is "*[e]specially*" important when the charges are numerous or complicated, but the rule is not limited to such cases. *Id.* (emphasis added). *Cf. Sira*, 380 F.3d at 72 (inmate must have "meaningful opportunity" to "prepare a response" to "curative disclosures"). It would certainly not be reasonable to require Elder to remember the dates on seven disbursement forms.

Defendants did not satisfy the 24-hour rule. It is undisputed that Elder did not have the disbursement forms in his possession for 24 hours. (JE.Br.41). Even if Elder had an opportunity to review the forms at the hearing before it was adjourned—which he disputes, as explained below—that portion of the hearing lasted only 13 minutes. (A-315, 319). Defendants claim that Elder could have written down the relevant information (D.Br.37), but they point to no evidence in the record supporting this assertion. The only evidence is to the contrary, since even though Elder complained to Kling that he had not received copies of the disbursement forms, Kling adjourned the hearing without correcting the problem. (A-319). Regardless, it makes no sense to put the burden on the inmate to seek an opportunity to write down the necessary facts. "Due process requires that prison officials *give* an accused inmate *written* notice"—not just the chance to request notice. *Sira*, 380 F.3d at 70 (emphasis added).

Thus, whether Elder had a meaningful opportunity to see the disbursement forms during the hearing is irrelevant. Even if it were relevant, Defendants' version of the facts cannot be credited on summary judgment. Elder testified at his deposition that Kling kept the forms by his side and only displayed them to Elder without giving him a good look. (JE.Br.15-16, 40-41). Although Defendants claim that the hearing transcript "refute[s]" Elder's testimony, the portions they cite are entirely consistent with Elder's explanation that Kling "showed" him the

forms only superficially. (D.Br.37 (citing A-318-319, 322, 324-325)). Indeed, the only part of the hearing transcript from before the adjournment that Defendants cite is ambiguous, open to interpretation, and inadmissible hearsay on summary judgment. (A-318 (Kling supposedly says, "that is the written evidence I am showing you to the record at this point")).

Focusing on the undisputed facts, Defendants plainly did not give Elder adequate written notice 24 hours before his hearing or allow him to retain such notice for at least 24 hours. Elder is therefore entitled to summary judgment.

IV. ELDER IS ENTITLED TO SUMMARY JUDGMENT ON HIS CLAIM OF INSUFFICIENT EVIDENCE

The hearing record contained no reliable evidence that any crime had occurred. (JE.Br.44-47). The only conclusion possibly supported by the record was that someone whose handwriting resembled Elder's had filled out the disbursement forms. At a minimum, due process also required evidence that Lawrence had not authorized the disbursements. But there was no such evidence, as the Fourth Department recognized in annulling the convictions. *See Elder*, 115 A.D.3d at 1177-78. In particular, there was no evidence at the hearing that Lawrence had complained of any thefts from his account.

Defendants try to minimize the importance of the Fourth Department ruling, arguing that the standard of review differs in state and federal proceedings and that the state court "appears to have overlooked" some evidence. (D.Br.45). But

nothing in the Fourth Department opinion suggests it turned on the standard of review or that it overlooked anything. That Court correctly observed that there was no evidence that Lawrence was the victim of any crime.

Defendants argue that Kling was entitled to conclude from the purported handwriting "match" and the misspelling of Lawrence's name that Elder had filled out the disbursement forms, and that Kling could further assume that Lawrence had not authorized the disbursements. (D.Br.45-48). Putting aside the obvious weaknesses of this evidence,[14] Defendants point to no evidence supporting Kling's assumption that the disbursements were unauthorized. Evidence, not speculation, was required for Kling to find against Elder on that element of theft.

Finally, Defendants suggest that Elder could be guilty of forgery simply for filling out the disbursement forms. (D.Br.46-47). The rule against forgery, however, requires an "intent to defraud or deceive." *Costantino v. Goord*, 38 A.D.3d 659, 660 (2d Dep't 2007). Defendants do not explain how Elder could have violated that rule unless he used the forms to steal from Lawrence.

---

[14] There was no evidence that Elder's handwriting was unique or that Lawrence's was noticeably different. *Cf. Jones v. Fischer*, No. 9:10-CV-1331, 2013 WL 5441353, at *17 (N.D.N.Y. Sept. 27, 2013) (cited at D.Br.46) (defendants "compared the threatening letter with samples of plaintiff's handwriting and samples of the handwriting of eight porters who lived on the same unit"). Regardless, Lawrence had a strong motive and the ability to frame Elder. (JE.Br.8-9, 13, 19-20). It is unclear how Elder could have fooled several different officers into authorizing seven disbursements from Lawrence's accounts, even if some of them were "lax" in verifying identification.

Given the lack of evidence at the hearing, Elder was entitled to summary judgment on his claim. We further note, acknowledging that this point is brand-new, that while Elder was charged with and convicted of theft under rule 116.10 (A-297, 328), that rule prohibits theft of "State property," not Lawrence's property. 7 NYCRR 270.2(B)(17)(i); *Adamson v. Barto*, 37 A.D.3d 597, 597-98 (2d Dep't 2007). Elder's theft conviction was therefore invalid for this reason as well.

V. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants' qualified immunity arguments have been waived and are without merit. They should be swiftly rejected.

A. Defendants Have Waived Qualified Immunity

On summary judgment, Defendants chose not to argue that anyone other than Bradt was entitled to qualified immunity. (D.Br.48-49). "Qualified immunity is an affirmative defense that may be waived if, as here, the defendants failed to move for summary judgment on this defense, even if, also as here, the defendants asserted the defense in their answer." *Harris v. Miller*, 818 F.3d 49, 63 (2d Cir. 2016). Thus, every Defendant except Bradt has waived qualified immunity. *See McCardle v. Haddad*, 131 F.3d 43, 51-52 (2d Cir. 1997); *Blissett v. Coughlin*, 66 F.3d 531, 538-39 (2d Cir. 1995); *Loricco v. Rescigno*, 89 F. App'x 300, 301 (2d Cir. 2004).

The Court can overlook waiver, but it should not do so because Defendants "proffer no reason for their failure to raise the arguments below." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) (quotation marks omitted). Instead, Defendants assert that qualified immunity "can be raised at any time," which is false. (D.Br.49). Defendants made the tactical decision to argue only that Bradt had qualified immunity, and they are bound by that choice. *See Darnell*, 849 F.3d at 38 n.17 (argument raised on behalf of only one defendant in the district court was "deemed waived" by the other defendants on appeal).

The cases Defendants cite are inapposite. In *Fabrikant v. French*, 691 F.3d 193 (2d Cir. 2012), "it [wa]s understandable" that certain defendants had not asserted qualified immunity because they denied being state actors for purposes of § 1983. *Id.* at 212. And both there and in *Burns v. Martuscello*, 890 F.3d 77 (2d Cir. 2018), the Court considered qualified immunity because the plaintiffs claimed rights that were novel and raised pure questions of law. *Id.* at 94 & n.4 (key precedent "was not decided" until "well after" defendants' conduct); *Fabrikant*, 691 F.3d at 212-14 ("no binding precedent . . . comes close to establishing" plaintiff's claimed right). Here, by contrast, the rights claimed by Elder are firmly grounded in precedent. Even if they raise questions of law, Defendants may not "blindsid[e]" Elder with new arguments on appeal. *Ritchie Capital Mgmt., L.L.C. v. Costco Wholesale Corp.*, 667 F. App'x 328, 329 (2d Cir. 2016).

Thus, where Elder is otherwise entitled to summary judgment, the Court should disregard qualified immunity and enter judgment in Elder's favor. Where Elder is otherwise entitled to a trial on his claims, the Court should leave qualified immunity for the district court to consider "in the first instance." *Darnell*, 849 F.3d at 39; *cf. Loricco*, 89 F. App'x at 301.

B. Defendants' Qualified Immunity Arguments Have No Merit

Defendants are not entitled to qualified immunity in any event. They "bear[] the burden" of "proving the affirmative defense of qualified immunity." *Blissett*, 66 F.3d at 539. Although Defendants devote several pages to emphasizing the doctrine's breadth (D.Br.49-51), they neglect to mention that "qualified immunity law does not require a case on point concerning the exact permutation of facts" before the Court. *Hancock v. Cty. of Rensselaer*, 882 F.3d 58, 69 (2d Cir. 2018); *accord White v. Pauly*, 137 S. Ct. 548, 551-52 (2017). "Some measure of abstraction is common sense is required," as the ultimate question is whether the defendant had "fair warning" that his or her conduct was unconstitutional. *Terebesi v. Torreso*, 764 F.3d 217, 230 n.11, 237 n.20 (2d Cir. 2014). Even "a generally phrased statement of the law may provide sufficient warning" to the defendant. *Id.* at 230 n.11. And if "preexisting law clearly foreshadows a particular ruling," the defendant cannot claim immunity. *Burns*, 890 F.3d at 94 (quotation marks omitted).

1. *Witnesses*. Kling cannot claim that this Court's decisions gave him inadequate guidance regarding Elder's request for witnesses. (D.Br.53). *Kingsley* clearly established that Kling had a duty to identify the witnesses using "readily available" prison records. 937 F.2d at 31 & n.6. Kling clearly violated that duty, since he cannot dispute that the staffing records were readily available and listed the relevant witnesses.

Kling also asks for immunity because Elder did not insist that he consult the staffing records. (D.Br.52-53). But Kling does not argue (or cite evidence) that he was ignorant of the records, let alone reasonably ignorant. Nor could he reasonably have expected Elder to identify those records at the hearing. (*See* Point I.A *supra*). Indeed, there is no indication that the inmate did so in *Kingsley*, and the Court did not impose any such burden on the inmate. *See* 937 F.2d at 28, 31.

In sum, nothing in the record or the caselaw entitles Kling to qualified immunity, and he cannot avoid summary judgment. *See Zavaro v. Coughlin*, 970 F.2d 1148, 1153-54 (2d Cir. 1992).

2. *Assistance*. MacIntyre's one-sentence invocation of qualified immunity is frivolous. (D.Br.51). He was obligated to interview the witnesses Elder requested, obtain relevant documents, and provide assistance in good faith. (JE.Br.29-30). He clearly violated that obligation by ignoring most of Elder's requests and telling Elder he would only get the evidence at the hearing itself.

(JE.Br.10-12). Consequently, he cannot seek an affirmance on qualified immunity grounds. *See Ayers*, 152 F.3d at 81-82; *Sira*, 380 F.3d at 75-76.

3. *Notice*. Kling and McCarthy could not reasonably believe that the misbehavior report gave adequate notice. (D.Br.52, 54). *Sira* clearly established that prison officials cannot force an inmate to "guess" the timing and extent of his alleged misconduct and should disclose that information if "known." 380 F.3d at 71-72.

Kling could not reasonably believe that he cured the deficient notice, since he failed to satisfy the 24-hour rule in *Benitez*. *See* 985 F.2d at 665. Kling faults Elder for failing to demand "access [to] the evidence at the hearing" (D.Br.52), but access at the hearing would not have satisfied *Benitez* either. And Elder clearly complained that he lacked notice, but Kling did not provide it. (A-319).

4. *Sufficiency of the evidence*. It was clearly established that Kling had to base his findings on evidence and could not simply assume the existence of facts. *See, e.g.*, *Zavaro*, 970 F.2d at 1153-54. Defendants' citation to *Sira* is inapposite (D.Br.53), since the defendants there received immunity from a new rule concerning the reliability of a specific type of evidence (third party hearsay from confidential informants). *See* 380 F.3d at 77-82. Here, the absence of evidence on an element of the offense was a clear violation of Elder's rights.

5. *Supervisors*. Based on the above, the Court can swiftly reject Bradt and Prack's primary argument—that because Kling and MacIntyre are not liable, neither are they. (D.Br.53-54). They also claim that Elder did not alert them to any due process violation (D.Br.54), but their "single conclusory sentence" without citations is not an argument. *Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005). And while Bradt raised qualified immunity below, he did not make this point (Dkt. 82-7 at 20-21), so it is doubly waived. It is also incorrect. Elsewhere in their brief, Defendants identify only two issues that Elder supposedly omitted from his prison appeals (D.Br.14), but Elder raised both issues (A-67 ¶¶ 2-3; A-74). There is no basis to extend immunity to Bradt or Prack.

VI. ELDER SHOULD BE ALLOWED TO REPLEAD HIS EIGHTH AMENDMENT CLAIM

Defendants contend that it would be futile to grant Elder leave to replead his Eighth Amendment claim for two reasons, neither of which has merit. First, Defendants assert that Elder's allegations of "exposure to human waste" and an "often dirty" cell that he was prevented from cleaning were too mild to violate the Eighth Amendment. (D.Br.55-56). But Defendants offer no support whatsoever for that conclusion. Elder was exposed to these conditions for half a year, and even the district court declined to rule that these unsanitary conditions were constitutionally acceptable. (JE.Br.48-49). Moreover, Defendants simply assume, without justification, that Elder could not plead additional facts. (D.Br.56). As a

pro se litigant, Elder was entitled to one opportunity to try again if his complaint was defective. (JE.Br.49).

Second, Defendants contend that because "there was no suggestion in the amended complaint" that they knew about the conditions of Elder's confinement, Elder would have to add new defendants, and any claims against those new defendants would be time-barred. (D.Br.56-57). This convoluted argument fails at the outset, since Elder may well be able to plead his claim against Defendants. That he did not initially identify the persons responsible for his conditions of confinement is the reason why he needs leave to replead; it is not a reason to assume he could not supply the necessary allegations. (JE.Br.49).

Furthermore, even if Elder would have to name new defendants, it would be improper to affirm the dismissal of Elder's claim based on the statute of limitations—an *affirmative defense* that (1) was never argued below, (2) raises factual issues (such as Elder's diligence, *see* D.Br.57), (3) must be asserted by the new defendants, and (4) cannot be raised by the current Defendants, who lack standing to seek the dismissal of claims asserted against others. *See Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) (state of limitations is an affirmative, waivable, "personal defense," and the "court ordinarily should not raise it *sua sponte*"); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 100-01 (2d Cir. 2007) (acknowledging "the general prohibition on a litigant's

raising another person's legal rights") (quotation marks omitted). It would be especially perverse to affirm given that, if the district court had granted leave to replead (as was required under this Court's precedents), there would have been no question that the re-pled claim was timely.[15] (A-328 (SHU sentence ended March 2013); SPA-14-15 (claim dismissed September 2015)). Elder is entitled to an opportunity to replead (JE.Br.49), and any affirmative defenses can be addressed by the district court if properly raised.

CONCLUSION

The judgment should be reversed in its entirety 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.

We also respectfully request that the Court consider urging the district court to permit further discovery on remand and to appoint counsel if Elder so requests. This Court has made similar recommendations *sua sponte* in appropriate cases. *See Willey*, 801 F.3d at 71.

[15] Thus, it is misleading for Defendants to suggest that this Court is "review[ing]" an earlier determination of futility. (D.Br.55). Defendants argue that an amendment is "now" futile (D.Br.56) because of the time that has elapsed since the district court's improper dismissal.

Dated: New York, New York
August 24, 2018

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Fabien Thayamballi
SHAPIRO ARATO LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Plaintiff-Appellant Jarvis Elder

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 Rule of Appellate Procedure 32(g) that the foregoing brief contains 6,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: August 24, 2018

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