APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2020
Argued: November 18, 2020
Decided: January 12, 2021

Docket No. 19-3482

DEVAR HURD,
Plaintiff-Appellant,

v.

STACEY FREDENBURGH,
IN HER INDIVIDUAL CAPACITY,
Defendant-Appellee.†

Before:

WALKER, KATZMANN, WESLEY, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Matsumoto, *J.*), dismissing the complaint for failure to state a claim.

Because of errors in his sentencing calculation, Plaintiff-Appellant Devar Hurd was incarcerated for almost a year past the date on which state law mandated his release. Hurd sued Defendant-Appellee Stacey Fredenburgh, a New York State prison official, alleging that she violated his Eighth and Four-

† The Clerk of the Court is directed to amend the official caption as set forth above.

teenth Amendment rights by keeping him imprisoned based upon those errors. The district court concluded that Hurd's alleged injury was not cognizable under either constitutional provision and, in the alternative, that Fredenburgh was entitled to qualified immunity.

We agree with the district court that the complaint should be dismissed, but agree with its reasoning only in part. Contrary to the district court's determination, we hold that Hurd alleged a harm of constitutional magnitude under the Eighth Amendment because New York State lacked authority to detain him past his mandatory conditional release date. We also hold that Hurd had a liberty interest in his right to conditional release protected by the Fourteenth Amendment's substantive due process clause, and the district court erred in concluding otherwise. But because neither of these rights was clearly established before today, Fredenburgh is entitled to qualified immunity for any responsibility she may have had for Hurd's prolonged detention.

Accordingly, we **AFFIRM** the judgment of the district court.

JACOB LOUP (Joel B. Rudin, *on the brief*), Law Offices of Joel B. Rudin, P.C., New York, NY, *for Plaintiff-Appellant*.

LINDA FANG, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Anisha S. Dasgupta, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General of the State of New York, New York, NY, *for Defendant-Appellee*.

WESLEY, *Circuit Judge*:

Devar Hurd was charged in a single state indictment with nine misdemeanors and one felony, which took three trials to resolve. He remained in local custody throughout the lengthy trial process. Hurd received a sentence specific to each conviction, but those sentences merged into one by operation of New York law. When Hurd was transferred into state custody to serve what became his single felony sentence, his credit for time already served and good behavior entitled him to immediate release. But Hurd was not released from state custody for nearly a year. He contends this prolonged incarceration violated his rights under the Eighth Amendment and the Fourteenth Amendment's substantive due process clause.

BACKGROUND[1]

Devar Hurd was arrested in July 2013 and indicted for seven counts of misdemeanor criminal contempt in the second degree, one count of misdemeanor stalking in the fourth degree, one count of misdemeanor harassment in the first degree, and one count of felony stalking in the second degree. He was held in the custody of the New York City Department of Correction ("NYCDOC") following his arrest, where he remained during multiple trials on the indictment.

Hurd's first trial in December 2014 ended in a mistrial. At his retrial in October 2015, the jury convicted Hurd of the nine misdemeanor counts; the state court declared a mistrial on the felony. The state court imposed a set of definite sentences for the misdemeanors ranging from 90 days to one year each,

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[1] Except as otherwise noted, these facts are as alleged in Hurd's First Amended Complaint.

to run consecutive to the others, in the custody of NYCDOC. Under New York law however, because the aggregate term of these definite sentences exceeded two years, Hurd's term of imprisonment on the misdemeanor counts was capped at two years. *See* N.Y. Penal Law § 70.30(2)(b).

Hurd faced another retrial on the felony count in March 2016; the jury convicted him of stalking in the second degree. The state court sentenced Hurd to an indeterminate sentence with a minimum of one-and-one-third years and a maximum of four years, to be served in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"). Because the state court did not specify the manner in which Hurd's felony sentence was to run, New York law mandated that it would run concurrently with his two-year sentence on the misdemeanors. *See id.* § 70.25(1)(a). Hurd's misdemeanor and felony sentences also merged by operation of New York law. *See id.* § 70.35. Thus, Hurd's maximum sentence on the indictment was four years.

Hurd would not have to serve four full years in prison after his sentence was imposed, however. New York law provides that any sentence "shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." *Id.* § 70.30(3). This is known as "jail-time credit." Thus, Hurd was entitled to credit against his maximum four-year "state sentence" for all the time he spent in NYCDOC custody from his arrest in July 2013 to his transfer to DOCCS custody in April 2016.

New York law also provides for "good-time credit," whereby an inmate "may receive time allowance against the term or maximum term of his or her sentence . . . for good behavior . . . ." N.Y. Corr. Law § 803(1)(a). Once good-time credit is approved, an inmate "*shall*, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her . . . is equal to the unserved portion of his or her term, maximum term or aggregate maximum term." N.Y. Penal Law § 70.40(1)(b) (emphasis added). This is known as the inmate's "conditional release date."

The New York Court of Appeals has referred to a conditional release date as "the statutorily mandated release date, calculated by applying both his good behavior time and his jail time, or time served awaiting trial." *Eiseman v. New York*, 70 N.Y.2d 175, 180 (1987) (Kaye, *J.*) (internal quotation marks and citations omitted). Thus, conditional release under New York law is unlike parole, which is a discretionary decision reserved to the judgment of the parole board. As then-Judge Kaye's explanation suggests, conditional release is a mathematical concept: an inmate will have completed their term of imprisonment when (1) the number of pre- and post-trial custody days served, plus (2) the number of approved days earned for good behavior, equals the inmate's sentence term. By sheer calculation of days, the inmate has satisfied their term of imprisonment, and they are entitled to immediate release from prison.

Hurd was transferred from NYCDOC custody into DOCCS custody in April 2016. Whenever an inmate is transferred from local to state custody, the local jurisdiction must calculate the inmate's jail-time

credit and provide DOCCS with a certified record of that credit. *See* N.Y. Corr. Law § 600-a. Accordingly, NYCDOC officials issued a "Jail Time Certification" ("JTC"), confirming that Hurd was entitled to 996 days of jail-time credit against his maximum four-year sentence. DOCCS officials also produced a "Legal Date Computation," indicating Hurd's eligibility for good-time credit of up to one year and four months and jail-time credit of two years, eight months, and 26 days.

Assuming his good-time credit would be approved, the combination of his jail-time credit and good-time credit gave Hurd a conditional release date of March 17, 2016—pre-dating his transfer into DOCCS custody. This conditional release date was reflected on the Legal Date Computation. Thus, at the time of his arrival in state custody, Hurd "was told that he was eligible to be immediately released." J.A. 17. DOCCS approved Hurd's good-time credit on April 19, 2016, at which point he satisfied the statutory requirements entitling him to conditional release.

DOCCS Inmate Records Coordinator Stacey Fredenburgh began to process Hurd's release documents. Hurd's complaint sets out a series of interactions between Fredenburgh and NYCDOC all centered around verifying the correct computation of his local jail-time credit. Without identifying a reason for any animus towards him, Hurd alleges that Fredenburgh and NYCDOC employees—most notably Principal Administrative Associate for NYCDOC's Legal Division, Edwin Felicien—"agreed to reduce Mr. Hurd's jail-time credit so that he would not be released." J.A. 17. Between April and June 2016, Felicien sent Fredenburgh four amended JTCs, each of which reflected a different, and much lower, jail-time

credit than the 996 days reflected in the original JTC. It is undisputed that each of these revised JTCs was wrong. The last amended JTC credited Hurd with 508 days of jail-time credit. As a result, DOCCS no longer considered Hurd eligible for conditional release; Hurd remained in prison.

Hurd pursued the official grievance process, filed two notices of claim, and lodged informal letter complaints to prison officials, including Fredenburgh, protesting that he was being held past his conditional release date. Fredenburgh responded in a letter to Hurd, telling him "that she could do nothing to address his concerns and that he must contact 'Rikers Island'" (an apparent reference to NYCDOC). J.A. 19. DOCCS took no other action in response to Hurd's complaints.

Finally, Hurd's counsel contacted NYCDOC's legal department on March 20, 2017. Three days later, NYCDOC sent an amended JTC crediting Hurd with the original 996 days of jail-time credit. DOCCS released Hurd on March 30, 2017—11 months and 11 days after the date on which he was entitled to immediate release.

Hurd filed the instant lawsuit under 42 U.S.C. § 1983 against New York City (the "City"), an NYCDOC employee, and Fredenburgh for violating his rights under the Eighth Amendment and the Fourteenth Amendment's substantive due process clause. Hurd settled with the City defendants. The district court thereafter granted Fredenburgh's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, holding that the prolonged imprisonment beyond Hurd's mandatory conditional release date was not a cognizable

injury under the Eighth and Fourteenth Amendments, and, in the alternative, that Fredenburgh was entitled to qualified immunity.

Hurd also filed a state law false imprisonment claim in New York's Court of Claims. Two weeks after the district court dismissed Hurd's § 1983 complaint, the Court of Claims granted summary judgment for the State, concluding that Fredenburgh acted reasonably considering her state law obligations and that Hurd's prolonged detention was attributable to the City's errors only.[2]

The Court of Claims noted that NYCDOC has the obligation under Penal Law § 600-a to send a JTC to DOCCS when an inmate is transferred from local to state custody. It noted further that the State "is bound by the jail time certifications it receives from local authorities and 'may not add or subtract therefrom.'" Add. 34 (quoting *McLamb v. Fischer*, 70 A.D.3d 1090, 1091 (3d Dep't 2010)); *see also Torres Bennett*, 271 A.D.2d 830, 831 (3d Dep't 2000). Although the State "changed its policy in 2014 to take affirmative steps to review a local commitment order after an inmate is returned to state custody from a local jail," *Torres v. New York*, 149 A.D.3d 1290, 1292 n.* (3d Dep't

[2] The parties dispute whether we can (or should) consider the Court of Claims record in resolving this appeal. As discussed below, we need not answer this question. We take judicial notice of that court's decision only to establish its existence and that the court made certain factual findings, which is necessary to complete the narrative of Hurd's federal action and provide context for Fredenburgh's defenses. *See Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (citing *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)). We do not give any effect to those factual findings, nor do we consider them for their truth or use them to support any factual determination (for we make none) in this appeal.

2017), the Court of Claims found that Fredenburgh's communications with Felicien satisfied the necessary review.

The Court of Claims concluded that, although "Fredenburgh's actions may have resulted in DOCCS receiving incorrect information, . . . her actions were reasonable at the time." Add. 35. It reasoned that the City's errors caused Hurd's prolonged detention, and Hurd's proper recourse was against the City, not the State. Hurd did not appeal the decision.

Hurd did appeal the dismissal of his federal complaint.

DISCUSSION

We review *de novo* a district court's decision granting a Rule 12(b)(6) motion, including on qualified immunity grounds. *See Hernandez v. United States*, 939 F.3d 191, 198 (2d Cir. 2019); *Charles W. v. Maul*, 214 F.3d 350, 356 (2d Cir. 2000). In conducting our review, we "accept as true all factual allegations and draw from them all reasonable inferences; but we are not required to credit conclusory allegations or legal conclusions couched as factual allegations." *Hernandez*, 939 F.3d at 198 (citation omitted).

The crux of both of Hurd's constitutional arguments is that "[o]n April 19, 2016, Hurd had enough jail-time credit and approved good-time credit to make his conditional release from prison *mandatory* under state law. However, Fredenburgh worked with an official of [NYCDOC] to reduce Hurd's jail-time credit so that he would not be released on his mandatory conditional release date . . . ." Appellant Br. 2–3. The district court rejected this theory, determining that neither the Eighth Amendment nor the

Fourteenth Amendment's substantive due process clause protects an inmate's right to, or interest in, conditional release under state law. The district court concluded that Hurd failed to plead a violation of his Eighth Amendment rights because "he was released prior to the date his maximum sentence expired," J.A. 39, and that Hurd failed to allege a violation of his Fourteenth Amendment rights because he "has no substantive due process right to conditional release" before the expiration of his maximum sentence, J.A. 51, 54.

After finding that Hurd failed to state a claim for violations of his Eighth or Fourteenth Amendment rights, the district court concluded in the alternative that Fredenburgh was entitled to qualified immunity. We agree with the district court's latter determination, but we disagree with its conclusions that Hurd did not plausibly allege harm to either his Eighth or Fourteenth Amendment rights.[3]

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[3] Our qualified immunity analysis "is guided by two questions: first, whether the facts show that the defendants' conduct violated plaintiffs' constitutional rights, and second, whether the right was clearly established at the time of the defendants' actions." *Golodner v. Berliner*, 770 F.3d 196, 201 (2d Cir. 2014) (internal quotation marks, alteration, and citation omitted). "We may address these questions in either order," and "[i]f we answer either question in the negative, qualified immunity attaches." *Id.* Although it has become the virtual default practice of federal courts considering a qualified immunity defense to assume the constitutional violation in the first question and resolve a case on the clearly established prong, "it is often beneficial" to analyze both prongs of the qualified immunity analysis. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "[T]he two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* This is such a case.

I. Eighth Amendment

"A plaintiff asserting an Eighth Amendment claim pursuant to 42 U.S.C. § 1983 must meet two requirements. First, the alleged deprivation must be, in objective terms, sufficiently serious. Second, the charged official must act with a sufficiently culpable state of mind." *Francis v. Fiacco*, 942 F.3d 126, 150 (2d Cir. 2019) (internal quotation marks and citations omitted).

To satisfy the first requirement, a plaintiff must plead "a harm of a magnitude that violates a person's eighth amendment rights." *Calhoun v. N.Y. State Div. of Parole Officers*, 999 F.2d 647, 654 (2d Cir. 1993) (internal quotation marks and citation omitted). "The Eighth Amendment[] . . . proscribes more than physically barbarous punishments. It prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (internal quotation marks, alteration, and citations omitted).

The constitutional claim is not measured by the punishment alone, for "an Eighth Amendment violation typically requires a state of mind that is the equivalent of criminal recklessness." *Francis*, 942 F.3d at 150 (internal quotation marks and citation omitted). "This standard requires that only the deliberate infliction of punishment, and not an ordinary lack of due care for prisoner interests or safety, lead to liability." *Id.* (alteration and citation omitted). Under this standard, prison officials can be found "deliberately indifferent to their own clerical errors on the basis of their refusals to investigate well-

founded complaints regarding these errors." *Id.* at 151 (internal quotation marks and citations omitted). The district court concluded that Hurd failed to allege a harm of constitutional magnitude because he was released before his maximum sentence expired. We disagree. The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," including punishments that are "totally without penological justification." *Gregg v. Georgia*, 428 U.S. 153, 173, 183 (1976). There is no penological justification for incarceration beyond a mandatory release date because "any deterrent and retributive purposes served by [the inmate's] time in jail were fulfilled as of that date." *See Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989).

"Next to bodily security, freedom of choice and movement has the highest place in the spectrum of values recognized by our Constitution." *Id.* at 1109. For that reason, unauthorized detention of just one day past an inmate's mandatory release date qualifies as a harm of constitutional magnitude under the first prong of the Eighth Amendment analysis.[4]

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[4] We acknowledge that, in *Calhoun*, we stated that a "five-day extension of [the plaintiff's] release date did not inflict 'a harm of a magnitude' that violates a person's eighth amendment rights." 999 F.2d at 654. But we did not announce this as a constitutional rule. The single paragraph devoted to the plaintiff's Eighth Amendment claim in *Calhoun* included only a descriptive, rather than normative, discussion of this issue, and we are not bound by its conclusion in announcing a constitutional rule here.

Indeed, in *Calhoun* we cited to *Sample*, which relied on the deliberate indifference prong as dispositive in cases of unavoidable administrative delay, mistakes, errors, and accidents. *See, e.g.*, *Sample*, 885 F.2d at 1109 ("Because such discretion is necessary to the administration of prisons, an official acting in good faith

Hurd's unauthorized imprisonment for almost one year certainly qualifies under that standard. *See id.* ("Detention for a significant period beyond the term of one's sentence inflicts a harm of a magnitude [recognized under the Eighth Amendment].").

It matters not that Hurd was detained past his statutory conditional release date as opposed to the expiration of the maximum sentence imposed on him by the sentencing judge. By using the word "shall," New York chose to make conditional release mandatory upon the approval of good-time credit and the inmate's request for release. *See* N.Y. Penal Law § 70.40(1)(b). It is the mandatory nature of that release, not the label of "conditional" or "maximum," that is dispositive.

In effect, Hurd's conditional release date became the operative date on which his maximum term of imprisonment expired. Once Hurd met the statutory requirements for conditional release, his release from prison was mandatory under state law. Fredenburgh does not dispute that DOCCS had no authority to keep Hurd incarcerated past his conditional release date for the crimes of which he was convicted and sentenced. Even assuming the State could impose

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within that discretion, although in the process perhaps injuring an inmate, has not inflicted a cruel and unusual punishment upon that inmate."). This approach—recognizing a harm of constitutional magnitude whenever an inmate is detained without authorization but finding a constitutional violation only where that harm is deliberately inflicted—avoids the arbitrary task of distinguishing between the permissible and impermissible length of unauthorized detention under the Constitution. Moreover, it reflects the notion that freedom from unlawful restraint is a right so core to our understanding of liberty that suffering even one day of unlawful detention is a harm recognized by the Constitution.

some supervisory conditions following Hurd's release,[5] his continued *imprisonment* was a punishment that was neither authorized by law nor justified by any penological interest asserted by the State. *See Sample*, 885 F.2d at 1108. Because the State detained him for over 11 months past the last date on which New York law authorized his imprisonment, Hurd suffered a harm of constitutional magnitude under the Eighth Amendment. The district court erred in concluding otherwise.

That does not mean Hurd suffered a violation of his Eighth Amendment rights, however. Nor does it mean an inmate whose release is not processed on their conditional release date is entitled to damages under § 1983. Far from it. If a period of prolonged detention results from discretionary decisions made in good faith, mistake, or processing or other administrative delays, as opposed to the deliberate indifference of prison officials, then there is no Eighth Amendment liability. The deliberate indifference prong will do most of the work under these and similar circumstances, as "[t]he degree to which a harm is

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[5] New York law provides that inmates granted conditional release "shall be under the supervision of the state department of corrections and community supervision for a period equal to the unserved portion of the [maximum] term," and that "[t]he conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law." N.Y. Penal Law § 70.40(1)(b); *see also* N.Y. Exec. Law § 259-c(2) (granting the state board of parole authority of "determining the conditions of release of the person who may be . . . conditionally released"). As noted above, the State's right to impose *some* form of punishment through supervision or other conditions of release (if any) does not justify a punishment of *imprisonment* that is unauthorized by law.

'unnecessary' in the sense of being unjustified by the exigencies of prison administration will affect the state-of-mind requirement a plaintiff must meet to demonstrate that a particular prison official violated the eighth amendment." *Sample*, 885 F.2d at 1109.

To that end, the district court concluded that "Fredenburgh's alleged conduct is troublesome and would certainly satisfy deliberate indifference if not willfulness, as [Hurd] alleges Fredenburgh *agreed* with Felicien to keep [Hurd] incarcerated past his conditional release date." J.A. 57. Fredenburgh argues that collateral estoppel applies here because of the Court of Claims' finding that she acted reasonably under the circumstances, and that Hurd is therefore precluded from arguing that Fredenburgh acted with deliberate indifference.

Regardless of the Court of Claims' decision, we are skeptical that Fredenburgh—whom Hurd failed to demonstrate has any authority or duty to change an erroneous JTC from the City—can be deliberately indifferent to any harm suffered because of that error. There must be "a causal connection between the official's response to the problem and the infliction of the unjustified detention," *Sample*, 885 F.2d at 1110, and if Fredenburgh could not do anything about Hurd's prolonged detention as a matter of law, then any deliberate indifference on her part would likely be irrelevant.

For example, in this case, Hurd cites to no authority or factual allegations establishing that Fredenburgh had an obligation under New York law or DOCCS policy to confirm the accuracy of the JTCs she received. Nor is it clear how Fredenburgh would or could have accomplished that, given that Penal Law

§ 600-a delegates the sole responsibility for certifying jail-time credit to NYCDOC, and the relevant information would be contained within NYCDOC records regardless. Nor are there any allegations that the prison had "procedures in place calling for [Fredenburgh] to pursue the matter," or that "given . . . [Fredenburgh's] job description or the role . . . she has assumed in the administration of the prison, [the jail-time credit] calculation problem will not likely be resolved unless . . . she addresses it or refers it to others . . . ." *Id.* Hurd's legal conclusion that Fredenburgh had such a duty or responsibility is not entitled to unquestioned acceptance at the motion to dismiss stage.

We acknowledge that Hurd's allegations do not concern only Fredenburgh's ability to change his jail-time credit but also her alleged conduct in agreeing to create the erroneous JTCs to keep Hurd in prison in the first place. As the district court concluded, such allegations could amount to deliberate indifference. We need not resolve this issue. Nor do we reach the issue of whether the Court of Claims' reasonableness finding has preclusive effect here. Because it was not clearly established that prolonged detention past one's mandatory conditional release date constitutes a harm of constitutional magnitude under the Eighth Amendment, Fredenburgh is entitled to qualified immunity on Hurd's claim. Before addressing that point, however, we turn to Hurd's Fourteenth Amendment argument.

II. Fourteenth Amendment

The Fourteenth Amendment guarantees "more than fair process"; it "cover[s] a substantive sphere

as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (internal quotation marks and citations omitted). "Substantive due process rights safeguard persons against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Southerland v. City of New York*, 680 F.3d 127, 151 (2d Cir. 2012) (internal quotation marks and citation omitted).

"The first step in substantive due process analysis is to identify the constitutional right at stake." *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). Next, the plaintiff "must demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Southerland*, 680 F.3d at 151–52 (internal quotation marks and citation omitted). "The interference with the plaintiff's protected right must be so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection." *Id.* at 152 (internal quotation marks and citation omitted).

The district court rejected Hurd's substantive due process claim, concluding that he lacked a cognizable liberty interest in conditional release because it is a state-created right. We disagree.

The district court reasoned that conditional release "is clearly a state-created right, as the Supreme Court has held that conditional release is not protected by the Constitution." J.A. 51. Although "[t]here is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence," *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011), that

does not establish that state inmates lack a liberty interest in conditional release where the state has created a statutory mechanism providing for *mandatory* conditional release for eligible inmates. It means only that an inmate has no constitutional right to demand or expect conditional release where the incarcerating authority does not offer such an opportunity under its law.[6]

Because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action[,] . . . commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (internal quotation marks and citations omitted); *see also Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004) (noting that individuals have a "protected liberty interest in being free from wrongful, prolonged incarceration"). Inmates eligible for mandatory conditional release are not limited to the confines of procedural due process in protecting that

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[6] Along these lines, the district court relied on our reaffirmation in *Graziano v. Pataki*, 689 F.3d 110, 114–15 (2d Cir. 2012) (per curiam), that New York inmates lack a liberty interest in parole because New York's parole scheme does not create a legitimate expectation of release. But New York's parole scheme differs from the promise of conditional release. No inmate is entitled to parole; it is a discretionary decision reserved to the judgment of the parole board. *See id.* at 113–14. *All* state inmates are eligible for conditional release. Unlike parole, where inmates have only a possibility or probability of being granted the chance to complete their sentence outside prison, inmates such as Hurd who satisfy the statutory requirements for conditional release are guaranteed immediate release from prison. That difference creates a legitimate expectation of release, and by extension a liberty interest protected by the due process clause.

right. *Cf. Swarthout*, 562 U.S. at 220. They also are entitled to substantive due process protection against egregious and arbitrary government interference.

Substantive due process protects rights that are rooted in the principles of ordered liberty. Freedom from unlawful restraint is exactly that. Hurd remained in prison for almost one year while the State lacked any authority to further detain him. Because New York's conditional release scheme is mandatory, there is no meaningful difference in Hurd's liberty interest in release from prison at the expiration of his maximum sentence and conditional release when he became entitled to an earlier release date. Once Hurd's good-time credit was approved, the expiration date of his maximum term of imprisonment and his "conditional" release date were one and the same for substantive due process purposes.

It is of no moment that conditional release is a state-created right. Although many state-created rights are not recognized under the substantive due process clause, state-created rights that trigger core constitutional interests are entitled to its protection. *Cf. Local 342, Long Island Pub. Serv. Emps. v. Town Bd. of Town of Huntington*, 31 F.3d 1191, 1196 (2d Cir. 1994) (explaining that the substantive due process clause does not protect "simple, state-law contractual rights, without more"). It is the nature of the right, not just its origin, that matters. Conditional release under New York law is not akin to a state-created right of contract; it is a state-created right of mandatory release from prison, preventing unlawful continued physical restraint. *Cf. Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979) ("[I]nterest[s] entitled to protection as a matter of substantive due

process [must] resembl[e] the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life." (internal quotation marks and citation omitted)); *see also Local 342*, 31 F.3d at 1196 (substantive due process protects rights that are "so vital that neither liberty nor justice would exist if they were sacrificed" (internal quotation marks and citation omitted)). That distinction makes all the difference. Once Hurd satisfied the statutory requirements for conditional release, he had a liberty interest in freedom from detention upon his conditional release date, as guaranteed by New York law.[7]

Fredenburgh's error is considered at the second step of the substantive due process analysis—the nature of the alleged interference with Hurd's liberty interest. Specifically, we must determine whether Fredenburgh's conduct was egregious and shocking to the conscience.

The district court reasoned that, "if true, [Hurd's] allegations that Fredenburgh *intentionally* took actions to keep [Hurd] imprisoned without justification might shock the judicial conscience . . . ." J.A. 52. Here, too, Fredenburgh argues that collateral estoppel applies because of the Court of Claims' finding

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[7] Although Fredenburgh does not raise the issue, we acknowledge that the Supreme Court cautions against expanding the substantive due process clause where a more specific Amendment provides a source for protection against government conduct. *See, e.g.*, *Lewis*, 523 U.S. at 842. Our holding does not expand the protection of the Fourteenth Amendment's substantive due process clause, however. We are applying the clause to one of the explicit concepts it exists to protect: liberty from unjustified restraint. *Cf. Davis*, 375 F.3d at 714. Our conclusion that Hurd also alleged a harm of constitutional magnitude under the Eighth Amendment does not deprive him of a liberty interest in his mandatory conditional release.

that she acted reasonably under the circumstances, which precludes any finding in this case that her conduct satisfied the high standard for a substantive due process violation. Again, we need not reach this issue, because it was not clearly established that Hurd had a liberty interest in his mandatory conditional release at the time of the sentencing miscalculations.

III. Clearly Established Law

"Government actors are entitled to qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 432–33 (2d Cir. 2009) (internal quotation marks and citation omitted). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 433 (citation omitted). "The principle of qualified immunity ensures that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.* (internal quotation marks and citation omitted).

Fredenburgh is entitled to qualified immunity under this standard. It was not clearly established during the period of Hurd's prolonged detention that an inmate suffers harm of a constitutional magnitude under the Eighth Amendment when they are imprisoned past their mandatory conditional release date, nor was it clearly established that an inmate has a liberty interest in mandatory conditional release protected by the Fourteenth Amendment's substantive due process clause. Hurd nevertheless urges us to find that these rights were clearly established because they follow

from existing precedent. For his Eighth Amendment claim, Hurd relies on *Sample*, 885 F.2d 1099, *Calhoun*, 999 F.2d 647, *Sudler v. City of New York*, 689 F.3d 159 (2d Cir. 2012), and *Francis*, 942 F.3d 126. These cases confirm a uniform legal principle that no federal, state, or local authority can keep an inmate detained past the expiration of the sentence imposed on them. But in the qualified immunity analysis, the Supreme Court has admonished that rights should not be defined at a high level of generality and instead must be "particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation marks and citation omitted). None of the cases upon which Hurd relies addresses a conditional release scheme, let alone one in which an inmate is entitled to mandatory release prior to the expiration of their maximum sentence. More to the point, none of them confirm that prolonging an inmate's detention past their conditional release date might violate the inmate's rights under the Eighth Amendment.

Sample concerned Pennsylvania inmate Joseph Sample, who was granted bail pending a new trial after his life sentence was vacated on appeal. 885 F.2d at 1102. The senior records officer at a Pittsburgh detention facility was instructed to determine whether Sample could be released; the officer erroneously informed authorities that Sample still had time left on another sentence. *Id.* Sample served nine extra months in prison as a result. *Id.* at 1102–03.

Because of his authority and job responsibilities, the records officer's error rendered him liable under the Eighth Amendment. *Id.* at 1110–12. Specifically, the Third Circuit held that prolonged incarceration past the expiration of a prison sentence constitutes

punishment under the Eighth Amendment. *Id.* at 1108. Where there is no penological justification for that incarceration, as determined by the deliberate indifference prong, that punishment is cruel and unusual; and to be liable under § 1983, the officer's deliberate indifference must have caused the prolonged incarceration. *Id.* at 1108–11.

To be sure, *Sample* clearly established that "imprisonment beyond one's term constitutes punishment within the meaning of the eighth amendment." 885 F.2d at 1108. But it did not establish that the Eighth Amendment prohibits imprisonment beyond a mandatory conditional release date that occurs prior to the expiration of the maximum sentence.

Calhoun concerned New York inmate Bennie Calhoun, who was sentenced to a maximum term of six years, released on parole, arrested for a parole violation with two months left on the maximum term, and reincarcerated on a finding of probable cause for the parole violation. 999 F.2d at 650. The parole board declared Calhoun a "delinquent," meaning the time between his arrest and reincarceration—in this case, five days—was added to his maximum sentence. *Id.* at 650–51. New York law entitled Calhoun to a final parole revocation hearing to determine his guilt on the parole violation, but his amended maximum sentence expired before this hearing could take place, and Calhoun was administratively discharged. *Id.* He sued based on this prolonged incarceration of five days. *Id.* at 651–52.

We focused on Calhoun's due process claim—that he was sentenced based on a parole violation charge, rather than any finding of guilt. *Id.* at 652–54. But in a single paragraph, we noted (again, as a descriptive

matter) that five extra days in prison does not satisfy the constitutional harm prong of the Eighth Amendment analysis, and even if it did, Calhoun could not show any deliberate indifference and his Eighth Amendment claim failed. *Id.* at 654. We distinguished those five days from the nine months of prolonged detention in *Sample*—long enough to qualify as harm of a constitutional magnitude. *Id.* Thus, at most, *Calhoun* reinforced *Sample*'s holding that unlawful detention past the expiration of a maximum sentence constitutes punishment under the Eighth Amendment. Like *Sample*, *Calhoun* did not touch on conditional release.

Sudler concerned New York inmates who were sentenced to felony state prison terms, released on parole, convicted of misdemeanor parole violations, sentenced to concurrent sentences in City custody for those parole violations, and denied "parole jail-time credit" by prison officials upon their transfer back into state custody to complete their original sentence terms. 689 F.3d at 162–65. By denying the inmates credit for the time served on their misdemeanor parole violations against their felony prison terms, the prison officials effectively imposed consecutive sentences and prolonged the terms of the inmates' sentences, without an order from the sentencing judges.

We held that the prison officials were entitled to qualified immunity because it was not clearly established that an inmate's procedural due process rights are violated when an administrator alters a sentence imposed by the court. *Id.* at 174–77. After introducing the inmates' due process theory, we noted in a footnote that "[w]e have suggested in the past, and other courts within and without this Circuit have held, that detention beyond that authorized by law may violate the

Eighth Amendment." *Id.* at 169 n.11. In addition to *Sample*, we cited to *Calhoun* for support, describing the latter decision as "assuming that detention of a prisoner beyond the end of his term could violate the Eighth Amendment in appropriate circumstances, but finding no violation where the unauthorized detention lasted only five days and the plaintiff failed to demonstrate the defendants' deliberate indifference." *Id.* Because no party in *Sudler* raised the issue, however, any Eighth Amendment claim was waived. *Id.* Accordingly, *Sudler* only reinforces the principle established in *Sample* and acknowledged in *Calhoun* that the Eighth Amendment protects against prolonged imprisonment that is not authorized by law. It too did not discuss conditional release or how conditional release relates to the expiration of a maximum term of imprisonment.

Francis concerned New York inmate Byran Francis, who was sentenced in state court to serve time concurrent with a federal sentence yet to be imposed, contrary to New York law. 942 F.3d at 131–35. The subsequently imposed federal sentence was not ordered to run concurrently with the previously imposed state sentence. *Id.* at 132. After Francis commenced his federal sentence, DOCCS officials realized the state court's error, determined of their own accord that Francis's sentences were consecutive, and requested the federal authorities transfer him back to state custody at the completion of his federal sentence, without seeking clarification or providing Francis an opportunity to be heard. *Id.* at 134–36. Upon release from federal custody into state custody, Francis sought resentencing in state court and was released four months later. *Id.* at 136–37.

We held that this violated the Francis's procedural due process rights. *Id.* at 141–45. The officials were entitled to qualified immunity, however, because the specific procedural protections to which we found Francis entitled were not clearly the merits of Francis's Eighth Amendment claim in determining that the officials were entitled to qualified immunity for any constitutional violation. *Id.* at 149–51. We acknowledged in *Francis* that "[n]o case establishes that these four months of additional incarceration, although of serious dimension, crossed the threshold of sufficient objective seriousness to constitute cruel and unusual punishment under the Eighth Amendment." *Id.* at 150 (internal quotation marks, alteration, and citation omitted). In doing so, we rejected the inmate's argument that *Haygood v. Younger*, 769 F.2d 1350, 1352–53, 1358 (9th Cir. 1985) (en banc)—where an inmate remained incarcerated for five years due to an erroneous interpretation of state law—and *Sample*, 885 F.2d 1099, clearly foreshadowed a constitutional determination.

Although these courts hinted at the outcome in this case, our legal conclusion was not manifest. Each case concerns detention beyond an inmate's maximum sentence. Before today, we have never held that an inmate suffers a constitutional harm under the Eighth Amendment when they are detained beyond a statutorily mandated release date, even if that mandatory release date precedes the expiration of the maximum term of their sentence. It was clearly established that New York State could not detain Hurd past the expiration of his maximum sentence, but it was not clearly established that once Hurd's

conditional release date was approved, continued detention beyond that date qualifies as a constitutional harm for Eighth Amendment purposes.

As for his substantive due process claim, Hurd admits that no decision has held that imprisonment past a mandatory conditional release date violates the Fourteenth Amendment's substantive protections. He nevertheless argues that "such a conclusion follows inescapably from the procedural due process cases, as a prisoner must have such a right once state officials have actually granted him discretionary early release." Appellant Br. 39.

We disagree. The substantive due process analysis differs from procedural due process; and it is not the case that one must follow from the other. And for the same reasons that our precedents do not dictate the outcome of his Eighth Amendment claim, Hurd's liberty interest in conditional release does not obviously follow from the procedural due process cases upon which Hurd relies.

Fredenburgh is therefore entitled to qualified immunity on Hurd's Eighth and Fourteenth Amendment claims.

CONCLUSION

For the reasons stated above, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed Sept. 26, 2019]

DEVAR HURD,
Plaintiff,

-against- 18-CV-3704(KAM)(JO)

CITY OF NEW YORK, et al.,
Defendants.

MEMORANDUM & ORDER

MATSUMOTO, United States District Judge:

Plaintiff Devar Hurd ("Hurd" or "plaintiff") brought this action pursuant to 42 U.S.C. § 1983 by filing a complaint on June 26, 2018, naming as defendants the City of New York, Salathia Mixon, and Stacey Fredenburgh ("Fredenburgh" or "defendant"). (*See* ECF No. 1, Compl.) The Complaint alleges Mixon, Fredenburgh, and the City deprived plaintiff of his constitutional rights under the Eighth and Fourteenth Amendments due to an error in his sentencing calculations that caused plaintiff to be imprisoned past his conditional release date. (*Id.* at 1.) Plaintiff filed an amended complaint on November 2, 2018, bringing largely the same claims but dropping state law claims against defendant Fredenburgh. (*See* ECF No. 23, Am. Compl.). On June 7, 2019, the City of New York and Mixon reached a settlement agreement with Hurd, and were subsequently dismissed from this action. (*See* ECF No. 53, Settlement Agreement; ECF No. 54, Order Dismissing Parties.) Plaintiff seeks

monetary damages due to his alleged wrongful imprisonment in violation of the Due Process Clause of the Fourteenth Amendment and of the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Fredenburgh, the only remaining defendant, now moves this court to dismiss plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") for failure to state a claim. (*See* ECF No. 33, Mot. to Dismiss; ECF No. 34, Def.'s Mem. ("DM"); ECF No. 35, Pl.'s Opp. ("Opp."); ECF No. 36, Def.'s Reply ("Reply").) For the reasons discussed below, the court GRANTS defendant's motion and finds that plaintiff's Fourteenth Amendment due process claim fails because he did not plead a substantive due process right, that plaintiff fails to plead a violation of his Eighth Amendment rights because he was released prior to the date his maximum sentence expired, and that regardless of those deficiencies, defendant is entitled to qualified immunity.

BACKGROUND

The following facts are drawn exclusively from plaintiff's Amended Complaint. Hurd was arrested on July 23, 2013, and charged under Indictment No. 3134-2013 (the "Indictment"), (Am. Compl. 3), and was held in the custody of New York City's Department of Correction ("NYCDOC"), (*id.* at 6). On October 8, 2015, after a second trial on the Indictment, Hurd was convicted on nine of ten counts submitted to the jury; the court declared a mistrial as to the tenth count. (*Id.* at 4.) The nine counts of conviction were all misdemeanors,[1] and on October 23, 2015, Hurd received consecutive one-year definite sentences for

[1] The misdemeanor counts consisted of seven counts of criminal contempt in the second degree, N.Y. Penal Law § 215.50(3); one

each of the seven counts of criminal contempt in the second degree; a 90-day definite sentence for the count of stalking in the fourth degree; and a 90-day definite sentence for the count of harassment in the first degree. (*Id.*) By operation of law, however, the maximum term of incarceration Hurd could serve for these consecutive, definite sentences was two years. (*Id.*); *see* N.Y. Penal Law § 70.30(2)(b).

On March 18, 2016, after a third trial on the Indictment, a jury convicted Hurd of the remaining count, stalking in the second degree, a felony (the "Felony Count"). (*Id.*); *see* N.Y. Penal Law § 120.55(2). On March 31, 2016, Hurd received an indeterminate prison sentence, with a minimum of one-and-one-third years, and a maximum of four years, to be served in the custody of New York State's Department of Corrections and Community Supervision ("DOCCS"), and that was required to run concurrently with his sentence on the misdemeanor counts. (Am. Compl. 5.) By operation of law, Hurd's indeterminate sentence on the Felony Count merged with the definite sentences on the misdemeanor counts and, accordingly, Hurd's maximum term of imprisonment for the ten counts of conviction was four years. (*Id.*)

On or about April 14, 2016, Hurd was transferred from NYCDOC custody to DOCCS custody at Ulster Correctional Facility. (*Id.* at 6.) Accordingly, NYCDOC officials issued a "Jail Time Certification" ("JTC") certifying that Hurd was entitled to 996 days of jail-time credit under N.Y. Penal Law § 70.30(3), for time served in City custody while awaiting trial and

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count of stalking in the fourth degree, *id.* § 120.45(1); and one count of harassment in the first degree, *id.* § 240.25. (Am. Compl. 4.)

sentencing. (*Id.* at 5-6.) Concurrently, Hurd alleges, DOCCS officials produced a "Legal Date Computation" indicating that Hurd was eligible for good-time credit of up to one year and four months pursuant to N.Y. Penal Law §§ 70.30(4)(a), 70.40(1)(b), and N.Y. Correct. Law § 803(1)(a)-(b). (*Id.* at 6-7.) Plaintiff's Legal Date Computation also indicated he was entitled to jail-time credit of two years, eight months, and 26 days. (*Id.* at 7.) Based on these two credits, the Legal Date Computation further indicated that Hurd's conditional release date, assuming his good-time credit was approved, was March 17, 2016, *i.e.*, nearly a month prior to the date he was actually transferred to state custody. (*Id.*) On April 19, 2016, DOCCS awarded Hurd the full one year and four months of good-time credit for which he was eligible. (*Id.*)

Hurd alleges that his jail-time credit was erroneously reduced and that, as a result, he was wrongfully kept in prison past his conditional release date. (*Id.* at 8.) When Hurd was not immediately released upon the April 19, 2016 approval of his good-time credit, he repeatedly complained to unidentified prison officials about his alleged wrongful imprisonment. (*Id.*) According to Hurd, NYCDOC employee Edwin Felicien had spoken with defendant Fredenburgh, and the two agreed to reduce Hurd's jail-time credit so that he would not be released. (*Id.*)

The Amended Complaint further alleges that on May 4, 2016, defendant Fredenburgh asked Mixon for her assistance in obtaining an amended JTC to reduce Hurd's jail-time credit so that DOCCS could continue to imprison him. (*Id.*) Over the next few days, Mixon told Fredenburgh multiple times that Hurd was entitled to all 996 days of jail-time credit that NYCDOC officials had certified in Hurd's original JTC, and that

Mixon even "called sentencing review" to confirm that Hurd's original JTC was correct. (*Id.*)

On May 6, 2016, Felicien emailed Fredenburgh an amended JTC, indicating Hurd was entitled to 507 days jail-time credit. Later that day, Felicien emailed Fredenburgh a second amended JTC, which reduced Hurd's eligible jail-time credit to 469 days. (*Id.* at 9.) Fredenburgh and Mixon reviewed the JTCs but neither took any action to correct these JTCs. (*Id.*) Around May 13, 2016, Hurd wrote grievance letters to defendant Fredenburgh and other DOCCS officials at Ulster Correctional Facility demanding that they release him in accordance with the original, accurate JTC. (*Id.* at 10.) On May 24 and 25, Fredenburgh responded to Hurd in writing that she could do nothing to address his concerns and that he must instead contact "Rikers Island." (*Id.*) On June 9, Felicien issued a third amended JTC, crediting Hurd with 524 days of jail-time credit. (*Id.*) Once again, on June 13, 2016, Felicien issued a fourth amended JTC crediting Hurd with 508 days of jail-time credit. (*Id.*)

In late June 2016, Hurd was eventually transferred to Riverview Correctional Facility. (*Id.*) There he pursued the official grievance process to the DOCCS Central Office Review Committee, filed two Notices of Claim, and wrote letters to various Riverview officials and the DOCCS' Office of Sentencing Review. (*Id.*) DOCCS officials, however, "refused to intervene." (*Id.*)

Then, on March 23, 2017, NYCDOC Assistant General Counsel Justin Kramer instructed Mixon to notify DOCCS that Hurd was entitled to all the jail-time credit he had originally been entitled to. (*Id.* at 11.) That same day, Mixon prepared an amended JTC

which certified that Hurd was entitled to 996 days of jail-time credit. (*Id.*) Mixon emailed this amended JTC to an unidentified inmate records coordinator at Riverview Correctional Facility. (*Id.*) This coordinator then verified that Hurd was still entitled to all the good-time credit for which he had been eligible when he was first transferred to DOCCS custody, and DOCCS accordingly conditionally released Hurd on March 30, 2017. (*Id.*)

LEGAL STANDARD

I. Sufficiency of the Pleadings

A plaintiff must plead facts that, if accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is facially plausible when the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint need not contain detailed factual allegations, but must contain more than mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" or "naked assertions" devoid of "further factual enhancement." *Id*. For motions under Rule 12(b)(6), the court assumes the truth of all facts asserted in the operative complaint and draws all reasonable inferences from those facts in favor of the non-moving plaintiff. *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir. 2006).

DISCUSSION

Defendant moves to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be

granted. Defendant first argues that plaintiff's due process rights were not violated because he did not, and cannot, establish that he has a liberty interest in conditional release, and that plaintiff had adequate post-deprivation remedies in the form of an Article 78 or state habeas proceeding, that satisfy due process. (DM 5-6.) Defendant thus contends that plaintiff's Fourteenth Amendment claim fails. As to plaintiff's Eighth Amendment claim that he was subjected to cruel and unusual punishment, defendant argues first that plaintiff has not pled the requisite mental culpability and deliberate indifference, and second, that plaintiff was not held beyond his maximum release date as a result of defendant's alleged conduct. (*Id.* at 7-9.) Alternatively, defendant argues that she is entitled to qualified immunity as there is no clearly established law that proscribed defendant's conduct.[2] *Id.* at 9-11.)

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[2] For the first time on reply, defendant appears to argue that plaintiff's claims under 42 U.S.C. § 1983 are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that prisoner § 1983 claims that necessarily challenge the validity of a conviction or sentence are not cognizable unless the underlying conviction or sentence has been overturned. (Reply 5.) Applying *Heck* would require this court to consider whether plaintiff's § 1983 claims necessarily challenges the validity of his conviction or sentence, including its length. However, "[i]t is well-established that 'arguments may not be made for the first time in a reply brief.'" *Zirogiannis v. Seterus, Inc.*, 221 F. Supp. 3d 292, 298 (E.D.N.Y. 2016) (quoting *Knipe v. Skinner*, 999 F.2d708, 711 (2d Cir. 1993)). The court, therefore, will not consider "[n]ew arguments first raised in reply papers in support of [the] motion." *Domino Media, Inc. v. Kranis*, 9 F. Supp. 2d 374, 387 (S.D.N.Y. 1998). It is worth noting, however, that *Heck* does not pose an absolute bar to prisoner § 1983 claims in this Circuit, and *Heck*'s application to such claims brought by *former* prisoners is an open question. *See generally Opperisano v. P.O. Jones*, 286 F. Supp. 3d 450, 457

Plaintiff responds that the Second Circuit has held prisoners possess a liberty interest in earned good-time credit and that New York's parole system creates a legitimate expectancy of release. (Opp. 12.) Plaintiff also responds that defendant's alleged deliberate indifference, supports a finding that defendant's conduct "shocked the conscience," thus establishing a sustainable substantive due process claim. (Opp. 10-12.)

As to his Eighth Amendment claim, plaintiff relies on his factual allegations that Fredenburgh knew of Hurd's plight and refused to rectify the error, thus supporting an inference she acted with deliberate indifference. (*Id.* at 6-8.) He also argues that prolonged confinement is measured not from a prisoner's maximum release date, but whether he was "detained after he should have been released." (*Id.* at 6.) Thus, plaintiff argues, his confinement beyond his originally calculated conditional release date makes out an Eighth Amendment claim for cruel and unusual punishment.

Finally, responding to defendant's assertion of qualified immunity, plaintiff argues that defendant's subjective belief requires factual development and is not suitable for disposition on a motion to dismiss. (*Id.* at 17.) Second, he argues that the law was clearly established through Second Circuit precedent or that, in the alternative, it was not objectively reasonable for

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(E.D.N.Y. 2018); *see also Green v. Montgomery*, 219 F.3d 52, 61 n.3 (2d Cir. 2000) ("*Heck* acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (*i.e.*, when he is in state custody). Because it does not appear that [the claimant is] presently in state custody his § 1983 action is not barred by *Heck*." (citations omitted)). In any event, the court need not rule on whether *Heck* applies to the instant case, and is reluctant to do so in light of the parties' failure to submit fulsome briefing on the question.

defendant to believe she could not alter Hurd's JTC certificates because she had in fact procured changes in the first place. (*Id*.)

I. Substantive Due Process

Plaintiff alleges that being held some 996 days beyond his conditional release date violated a substantive due process right conferred to him by New York State Law. (Am. Compl. 11.) Defendant moves to dismiss this claim. She argues that plaintiff fails to plead a substantive due process claim because he cannot establish a liberty interest in his conditional release and, in any event, that he was afforded due process. (DM 5-7.) This latter argument, however, appears to contemplate a *procedural* due process claim, challenging whether plaintiff was afforded the process he was due for the deprivation he suffered. S*ubstantive* due process claims, on the other hand, generally require the court to consider whether the government could affect such a deprivation, "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). For his part, plaintiff expressly denies that he brings a procedural due process claim, (Opp. 12 n.2), and the Amended Complaint clearly states that plaintiff's first cause of action is for a violation of his substantive due process rights, (Am. Compl. 12). He thus argues that the Amended Complaint satisfies the substantive due process pleading standard of "egregious" or "conscience-shocking" conduct. (Opp. 10 (citing *Lombardi v. Whitman*, 485 F.3d 73, 79 (2d Cir. 2007) and *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005)).)

Yet, in support of plaintiff's argument, he relies heavily on cases in the Second Circuit, and other Circuits, clearly addressing *procedural* due process

claims. (*See id.* (citing *Zurak v. Regan*, 550 F.2d 86, 92-93 (2d Cir. 1977) (affirming district court's order directing implementation of procedures at Riker's Island for timely disposing of conditional release applications)).) Taken together, plaintiff's disavowal of a procedural due process claim, coupled with his citation to, and reliance on, procedural due process cases, obscures the nature of the due process claim plaintiff asserts and defendant seeks to dismiss.

Nevertheless, the court will take plaintiff at his word and analyze his pleading as asserting a substantive due process claim. Due Process claims must plead two elements: (1) that "the plaintiff had an actual interest protected by the Fifth Amendment—life, liberty or property—at stake;" and (2) that "[d]efendants infringed on that interest in a manner that was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2012) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)); *see also Leder v. Am. Traffic Sols., Inc.*, 630 F. App'x 61, 62 (2d Cir. 2015) ("A substantive due process claim under 42 U.S.C. § 1983 requires plaintiff to show (1) a fundamental liberty interest, (2) the deprivation of which was arbitrary in the constitutional sense."). The "[s]ubstantive due process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires [the court] to exercise the utmost care whenever [the court is] asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Thus, plaintiff must first establish that "he possessed a liberty or property interest of which [Fredenburgh] deprived him." *Sutera v. Transp. Sec. Admin.*, 708 F. Supp. 2d 304, 313 (E.D.N.Y. 2010). This he cannot do.

The substantive component of the "Due Process Clause protects only those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, as well as implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *United States v. Windsor*, 570 U.S. 744, 808 (2013) (Roberts, C.J., dissenting); *see also Albright v. Oliver*, 510 U.S. 266, 272 (1994) (noting the substantive due process clause, for the most part, protects "matters relating to marriage, family, procreation, and the right to bodily integrity"). "Recognized fundamental rights include those created by the Constitution, most rights enumerated in the Bill of Rights, and certain enumerated rights, such as the right to privacy." *St. Francis Hosp. v. Sebelius*, 34 F. Supp. 3d 234, 246 (E.D.N.Y. 2014). While certain state-created rights are entitled to protections of *procedural* due process, *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995), "*substantive* due process right[s] are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)(emphasis added); *see also Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979); *Local 342, Long Island Pub. Serv. Emps., UMD, ILA, AFL–CIO v. Town Bd. of Town of Huntington*, 31 F.3d 1191, 1196 (2d Cir. 1994); *Barna v. Travis*, 239 F.3d 169, 170 (2d Cir. 2001).

Thus, "a government or state-created right is not a fundamental right implicating substantive due process," *St. Francis Hosp.*, 34 F. Supp. 3d at 246, and the court must look to the Federal Constitution or other sources of protected interests "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Supreme Court, however, has held

that "[t]here is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011); *see also Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981). Even if substantive due process could reach state-created rights, "the Second Circuit has declined to opine on whether New York recognizes a liberty interest in conditional release." *Hayes v. Annucci*, No. 14-CV-8845, 2016 WL 1746109, at *3 (S.D.N.Y. Apr. 28, 2016) (citing *Doe v. Simon*, 221 F.3d 137, 139 (2d Cir. 2000)); *cf. Graziano v. Pataki*, 689 F.3d 110, 114–15 (2d Cir. 2012) ("We have squarely held that because the New York parole scheme is not one that creates a legitimate expectancy of release, '[prisoners] have no liberty interest in parole, and the protections of the Due Process Clause are inapplicable.'").

Plaintiff alleges he was deprived of his timely conditional release from state custody. This is clearly a state-created right, as the Supreme Court has held that conditional release is not protected by the Constitution. Therefore, plaintiff has no substantive due process right to conditional release, and arguably no procedural due process right, either. Although the court finds that, if true, plaintiff's allegations that Fredenburgh *intentionally* took actions to keep plaintiff imprisoned without justification might shock the judicial conscience, plaintiff has failed to satisfy the first pleading requirement for a substantive due process claim. The court therefore GRANTS defendant's motion to dismiss as to plaintiff's substantive due process claim.

Were the court to construe plaintiff's claim as one for procedural due process violations, encompassing state-created rights, his claim similarly would fail.

First, "there is no procedural due process violation 'when a state employee intentionally deprives an individual of property or liberty [through random, unauthorized acts by the state employee], so long as the State provides a meaningful post [-]deprivation remedy.'" *Sharp v. Inc. Vill. of Farmingdale*, No. 16-CV-2994, 2018 WL 4404075, at *6 (E.D.N.Y. Sept. 14, 2018) (quoting *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 880 (2d Cir. 1996)). Plaintiff does not allege that there were no post-deprivation remedies available to him or that they were inadequate. Even still, it is well-settled that "an Article 78 proceeding is a perfectly adequate post[-]deprivation remedy." *Grillo v. N.Y.C. Transit Auth.*, 291 F.3d 231, 234 (2d Cir. 2002); *see also Peterson v. Tomaselli*, 469 F. Supp. 2d 146, 165 (S.D.N.Y. 2007)(assuming without deciding New York created legitimate expectation for inmates in conditional release and nevertheless concluding the plaintiff was afforded adequate due process in the form of Article 78 or state habeas proceeding).

Finally, the court finds that, even if plaintiff adequately pleaded either a substantive or procedural due process violation, defendant Fredenburgh would be entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Courts are free to consider either prong first, that is, whether the constitutional violation occurred, or was sufficiently alleged, or

whether the constitutional right was clearly established at the time of the alleged conduct. *Id.* at 235-36 (holding that district courts "should . . . decide[] which of the two prongs of the qualified immunity analysis should be addressed first").

First, plaintiff's argument that defendant's state of mind requires factual development is unavailing. The Supreme Court has made quite clear that the "defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was . . . improperly motivated." *Crawford–El v. Britton*, 523 U.S. 574, 588 (1998). Evidence of subjective intent, therefore, "is simply irrelevant to [the] defense." *Doninger v. Niehoff*, 642 F.3d 334, 349 (2d Cir. 2011) (quoting *Crawford-El*, 523 U.S. at 588).

Furthermore, the law is not so clearly established that prisoners maintain a fundamental liberty interest, or even a state-created liberty interest protected by the procedural due process clause. *See D'Angelo v. Annucci*, No. 16-CV-6459, 2017 WL 6514692, at *9 (S.D.N.Y. Dec. 19, 2017). As discussed above, "neither the Supreme Court nor the Second Circuit has held that the Fourteenth Amendment guarantee of freedom from incarceration without due process includes the right to early release prior to the expiration of an individual's sentence." *McMillan v. Perez*, No. 14-CV-3854, 2016 WL 4926202, at *6 (S.D.N.Y. Sept. 14, 2016) (citing *Greenholtz*, 442 U.S. at 7); *see also Abed v. Armstrong*, 209 F.3d 63, 66–67 (2d Cir. 2000). In fact, district courts in the Second Circuit have indicated the opposite. *See McMillan*, 2016 WL 4926202, at *6 (collecting cases). It cannot be said that the case law clearly foreshadows finding such a right in the context of substantive due process.

Plaintiff's two cited authorities, *Zurak* and *Abed*, are inapposite. Though the court in *Zurak* may have found that inmates have a liberty interest for conditional release worthy of *procedural* due process protections, that proposition has since been clearly refuted by the Second Circuit. *Graziano*, 689 F.3d at 114–15. Furthermore, *Zurak* did not address liberty interests in the context of *substantive* due process. And the court in *Abed* discusses a state-created liberty interest in earned good-time credits. Here, plaintiff does not claim that he was deprived of good-time credits without due process, but instead claims that his release was delayed by the erroneously amended JTCs. Neither case, therefore, clearly establishes that prolonging detention past an inmate's conditional release date is a constitutional violation, or that inmates have a protected interest in earned jail-time credits for the purposes of conditional release.

Plaintiff argues that even if there was not clearly established law on the issue, "this is one of the rare cases where the unlawfulness of the defendants' conduct was so clear that qualified immunity would be inappropriate" because her conduct was "outrageous and patently unconstitutional." (Opp. 17-18.) But, as discussed above, defendant's intent is irrelevant for the purposes of the court's qualified immunity determination. Thus, defendant Fredenburgh is alternatively entitled to qualified immunity as to plaintiff's substantive due process claims. For this and the foregoing reasons, defendant's motion to dismiss plaintiff's substantive due process claim is GRANTED.

II. Cruel and Unusual Punishment

Plaintiff brings a second claim under § 1983, alleging a violation of his Eighth Amendment right to be

free from cruel and unusual punishment. (Am. Compl. 13-14.) Specifically, he alleges that Fredenburgh knew or should have known plaintiff would have remained in prison if he did not receive the full jail-time credit to which he was entitled. (*Id.* ¶ 106-08.)

Defendant also moves to dismiss this claim. She argues that plaintiff fails to plead both the required intent and constitutional harm because he was not imprisoned past his *maximum* sentence. (DM. 7.) Eighth Amendment claims require two well-pleaded elements, one subjective and one objective. "First, the prisoner must allege that the defendant acted with a subjectively 'sufficiently culpable state of mind.'" *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015) (quoting *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). "Second, he must allege that the conduct was objectively 'harmful enough' or 'sufficiently serious' to reach constitutional dimensions." *Id.* (quoting *Hudson*, 503 U.S at 8, 20). What constitutes objectively harmful or sufficiently serious conduct is "context specific," *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013), and "depends upon the claim at issue," *Hudson*, 503 U.S. at 8. In the context of prolonged detention, a defendant's "sufficiently culpable state of mind" must meet, at a minimum, deliberate indifference. *Calhoun v. N.Y. State Div. of Parole Officers*, 999 F.2d 647, 654 (2d Cir. 1993).

The parties dispute whether plaintiff's allegations rise to deliberate indifference on the part of Fredenburgh. For her part, defendant Fredenburgh appears to overlook that plaintiff alleges her intentional conduct, not just that she ignored a known risk. *See Brims v. Burdi*, No. 03-CV-3159, 2004 WL 1403281, at *2 (S.D.N.Y. June 23, 2004) (finding complaint alleged deliberate indifference where "defendants knew, but

ignored, the fact that [plaintiff's] . . . release date was imminent"). Whether or not these allegations are susceptible to proof, the court must accept them as true. As noted above, Fredenburgh's alleged conduct is troublesome and would certainly satisfy deliberate indifference if not willfulness, as plaintiff alleges Fredenburgh *agreed* with Felicien to keep plaintiff incarcerated past his conditional release date. Nevertheless, the court finds that plaintiff has not satisfied the objective pleading requirement of a harm rising to constitutional dimensions.

Courts have found that detention prolonged beyond conditional release does not satisfy the objective harm requirement for Eighth Amendment claims. *D'Angelo*, 2017 WL 6514692, at *10 (collecting cases). In coming to this conclusion, courts rely on the several cases in the Second Circuit which found that detention prolonged days beyond a *maximum* sentence did not violate the Eighth Amendment. *See, e.g.*, *Calhoun*, 999 F.2d at 653 (holding that five days of incarceration beyond the plaintiff's maximum sentence "did not inflict a harm of a magnitude that violates a person's Eighth amendment rights"); *Brims v. Burdi*, No. 03-CV-3159, 2014 WL 1403281, at *2 (S.D.N.Y June 23, 2004) (finding detention six days beyond maximum sentence "not a harm of sufficient magnitude to implicate the Eighth Amendment"); *Lozada v. Warden Downstate Corr. Facility*, No. 10-CV-8425, 2012 WL 2402069, at *2 (S.D.N.Y. June 26, 2012) (finding detention seven days beyond maximum sentence insufficient to bring Eighth Amendment claim). Given this backdrop, at least two courts in this Circuit have granted motions to dismiss a prisoner's complaint bringing Eighth Amendment claims where the com-

plaint alleged detention prolonged beyond a conditional release date, and not a maximum release date. *See Hayes v. Annucci*, No. 14-CV-8846, 2016 WL 1746109, at *5 (S.D.N.Y. April 28, 2016); *D'Angelo*, 2017 WL 6514692, at *10.

Because plaintiff was released prior to the expiration date of his maximum sentence, he was not exposed to any additional punishment than permitted by the Constitution, let alone cruel and unusual punishment. Therefore, plaintiff has not sufficiently pleaded an Eighth Amendment claim, and defendant's motion to dismiss this claim is GRANTED.

Even if the court were to find that plaintiff has adequately pleaded an Eighth Amendment violation, defendant would be entitled to qualified immunity. Plaintiff argues that *Zurak* and *Abed*, among others, clearly establish that Hurd had a liberty interest in conditional release, and that any unlawful prolonged imprisonment violates the Eighth Amendment. (Opp. 17.) Defendant argues that caselaw within the Second Circuit notes uncertainty around whether the detention of an inmate past a conditional release date, but not beyond his maximum sentence, violates any constitutional right. (DM 10.) The court agrees with defendant; the relevant case law does not clearly establish or foreshadow that prolonging a prisoner's detention beyond his conditional release date constitutes cruel and unusual punishment. Therefore, and in the alternative, defendant would be entitled to qualified immunity for plaintiff's Eighth Amendment claim.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is GRANTED, and plaintiff's Amended Complaint is dismissed in its entirety. The Clerk of Court

is respectfully directed to dismiss the Amended Complaint, enter judgment, and close the case.

SO ORDERED.

Dated: September 26, 2019
Brooklyn, New York

/s/
Kiyo A. Matsumoto
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed Nov. 2, 2018]

DEVAR HURD,
Plaintiff,

-against-

THE CITY OF NEW YORK, SALATHIA MIXON, in her individual and official capacities, and STACEY FREDENBURGH, in her individual capacity,
Defendants.

FIRST AMENDED COMPLAINT

18-cv-3704 (KAM) (JO)

Jury Trial Demanded

Plaintiff DEVAR HURD, by his attorneys, the LAW OFFICES OF JOEL B. RUDIN, P.C., respectfully alleges, upon information and belief, as follows:

NATURE OF THE ACTION

1. In April 2016, Plaintiff DEVAR HURD was legally entitled to be immediately freed from government custody, having already served in pretrial detention the entire term of the state prison sentence that he was required to serve. Instead of being released, however, he languished in prison for more than 11 months because city and state officials caused or failed to correct a miscalculation of his jail-time credit.

2. This civil action seeks monetary damages for Mr. Hurd, pursuant to 42 U.S.C. §§ 1983 and 1988 and state law, due to this wrongful imprisonment—in violation of the Due Process Clause of the Fifth and Four-

teenth Amendments to the United States Constitution as well as the Cruel and Unusual Punishment Clause of the Eighth Amendment—which was substantially caused by Defendants.

JURISDICTION, VENUE, AND CONDITIONS PRECEDENT

3. This action arises under 42 U.S.C. §§ 1983 and 1988, and under the common law of the State of New York.

4. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343, and under the principles of pendent jurisdiction.

5. Venue is proper under 28 U.S.C. § 1391 because a substantial part of the events giving rise to this claim occurred in this district.

6. On or about June 9, 2017, Plaintiff served the City of New York timely notice of the present claims, in accordance with N.Y. Gen. Mun. Law § 50-e.

7. A hearing was held in accordance with N.Y. Gen. Mun. Law § 50-h on November 8, 2017.

8. Plaintiff has duly complied with all conditions precedent to the commencement of this action.

THE PARTIES

9. Plaintiff DEVAR HURD is a citizen and resident of the State of New York and of the United States, and resides in Brooklyn, New York.

10. Defendant CITY OF NEW YORK (the "City") is a municipal corporation of the State of New York and is a resident of the Eastern District of New York.

11. The New York City Department of Correction ("NYCDOC") is an agency of the City.

12. Employees of the NYCDOC are agents and employees of the City.

13. The City is legally responsible for torts that NYCDOC employees commit within the scope of their employment.

14. Defendant SALATHIA MIXON was, at all relevant times, a Jail Time Coordinator employed by the NYCDOC, acting within the scope of her authority and under color of state law. She is named here in her individual and official capacities.

15. Defendant STACEY FREDENBURGH was, at all relevant times, an Inmate Records Coordinator employed by the New York State Department of Corrections and Community Supervision ("DOCCS"), acting within the scope of her authority and under color of state law. She is named here in her individual capacity.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

Mr. Hurd's Conviction and Sentence

16. Plaintiff Devar Hurd was arrested on July 23, 2013.

17. He was subsequently indicted under Indictment No. 3134-2013 (the "Indictment").

18. The Indictment alleged several counts, all of which were part of the same transaction or occurrence.

19. Mr. Hurd was held in the custody of NYCDOC during the entire time the charges in the Indictment were pending.

20. On December 18, 2014, Mr. Hurd's first trial on the Indictment ended in a mistrial.

21. On October 8, 2015, after a second trial on the Indictment, Mr. Hurd was convicted on nine of the ten counts submitted to the jury. The court declared a mistrial as to the remaining count.

22. The nine counts of conviction were all misdemeanors (the "Misdemeanor Counts") and consisted of seven counts of criminal contempt in the second degree, N.Y.P.L. § 215.50(3); one count of stalking in the fourth degree, *id.* § 120.45(1); and one count of harassment in the first degree, *id.* § 240.25.

23. On October 23, 2015, Mr. Hurd was sentenced on the Misdemeanor Counts as follows:

a. one-year definite sentences for each of the seven counts of criminal contempt in the second degree;

b. a 90-day definite sentence for the count of stalking in the fourth degree; and

c. a 90-day definite sentence for the count of harassment in the first degree.

24. The court specified that the sentences for the Misdemeanor Counts were to run consecutively to each other.

25. By operation of law, the maximum term of incarceration Mr. Hurd could serve for these consecutive definite sentences was two years. *See* N.Y.P.L. § 70.30(2)(b).

26. On March 18, 2016, after a third trial on the Indictment, Mr. Hurd was convicted of the remaining count in the Indictment, stalking in the second degree,

an E felony (the "Felony Count"). *See* N.Y.P.L. § 120.55(2).

27. On March 31, 2016, Mr. Hurd was sentenced on the Felony Count to an indeterminate term of state imprisonment, with a minimum of one-and-one-third years, and a maximum of four years, to be served in the custody of DOCCS.

28. By operation of law, because the court that sentenced Mr. Hurd to the indeterminate sentence on the Felony Count did not specify whether that sentence was to run concurrent with, or consecutive to, the sentences on the Misdemeanor Counts, the indeterminate sentence was required to run concurrent with those sentences.

29. Further, by operation of law, Mr. Hurd's indeterminate sentence on the Felony Count merged with the definite sentences on the Misdemeanor Counts, meaning that the indeterminate sentence of one-and-one-third to four years could not legally run consecutive to the two years' worth of definite sentences.

30. Accordingly, Mr. Hurd's maximum term of imprisonment under the Indictment was four years.

Mr. Hurd's Legal Entitlement to Be Immediately Released

31. At all times relevant to this complaint, New York State law provided that the term of a sentence imposed on a person "shall" be reduced by the amount of time he has spent in pretrial detention on the charges that resulted in the sentence. *See* N.Y.P.L. § 70.30(3).

32. Such a reduction is commonly referred to as "jail-time credit."

33. The City of New York, by its officials the NYCDOC Commissioner of Correction and his or her employees—including Jail Time Coordinator Salathia Mixon and Principal Administrative Associate for the Legal Division Edwin Felicien—had a legal duty to Mr. Hurd to provide DOCCS with an accurate calculation of all jail-time credit to which he was entitled. *See* N.Y. Corr. Law § 600-a.

34. On or about April 14, 2016, Mr. Hurd was transferred from the custody of NYCDOC to the custody of DOCCS at Ulster Correctional Facility.

35. Since Mr. Hurd had been held in NYCDOC custody on the charges in the Indictment since July 23, 2013, he was entitled to 996 days of jail-time credit.

36. NYCDOC officials issued a "Jail Time Certification" ("JTC") certifying that Mr. Hurd was entitled to 996 days of jail-time credit.

37. Upon Mr. Hurd's transfer to DOCCS custody, DOCCS officials received this JTC.

38. At all times relevant to this complaint, New York State law provided that:

a. persons sentenced to an indeterminate prison term are eligible for a reduction of up to one-third of their maximum prison term for good behavior, *see* N.Y.P.L. § 70.30(4)(a); N.Y. Corr. Law § 803(1)(a)-(b); and

b. a person serving an indeterminate prison term "shall" be "conditionally released" upon request when the unserved portion of his prison term is equal to the amount of good-behavior time he has been allowed, *see* N.Y.P.L. § 70.40(1)(b).

39. The term reduction that a person receives for good behavior is commonly referred to as "good-time credit."

40. DOCCS refers to the date on which a person is required to be conditionally released under the above provisions of law as the person's "conditional release date."

41. Under the above provisions of law, Mr. Hurd was eligible for good-time credit of up to one-third of his maximum prison term.

42. Since Mr. Hurd's maximum prison term was four years, he was eligible for good-time credit of up to one year and four months.

43. Upon Mr. Hurd's transfer to DOCCS custody, DOCCS officials produced a "Legal Date Computation" indicating he was eligible for good-time credit of up to one year and four months.

44. This Legal Date Computation also indicated, in accordance with the JTC provided by NYCDOC officials, that Mr. Hurd was entitled to jail-time credit in the amount of two years, eight months, and 26 days.

45. Based on these two credits, the Legal Date Computation further indicated that Mr. Hurd's conditional release date, assuming his good-time credit were to be approved, was March 17, 2016.

46. On April 19, 2016, DOCCS awarded Mr. Hurd the full one year and four months of good-time credit for which he was eligible.

47. From the time of Mr. Hurd's transfer to DOCCS custody, he had repeatedly requested to be immediately released.

48. Therefore, as of April 19, 2016, Mr. Hurd was legally entitled to be conditionally released immediately.

Mr. Hurd's Jail-Time Credit Is Erroneously Reduced and He Is Wrongfully Kept in Prison

49. At the time of Mr. Hurd's transfer to DOCCS custody, on or about April 14, 2016, he was told that he was eligible to be immediately released.

50. Mr. Hurd was further told that DOCCS had to process him through the state prison system before releasing him.

51. He was told that this processing would take only a few days.

52. Upon Mr. Hurd's transfer to DOCCS custody, DOCCS officials had begun preparing for his immediate release.

53. However, after the April 19 approval of Mr. Hurd's conditional release date, several days passed and still Mr. Hurd was not released.

54. Mr. Hurd repeatedly complained to DOCCS officials that he was being wrongfully imprisoned.

55. Unbeknownst to Mr. Hurd, after his transfer to DOCCS custody, NYCDOC employee Edwin Felicien had spoken with Defendant Fredenburgh, and they agreed to reduce Mr. Hurd's jail-time credit so that he would not be released.

56. On May 4, 2016, Defendant Fredenburgh asked Defendant Mixon for her assistance in obtaining an amended JTC reducing Mr. Hurd's jail-time credit so that DOCCS could continue to imprison Mr. Hurd.

57. Over the next few days, Mixon told Fredenburgh multiple times that, in fact, Hurd was entitled to all 996 days of jail-time credit that NYCDOC officials had certified in Hurd's original JTC.

58. Mixon told Fredenburgh that she had even "called sentencing review" and confirmed that the original JTC was correct.

59. On May 6, Felicien emailed Fredenburgh an amended JTC, which reduced Mr. Hurd's jail-time credit to 507 days.

60. This JTC was incorrect.

61. Fredenburgh forwarded this email and the amended JTC to Mixon.

62. Mixon reviewed the JTC.

63. Later that day, Felicien emailed Fredenburgh a second amended JTC, which further reduced Mr. Hurd's jail-time credit to 469 days.

64. This JTC was also incorrect.

65. Fredenburgh also forwarded this email and amended JTC to Mixon.

66. Mixon also reviewed this JTC.

67. Neither Fredenburgh nor Mixon took any action to correct these erroneous JTCs.

68. On May 12, newly-assigned appellate counsel for Mr. Hurd emailed Defendant Mixon requesting Mr. Hurd's JTC.

69. Mixon directed them to contact Felicien.

70. On May 13, Hurd sent a six-page letter to Felicien detailing the errors in Felicien's amended JTCs and demanding that Felicien amend Hurd's JTC

again to restore the full 996 days of jail-time credit to which Hurd was legally entitled so that he would be immediately given his freedom.

71. Mr. Felicien did not respond to Mr. Hurd.

72. Around the same time, Mr. Hurd wrote grievance letters to Defendant Fredenburgh and other DOCCS officials at Ulster Correctional Facility demanding that they release him in accordance with the original, accurate JTC.

73. On May 24 and 25, Fredenburgh responded in writing to Hurd.

74. Fredenburgh told Hurd that she could do nothing to address his concerns and that he must contact "Rikers Island."

75. Felicien issued a third amended JTC on June 9, crediting Hurd with 524 days of jail time.

76. This JTC was also incorrect.

77. Felicien issued a fourth amended JTC on June 13, crediting Hurd with 508 days of jail time.

78. This JTC was also incorrect.

79. In late June 2016, Mr. Hurd was transferred from Ulster Correctional Facility to Watertown Correctional Facility, where he remained for a few days. He was then transferred to Riverview Correctional Facility.

80. At Riverview, Mr. Hurd's Kafkaesque ordeal continued. He desperately sought to have Felicien's errors corrected so that he would be granted the freedom to which he was legally entitled.

81. Mr. Hurd pursued the official grievance process all the way up to the DOCCS Central Office Review Committee, filed two notices of claim, and wrote letters to various Riverview officials and the DOCCS Office of Sentencing Review.

82. The DOCCS officials refused to intervene.

Mr. Hurd Is Finally Released After More than 11 Months of Wrongful Imprisonment

83. On March 20, 2017, Mr. Hurd's appellate counsel wrote to the NYCDOC legal department.

84. Mr. Hurd's attorney explained that Mr. Hurd's original JTC awarding him 996 days of jail-time credit was correct and that, accordingly, Mr. Hurd was legally entitled to be immediately released.

85. On March 23, NYCDOC Assistant General Counsel Justin Kramer instructed Defendant Mixon to notify DOCCS that Mr. Hurd was entitled to all the jail-time credit he had originally been credited with almost a year before.

86. The same day, Mixon prepared an amended JTC, which certified that Mr. Hurd was entitled to 996 days of jail-time credit.

87. This was the same amount of jail-time credit that Mixon had told Fredenburgh that Hurd was entitled to back in May 2016.

88. Mixon emailed this amended JTC to an inmate records coordinator at Riverview Correctional Facility.

89. This inmate records coordinator verified that Mr. Hurd was still entitled to all the good-time credit for which he had been eligible when he was first transferred to DOCCS custody.

90. DOCCS conditionally released Mr. Hurd on March 30, 2017.

91. Because of the actions of Defendants Mixon and Fredenburgh and of Mr. Felicien, Mr. Hurd wrongfully remained in prison for at least 11 months and 11 days beyond the date on which state law mandated that he be released.

FIRST CAUSE OF ACTION

42 U.S.C. § 1983. Violation of substantive due process under the Fifth and Fourteenth Amendments. Defendants Mixon and Fredenburgh.

92. Plaintiff repeats and realleges each allegation contained in the preceding paragraphs as if fully set forth herein.

93. Plaintiff was legally entitled to be immediately released upon his transfer to DOCCS custody based on the City jail-time credit to which he was automatically entitled as a matter of law, together with the good-time credit he had been actually awarded in accordance with state statute.

94. He had a liberty interest in his timely release conferred upon him by New York State law.

95. Defendants Fredenburgh and Mixon knew or should have known that Plaintiff's original JTC certifying that he was entitled to 996 days of jail-time credit was correct and that Plaintiff was legally entitled to be immediately released.

96. They knew or should have known that any reduction of the jail-time credit certified in Plaintiff's original JTC would be incorrect and would cause him to remain wrongfully imprisoned.

97. They knew or should have known that the amended JTCs issued by Mr. Felicien were incorrect and would cause Plaintiff to remain wrongfully imprisoned.

98. Nevertheless, they failed to prevent the erroneous JTCs from being issued or to correct the erroneous JTCs.

99. They had a duty to ensure Plaintiff's timely release.

100. Defendants Mixon and Fredenburgh acted knowingly, willfully, intentionally, and with deliberate or reckless indifference to Plaintiff's right to be released, in a manner shocking to the conscience, to cause Plaintiff to be wrongfully imprisoned for more than 11 months beyond the date on which he was legally entitled to be released.

101. As a result of this misconduct, Defendants Mixon and Fredenburgh are liable to Plaintiff for their violation of his constitutional right to substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution.[1]

SECOND CAUSE OF ACTION

42 U.S.C. § 1983. Cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Defendants Mixon and Fredenburgh.

102. Plaintiff repeats and realleges each allegation contained in the preceding paragraphs as if fully set forth herein.

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[1] Mr. Felicien is not named in this lawsuit because he is deceased.

103. Plaintiff was legally entitled to be immediately released upon his transfer to DOCCS custody based upon the City jail-time credit to which he was automatically entitled as a matter of law, together with the good-time credit he had been actually awarded in accordance with state statute.

104. He had a liberty interest in his timely release conferred upon him by New York State law.

105. Plaintiff was wrongfully imprisoned beyond the date on which he was legally entitled to be released for at least 11 months and 11 days.

106. Making a human being spend that many days in prison beyond the date on which he was legally entitled to be released inflicts a harm of such magnitude that it violates that person's Eighth Amendment right against cruel and unusual punishment, as applied to the states under the Fourteenth Amendment.

107. Defendants Mixon and Fredenburgh knew or should have known that Plaintiff was legally entitled to be immediately released, and that he would remain wrongfully imprisoned if he did not receive the jail-time credit to which he was entitled.

108. Nevertheless, Defendants Mixon and Fredenburgh knowingly, intentionally, willfully, recklessly, or out of deliberate indifference caused Plaintiff's jail-time credit to be reduced and/or failed in their responsibility to correct the false calculation, as a result of which he remained wrongfully imprisoned for more than 11 months beyond the date on which he was legally entitled to be released.

109. Defendants Mixon and Fredenburgh are liable to Plaintiff for causing him to suffer cruel and unusual punishment within the meaning of the Eighth

and Fourteenth Amendments to the United States Constitution.

THIRD CAUSE OF ACTION

42 U.S.C. § 1983. Failure to intervene in violation of the Eighth and Fourteenth Amendments. Defendants Mixon and Fredenburgh.

110. Plaintiff repeats and realleges each allegation contained in the preceding paragraphs as if fully set forth herein.

111. Mr. Felicien violated Plaintiff's Eighth and Fourteenth Amendment rights to be immediately released upon his transfer to DOCCS custody.

112. Defendants Mixon and Fredenburgh each had an affirmative duty to Plaintiff to protect these constitutional rights from infringement by other government officials.

113. Defendants Mixon and Fredenburgh knew that Plaintiff's constitutional rights would be violated if any of Mr. Felicien's incorrect JTCs were to go into effect.

114. Defendants Mixon and Fredenburgh both had reasonable opportunities to intervene.

115. Nevertheless, Defendants Mixon and Fredenburgh intentionally, recklessly, or out of deliberate indifference failed to take reasonable steps to intervene.

116. In failing to intervene, Defendants Mixon and Fredenburgh were a proximate cause of Plaintiff's wrongful imprisonment for more than 11 months beyond the date on which he was legally entitled to be released, in violation of his right to be free from cruel and unusual punishment.

FOURTH CAUSE OF ACTION

State-law intentional infliction of emotional distress. Defendants Mixon and the City of New York.

117. Plaintiff repeats and realleges each allegation contained in the preceding paragraphs as if fully set forth herein.

118. Defendant Mixon and Mr. Felicien knew or should have known that Plaintiff was legally entitled to be immediately released and that any reduction of the jail-time credit certified in Plaintiff's original JTC would be incorrect and would cause him to remain wrongfully imprisoned.

119. Nevertheless, they caused Mr. Felicien's erroneous JTCs to be issued and failed to correct the erroneous JTCs once they had been issued.

120. This conduct was extreme and outrageous.

121. Defendant Mixon and Mr. Felicien engaged in such conduct with an intention to cause Plaintiff, or in reckless disregard of the substantial probability that it would cause Plaintiff, severe emotional distress.

122. This conduct by Defendant Mixon and Mr. Felicien was a proximate cause of the severe emotional distress that Plaintiff suffered during, and continues to suffer after, his wrongful imprisonment.

123. Defendant City of New York is liable for the conduct of Defendant Mixon and Mr. Felicien under the principle of *respondeat superior*.

FIFTH CAUSE OF ACTION

State-law false imprisonment. Defendants Mixon and the City of New York.

124. Plaintiff repeats and realleges each allegation contained in ¶¶ 1-91 as if fully set forth herein.

125. Defendant Mixon and NYCDOC employee Felicien intended to confine Plaintiff.

126. Plaintiff was conscious of his confinement.

127. Plaintiff did not consent to his confinement.

128. Plaintiff's confinement was not privileged.

129. Defendant City of New York is liable for the conduct of Defendant Mixon and Mr. Felicien under the principle of *respondeat superior*.

SIXTH CAUSE OF ACTION

State-law negligence. Defendants Mixon and the City of New York.

130. Plaintiff repeats and realleges each allegation contained in ¶¶ 1-91 as if fully set forth herein.

131. Defendant Mixon and NYCDOC employee Felicien owed a duty to Plaintiff to accurately calculate his jail-time credit or to cause known errors to his jail-time credit calculation to be corrected.

132. Defendant Mixon and NYCDOC employee Felicien negligently breached that duty.

133. These breaches caused Plaintiff to be wrongfully imprisoned for more than 11 months beyond the date on which he was legally entitled to be released and to suffer substantial mental and emotional harm and other injuries.

134. Defendant City of New York is liable for the negligence of Defendant Mixon and Mr. Felicien under the principle of *respondeat superior*.

SEVENTH CAUSE OF ACTION

42 U.S.C. § 1983 and *Monell*. Defendant City of New York based on the NYCDOC's failure to adequately train, supervise, and/or discipline its employees.

135. Plaintiff repeats and realleges each allegation contained in ¶¶ 1-91 as if fully set forth herein.

136. NYCDOC employees Mixon and Felicien, acting knowingly, intentionally, recklessly, negligently, out of deliberate indifference, and/or out of ignorance, violated Plaintiff's right to substantive and procedural due process under the Fifth and Fourteenth Amendments and his right to be free from cruel and unusual punishment under the Eighth Amendment, and caused his resulting deprivation of liberty and other injuries.

137. Under the principles of municipal liability for federal civil rights violations, the Commissioner of the NYCDOC (the "Commissioner") and/or his authorized delegates, during all times relevant to this complaint, had final responsibility for training, instructing, supervising, and disciplining NYCDOC employees with respect to those employees' obligations, consistent with the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, to ensure the issuance of accurate JTCs so that persons who had served time in the custody of NYCDOC were not imprisoned after they were legally entitled to be released.

138. In his role as policymaker, the Commissioner and/or his authorized delegates maintained a policy,

custom, or practice of deliberate indifference to past violations by NYCDOC employees of the above-enumerated constitutional obligations, to the risk of future such violations, and to the obvious need to adequately train, supervise, and/or discipline NYCDOC employees with respect to these obligations.

139. The aforesaid deliberate or de facto policies, procedures, regulations, practices, and/or customs (including the failure to properly instruct, train, supervise, and/or discipline employees) were implemented or tolerated by policymaking officials for Defendant City—including but not limited to the Commissioner—who knew, or should have known:

a. to a moral certainty that such policies, procedures, regulations, practices, and/or customs concern issues that employees of NYCDOC regularly confront;

b. that such issues present NYCDOC employees with difficult choices of the sort that training, supervision, and/or discipline will make less difficult;

c. that NYCDOC employees facing such difficult choices often have incentives to make the wrong choices;

d. that the wrong choice by NYCDOC employees in such circumstances will frequently cause the deprivation of the constitutional rights of prisoners and resulting constitutional injuries; and

e. that NYCDOC employees had a history of making wrong choices in such matters.

140. The need to adequately train, supervise, and/or discipline NYCDOC employees was especially

obvious given the difficult nature of jail-time calculations, for which more than the application of common sense is required.

141. At the time of Plaintiff's unconstitutionally prolonged imprisonment, NYCDOC policymaking officials knew that there had been a history of NYCDOC employees mishandling the calculation of jail-time credit, which had resulted in violations of the constitutional rights of prisoners.

142. Before Plaintiff was transferred from NYCDOC to DOCCS custody, *Al Jazeera America* ran a publicly-available article about an inmate, Michael McPherson, who, due to an erroneous JTC, served 212 days in DOCCS custody after he was legally entitled to be released.[2]

143. According to this article, a paralegal at the New York City Legal Aid Society reported having to correct 100 to 200 erroneous calculations each year for clients.

144. The article attributed these chronic errors, in part, to "indifferent prison [and jail] bureaucracies."

145. The article also reported that "two veterans of the [NYCDOC] who retired in 2005 after collectively serving 40 years say they did not receive any training in sentence calculation nor were they aware of such mandatory training despite their involvement in calculating sentences and overseeing discharges."

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[2] *See* Arvind Dilawar, *Inaccurate sentencing condemns prisoners to serve longer than is lawful*, Al Jazeera America, Feb. 24, 2016, http://america.aljazeera.com/articles/2016/2/24

/inaccurate-sentences-in-prison-for-the-wrong-time.html.

146. In the three years before NYCDOC officials mishandled Plaintiff's jail-time calculation, NYCDOC received *more than one grievance a day* about the mishandling of jail-time calculations:

a. 474 grievances related to jail-time calculations in FY 2013;

b. 489 grievances related to jail-time calculations in FY 2014; and

c. 419 grievances related to jail-time calculations in FY 2015.[3]

147. In its report containing these statistics, the New York City Board of Correction recommended that the NYCDOC devote additional resources to addressing such grievances.

148. However, the number of grievances actually increased following the publication of the report; in FY 2017, NYCDOC received 567 grievances about jail-time calculations.[4]

149. Although NYCDOC policymaking officials knew that their employees routinely mishandle jail-time credit calculations, upon information and belief, no NYCDOC employee was ever disciplined for mishandling a person's jail-time Calculation.[5]

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[3] *See A Study of the Department of Correction Inmate Grievance and Request Program*, N.Y.C. Bd. of Corr., Oct. 2016, at 9, https://www1.nyc.gov/assets/boc/downloads/pdf/final_board_of_correctionreport_oct2016.pdf.

[4] *See Second Assessment of the New York City Department of Correction Inmate Grievance System*, N.Y.C. Bd. of Corr., June 2018, at 27, https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2018/June-12-2018/GrievanceAuditReport_Final_2018.11.06.pdf.

[5] Defendant Mixon, NYCDOC's Jail Time Coordinator, testified

150. Nor, despite this history, did NYCDOC provide essential training to its employees concerning how to read and understand state statutes and judicial decisions governing the calculation of jail time credit.[6]

151. Defendant Mixon has never received such training or been disciplined despite having a known history of mishandling jail-time calculations and causing potential monetary liability to New York City.

152. In 2016, Robert Gist sued Mixon and other government officials.

153. Mixon knew Gist was wrongfully being held in prison because of an erroneous JTC issued by NYCDOC, but Mixon nevertheless delayed correcting the error for more than a year.

154. The City paid Gist substantial monetary damages as a result of that lawsuit.

155. In 2017, Glenn Kindler sued Mixon and other government officials.

156. NYCDOC officials erroneously failed to issue a JTC for Kindler, which resulted in his being wrongfully imprisoned for more than 250 days. Mixon knew about this error yet failed to correct it for six months.

157. Mixon was also a named defendant in a lawsuit brought by Christian Aponte in 2017.

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in a sworn deposition earlier this year that, despite having been employed by NYCDOC for many years, she was not aware of any employee ever being disciplined for miscalculations causing prisoners to be held beyond the date they were required by law to be released.

[6] Defendant Mixon testified that she, as the NYCDOC's Jail Time Coordinator, has never received such training.

158. After Aponte's lawyer called Mixon to ensure that Aponte would be not be detained on Rikers Island past the date on which he was legally entitled to be released, Mixon emailed the lawyer saying she was leaving work for the weekend and there was nothing she could do.

159. As a result, Aponte wrongfully remained in custody over the weekend.

160. Despite these allegations, Mixon was never disciplined in relation to the mishandling of any person's jail-time calculation.[7]

161. In addition, before Plaintiff's wrongful imprisonment, NYCDOC policymaking officials knew or should have known that Mr. Felicien was responsible for many of the hundreds of erroneous JTCs that NYCDOC had issued.

162. Mr. Felicien's lack of competence with respect to the accurate calculation of jail-time credit was also evident from the JTCs he issued in Plaintiff's case.

163. Over the course of a month, Mr. Felicien issued four different JTCs for Plaintiff, each of them containing an erroneous calculation of Plaintiff's jail-time credit.

164. These JTCs were riddled with typos, garbled sentences, simple factual mistakes (like misstating Plaintiff's date of arrest), and basic errors of arithmetic.

165. Mr. Felicien had previously produced numerous JTCs that were similarly full of errors.

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[7] Mixon admitted this in her deposition.

166. It would have been obvious to anyone supervising Mr. Felicien either that he required further training and supervision in order to produce accurate JTCs or that he lacked the ability to reliably produce accurate JTCs and thus should not be trusted with that task.

167. But he did not receive such supervision or training.

168. Despite NYCDOC policymaking officials' knowledge of the obvious need to implement adequate policies, procedures, regulations, practices, customs, training, supervision, and/or discipline to prevent NYCDOC employees, including Defendant Mixon and Mr. Felicien, from violating the constitutional rights of prisoners by mishandling jail-time calculations, these policymaking officials, deliberately indifferent to such need, failed to take such measures.

169. Indeed, policymaking officials knew, but did nothing to address, the custom, pattern, or practice by NYCDOC employees of mishandling the calculation of jail-time credit, in violation of the above-enumerated constitutional rights of persons who have been held in NYCDOC custody.

170. The aforesaid policies, procedures, regulations, practices, and/or customs of Defendant City were collectively and individually a substantial factor in bringing about the aforesaid violations of Plaintiff's rights under the Constitution and laws of the United States and in causing his damages.

171. By virtue of the foregoing, Defendant City of New York is liable for having caused the foregoing violations of Plaintiff's constitutional rights and his constitutional injuries.

EIGHTH CAUSE OF ACTION

42 U.S.C. § 1983 and *Monell*. Defendant City of New York based on the NYCDOC's violation of Plaintiff's right to procedural due process.

172. Plaintiff repeats and realleges each allegation contained in ¶¶ 1-91 and ¶¶ 135-171 as if fully set forth herein.

173. Defendant Mixon's and Mr. Felicien's actions were not random or unauthorized.

174. Rather, Mixon and Felicien were acting based on established government procedures.

175. These procedures were inadequate to satisfy the due process rights, guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, of persons whose jail-time credit was being or had been calculated by NYCDOC officials.

176. Even though NYCDOC policymaking officials were aware that NYCDOC employees mishandled the JTCs of at least hundreds of persons every year, and received hundreds of such complaints from persons in NYCDOC custody every year, established procedures did not provide for the meaningful review of JTCs to ensure their accuracy before they were issued.

177. Nor did established procedures provide for the meaningful review of complaints that previously issued JTCs were inaccurate.

178. Further, NYCDOC policymaking officials knew that it was the practice of DOCCS officials to claim, in response to prisoners' complaints about inaccurate JTCs, that only NYCDOC could address such complaints, thus making it all the more crucial that

NYCDOC establish adequate procedures for reviewing such complaints.

179. The private interests that were affected by the failure of NYCDOC policymaking officials to establish adequate procedures were immense: hundreds of persons each year spent days, months, or years wrongfully imprisoned after they were legally entitled to be released.

180. The risk that existing procedures, such as they were, would cause such deprivations of liberty was high.

181. The probable value of adding procedural safeguards to ensure such meaningful review was immense, as it would have prevented hundreds of persons each year from being deprived of their liberty.

182. The City government's interest in ensuring that hundreds of people were not illegally imprisoned substantially outweighed the comparatively minor cost of adding procedural safeguards to prevent such wrongful deprivations of liberty.

183. Policymaking officials knew or should have known that established procedures were inadequate to satisfy the constitutional due process rights of persons whose jail-time credit was being or had been calculated but, out of deliberate indifference for those persons' constitutional rights, these policymaking officials failed to establish adequate procedures.

184. The failure of NYCDOC policymaking officials to establish constitutionally adequate procedures for ensuring the issuance of accurate JTCs directly and proximately caused the deprivation of Plaintiff's liberty and related injuries at the hands of

NYCDOC employees Mixon and Felicien, in violation of Plaintiff's constitutional right to due process.

185. By virtue of the foregoing, Defendant City of New York is liable for having substantially caused the foregoing violations of Plaintiff's constitutional rights and his constitutional injuries.

NINTH CAUSE OF ACTION

State-law negligent hiring, training, and supervision. Defendant City of New York.

186. Plaintiff repeats and realleges each allegation contained in ¶¶ 1-91 and ¶¶ 135-185 as if fully set forth herein.

187. By virtue of the foregoing, Defendant City of New York is liable to Plaintiff because of its intentional, deliberately indifferent, careless, reckless, and/or negligent failure to adequately train, hire, supervise, and discipline its agents, servants, and/or employees.

DEMAND FOR DAMAGES

WHEREFORE, Plaintiff Devar Hurd demands judgment against Defendants as follows:

a. compensatory damages of not less than $1,040,000;

b. punitive damages against Defendants Mixon and Fredenburgh of not less than $1,000,000;

c. reasonable attorneys' fees, together with costs and disbursements, pursuant to 42 U.S.C. § 1988 and the inherent powers of this Court;

d. pre-judgment interest as allowed by law; and such other and further relief as this Court may deem just and proper.

/s/ Joel B. Rudin
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Dated: New York, New York
November 2, 2018