

No. 20-1752

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IN THE  
**Supreme Court of the United States**

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DEVAR HURD,

*Petitioner,*

v.

STACEY FREDENBURGH,

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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**COUNTERSTATEMENT OF  
QUESTIONS PRESENTED**

1. Whether the law was clearly established that mistakenly detaining an incarcerated person within the maximum term of a validly imposed sentence, but beyond when he qualified for early conditional release under New York law, constituted a harm cognizable under the Eighth Amendment.
2. Whether the law was clearly established that New York's conditional release statute confers a liberty interest in early release, prior to the expiration of a maximum sentence, that is fundamental and protected by substantive due process.

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## INTRODUCTION

New York law provides that persons sentenced to certain types of prison sentences may earn “good time” for good behavior in prison, and as a result are entitled to “conditional release” (supervised release revocable for violation of specified conditions) after they have served a reduced portion of their maximum term. N.Y. Penal Law § 70.40(1)(b). New York law also provides that persons serving state prison sentences are entitled to credit for time spent in local custody while awaiting trial and sentencing, *id.* § 70.30(3), and that in calculating release dates the State must rely on a certificate from local authorities documenting the amount of time the individual spent in local custody while awaiting trial and sentencing, N.Y. Correction Law § 600-a.

This case concerns the interaction between those two provisions of state law. As the court below explained, petitioner 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 trials. After being convicted of the misdemeanor charges and completing the sentences for those charges, Hurd was convicted after a jury trial on the related charge of felony stalking and was sentenced to serve one-and-one-third to four years in state prison. After Hurd’s final sentencing, the New York City Department of Corrections (City DOC) transferred Hurd to the custody of the New York State Department of Corrections and Community Supervision (DOCCS). It is undisputed here that in connection with Hurd’s transfer, local officials of City DOC issued several erroneous jail-time credit certificates for him, understating the amount of time Hurd

had spent in local custody awaiting trial and sentencing. Respondent Stacey Fredenburgh, a clerical employee of State DOCCS, relied on these certificates to calculate Hurd's conditional release date. As a result, State DOCCS detained Hurd for approximately eleven months beyond when he qualified for conditional release, in the mistaken belief that he had not yet served enough time to qualify. This detention did not continue past the date on which his maximum sentence was fully served. Once City DOC corrected the errors in Hurd's jail-time credit certifications, DOCCS promptly released Hurd.

Hurd sought damages for this erroneous detention in two different forums: he filed a state court action against New York State, and he filed this federal civil rights action against two New York City defendants and state employee Fredenburgh. The suit against the State was rejected upon the state court's finding that Fredenburgh had acted reasonably and diligently and was not liable for the injuries caused to Hurd by City DOC's errors; Hurd did not appeal. In this federal suit under 42 U.S.C. § 1983, Hurd settled with the city defendants and dismissed his claims against them. His claim against Fredenburgh—the subject of this petition—was dismissed by the district court for lack of merit and, alternatively, based on qualified immunity. The U.S. Court of Appeals for the Second Circuit affirmed, concluding that Fredenburgh had qualified immunity from Hurd's claims. As the court explained, no prior law clearly established that detaining a person who was still within the maximum term of a validly imposed sentence, but who qualified for early conditional release under New York law, constituted a harm

cognizable under the Eighth Amendment or substantive due process. The court of appeals did not reach any of Fredenburgh's other grounds for dismissal.

Certiorari is not warranted to review the Second Circuit's decision. The decision rests on an analysis of New York's conditional release scheme, adheres to the precedents of this Court, creates no circuit split, and is unlikely to have recurring importance outside of the circuit. Contrary to Hurd's contention, at the time of the jail-time-credit miscalculations at issue here, the law was not clearly established for purposes of qualified immunity that detaining a person under a validly imposed criminal sentence, when that person qualified for early conditional release under New York law, constituted "cruel and unusual" punishment under the Eighth Amendment or violated substantive due process. This case is also a poor vehicle for considering those questions because several independent grounds would foreclose Hurd's constitutional claims even if the qualified immunity questions were resolved in his favor. For example, the final judgment in Hurd's parallel state court suit precludes Hurd from proving that Fredenburgh acted culpably or that she caused his extended detention.

## **STATEMENT**

### **A. New York's Statutory Scheme for Early Conditional Release**

In New York, a sentence of imprisonment for a felony commences when a person "is received in an institution under the jurisdiction of the state department of corrections and community supervision," or DOCCS. N.Y. Penal Law § 70.30(1). New York law provides a jail-time credit for "the amount of time the person spent

in [local] custody prior to the commencement of [the] sentence” when the prior detention was based on the same charge or charges that resulted in the later sentence. *Id.* § 70.30(3).

By statute, the calculation of an individual’s jail-time credit is carried out by the local jurisdiction where the individual was detained prior to beginning a felony sentence with DOCCS. N.Y. Correction Law § 600-a. For persons detained in New York City, this statutory duty falls on “the commissioner of correction of the city of New York”: the head of City DOC. *Id.* City DOC has a statutory duty to maintain records of the jail-time credit and to “deliver a certified transcript” of the jail-time credit to the facility taking custody of the individual. *Id.*

Under state law, DOCCS is bound by the jail-time certificates it receives and may not alter or recalculate the credits contained in the certificates. *E.g., Matter of Velez v. New York State Dep’t of Corr. & Cnty. Supervision*, 163 A.D.3d 1210, 1211 (3d Dep’t 2018); *Middleton v. State*, 54 A.D.2d 450, 452 (3d Dep’t 1976), *aff’d on op. below*, 43 N.Y.2d 678 (1977). When a local jurisdiction amends an individual’s jail-time certificate, DOCCS must adhere to the last amended jail-time certificate it receives. *See Matter of Villanueva v. Goord*, 29 A.D.3d 1097, 1098 (3d Dep’t 2006).

At the discretion of DOCCS, persons incarcerated in a DOCCS facility may be awarded good-time credit to be applied against their maximum sentence. *See Correction Law § 803(1)(a)-(b), (4); 7 N.Y.C.R.R. §§ 261.3(a)-(d), 262.1.* When the total good-time credit awarded to the individual “is equal to the unserved portion” of his sentence after applying jail-time credits, and the individual otherwise satisfies the other mandatory conditions

for release, the individual “shall, if he or she so requests, be conditionally released.” Penal Law § 70.40(1)(b). Anyone who is conditionally released must abide by all conditions of release and post-release supervision pronounced by DOCCS and remains in DOCCS’s “legal custody” until the expiration of his or her maximum sentence. *Id.*; N.Y. Executive Law §§ 259-c(2), 259-i(2)(b); 9 N.Y.C.R.R. § 8003.1(a), (c).

## **B. Factual Background<sup>1</sup>**

Hurd was arrested on July 23, 2013, and later indicted for misdemeanor and felony criminal contempt, harassment, and stalking. Pet. App. 49a-50a. He stood trial three times. The first trial ended in a mistrial. The second trial produced a conviction of nine misdemeanor counts of stalking, harassment, and criminal contempt, and a mistrial on the felony stalking charge. Pet. App. 50a. The misdemeanor convictions cumulatively resulted in a two-year sentence to be served in the custody of City DOC. Pet. App. 50a. In 2016, at a third trial, Hurd was convicted of felony stalking, and was sentenced to a term of one-and-one-third to four years, to be served in the custody of DOCCS. Pet. App. 50a-51a.

After he was sentenced on the felony conviction, on April 14, 2016, Hurd was transferred to state custody from City DOC, which had been holding him since his arrest in July 2013. Pet. App. 52a. Upon his transfer to

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<sup>1</sup> This factual recitation is taken from Hurd’s amended complaint here, Hurd’s filings in his prior state Court of Claims action, and the decision in that claims action, *see Hurd v. State of New York*, No. 129808 (N.Y. Ct. Cl.)—all of which are part of the record below. Hurd’s state court filings and the final decision in the state court action set forth the issues that Hurd raised and that the state court decided, which Hurd is bound by in this action. *Infra* at 17-20.

DOCCS's Ulster Correctional Facility, City DOC provided DOCCS with a certificate crediting Hurd with 996 days of jail time. Pet. App. 52a.

Respondent Stacey Fredenburgh, an inmate records coordinator at Ulster Correctional Facility, was responsible for processing Hurd's transfer paperwork. CA2 Br. for Appellee at ADD15 (Dkt. No. 47) ("CA2 Br."). On April 19, 2016, DOCCS awarded Hurd the full one year and four months of good-time credit he was allowed under state law. CA2 Br. at ADD14. Based on the jail-time credit certificate issued by City DOC, and the good-time credit Hurd had earned and was awarded, DOCCS determined that Hurd's conditional release date was March 17, 2016—a date that had passed a month earlier. Pet. App. 53a-54a. DOCCS also calculated that the maximum expiration date of Hurd's sentence was July 17, 2017.<sup>2</sup> CA2 Br. at ADD28.

Because Hurd's resulting conditional release date preceded the date he was transferred into state custody, DOCCS began processing him for release. Pet App. 54a. As part of that process, Fredenburgh was required to confirm with City DOC whether Hurd still owed time on his misdemeanor sentences, in which case DOCCS would be required to transfer him back to City DOC custody to serve the remainder of those sentences. CA2 Br. at ADD32, 34. On April 25, 2016, Edward Felicien—one of the city officials responsible for calculating Hurd's local jail-time credits—informred Fredenburgh that Hurd had satisfied his misdemeanor

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<sup>2</sup> A maximum expiration date is calculated by adding an individual's maximum sentence to the date that he or she is received in DOCCS custody, Penal Law § 70.30(1)), and subtracting the amount of jail-time credit contained in the jail-time credit certificate. See *id.* § 70.30(3).

sentences, but that City DOC's jail-time certificate was incorrect, and thus City DOC would be issuing a corrected certificate. CA2 Br. at ADD16, 34.

On May 4, 2016, having received no corrected certificate from Felicien, Fredenburgh contacted another city official, Salathia Mixon, to follow up. CA2 Br. at ADD16. Mixon told Fredenburgh that the initial jail-time certificate was correct. In light of the conflicting information from the two city officials, Fredenburgh requested that City DOC provide written confirmation that Hurd's jail-time certificate would not be amended. CA2 Br. at ADD34. City DOC did not provide any such written confirmation.

Over the next month, City DOC issued a total of four amended jail-time certificates for Hurd, each superseding the prior certificates. On May 6, 2016, Fredenburgh received two amended jail-time certificates for Hurd from Felicien, one crediting Hurd with 507 days of jail time, and the next crediting him with 469 days. Pet. App. 55a. A month later, on June 9 and June 13, Felicien sent to DOCCS two more amended certificates for Hurd, crediting Hurd with 524 days and 508 days of jail-time credit, respectively. Pet. App. 56a. As state law required, Fredenburgh repeatedly recalculated Hurd's conditional release dates based on the most recent amended certificate provided by City DOC, and she concluded that Hurd was no longer eligible for conditional release.

Hurd complained to Felicien on May 13 about the erroneous jail-time certificates, and he also complained to Fredenburgh and other DOCCS officials at around the same time. Pet. App. 55a-56a. Fredenburgh advised Hurd that he needed to contact City DOC about his jail-time credit. Pet. App. 56a.

Later in June 2016, Hurd was transferred to DOCCS's Riverview Correctional Facility, where he complained to unidentified DOCCS officials about City DOC's issuance of an erroneous jail-time credit certificate. Pet. App. 56a-57a. Hurd does not allege that Fredenburgh, who worked at Ulster Correctional Facility, received any of these complaints or had any ability to effect his conditional release after his transfer out of Ulster.

On March 23, 2017, upon the instruction of a City DOC Assistant General Counsel, City DOC issued an amended jail-time certificate crediting Hurd with 996 days of jail time. City DOC sent the certificate to the inmate records coordinator at Riverview Correctional Facility. Pet. App. 57a; CA2 Br. at ADD25. That official, who was not Fredenburgh, verified that Hurd had satisfied all statutory conditions for conditional release. DOCCS then released Hurd to parole supervision on March 30, 2017. Pet. App. 57a-58a.

### **C. Procedural History**

1. In June 2017, Hurd filed a money damages claim against New York State in the New York Court of Claims, alleging that DOCCS officials caused him to be wrongfully imprisoned past his conditional release date. CA2 Br. at ADD1-7. The parties cross-moved for summary judgment in 2019. CA2 Br. at ADD 37.

On October 7, 2019, the state court granted summary judgment to the State on Hurd's wrongful imprisonment claim, finding that Fredenburgh had acted in an "objectively reasonable" manner when calculating Hurd's conditional release dates. CA2 Br. at ADD33.

The state court expressly rejected Hurd’s contention that Fredenburgh “solicited” the incorrect jail-time certifications from Felicien,” concluding that the summary judgment record instead showed that Fredenburgh acted “reasonabl[y]” and “diligently” in following up with City DOC “after being told by Felicien that [Hurd’s] jail-time certification was incorrect.” CA2 Br. at ADD35-36. The court found that the State was not liable for Hurd’s prolonged detention; as the court explained, the multiple erroneous jail-time certificates issued by City DOC—and not any negligence or malice on Fredenburgh’s part—caused the delay in Hurd’s release. CA2 Br. at ADD36.

Hurd did not appeal the state court decision.

2. In June 2018, represented by the same attorneys involved in his state court action, Hurd filed this civil rights action against Fredenburgh, Mixon, and the City of New York, seeking money damages for his extended detention.<sup>3</sup> CA2 JA 2 (Dkt. No. 34). As relevant here, Hurd claimed that Fredenburgh had violated his Eighth Amendment and substantive due process rights.

Hurd alleged that Fredenburgh and Felicien “agreed to reduce” his jail-time credit “so that he would not be released.” Pet. App. 54a. He further alleged that Fredenburgh “asked” Mixon on May 4, 2016 for “assistance in obtaining an amended [jail-time certificate] reducing [Hurd’s] jail-time credit so that DOCCS could continue to imprison” him. Pet. App. 54a. Hurd alleged that Fredenburgh “knew or should have known” that the amended jail-time certificates were “incorrect,” and “failed to prevent the erroneous [certificates] from being issued or to correct the erroneous [certificates].” Pet.

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<sup>3</sup> Hurd did not sue Felicien, who had died. Pet. App. 59a n.1.

App. 59a. He also alleged that Fredenburgh “knowingly, intentionally, willfully, recklessly or out of deliberate indifference caused” Hurd’s jail-time credit “to be reduced and/or failed in [her] responsibility to correct the false calculation.” Pet. App. 60a.

Hurd did not allege any motive for the purported agreement between Fredenburgh and Felicien, or any other facts supporting the existence of such a conspiracy. Nor did he allege any reason why Fredenburgh was intent on continuing to detain him, or how she would have known the correct amount of jail-time credit that Hurd should have received from City DOC.

All defendants moved to dismiss. CA2 JA 5-6. While the dismissal motions were pending, the parties proceeded to discovery. CA2 JA 4. In June 2019, just before the close of discovery, Mixon and the City settled with Hurd and were dismissed from the case, leaving Fredenburgh as the sole remaining defendant. CA2 JA 7-8.

On September 26, 2019, the district court granted Fredenburgh’s motion to dismiss. The court concluded that Hurd had no constitutionally protected substantive due process liberty interest in early release “before the expiration of a valid sentence.” Pet. App. 39a (quotation marks omitted). The court also concluded that any excess detention beyond the date when he qualified for conditional release, but “prior to the expiration of his maximum sentence,” did not constitute cruel and unusual punishment under the Eighth Amendment. Pet. App. 45a.

The district court found in the alternative that dismissal was warranted based on qualified immunity. The court concluded that there was no clearly estab-

lished law in the Second Circuit that “prolonging detention past an inmate’s conditional release date is a constitutional violation” under either substantive due process or the Eighth Amendment. Pet. App. 41a-42a, 45a.

3. Hurd appealed the dismissal of his federal civil rights complaint, and a unanimous panel of the Second Circuit Court of Appeals (Walker, Katzmann, Wesley, JJ.) affirmed.

The court first held that any period of detention beyond the date when Hurd qualified for early conditional release constituted a cognizable injury under the Eighth Amendment and substantive due process. Pet. App. 13a. The court explained that New York law mandated Hurd’s release to parole supervision “[o]nce Hurd met the statutory requirements for conditional release.” Pet. App. 13a.

The court observed, however, that its decision was the first to hold that a violation of New York’s conditional release statute could constitute a harm of constitutional dimension where the detention did not exceed the maximum term of a validly imposed sentence; accordingly, the court concluded that Fredenburgh was entitled to qualified immunity. Pet. App. 22a, 26a-27a.

In light of its qualified immunity analysis, the Second Circuit did not rule on the alternative bases for dismissal advanced by Fredenburgh. For example, the court of appeals did not decide whether the decision in Hurd’s state court litigation precluded his claims against Fredenburgh. Pet. App. 8a n.2, 15a, 20a-21a. Nor did the court of appeals resolve whether Hurd’s amended complaint plausibly alleged that Fredenburgh acted with the requisite mental state or caused Hurd’s excess detention, although the court of appeals was “skeptical” that it did so. Pet. App. 15a.

## **REASONS FOR DENYING THE PETITION**

Hurd seeks summary reversal or merits review of the Second Circuit’s conclusion that—prior to the decision below—no clearly established law provided that mistakenly detaining an incarcerated person within the term of a validly pronounced maximum sentence, but beyond the date when the person qualifies for early conditional release under a New York state statutory scheme, constitutes cruel and unusual punishment or violates substantive due process. The court of appeals’ conclusion does not conflict with any rulings from this Court or another federal court of appeals. Moreover, this case is a poor vehicle for addressing the qualified immunity questions that Hurd presents because regardless of how those questions are resolved, Hurd cannot prevail on his claims. Accordingly, Hurd’s petition for certiorari should be denied.

### **A. The Decision Below Is Consistent with This Court’s Precedents and Does Not Implicate a Circuit Split.**

The qualified immunity ruling that Hurd asks this Court to review is grounded in specific features of New York’s early conditional release scheme and does not create or implicate any conflict in appellate authority. The scheme allows persons who were convicted of New York state law crimes to qualify for early conditional release from their sentences based on discretionary good-time credits awarded by state authorities; the calculation must also take into account nondiscretionary jail-time credits certified by local officials from the jurisdiction where the person was detained while awaiting trial and sentencing.

The Second Circuit concluded that under the wording of the New York statute providing for early conditional release, “[o]nce Hurd met the statutory requirements for conditional release, his release from prison was mandatory under state law.” Pet. App. 13a; *see id.* (noting the state statute’s use of the word “shall”). The court then concluded that when erroneous jail-time credit certificates provided by New York City caused Hurd to be incarcerated past the date he would have qualified for early conditional release, “Hurd suffered a harm of constitutional magnitude.” Pet. App. 14a; *accord id.* at 16a. The court recognized, however, that the constitutional significance of this error was not clearly established “at the time of the sentencing miscalculations,” Pet. App. 21a; *see id.* at 26a-27a. The court thus correctly concluded that respondent Fredenburgh was entitled to qualified immunity from Hurd’s Eighth and Fourteenth Amendment claims. Pet. App. 16a, 21a, 27a.

Although Hurd now asks this Court to review that ruling, he conceded below that no clearly established law treated continued detention past the date when a person qualified for early conditional release—but not past the person’s maximum sentence expiration date—as a violation of substantive due process. *See* Pet. App. 27a; CA2 Br. for Appellant at 39 (Dkt. No. 35); *see also Doe v. Simon*, 221 F.3d 137, 139 (2d Cir. 2000) (finding it unnecessary to decide whether New York’s conditional release statute creates a constitutionally protected liberty interest in early release).

There is similarly no merit to Hurd’s argument that decisions before the Second Circuit’s ruling had clearly established that mistakenly incarcerating a person past an early conditional release date constituted a harm cognizable under the Eighth Amendment. As the

court of appeals observed, “[n]one 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”—and “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.” Pet. App. 22a.

For example, this Court has never held that a state statutory right to be released from incarceration before the end of the maximum term of a valid sentence implicates a fundamental right protected by the federal constitution. To the contrary, this Court has recognized that “[w]hatever liberty interest exists is, of course, a *state* interest created by [state] law.” *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011). As the Court has explained, “[t]here is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no [constitutional] duty to” afford early conditional release. *Id.*

Nor has this Court held that the Eighth Amendment prohibits detention during the maximum term of a validly imposed and proportionate criminal sentence, unless the detention involves cruel and unusual conditions.<sup>4</sup> The Court has explained that where incarceration alone is concerned, the Eighth Amendment “forbids

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<sup>4</sup> Conditions of imprisonment that “involve the unnecessary and wanton infliction of pain” run afoul of Eighth Amendment’s prohibitions. *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981) (quotation marks omitted). The same is true of confinement under conditions that are “deplorably unsanitary.” *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (freezing cell with raw sewage on the floor and cell covered in fecal matter). But Hurd’s complaint does not allege any such wanton infliction of pain or deplorable conditions, so his reliance on *Rhodes* and *Taylor* (see Pet. 13, 14) is misplaced.

only extreme sentences that are grossly disproportionate to the crime,” *Ewing v. California*, 538 U.S. 11, 23 (2003) (quotation marks omitted), and “so totally without penological justification that [they] result[] in the gratuitous infliction of suffering,” *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (op. of Stewart, J.).

None of Hurd’s referenced authorities from this Court (see Pet. at 13-14) are to the contrary. Hurd was not subject to indefinite civil detention after the expiration of his maximum criminal sentence, as in *McNeil v. Director, Patuxent Institute*, 407 U.S. 245 (1972), involuntarily civilly committed in the absence of a criminal sentence or any legal process whatsoever, as in *O’Connor v. Donaldson*, 422 U.S. 563 (1975), or sentenced to life without parole as a juvenile, as in *Graham v. Florida*, 560 U.S. 48 (2010).

To constitute “clearly established law” for purposes of a qualified immunity analysis, a precedent “must be ‘particularized’ to the facts of the case.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, (1987)). The cases from this Court that Hurd references are too factually distinguishable to support his reliance on them.

Contrary to Hurd’s contention (Pet. 15), the court of appeals did not hold that no clearly established law provided it was *unlawful* to detain a person beyond the date when he qualified for conditional release under state law. It merely concluded that no clearly established law provided that such excess detention, which was otherwise within the maximum term of a validly imposed criminal sentence, would give rise to a *constitutional* harm. That distinction fully comports with this Court’s precedents, which have long recognized that not every deprivation of liberty gives rise to

a claim under the federal constitution. *See Baker v. McCollan*, 443 U.S. 137, 144 (1979).

The Second Circuit's ruling did not create a circuit split either. Because Hurd was not detained beyond his maximum sentence, Hurd misplaces his reliance on cases addressing detentions in excess of a maximum sentence. *See Pet. App. 22a-23a*.<sup>5</sup> Nor is he aided by readily distinguishable decisions concerning post-sentence detentions of other kinds, or errors in the initial imposition of a sentence.<sup>6</sup> Those cases do not establish that the Eighth Amendment "appl[ied] with obvious clarity to the specific conduct in question" here. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). There is thus no basis for summary reversal or merits review of Hurd's constitutional claims.

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<sup>5</sup> *See also, e.g., Porter v. Epps*, 659 F.3d 440, 444 (5th Cir. 2011) (excess detention of "fifteen months beyond the expiration of the sentence imposed"); *Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989) (nine-month excess detention beyond maximum sentence); *Haygood v. Younger*, 769 F.2d 1350, 1352-53 (9th Cir. 1985) (en banc) (five-year excess detention beyond maximum sentence); Pet. 16-19 (discussing *Sample*, *Haygood*, and *Porter*).

<sup>6</sup> *See Figgs v. Dawson*, 829 F.3d 895, 898-901 (7th Cir. 2016) (alleged unlawful detention based on error in application of initial criminal sentence); *Hankins v. Lowe*, 786 F.3d 603, 605 (7th Cir. 2015) (intentionally subjecting parolee to supervision beyond expiration of parole term); *Davis v. Hall*, 375 F.3d 703, 706-07 (8th Cir. 2004) (continued detention after judge had ordered plaintiff immediately released). *But see Scott v. Baldwin*, 720 F.3d 1034, 1036-37 (8th Cir. 2013) (law not clearly established that delay in calculating release date violated Eighth and Fourteenth Amendments); Pet. 18-19 n.3 (discussing *Figgs*, *Hankins*, *Davis*, and *Scott*).

**B. This Dispute Is Not an Appropriate Vehicle for Considering the Questions Presented in Any Event.**

This case is a poor vehicle for reviewing the questions presented here because Hurd could not obtain any relief even if those questions were resolved in his favor. Although the court of appeals based its dismissal on qualified immunity, other independent grounds exist for dismissing Hurd's claims. Specifically, Hurd will not be able to prove Fredenburgh's culpability or that she caused his extended detention, due to the preclusive effect of a state court ruling by which he is bound. And his bare assertion that Fredenburgh acted with malice and conspired for no discernible reason to wrongfully detain him is not entitled to the presumption of truth at the motion to dismiss stage.

*First*, settled preclusion principles foreclose Fredenburgh's liability in this case. Two weeks after the district court dismissed Hurd's federal complaint against Fredenburgh, the trial court in Hurd's parallel state court action entered summary judgment for the State on Hurd's claims that Fredenburgh had acted negligently and wrongfully in causing his excess detention. Hurd did not appeal from the state court judgment, and the state court's findings thus have preclusive effect in this § 1983 action. *See Allen v. McCurry*, 449 U.S. 90, 102-04 (1980).

Hurd was represented by the same counsel in both his federal and state court actions, he had full incentive in the state court suit to vigorously litigate the question of Fredenburgh's liability, and he did in fact vigorously

litigate that question.<sup>7</sup> Because Hurd “had a full and fair opportunity to litigate” Fredenburgh’s culpability in the state Court of Claims, and the issue was “actually and necessarily determined,” he is collaterally estopped from relitigating the issue in this action. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). Hurd’s state court case for damages for wrongful imprisonment was based on the same facts and conduct by Fredenburgh that are at issue here. In both actions, Hurd alleged that Fredenburgh agreed with Felicien to wrongfully extend Hurd’s detention, solicited erroneous jail-time certificates in order to do so, and unreasonably relied on those erroneous jail-time certificates despite Hurd’s complaints. Pet. App. 54a-55a; CA2 Br. at ADD 19-21, 24, 35.

The state court resolved these issues against Hurd when it determined, based on the undisputed summary judgment record adduced by the parties, that Fredenburgh acted reasonably and diligently—and not maliciously or negligently—in connection with processing Hurd’s release. CA2 Br. at ADD33, 35-36. The state court expressly rejected the sole basis for Hurd’s wrongful imprisonment claim—that Fredenburgh had conspired with Felicien and “solicited” an erroneous jail-time certificate in order to continue to detain him—

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<sup>7</sup> Discovery in Hurd’s federal action had largely concluded by the time the summary judgment briefing was completed in the Court of Claims. *See* CA2 JA 7-8. And it was not until months after the conclusion of the state court summary judgment briefing that Hurd reached a settlement with the city defendants in his federal action. *See* CA2 JA 7. This later change in circumstances did not deprive Hurd of his earlier incentive or opportunity to fully and vigorously litigate his state court claims at summary judgment.

finding “no support in the record” for the contention. CA2 Br. at ADD35.

As the state court recognized, New York state law required City DOC to maintain a record of Hurd's jail-time credit and to report the amount of the credit to DOCCS. Correction Law § 600-a. And under state law, DOCCS was legally bound by the jail-time certificates received from City DOC, which Fredenburgh could not “add or subtract therefrom.” CA2 Br. at ADD34 (quoting *McLamb v. Fischer*, 70 A.D.3d 1090 (3d Dep't 2010)); *Matter of Velez*, 163 A.D.3d at 1211. Accordingly, it was the “inaccurate information” provided by City DOC to Fredenburgh—and not any culpable conduct by Fredenburgh—that caused Hurd to be detained beyond his conditional release date. CA2 Br. at ADD32-36.

The state court found that Fredenburgh contacted City DOC, as she was required to do, to confirm whether Hurd owed additional time on his misdemeanor sentences. CA2 Br. at ADD32. When Felicien, a City DOC official, told her that Hurd's initial jail-time certificate was incorrect, Fredenburgh acted diligently in following up to try to obtain a corrected certificate—even contacting Mixon, another City DOC official, for assistance. CA2 Br. at ADD32-33. And when Mixon told Fredenburgh that Hurd's initial jail-time certificate was correct, Fredenburgh acted reasonably in requesting written confirmation from City DOC, given the conflicting information from Felicien and Mixon. CA2 Br. at ADD33. The court further found that despite Fredenburgh's inquiries, City DOC did not provide Fredenburgh with the written confirmation Fredenburgh requested; she instead received several amended jail-time certificates from City DOC in May and June 2016, which she was required to rely on when recalculating Hurd's conditional release date. CA2 Br. at ADD34-36.

Hurd is bound by these findings in this § 1983 case. *See Allen*, 449 U.S. at 103-04. And as these findings establish, Fredenburgh did not “meddle” with or “disregard[] both sentences imposed by courts and penal statutes drafted by democratically-elected legislatures” (Pet. 12-13). She simply complied with her obligations under state law, albeit while relying on erroneous information provided by City DOC that she had no authority to alter.

*Second*, even if Hurd’s claims were not foreclosed by a state court decision with preclusive effect, he cannot prevail here because the amended complaint fails to plausibly allege that Fredenburgh violated his constitutional rights. Hurd’s claims against Fredenburgh derive almost entirely from his conclusory allegation that Fredenburgh and Felicien “agreed to reduce [Hurd’s] jail-time credit so that he would not be released.” Pet. App. 54a. But as the court of appeals noted (Pet. App. 6a), Hurd’s complaint contains no factual allegations supporting the existence of such an agreement or explaining why Fredenburgh was intent on illegally detaining him. A “bare assertion of conspiracy” is not entitled to the presumption of truth, and thus fails to plausibly establish any unlawful conduct. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). Similarly deficient are Hurd’s unsupported and conclusory allegations that Fredenburgh acted “knowingly, intentionally, willfully, recklessly, or out of deliberate indifference” (Pet. App. 59a-60a) in causing Hurd’s jail-time credit to be reduced. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

Contrary to Hurd’s suggestion (Pet. 9), the court of appeals did not affirm any district court finding that Hurd had “adequately pled the subjective element of his Eighth Amendment claim” against Fredenburgh.

The court of appeals expressly declined to resolve whether Hurd's allegations might shock the conscience or establish deliberate indifference in light of its conclusion that no clearly established law supported the objective prong of Hurd's constitutional claims. *See Pet. App.* 16a, 20a-21a. Moreover, the court of appeals strongly implied that Hurd's allegations would *not* pass muster: it was "skeptical" that Fredenburgh, "whom Hurd failed to demonstrate has any authority or duty to change an erroneous [jail-time certificate] from the City," could "be deliberately indifferent to any harm suffered because of" an erroneous certificate. *Pet. App.* 15a-16a. The court of appeals also suggested that this same lack of authority would prevent Hurd from establishing the requisite causal connection between Fredenburgh's actions and his excess detention. *Pet. App.* 15a-16a.

Hurd likewise fails to state a claim for any constitutional violation with his allegations that Fredenburgh "knew or should have known that the amended [jail-time certificates] issued by Mr. Felicien were incorrect," but "failed to prevent the erroneous [certificates] from being issued or to correct the erroneous [certificates]." *Pet. App.* 59a-60a.

New York law "delegates the sole responsibility for certifying jail-time credit to" local officials and does not permit state prison authorities to alter the jail-time certificates they receive. *See Pet. App.* 15a-16a; Correction Law § 600-a; *Matter of Velez*, 163 A.D.3d at 1211. These features of state law refute Hurd's conclusory assertion that Fredenburgh had a duty to correct the erroneous jail-time certificates or to prevent their issuance. Hurd's allegations of negligence are thus "not entitled to unquestioned acceptance at the motion to

dismiss stage.”<sup>8</sup> Pet. App. 15a-16a; *see Twombly*, 550 U.S. at 555.

Moreover, even if Hurd’s allegations were assumed to be true, they sound at most in negligence—and negligence is insufficient to state a claim under substantive due process or the Eighth Amendment. *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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<sup>8</sup> Nor does the amended complaint allege how Fredenburgh, a *state* official, could have verified jail-time credit information that *local* authorities were statutorily charged with maintaining and reporting accurately—as the Second Circuit noted, *see* Pet. App. 15a-16a. Hurd’s allegations likewise fail to demonstrate that Fredenburgh had any continuing responsibility for or authority over his conditional release date after he was transferred to a different DOCCS facility in June 2016, two months after he was first received in DOCCS custody. Pet. App. 56a-57a.