

No. 20-1752

IN THE
Supreme Court of the United States

DEVAR HURD,

Petitioner,

v.

STACEY FREDENBURGH, IN HER INDIVIDUAL CAPACITY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

Respondent does not even try to present an *arguable* legal basis for Petitioner’s wrongful incarceration for nearly a year past his release date. That makes it indisputably clear that there simply was no legal basis and that Respondent is not entitled to qualified immunity. The Eighth and Fourteenth Amendments unambiguously prohibit prolonged incarceration without lawful authorization, and there quite obviously was no lawful authorization here.

Contrary to Respondent and the Second Circuit, the bedrock right against lengthy, lawless detention cannot turn on the vagaries of a given statutory scheme. The Court should summarily reverse because the right against imprisonment without legal basis is fundamental to liberty and must be acknowledged as clearly established. *See Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (summary reversal); *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (summary vacatur); *McCoy v. Alamu*, 141 S. Ct. 1364 (Mem) (2021) (granting the petition, vacating, and remanding in light of *Taylor*).

I. The Court Should Summarily Reverse The Second Circuit’s Patently Incorrect Award Of Qualified Immunity.

This is a case where “[a] general constitutional rule already identified in the decisional law . . . appli[es] with obvious clarity to the specific conduct in question”—and defeats qualified immunity. *Taylor*, 141 S. Ct. at 53-54 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The law forbids prolonged imprisonment with no legal basis. Respondent concedes the lack of

any arguable legal basis for incarcerating Petitioner for nearly a year.

1. Qualified immunity requires defining the relevant constitutional rule at the correct level of generality. Here, the relevant constitutional rules are that prolonged detention with no legitimate basis or legal authorization (1) gives rise to a Fourteenth Amendment liberty interest and (2) constitutes an objectively serious deprivation under the Eighth Amendment. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 252 (1972); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

Specifically, the relevant “general constitutional rule,” *Taylor*, 141 S. Ct. at 53-54, under the Eighth Amendment bans punishments that are “totally without penological justification.” *Gregg*, 428 U.S. at 173; *Rhodes*, 452 U.S. at 346. Similarly, the relevant general constitutional rule under the Fourteenth Amendment prohibits confining a person “without any lawful authority to support that confinement,” *McNeil*, 407 U.S. at 252, and recognizes that confinement cannot “constitutionally continue” when its “basis no longer exist[s],” *O'Connor*, 422 U.S. at 575.

These “general constitutional rule[s] appl[y] with obvious clarity” to this case because Petitioner’s prolonged confinement—as Respondent concedes—lacked even an arguable lawful basis. Respondent does not dispute, and therefore concedes, that no legal or legitimate basis existed to incarcerate Petitioner for nearly a year past his mandatory conditional release date. Respondent does not even claim ambiguity on this point. Therefore, Petitioner’s prolonged detention past his mandatory conditional release date

plainly lacked legal authorization, making it obvious that he suffered a harm of constitutional magnitude under the Eighth and Fourteenth Amendments.

2. Since she cannot claim that an arguably lawful basis existed for Petitioner’s wrongful incarceration, Respondent resorts to defining clearly established law with hair-splitting specificity. Like the Second Circuit, Respondent relies on a hyper-technical—and constitutionally meaningless—distinction between release unequivocally required by the mathematical operation of a maximum sentencing statute and release unequivocally required by the mathematical operation of a mandatory conditional release statute. This argument fails. The ancient right against lengthy, legally unauthorized imprisonment does not turn on such irrelevant distinctions.

The Second Circuit itself dismissed the distinction as irrelevant, opining that it was not “meaningful” and “matter[ed] not.” Pet. App. 13a, 19a. The Second Circuit acknowledged that the determination of a mandatory conditional release date—just like the determination of a maximum sentence expiration date—is a “mathematical concept.” Pet. App. 5a.

Respondent fails to provide any coherent answer to the obvious question: Why does a distinction between two types of mathematically-required, non-discretionary release dates determined by statute—a mandatory expiration date and a mandatory conditional release date—make any constitutional difference at all?

Critically, the term “conditional release” as used in New York sentencing law does not mean that release is discretionary or non-automatic. Pet. App. 5a. The

Second Circuit made the point explicitly in this very case: mandatory conditional release is not “a discretionary decision” but a “statutorily mandated release date, calculated by applying both [an inmate’s] good behavior time and his jail time, or time served awaiting trial.” Pet. App. 5a (quoting *Eiseman v. New York*, 70 N.Y.2d 175, 180 (1987)). Petitioner’s lawless incarceration resulted solely from falsified math: intentionally or knowingly incorrect counts of the number of days Petitioner spent in pretrial detention. Pet. App. 6a-7a, 9a, 16a, 31a-33a, 47a.

Respondent’s reliance on *Swarthout v. Cooke*, 562 U.S. 216 (2011), cited in BIO 14, totally misses the mark. *Swarthout* found no Fourteenth Amendment liberty interest created by a California parole statute that required a state board to set an early release date “unless it determines that ... consideration of the public safety requires a more lengthy period of incarceration.” *Id.* at 216-17. That discretion-laden determination could not be more different from the “mathematical concept,” Pet. App. 5a, at issue here.¹

II. This Case Is An Excellent Vehicle For Summary Intervention.

This case cleanly tees up the two questions presented. Respondent does not dispute that the Second Circuit decided the Eighth Amendment claim solely on the basis of qualified immunity as applied to the objective prong. Nor does Respondent contest that the

¹ In the Court of Appeals, Petitioner argued clearly and at length that Respondent violated clearly established Fourteenth Amendment law. *See* Appellant’s Br. 38-41; Appellant’s Reply Br. 18-28. Respondent’s contention that Petitioner conceded qualified immunity on the Fourteenth Amendment claim, *see* BIO 13, is absurd.

Second Circuit disposed of the Fourteenth Amendment claim based entirely on qualified immunity as opposed to the liberty interest prong. If this Court intervened and resolved either the Eighth Amendment qualified immunity question or the Fourteenth Amendment qualified immunity question in Petitioner's favor, that resolution alone would determine the outcome of the proceedings in this Court, require a remand to the Second Circuit, and preclude dismissal of the complaint based on the objective prong of the Eighth Amendment claim or the liberty interest prong of the Fourteenth Amendment claim.

True, further proceedings below would be necessary to fully resolve the case, but the outcome of those proceedings would hardly be the slam dunk Respondent imagines. Respondent makes two arguments about why she ultimately would win in the lower courts under the subjective prong of the Eighth Amendment claim and the "shocks the conscience" prong of the Fourteenth Amendment claim, but neither argument is persuasive.

1. Issue preclusion does not bar Petitioner's claims. Petitioner's federal complaint alleges that Respondent agreed with New York City officials to falsify the amount of time Petitioner spent in pretrial detention and then, independently of this initial falsification, ignored assurances by the New York City Jail Time Coordinator, and well-founded written complaints by Petitioner, that the original, correct jail-time calculation was the correct one. The Second Circuit explicitly "acknowledge[d] that [Petitioner's] allegations do not concern only [Respondent's] ability to change his jail time credit but also her alleged conduct

in agreeing to create the erroneous [jail time calculations] to keep [Petitioner] in prison in the first place.” Pet. App. 16a (emphasis added).

While the New York Court of Claims determined that Respondent did not *solicit* a false jail time calculation, that does not negate the possibility of an *agreement* to falsify the calculation. Respondent would not need to solicit a false jail time calculation in order to collude in falsifying it.

As the Second Circuit has explained, collateral estoppel under New York law requires that “the *identical issue* necessarily must have been decided in the prior action.” *Jenkins v. City of New York*, 478 F.3d 76, 85 (2d Cir. 2007) (quoting *Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (N.Y. 1997)). The identical issue must have been “squarely addressed.” *Oddo v. AGFA-Gevaert*, 587 N.Y.S.2d 15 (App. Div. 1992). Petitioner’s federal claims are not barred by issue preclusion because the Court of Claims did not address one of Respondent’s key factual claims in this case—that Respondent was part of an agreement to falsify the amount of time Petitioner spent in pretrial detention.

Nor did the Court of Claims squarely address Petitioner’s key factual allegation that Respondent ignored Petitioner’s detailed complaints about the false jail time certificates—the exact type of scenario that other courts have found makes out deliberate indifference. *See* Appellant’s Br. 22-23. The Court of Claims also ignored the chilling allegation that, when a colleague emailed Respondent that Petitioner’s jail time “gets less and less with each” new update, she responded, “Yes it does ☺.” Appellant’s Reply Br. 15.

2. Respondent waived her remaining argument—that Petitioner did not adequately plead Respondent’s agreement to the falsification of the amount of time Petitioner spent in pretrial detention. *See* BIO 20a-22a. Respondent lost on this issue in the district court and then failed to raise it on appeal.

In the district court, “[t]he parties dispute[d] whether plaintiff’s allegations r[is]e to deliberate indifference on the part of [Respondent].” Pet. App. 43. In addressing the Eighth Amendment claim, the district court agreed with Petitioner on this issue: “[Respondent’s] alleged conduct is troublesome and would certainly satisfy deliberate indifference if not willfulness, as [Petitioner] alleges [Respondent] agreed with [a New York City corrections official] to keep [Petitioner] incarcerated past his conditional release date.” Pet. App. 44a. As for the Fourteenth Amendment claim, the district court similarly found that Petitioner sufficiently alleged Respondent’s conscience-shocking behavior in intentionally prolonging Petitioner’s incarceration: “[T]he court finds that, if true, [Petitioner’s] allegations that [Respondent] intentionally took actions to keep plaintiff imprisoned without justification might shock the judicial conscience.” Pet. App. 39a.

In the Second Circuit, Respondent did not contest these determinations by the district court, thereby waiving any challenge to them. Instead, Respondent requested affirmance “for two . . . reasons.” Appellee’s Br. 3. First, she asserted collateral estoppel, a point addressed above. *Id.* Second, Respondent claimed “qualified immunity from [Petitioner’s] claims.” *Id.* Thus, the appellate court did not disturb the district court’s finding that Petitioner adequately pled the

subjective element of his Eighth Amendment claim. Pet. App. 16a. Similarly, the Second Circuit recited, but did not address or disturb, the district court's conclusion that Petitioner adequately pled for purposes of the Fourteenth Amendment claim that Respondent's behavior could "shock the judicial conscience." Pet. App. 20a. Therefore, Respondent has failed to preserve any challenge to the sufficiency of the allegations that she agreed to the intentional falsification of Petitioner's jail time credit.

III. The Court's Summary Intervention In This Case Is Exceptionally Important.

Respondent does not and could not contest the critical importance of the rule that the government must have a lawful or legitimate basis when it imprisons its citizens for long periods of time. "[N]o man shall be imprisoned contrary to law." 4 WILLIAM BLACKSTONE, COMMENTARIES *431-32. This clearly-established rule is among "freedom's first principles." *See Boumediene v. Bush*, 553 U.S.723, 797 (2008). The Court should intervene because that fundamental principle does not disappear or lose its clearly established status based on minute differences between one statute and another.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below summarily vacated.

Respectfully submitted,

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