No. 20-7846

IN THE
Supreme Court of the United States

ANGEL ORTIZ,
Petitioner,

v.

DENNIS BRESLIN, Superintendent,
Queensboro Correctional Facility, et al.,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

On a plea of guilty to robbery in the first degree and attempted sexual abuse in the first degree, petitioner was sentenced under New York law to a term of imprisonment of ten years, to be followed by a five-year term of state supervision to be served in the community so long as he satisfied, as relevant here, the condition imposed on certain sex offenders that he not reside within 1,000 feet of a school. At the end of his prison term he was unable to find compliant housing, and he was held for eight months in a correctional facility authorized under state law to serve as a transitional residence for people in that situation; he was then released to compliant housing. The question presented is:

> Whether either the Fourteenth Amendment Due Process Clause or the Eighth Amendment ban on cruel and unusual punishment prohibited the State from retaining petitioner in a state facility during the portion of his sentence when he was unable to satisfy the housing condition required by state law for his supervised release to the community.

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INTRODUCTION

Under New York law, certain sex offenders are not eligible for release into the community until they can establish a residence that is not within 1,000 feet of a school. As a result, when such an offender receives a sentence that includes a period of community supervision, he must sometimes serve a portion of that period of supervision in a residential facility designed for that purpose, until he can be placed in compliant housing. Petitioner's release into the community was delayed for eight months because such housing had not been located for him. He claims that this delay violated his constitutional rights to due process and to freedom from cruel and unusual punishment, and that the state court's contrary decision conflicts with decisions of the Second Circuit Court of Appeals and of this Court.

This Court should deny the petition. The case does not present a conflict between the state court and the decisions of any other court. Moreover, petitioner's claim relies heavily on unproven factual claims about the ability and willingness of New York City to provide compliant housing, although New York City is not a party to this litigation, and this Court has no ability to resolve that factual issue. While the case may show that there is a need for more compliant housing in New York City, it does not present a constitutional question meriting this Court's review.

STATEMENT

A. Petitioner's Sentence to a Term of Imprisonment and a Term of Post-Release Supervision Conditioned on Finding Housing That Is Not Within 1,000 Feet of a School

In 2008, on his plea of guilty to the crimes of robbery in the first degree and attempted sexual abuse in the first degree, petitioner was sentenced as a violent felony offender to a determinate sentence of 10 years of imprisonment to be followed by five years of post-release supervision. (Pet. App. 110a, 116a.) Post-release supervision is a form of state supervision akin to parole that may be served in the community so long as applicable conditions of release are satisfied. *See* N.Y. Penal Law § 70.45(3).

In petitioner's case, release to the community was conditioned by law on the requirement that he not knowingly enter any area within 1,000 feet of a school during the supervision period, and consequently that he establish his residence outside of any such area. This condition was mandated by the New York State Sexual Assault Reform Act (SARA), N.Y. Executive Law § 259-c(14), because petitioner had been convicted of a sex offense that subjected him to several forms of special treatment under that law, and because he had been adjudicated a "level 3" sex offender under the New York Sex Offender Registration Act, N.Y. Correction Law § 168-l(6)(c). "Level 3" is the most serious risk designation under the Registration Act, and means that, taking into account petitioner's current offense, his prior criminal history, and a variety of other factors, the sentencing court had found that his "risk of repeat offense is high and there exists a threat to the public safety," *id.* SARA requires that Level 3 sex offenders

convicted of certain enumerated crimes must have, as a condition of their release, the requirement that they not knowingly enter any area within 1,000 feet of a school curing the supervision period. Thus, the post-release supervision portion of petitioner's sentence did not authorize his release to the community until he obtained a residence that complied with the 1,000-foot restriction.

In September 2016, petitioner reached his "conditional release" date (Pet. App. 110a), the date, calculated on the basis of time already served in state and local custody and time-off earned for good behavior, on which an inmate is eligible to be released into the community on state supervision subject to "[t]he conditions of release . . . imposed by the state board of parole." N.Y. Penal Law § 70.40(1)(b). Petitioner was not released at that time, however, because he had not satisfied the condition of obtaining housing that satisfied the SARA residency restriction prohibiting him from living within 1,000 feet of a school. (Pet. App. 111a.)

In March 2018, petitioner finished serving his 10-year prison term and was formally placed on his five-year term of post-release supervision. (*See* Pet. App. 110a-111a, 118a.) But because he still had not obtained SARA-compliant housing in the community, petitioner was required to begin serving his supervision term in state custody. He was, however, transferred from the general confinement facility in which he was being held to a "residential treatment facility" (Pet. App. 110a, 118a-119a), a correctional facility designed to serve as temporary housing in which residents are offered programming and other opportunities to help ease the transition from incarceration to non-custodial life, N.Y.

Correction Law § 2(6), and authorized by law to be used for such purpose, *see id.* § 73(10).

Where an inmate who is otherwise approved for community supervision is unable to obtain appropriate housing, the State generally aims to coordinate with social services agencies in the area where the inmate resided prior to incarceration in order to help the inmate find adequate public housing there. *Cf.* N.Y. Correction Law § 203(2). Before he was incarcerated, petitioner had resided in New York City. (Pet. App. 116a.) Accordingly, when he completed his term of imprisonment, the State added him to its list of inmates waiting for openings in the limited supply of SARA-compliant housing in the New York City shelter system that the City reserves for state inmates. (Pet. App. 119a.)

In November 2018, petitioner was released from state custody to SARA-compliant New York City shelter housing. (Pet. App. 5a.)

B. Proceedings Below

In June 2018, while petitioner was still in state custody, he filed a petition for a state writ of habeas corpus in New York State Supreme Court, Queens County, naming as respondents the State Department of Corrections and Community Supervision and the superintendent of the residential treatment facility where he was being housed. (Pet. App. 109a-113a.) Petitioner sought immediate release from custody, asserting, among other things, that enforcement of the SARA 1,000-foot residency restriction so as to prevent him from serving his post-release supervision in the community violated the United States Constitution.

Specifically, he contended that his continued confinement in the residential treatment facility violated his right to substantive due process under the Fourteenth Amendment, as well as his Eighth Amendment right to freedom from cruel and unusual punishment. (Pet. App. 112a, 125a-143a.) The habeas petition was denied. (Pet. App. 87a-92a.)

Petitioner appealed to the New York State Supreme Court Appellate Division, Second Department. In November 2018, while that appeal was pending, he obtained SARA-compliant accommodations in the New York City shelter system and was released from state custody. (Pet. App. 84a.) Thereafter, the appellate court affirmed the denial of the habeas petition. (Pet. App. 83a-86a.)

The New York State Court of Appeals affirmed the intermediate appellate court's denial of habeas relief.[1] The Court of Appeals found that the case was moot but nevertheless reached the merits on the ground that the issue was important and likely to recur and evade review; the Court of Appeals rejected petitioner's claims. (Pet. App. 7a.)

On petitioner's substantive due process claim, the court held that, as a threshold matter, petitioner did not have a fundamental right to be released from custody when he had not satisfied the SARA residency restriction. (Pet. App. 12a-15a.) The court concluded that petitioner was in effect claiming the "right to be free of [post-release supervision] conditions"—a right

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[1] The New York State Court of Appeals also affirmed the denial of habeas relief sought by another, similarly situated state prison inmate whose appeal had been consolidated with petitioner's. (*See* Pet. App. 1a-2a.) That inmate did not seek review of the Court of Appeals decision.

lacking a "deeply rooted" constitutional pedigree. (Pet. App. 14a.) Indeed, the court noted, treating petitioner's claimed right to release as a fundamental right would be "self-defeating," because under state law, a person on community supervision who violates his conditions of release may be reincarcerated for the remainder of his supervision term—with the result that releasing petitioner as he requested would put him in immediate violation of his release conditions and make him subject to immediate arrest and reincarceration. (Pet. App. 13a.) Thus, the court ruled, heightened scrutiny was inapplicable; rational basis review applied. (Pet. App. 15a.) And rational basis review was satisfied, the court concluded, because petitioner's temporary confinement while awaiting placement in SARA-compliant shelter housing served the legitimate governmental purpose of keeping level-3 sex offenders—those determined to present the greatest risk to the public at large—away from schools, and, thus, from areas where minors are likely to be present. (Pet. App. 15a-17a.)

On petitioner's Eighth Amendment claim, the court appears to have assumed for argument's sake that petitioner's confinement while awaiting receipt of SARA-compliant shelter housing constituted "punishment." But the court concluded that any such punishment was not "cruel and unusual," rejecting both of petitioner's arguments to the contrary. First, the court held that petitioner's confinement, presuming it to be punishment, was not for the status of his indigency. "Instead, it reflects a broader set of social circumstances in which sex offender and society alike prefer that the offender remain in his city of long-time prior residence, especially if he must rely on local social services departments for shelter housing, and not relocate simply because SARA-compliant housing is

plentiful elsewhere." (Pet. App. 18a-19a.) Second, the court that held that petitioner's confinement was not the product of the State's supposed deliberate indifference to his predicament. (Pet. App. 17a-21.) Rather, it reflected the State's lawful exercise of its statutory authority in a manner mindful of "[t]he challenges . . . presented by inmates convicted of sex offenses who must obtain SARA-compliant housing and must do so in a very limited market without financial resources." (Pet. App. 20a.)

Finally, the Court of Appeals rejected petitioner's attempt to bolster his claims with the proposition that, had the State removed him from custody and simply dropped him off at the New York City shelter system intake center, he necessarily would have been given a SARA-compliant shelter bed. The court found it "improper to resolve questions about [the City's] policies and procedures regarding SARA-restricted sex offenders in cases in which [the City] is not a party and the existing record contains no evidence resolving those questions." (Pet. App. 20a.)

The instant petition for writ of certiorari followed.

REASONS FOR DENYING THE PETITION

A. The Decision of the New York Court of Appeals Does Not, as Petitioner Claims, Conflict with the Second Circuit's Decision in *Hurd v. Fredenburgh.*

Contrary to Petitioner's argument (Pet. 13-22), there is no conflict between the decision below and the decision of the United States Court of Appeals for the Second Circuit in *Hurd v. Fredenburgh*, 984 F.3d 1075 (2d Cir. 2021), *pet. for cert. filed*, No. 20-1752 (June 11,

2021). *Hurd* concluded that a New York state inmate had a core constitutional liberty interest in release to community supervision after relevant conditions of release had been satisfied, but *Hurd* cast no doubt on the decision below, which held that an inmate had no such fundamental liberty interest when he had failed to satisfy the relevant condition of release—namely, that he obtain housing at least 1,000 feet away from the nearest school.

In *Hurd*, a New York state prison inmate was retained in custody beyond his true conditional release date (but not beyond the overall maximum expiration date of his sentence), because his conditional release date was calculated incorrectly. 984 F.3d at 1082. Under state law, the inmate's conditional release date was to be calculated by subtracting specified periods from the term of imprisonment specified in his sentence; in his case the periods to be subtracted were the amount of "good time" he had earned and been awarded, and the time he had already spent in local jails prior to transfer to state custody. "Good time" is determined by state correctional authorities, and the time spent in local jails is reported to state authorities by local authorities. In *Hurd*, once the inmate had served the period of imprisonment resulting from that calculation, he had satisfied the statutory conditions entitling him to release from custody. *Id.* The inmate remained incarcerated for a longer period, because a state prison employee relied on erroneous information received from a city official who had understated the amount of time the inmate had spent detained in local jails. *Id.* The inmate sued the state employee for monetary damages under 42 U.S.C. § 1983, alleging that his confinement beyond his conditional release

date violated his Fourteenth Amendment right to substantive due process and his Eighth Amendment right to freedom from cruel and unusual punishment. *Id.* The district court dismissed the lawsuit, and the Second Circuit affirmed. *Id.*

The Second Circuit stated that "[o]nce [the inmate] 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," *id.* at 1089, and that interest was among the "core constitutional interests" protected by substantive due process, *see id.* at 1088. However, the court concluded that the prison employee was entitled to qualified immunity from damages on the inmate's substantive due process claim because when the employee relied on erroneous local jail-time information in calculating the inmate's jail-time credit, it had not been clearly established that a harm of constitutional dimension resulted from detaining an inmate beyond a conditional release date, but not past the overall maximum expiration date of his sentence. *Id.* at 1089.

The Second Circuit resolved the inmate's Eighth Amendment claim similarly. It held that the inmate's confinement beyond his conditional release date was "punishment" and that incarceration past that point "was neither authorized by law nor justified by any penological interest." *id.* at 1087. But the employee was entitled to qualified immunity, because it had not been clearly established, at the time the state employee relied on the city's mistaken jail-time credit certifications to continue to detain the inmate, that the violation of an inmate's state statutory right to conditional release constituted an Eighth Amendment violation. *Id.*

The decision of the New York State Court of Appeals below is entirely consistent with *Hurd*. In *Hurd*, the Second Circuit found that the inmate had a fundamental substantive due process right to release from custody upon his conditional release date "[o]nce [he] satisfied the statutory requirements for conditional release." *Id.* at 1089. But the quoted language makes clear that the right would *not* be implicated when an inmate had *not* satisfied the statutory requirements for conditional release. That is precisely the situation here. Petitioner is complaining about the refusal to release him at time when he had not yet obtained housing that complied with the SARA 1,000-foot residency restriction, and therefore he did not yet qualify for conditional release. (Pet. App. 111a.) Thus, there is no conflict between this case and *Hurd* as far as substantive due process is concerned.

For similar reasons, there is no conflict between this case and *Hurd* on the Eighth Amendment claims. The Second Circuit held in *Hurd* that the inmate was subjected to cruel and unusual punishment because his confinement beyond the date on which he should have been released to community supervision "was neither authorized by law nor justified by any penological interest." 984 F.3d at 1087. In contrast, petitioner's confinement beyond the date on which he otherwise would have been entitled to be released from custody and permitted to serve his term of supervision in the community was both authorized by law and justified by a penological interest. Having been unable to obtain SARA-compliant housing, petitioner was not entitled to release, and thus was required to remain in custody. *See* N.Y. Correction Law § 73(1). Further, as the court below held, keeping petitioner in custody until he obtained compliant housing furthered the legitimate

objective of keeping particularly dangerous sex offenders away from schools, and, thus, from areas where minors are likely to congregate. (Pet. App. 15a-17a.)

Accordingly, there is no conflict at all between the court below and the Second Circuit, much less one that warrants resolution by this Court.[2]

B. The Eighth Amendment Ruling Below Is Fully Consistent with This Court's Decisions in *Robinson* and *Bearden*.

Nor is there any conflict between the decision below and this Court's decisions in *Robinson v. California*, 370 U.S. 660 (1962), and *Bearden v. Georgia*, 461 U.S. 660 (1983), as petitioner suggests (Pet. 22-24).

Robinson held that a California statute which made it a criminal offense, punishable by up to 90 days in prison, for a person to "be addicted to the use of narcotics," violated the Eighth Amendment's ban on cruel and unusual punishment. 370 U.S. at 660. The constitutional flaw in the statute was that it "[made] the 'status' of narcotic addition a criminal offense," *id.* at 666, without requiring any specific act of use, or possession, or any other antisocial behavior.

The New York sentencing provision that petitioner challenges does no such thing. Petitioner's sentence, and the confinement he challenges, resulted not from his status as an indigent person but from his conviction

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[2] Even if there were such a conflict between this case and *Hurd*, it would be unripe for review because, as petitioner acknowledges (Pet. 11), the New York State Court of Appeals did not have the benefit of *Hurd* when it decided this case. At a minimum, this Court should decline to intervene until the Court of Appeals has had the opportunity to consider and resolve any conflict with *Hurd* in the appropriate case.

for robbery and attempted sexual abuse, and a finding, after petitioner had notice and an opportunity to be heard, that his prior criminal history and other characteristics indicated a high risk of reoffending and a danger to the public if released to the community without adequate safeguards.

Nor does the decision below conflict with *Bearden*, as petitioner suggests (Pet. 22). In *Bearden*, this Court held that the Fourteenth Amendment prohibits a State from exercising its discretion to revoke a defendant's probation for failure to pay a fine and remanding him into custody without first considering whether non-custodial alternatives may accomplish the relevant governmental objectives. *See* 461 U.S. at 664-73. However, the Court recognized that incarceration under those circumstances complies with the Constitution "if alternative measures are not adequate to meet the State's interests." *Id.* at 672. That is precisely the situation here. The New York state legislature has mandated the 1,000-foot restriction as a condition of release to supervision in the community for all persons subject to SARA, including petitioner. N.Y. Executive Law § 259-c(14). This reflects a legislative determination that, where an inmate has been unable to obtain SARA-compliant housing, there are no "alternative measures" adequate to meet to the State's penological and public safety interests short of continued custodial confinement until such housing may be obtained.

In conclusion, the ruling of the court below rejecting petitioner's Eighth Amendment status punishment claim does not create or implicate any conflict with a decision of this Court.

C. This Case Is Not An Appropriate Vehicle for Resolving the Issues Petitioner Asks This Court to Address.

Certiorari should be denied for the additional reason that the decision below is not an appropriate vehicle for resolving the constitutional issues as petitioner frames them. Petitioner's substantive due process and Eighth Amendment claims rest heavily on the claim that, had he been removed from custody and simply dropped off at the New York City shelter system intake center, he would have been given a shelter bed that complied with SARA's 1,000-foot restriction. (*See* Pet. i, 16, 20.) This claim hinges on disputed questions of state law and disputed questions of fact which were not properly presented to any of the courts below or resolved by them, and should not be resolved by this Court in the first instance.

First, petitioner argues that, under a 1981 consent decree entered into by the City in *Callahan v. Carey*, Case No. 42582/79 (N.Y. Sup. Ct. 1981), the City would have been legally obligated to provide petitioner with SARA-compliant shelter housing had he been dropped off at the shelter system intake center. Whether that is correct is a disputed question of state law that the New York State Court of Appeals has not answered. This Court ordinarily declines to answer such questions in the first instance. *See, e.g.*, *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 610 (2013) (declining to answer "a question of state law that the Florida Supreme Court did not address" in the decision being reviewed in that case).

Second, even if it were determined that the City had the legal obligation asserted by petitioner as a matter of state law, petitioner's position would depend

on his further claim that, as a factual matter, the New York City shelter system could and would have provided petitioner with one of its limited number of SARA-compliant shelter beds. This question implicates potentially difficult and sensitive issues of City policy and procedure. And as the court below determined, it would be "improper to resolve questions about [the City's] policies and procedures regarding SARA-restricted sex offenders in cases in which [the City] is not a party and the existing record contains no evidence resolving those questions." (Pet. App. 20a.)

This Court is in no position to determine the accuracy of petitioner's claim that New York City, a non-party to this litigation, is willing and able to provide SARA-complaint housing to all inmates who require such housing as a condition of their release, on the date they become eligible for community supervision. But petitioner's legal position rests largely on that contested factual claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

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