

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPEAL NO. 16-1988

PHILIP A. WHARTON, JOSEPH ROUNDTREE, JAMES MADDOX and
LAMAR CORREA

Appellants,

v.

CARL DANBERG, CATHY ESCHERICH and REBECCA MCBRIDE

Appellees.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF DELAWARE
CIVIL ACTION NO: 12-1240-LPS

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE
IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union Foundation of Delaware (“ACLU-DE”) is a nonprofit, nonpartisan membership organization founded in 1961 to protect and advance civil liberties throughout the State of Delaware. The mission of ACLU-DE, in conjunction with the American Civil Liberties Union, a national organization of 500,000 members with which it is affiliated, is to defend the rights granted to individuals and groups of individuals by the United States Constitution and its Amendments, including the Bill of Rights, the Delaware Constitution, and the statutes effectuating those constitutional provisions and expanding the rights granted thereby. ACLU-DE has a long history of legal advocacy for the constitutional rights of all persons in Delaware, including those who are incarcerated.

ACLU-DE’s interest in this case is to prevent changes in the law that would reduce its ability to protect the foregoing rights through litigation and, more importantly, reduce the federal courts’ ability to enforce constitutional protections.

First, substantial portion of ACLU-DE’s legal advocacy is brought to obtain prospective injunctive relief requiring State of Delaware officials to cease violating Delaware residents’ federal constitutional rights. If the District Court’s ruling on sovereign immunity becomes binding precedent in this circuit, it will substantially

limit the ability of the federal courts in Delaware and elsewhere to grant prospective relief preventing unconstitutional actions by state officials.

Second, prisoners seeking through litigation to prevent mistreatment by Department of Correction officials, and those advocating on their behalf, are often required to establish deliberate indifference by defendants. Under this Court's precedent, a plaintiff seeking to prove deliberate indifference in an over-incarceration case needs to show that a defendant who had knowledge of the risk either failed to act or "took only ineffectual action." If this Court affirms the District Court's grant of summary judgment of the Eighth Amendment claim, a defendant would then be able to avoid liability by showing he took ineffectual action.

Third, under established precedent people who have been subjected to wrongful treatment in prison may, in appropriate cases, assert claims for violation of the right to procedural due process and the right not to be subjected to cruel and unusual punishment. If this Court affirms the District Court decision, prisoners will no longer be able to assert procedural due process claims.

Fourth, acceptance of the District Court's qualified immunity analysis would decrease the ability of persons who have been injured by violation of their constitutional rights to recover fair compensation for their injuries.

Fifth, affirmance of the District Court's denial of class certification on the basis of its finding that commonality was missing will reduce the practicality of class action cases.

Appellants have consented to the filing of this Brief. Appellees have not. On June 27, 2016, in response to an email from counsel for amicus requesting consent to the filing of an amicus brief, counsel for appellees stated he would take no position.

ACLU-DE's legal review panel authorized the filing of the motion for leave to appear as amicus curiae that accompanies this brief. Amicus seeks leave to file the brief in accordance with Fed. R. App. P. 29.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than amicus curiae and its members, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Asserting claims under the Eighth and Fourteenth Amendments, Plaintiffs alleged “injury resulting from ‘the practice of the [Delaware Department of Correction (“[DDOC]”)] of over-detaining inmates,” *Wharton v. Coupe*, 2015 U.S. Dist. LEXIS 132385 at *2 (D. Del. Sept. 30, 2015) (internal brackets in original). They sought monetary and injunctive relief.

The District Court found a genuine dispute of material fact as to whether Defendants were aware of a significant risk that general disorganization and incompetence of DDOC personnel might cause inmates to suffer unwarranted punishment, in the form of over-incarceration. *Id.* at *18. However, it found three separate bases for granting summary judgment on liability on different parts of Plaintiffs’ claims, ultimately dismissing the entire case. This brief addresses those three decisions. In addition, the brief addresses the District Court’s denial of class certification and the court’s discussion of an alternative basis for dismissing the case.

The District Court dismissed Plaintiffs’ Eighth Amendment claim because it determined that a factfinder could not find Defendants to have been deliberately indifferent, since they had acknowledged an over-incarceration problem and acted to remedy it. That conclusion was error because it disregarded the evidence showing Defendants’ actions were ineffectual and, therefore, if accepted by the

factfinder, insufficient under this Court's precedent to disprove a claim of deliberate indifference. *See, e.g., Sample v. Diecks*, 885 F. 2d 1099, 1110 (3d Cir. 1989).

Finding that Plaintiffs' claims fit within this Court's Eighth Amendment and over-detention analysis, the District Court ruled that the more-specific-provision rule foreclosed Plaintiffs' Fourteenth Amendment Claim. That was error for two reasons. First, the more-specific-provision rule applies to substantive due process claims. *See Betts v. New Castle Youth Dev. Cir.*, 621 F.3d 249, 261 (3d Cir. 2010), and Plaintiffs' due process claim was a procedural due process claim. Second, at least one plaintiff and some putative class members were pre-trial detainees, so the Fourteenth Amendment, not the Eighth Amendment, would apply to improper punishment to which they were subjected. *See Bell v. Wolfish*, 441 U.S. 520, 531 n. 16 (1979).

Citing the Eleventh Amendment, the District Court granted summary judgment on the official capacity claims against Defendants. That was error because federal constitutional claims for prospective injunctive relief are properly raised as official capacity claims and are not barred by the Eleventh Amendment. *See Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645 (2002) ("Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908))".

The District Court's finding that the Fed. R. Civ. P. 23(a)(2)'s commonality requirement was not satisfied because at least one Plaintiff alleged a court error by in addition to asserting that over-incarceration resulted from disorganization and incompetence at DDOC was error because the claims against DDOC were central to all of the claims brought by Plaintiffs.

The District Court's qualified immunity analysis failed to recognize that the constitutional right Plaintiffs assert is well established, having been demonstrated by multiple decisions of this Court. *See, e.g., Sample*, 855 F.2d at 1099; *Montanez v. Thompson*, 603 F.3d 243, 252 (3d Cir. 2010)). In addition, the District Court's conclusion that Plaintiffs would have to prove there is a clearly established right to be released within 12 hours of court orders would not fit this case even if the court's legal analysis was correct, since each of the named Plaintiffs were held for between 5 and 27 days after they were entitled to be released.

ARGUMENT FOR AMICUS

I. THE DISTRICT COURT'S DELIBERATE INDIFFERENCE DETERMINATION DID NOT EMPLOY THE FULL ANALYSIS REQUIRED BY THIS COURT

The District Court granted summary judgment against Plaintiffs' Eighth Amendment claims on the basis of its finding that they could not prove Defendants were deliberately indifferent to the risk of Plaintiffs' over-detention. *Wharton*, 2015 U.S. Dist. LEXIS 132385 at *18. The court's analysis was erroneous because it failed to apply this Court's alternative test for establishing deliberate indifference.

The District Court accurately stated the three elements of an over-incarceration claim under the Eighth Amendment:

... Plaintiffs' burden is to demonstrate that '(1) a prison official had knowledge of the prisoner's problem and thus of the risk that unwarranted punishment was being, or would be, inflicted; (2) the official either failed to act or took only ineffectual action under the circumstances, indicating that his response to the problem was a product of deliberate indifference to the prisoner's plight; and (3) a causal connection between the official's response to the problem and the unjustified detention.'

Wharton, 2015 U.S. Dist. LEXIS 132385 at *17-18 (quoting *Montanez*, 603 F.3d at 252).

As to the first element, the court found that Plaintiffs had adduced evidence from which a

reasonable jury could find that Defendants had knowledge of the over-detention problem and the risk that unwarranted punishment was being inflicted. There are genuine disputes of material fact as to whether Defendants were aware of what might be found to be general disorganization and incompetence of DDOC personnel and whether Defendants were aware of a significant risk that unwarranted punishment might be inflicted on prisoners.

Wharton, 2015 U.S. Dist. LEXIS 132385, at *18.

As to the second element, the District Court ruled that “no reasonable factfinder could find Defendants were deliberately indifferent to the risk of Plaintiffs’ over-detention.” *Id.* In reaching that conclusion, the court misapplied the controlling law on “deliberate indifference” by disregarding the fact that a state actor’s ineffectual act to address a known problem will not absolve the actor from § 1983 liability.

This Court has established two ways to prove deliberate indifference to a known risk of over-incarceration: show that the official “failed to act” or show that the official “took only ineffectual action under the circumstances.” *Montanez*, 603 F.3d at 252. Although the evidence shows that that Defendants’ actions were insufficient to solve the problem, the District Court granted summary judgment against Plaintiffs on deliberate indifference because of actions the defendants took, without determining whether those actions could be found to be “ineffectual”.

Summarizing the basis for its ruling on deliberate indifference, the Court stated:

Even assuming that existing policies at the DDOC created an unreasonable risk of Eighth Amendment injury, there is insufficient evidence in the record from which a reasonable factfinder could conclude that Defendants were *indifferent* to that risk. To the contrary, the record shows that each of the Defendants worked to improve the DDOC and COR to address over-detention issues.

Wharton, 2015 U.S. Dist. LEXIS 132385 at *19 (emphasis in original).

Detailing what it concluded was sufficient to preclude the factfinder from determining that Commissioner Danberg was deliberately indifferent, the District Court said he was “praised as being ‘the first member of [former Governor] Minner[’s] administration to ever step up and accept responsibility for a problem [related to erroneous prisoner releases], acknowledging it exists and telling us what he is trying to do to fix it’” and he created COR in order to make the release process uniform. *See id.* at *20-21 But Danberg created COR in 2008 and, as discussed in the Brief of Appellant, Document 003112338291, at 2-5, the over-incarcerations problem became worse. Nothing in the District Court’s opinion suggests it found otherwise.

Likewise, while the District Court noted that COR Director McBride “demonstrated through her deposition that she was intimately familiar with COR’s procedures” and “actively worked to improve processes at COR to prevent and address problems of over-incarceration,” it did not find that anything she did reduced the over-incarceration problem. *See id.* at *21. While she testified that she set up a special unit in August, 2013 (JA 12), record evidence shows that the

overstays continued. *See e.g.*, JA228-229, 725-726, 733-734, 735-736, 749-750.

The District Court stated that the only reference to Commissioner Coupe – that he pressed a Bureau Chief to have COR form a special unit to speed up bail releases – “shows that Coupe was *not* deliberately indifferent to the over-detention problem.” *Id.* at *22. To the contrary, if Coupe knew of the “general disorganization and incompetence of DDOC personnel” and the “significant risk that unwarranted punishment might be inflicted on prisoners,” as the court ruled a jury could find, and he did nothing other than address bail releases, he could be found under *Montanez* to have been deliberately indifferent. *See id.* at *18. Moreover, McBride’s testimony indicated that Coupe’s action had been taken by August, 2013, and the problems continued. *See, e.g.*, JA228-229, 725-726, 733-734, 735-736, 749-750.

Likewise, if Danberg and McBride were aware of the general disorganization, incompetence and significant risk of unwarranted punishment but their actions were limited to what the District Court describes, they too could be found to have been deliberately indifferent.

II. THE ELEVENTH AMENDMENT DOES NOT BAR THE OFFICIAL CAPACITY CLAIMS FOR INJUNCTIVE RELIEF

Plaintiffs below asserted claims under the Eighth and Fourteenth Amendments and sought, *inter alia*, injunctive relief on behalf of themselves and a putative class of current and future Delaware inmates. *Wharton*, 2015 U.S. Dist. LEXIS 132385 at *2. Citing the Eleventh Amendment, the District Court ruled that “[t]o the extent Plaintiffs are suing Defendants in their official capacities, the Court determines that such claims are barred by the doctrine of sovereign immunity.” *Id.* at *11-12. That was error.

Federal constitutional claims for prospective injunctive relief are not barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123 (1908). Such claims are properly raised as official capacity claims. *See also, Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645 (2002) (“Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*.”).

To support its conclusion on immunity, the District Court cited *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), and treated the state as the real party in interest. But “official-capacity actions for prospective relief are not treated as actions against the State.” *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985) (citing *Ex parte Young*).

Pennhurst found Eleventh Amendment immunity for state law claims against officials where the state was the real party in interest, and explained why state law claims are treated differently than federal constitutional claims. *See Pennhurst*, 465 U.S. at 103-06. The other case cited by the District Court to support immunity, *Hawaii v. Gordon*, 373 U.S. 57 (1963), was an original action in the Supreme Court by which Hawaii sought to cause property admittedly belonging to the United States to be conveyed to the state. Neither case is analogous to the instant case, and neither case supports the District Court's conclusion. The Eleventh Amendment provides no basis for rejecting Plaintiffs' federal claims for prospective injunctive relief.

III. THE DISTRICT COURT ERRED BY APPLYING THE MORE-SPECIFIC-PROVISION RULE TO A PROCEDURAL DUE PROCESS CLAIM

Plaintiffs claim that inmates and detainees are detained past their release dates or past the dates when their sentences expire. They attribute this to various deficiencies at DDOC's Central Offender Records department ("COR"), which calculates sentences and prepared release orders. The deficiencies include inadequate staffing, being open only during limited hours, so it is insufficiently responsive to releases received after hours, frequently denying receipt of release orders, unresponsiveness to phone calls by bail bondsmen and others, and frequently failing to process release orders for more than 12 hours. *See Wharton*, 2015 U.S. Dist. LEXIS 132385, at *4-5. Plaintiffs seek relief under both the Eighth Amendment and the Fourteenth Amendment. *Id.* at *2.

Citing *Sample*, the District Court stated that these claims fit within the Third Circuit's over-detention and Eighth Amendment analysis. *Wharton*, 2015 U.S. Dist. LEXIS 132385, at *14-15. Then, noting that if claims are based on allegations that fit "within the Eighth Amendment's prohibition on cruel and unusual punishment ... the more-specific-provision rule forecloses ... substantive due process claims," *Id.* at *15 (quoting *Betts v. New Castle Youth Dev. Cir.*, 621 F.3d 249, 261 (3d Cir. 2010)), the District Court granted summary judgment on the Fourteenth Amendment Claims without considering them on the merits.

That was error in two respects.

First, unlike the plaintiff in *Sample*, at least one of the four named plaintiffs in the case *sub judice*, and some members of the putative class, were being held because they had been unable to make bail. *See* JA 531-32. A pretrial detainee's challenge to improper punishment arises under the Fourteenth Amendment, not the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 531 n. 16 (1979). Thus, their claims their claims did not arise under the Eighth Amendment.¹

Second, the claims for over-incarceration on sentences and on pre-trial detention include procedural due process, and it is beyond dispute that the "more-specific-provision rule" applies only to substantive due process claims. The language the District Court quoted from *Betts* states that "substantive due process claims" are foreclosed. *Betts* observed that in establishing the rule the Supreme Court had noted its "reluctan[ce] to expand the concept of substantive due process," and explained that under the rule, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Betts*, 621 F.3d at 260 (citations and internal quotation marks omitted).

¹ This is not a meaningless difference. The elements of an Eighth Amendment over-incarceration claim differ from the elements of a Fourteenth Amendment over-incarceration claim. *See Sample, supra*, 885 F.2d at 1110, 1113.

“[S]ubstantive due process ‘prohibits a State from taking certain actions regardless of the fairness of the procedures used to implement them,’” *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir. 1986) (quoting *Daniels v. Williams*, 474 U.S. 327 (1986)) (internal quotations omitted). “Procedural due process governs the manner in which the government may infringe upon an individual's life, liberty, or property.” *Evans v. Sec’y Pa. Dept. of Corr.*, 645 F.3d 650, 662-63 (3d Cir. 2011). “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)). Plaintiffs’ over-incarceration claims are unquestionably based on mistakes by DDOC. They are asserting, *inter alia*, claims based on their right to procedural due process.

For both these reasons, it was error for the District Court to reject the Fourteenth Amendment claim in reliance on the more-specific-provision rule.

IV. THE COMMONALITY REQUIRED BY FED. R. CIV. P. 23(a)(2) IS PRESENT BECAUSE THE CLAIMED DISORGANIZATION, NON-RESPONSIVENESS AND INCOMPETENCE OF DDOC'S CENTRAL OFFENDER RECORDS DEPARTMENT IS CENTRAL TO THE VALIDITY OF ALL CLAIMS

The District Court denied Plaintiffs' motion for class certification on the basis of its finding that "there is no 'common contention' for Plaintiffs' proposed class, the truth or falsity of which would "resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Wharton*, 2015 U.S. Dist. LEXIS 132385 at *110-11 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551 (2011)). This finding stemmed from the District Court's observation that at least one over-detention alleged by Plaintiffs was caused by a court errors or delay. But that did not eliminate a common contention that is central to the validity of each of the claims, because the Plaintiffs' and putative class members' over-detentions were made worse by the deficiencies at DDOC. For example, among the deficiencies claimed by Plaintiffs was COR's unresponsiveness to calls from bail bondsmen and inmates (who might be inquiring about delayed release papers they expected COR to have received from the courts). Whether an over-incarceration was caused solely by deficiencies at COR, or by the combination of a court error and an OCR's deficiency, an issue central to every claim is the lack of responsiveness, disorganization and incompetence Plaintiffs have asserted is present at COR.

“[A] finding of commonality does not require that all class members share identical claims,” *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 301 (3d Cir. 2011) (internal quotations and citations omitted). “[C]ommonality is satisfied where common questions generate common answers 'apt to drive the resolution of the litigation.’” *Id.* at 300 (quoting *Wal-Mart*, 131 S. Ct. at 2551 (emphasis omitted)). That is the situation in this case.

V. THE DISTRICT COURT'S STANDARD OF PROOF FOR QUALIFIED IMMUNITY WAS INCORRECT

Addressing qualified immunity, the District Court characterized the issue as “whether Plaintiffs have proven that there is a clearly established right for prisoners to be released within 12 hours of court orders or by midnight on the date their sentences terminate.” *Wharton*, 2015 U.S. Dist. LEXIS 132385 at *13. It did grant summary judgment on the basis of qualified immunity because it resolved the case on other grounds. However, since defendants will undoubtedly assert the defense if this Court reverses the grant of summary judgment, and amicus believes the District Court’s characterization of the issue was legal error, it is addressed here for efficiency.²

Qualified immunity immunizes government officials from civil damages liability unless they are shown to have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Taylor v. Burkes*, 135 S. Ct. 2042, 2044 (2015). To determine whether a legal right is clearly

² Amicus’s primary interest in the outcome of this case, in addition to preserving important principles of law, is to stop over-incarceration in the Delaware prisons. Qualified immunity cannot be applied to the official capacity claims. *See Kentucky v. Graham*, 473 U.S. at 167, so it would not apply to the claims for prospective injunctive relief. Nevertheless, qualified immunity is addressed by amicus because, as a practical matter, exposure to money damages liability for unconstitutional conduct is likely to improve Delaware officials’ compliance with their federal constitutional obligations.

established, courts may look “either to cases of controlling authority in their jurisdiction at the time of the incident or to a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (internal quotations omitted)). Both those sources show that the rights Plaintiffs assert were clearly established at the time of the challenged conduct.

Plaintiffs were incarcerated for from 5 to 27 days beyond their respective release dates in 2012 and 2013. (JA 302-03, 419-20, 531-32, 697-98). Well before that time, a substantial body of case law established the constitutional right of prisoners not to be subjected to incarceration beyond their release dates, and the duty of corrections officials to act to prevent over-incarceration.³ Since as early as 2001, this Court and at least seven other Circuit Courts (the 4th, 5th, 7th, 8th, 9th, and 11th) had spoken on this issue, as had a number of district courts. *See, e.g., Davis v. Hall*, 375 F.3d 703, 714 (8th Cir. 2004) (collecting cases); *Barnes v. District of Columbia*, 242 F.R.D. 113, 117 (D.D.C. 2007) (same).

³ As the cases cited below show, “over-incarceration”, that is, that the plaintiff has been imprisoned longer than legally authorized, can occur because the plaintiff’s sentence has expired, plaintiff was ordered released on bail or plaintiff was detained without probable cause.

The seminal Third Circuit case is *Sample v. Diecks*, which recognized that “imprisonment beyond one’s term constitutes punishment within the meaning of the eighth amendment,” and established the three part test for determining whether the over-incarceration of a prisoner has violated the Eighth Amendment. *See Sample*, 885 F. 2d at 1110,⁴ Consistent with the test it established, in evaluating the claim before it this court examined the facts to determine whether the defendant had knowledge “of the risk that unwarranted punishment was being, or would be inflicted” and “failed to act or took only ineffectual action under the circumstances.” *Id.* At least since *Sample*, it has been clear that a prisoner has the right not to be imprisoned beyond the expiration of his term if a responsible prison official⁵ knows of the risk of that occurring and can prevent it by acting in a manner that is not “ineffectual” under the circumstances. *See, e.g., Moore v. Tartler*, 986 F.2d 682, 686 (3d Cir. 1993) (finding that the defendant parole board officials were not liable because they conducted an inquiry that culminated in the sentencing judge clarifying the sentencing order and the plaintiff being released).

⁴ This is the same test that the District Court quoted from *Montanez*. *See Wharton*, 2015 U.S. Dist. LEXIS 132385, at *17-18; *Sample*, 885 F.2d at 1110.

⁵ The scope of the official’s duties and the role he or she plays is relevant to the determination of responsibility. *See Sample* 885 F. 2d at 1110. In the instant matter the defendants are the director of the division of DDOC responsible for calculating sentences and preparing releases as ordered by the court, and two Commissioners of DDOC who gave (apparently ineffectual) directives to that division relating to the timeliness of some releases. *Wharton*, 2015 U.S. Dist. LEXIS 132385, at * 3-4, 20-22.

Other Courts of Appeals decisions recognizing a prisoner's constitutional right not to be confined after he is entitled to be released include *Golson v. Dept. of Corrections*, 914 F.2d 1491(4th Cir. 1990) (unpublished table decision) (analyzing record to determine whether plaintiff's delayed release due to failure to credit jail time resulted from deliberate indifference by department of corrections personnel); *Douthit v. Jones*, 619 F. 2d 527, 535-36 (5th Cir. 1980) (holding qualified immunity inapplicable in over-incarceration case absent objective facts supporting good faith, reasonable belief that defendant jailors had legal authority to continue to hold plaintiff once he satisfied sentence); *Burke v. Johnston*, 452 F.3d 665,669 (7th Cir. 2006) ("... we agree that incarceration after the time specified in a sentence has expired violates the Eighth Amendment if it is the product of deliberate indifference...", citing approvingly *Moore v. Tartler*); *Slone v. Herman*, 983 F.2d 107, 110 (8th Cir. 1993) (recognizing that "any continued detention" after state lost its lawful authority to hold plaintiff violated due process clause of Fourteenth Amendment); unlawfully deprived plaintiff of his liberty, and a person's liberty is protected from unlawful state deprivation by the due process clause of the Fourteenth Amendment"); *Lee v. City of Los Angeles*, 250 F.3d 668, 683 (9th Cir. 2001)(recognizing " a constitutional right to be free from continued detention after it was known or should have known that the detainee was entitled to release") (quoting *Cannon v. Macon County*, 1 F.3d 1558 (11th Cir. 1993));

These cases did not involve corrections administrators failing to take appropriate action to correct “general disorganization and incompetence” that created “a significance that unwarranted punishment might be inflicted on prisoners”, but there is no requirement of a case directly on point “[if] existing precedent [has] placed the statutory or constitutional question beyond debate.” *Taylor*, 135 S. Ct. at 2044. The constitutional right asserted in this case is now beyond debate. Resolution of fact disputes will determine whether that right was violated, but the constitutional question to be addressed is now clear. It was established by *Sample* and the other circuit court decisions.

The District Court’s qualified immunity analysis was erroneous for a second reason as well. It viewed the determinative question on whether Defendants were entitled to qualified immunity to be whether there is “a clearly established right for prisoners to be released within 12 hours of court orders or by midnight on the date their sentences terminate.”⁶ *See Wharton*, 2015 U.S. Dist. LEXIS 132385 at *13. The qualified immunity doctrine does not require a plaintiff making an over-

⁶ As indicated herein, the qualified immunity doctrine does not require a plaintiff making an over-incarceration claim to show precedent establishing a constitutional right to be released within a specific number of hours. The facts of each case determine whether the over-incarceration violates the Constitution. But even if the law were to require precedent setting a time limit, requiring a 12 hour precedent for this case would be error, since Plaintiffs’ over-incarceration lasted from 5 to 27 days. (JA 302-03, 419-20, 531-32, 697-98)

incarceration claim to show precedent establishing a constitutional right to be released within a specific number of hours. The facts of each case determine whether the over-incarceration violates the Constitution. But even if the law were to require precedent showing a time limit, requiring a 12 hour precedent in this case would be error, since Plaintiffs' over-incarceration lasted from 5 to 27 days. (JA 302-03, 419-20, 531-32, 697-98)

CONCLUSION

For all of these reasons, *amicus* urges the Court to reverse the District Court's grant of summary judgment and its denial of class certification and to remand the case for trial.

July 5, 2016 .

Respectfully submitted,

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CERTIFICATES

Richard H. Morse, one of the attorneys for *Amicus*, hereby certifies that:

1. I am admitted to the bar of the Third Circuit.

2. I caused true and correct copies of the foregoing Brief of *Amicus* to be served upon the following counsel of record this 5th day of July, 2016, via this Court's ECF system, with paper copies sent by first class mail to:

Stephen A. Hampton, Esquire
Grady & Hampton, LLC
6 North Bradford Street
Dover, DE 19904

Michael F. McTaggart, Esquire
Department of Justice
Carvel State Office Building
820 North French Street, 6th Floor
Wilmington, DE 19801

3. Seven copies of the Brief of *Amicus* are being mailed by first class mail for filing in accordance with Rule 31.0 of the Local Appellate Rules.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 4,165 words, excluding the Cover Page, Table of Contents, Table of Authorities, Statement of Identity and Interest of *Amicus* and the Certifications.

5. The printed Brief of *Amicus* filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Brief of *Amicus* filed with the Court was virus checked using ESET NOD32 Antivirus version 9.0.381.0 on July 5, 2016, and was found to have no viruses.

/s/ Richard H. Morse
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To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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