CASE NO. 21-30625

In the United States Court of Appeals for the Fifth Circuit

PERCY TAYLOR,

Plaintiff–Appellee,

v.

JAMES LEBLANC, SECRETARY

Defendant–Appellant.

On Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:21-CV-72

BRIEF OF APPELLEE

Anya Bidwell, *Lead Counsel*
Patrick Jaicomo
Eli Tannenwald
Jaba Tsitsuashvili
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
abidwell@ij.org
pjaicomo@ij.org
jtsitsuashvili@ij.org
Counsel for Plaintiff-Appellee

Donna Unkel Grodner
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B1
Baton Rouge, LA 70808

CERTIFICATE OF INTERESTED PERSONS

(1) Case Number 21-30625, *Taylor v. LeBlanc*.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case.

Defendant–Appellant:

James LeBlanc

Defendants:

Robin Milligan
Timothy Hooper

Counsel for Defendants:

LOUISIANA DEPARTMENT OF JUSTICE
Jeff Landry
Elizabeth Murrill
Shae Gary McPhee
Phyllis E. Glazer
Elizabeth Baker Murrill
Andre Charles Castaing

Plaintiff–Appellee:

Percy Taylor

Counsel for Plaintiff:

INSTITUTE FOR JUSTICE
Anya Bidwell
Patrick Jaicomo
Eli Tannenwald
Jaba Tsitsuashvili

GRODNER & ASSOCIATES
Donna Unkel Grodner
2223 Qual Run Drive, Suite B1
Baton Rouge, LA 70808

Dated: August 1, 2023

/s/ Anna Bidwell
Lead Counsel for Plaintiff–Appellee

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered oral argument in this case, and the Clerk has calendared argument for 2:00 p.m. on September 6, 2023 in the En Banc Courtroom in New Orleans.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court correctly denied Defendant James LeBlanc qualified immunity because LeBlanc, through his deliberate indifference to well-documented, persistent, and systemic failures by Louisiana prison officials to correctly calculate and review prisoners' release dates, violated Percy Taylor's clearly established right to be released from prison at the completion of his sentence.

STATEMENT OF THE CASE

There's limit to how much breathing room qualified immunity provides. It is certainly not infinite. But if qualified immunity is granted to Appellant James LeBlanc here, that's exactly what it will be. Over and over again, since at least 2012, LeBlanc has been warned about a chronic overdetention problem in his prisons, caused by "processing delays, data errors, inconsistent methodologies" and a general lack of competence in his office. *Hicks v. LeBlanc*, 832 F. App'x 836, 842 (5th Cir. 2020) (mem. op.). Over and over again, LeBlanc has done next to nothing to fix it, resulting in inmates, Percy Taylor among them, being imprisoned beyond their release dates—an obvious violation of due process.

If LeBlanc were the NFL commissioner and referees—for ten straight seasons—made scoring mistakes, no one would doubt by now that the responsibility lies not just with the referees, but also with the commissioner. Yet, in the world with real

stakes, there is apparently some doubt as to whether the systemic constitutional violations resulting from overdetention problems in Louisiana prisons "stem from the same source." ROA.175. Over eleven years of data[1] establish that they do. As a Department of Justice report recently announced, "[s]ince at least 2012, more than a quarter of the people set for release from [Louisiana prisons'] custody each year are instead held past their release date." DOJ Report, *supra* note 1, at 1. Still, LeBlanc and his prisons have "persisted in these unconstitutional practices despite at least a decade of notice and clear recommendations for fixing the problem." *Id.* It's time for LeBlanc to accept responsibility for his failures as the head of Louisiana prisons and be held accountable for denying prisoners, like Taylor, their due process rights. Qualified immunity does not extend to the plainly incompetent and those who knowingly violate the law; in his inability to ensure the individuals held in his prisons are released at the completion of their sentences, LeBlanc is both. The district court's ruling must be affirmed.

---

[1] *See, e.g.*, 2012 Lean Six Sigma Report, *Grant v. Gusman*, No. 2:17-cv-2797 (E.D. La. Feb. 6, 2020), ECF No. 120-7 [hereinafter 2012 Study]; Daryl G. Purpera, La. Legis. Auditor, Management of Offender Data: Processes for Ensuring Accuracy (2017) (available at https://shorturl.at/rCMWY) [hereinafter 2017 Audit]; Daryl G. Purpera, La. Legis. Auditor, Department of Public Safety and Corrections—Corrections Services: Financial Audit Services Procedural Report (2019) (available at https://shorturl.at/avJ37) [hereinafter 2019 Audit]; U.S. Dep't of Just. C.R. Div., Investigation of the Louisiana Department of Public Safety & Corrections (2023) (available at https://shorturl.at/hELZ2) [hereinafter DOJ Report].

I. LeBlanc is the head of Louisiana's prisons and responsible for their policies or lack thereof.

Under Louisiana law, the prison buck stops with the Secretary of the Louisiana Department of Public Safety & Corrections ("DPSC"), James LeBlanc. As DPSC's "executive head and chief administrative officer," LeBlanc has "responsibility for the policies of the department" and "the administration, control, and operation of [its] functions, programs, and affairs." La. Stat. Ann. § 36:403. For this reason, he also has the power and duty to determine DPSC's policies and "make, alter, amend, and promulgate rules and regulations." *Id.* § 404(A)(2)-(3).

II. For more than a decade, LeBlanc has known of the overdetention epidemic in Louisiana prisons and done nothing to correct the problem.

Long before 2017—when Taylor first discovered and then complained to DPSC about errors in calculating his release date—LeBlanc knew not only that his prisons routinely held inmates past their release dates, but also that these overdetention problems were caused by his undersupervised, undertrained, underdisciplined, and underresourced staff making errors while calculating or reviewing sentences, including by failing to properly credit time served. LeBlanc also knew what he needed to do to fix these problems—adopt a comprehensive manual on sentence calculations; institute training, supervision, and discipline procedures; and conduct regular audits. Instead, as years went by, he did next to nothing.

i. 2012 Study

LeBlanc has known that Louisiana prisons have pervasive problems with accuracy and delays in calculating inmate release dates since at least 2012, when he was the "champion" of a study highlighting these problems. *See* ROA.91-92; 2012 Study, *supra* note 1, at 3. That study found a nearly-1,500-case backlog of cases where DPSC had not computed inmate release dates. 2012 Study, *supra* note 1, at 4. It also noted that more than 2,200 inmates were held beyond their release date annually. *Id.* at 5. Importantly, it highlighted that DPSC suffered from "inconsistencies in the quality of the work" and that only 56 percent of employees assigned to calculate release dates performed that work regularly. *Id.* at 22. The study recommended that LeBlanc "[d]esign supervision" to ensure "consistency of procedures and training" and "standardize . . . time computation procedures." *Id.* at 26-27. This was needed to, among other things, "make staff accountable for the quality and quantity of work performed." *Id.* at 11. LeBlanc took no meaningful actions to address these deficiencies—which was evident the next time his department was evaluated.

ii. 2017 Louisiana Audit

Five years later, when Louisiana audited DPSC, it found that DPSC still had no "formalized, consistent method for calculating offender release dates" and needed to "implement or strengthen existing policies and procedures to more

effectively manage offender data." 2017 Audit, *supra* note 1, at 9, 3. In an experiment, the audit asked two DPSC staff "to calculate release dates on the same offender," with the results "differ[ing] by 186 days," illustrating "the risk of error when there is no specific, agency-wide guidance or template for staff to use." *Id.* at 9. The audit noted that "calculating release dates is a complicated process, and [DPSC] does not have a standard method by which to perform these calculations," including, as was the case with Taylor (*see* Statement of the Case, Part III, *infra*, at 12-13), "the calculation for an offender who violated parole with consecutive sentences" versus "a parole violator with concurrent sentences." 2017 Audit, *supra* note 1, at 9. The 2017 audit also homed in on DPSC's failure to assess "credits for early release" and noted failures in assessing "[c]redit for time served" as one of the major factors in DPSC's systemic miscalculation of release dates. *Id.* at 9, 7. The 2017 audit further found that DPSC "does not have a policy requiring initial release date computations reviewed by a supervisor" and "does not have any policies, procedures, manuals, or agency-wide guidance that details the correct ways to calculate release dates." *Id.* at 9, 3. In other words, LeBlanc was still asleep at the switch.

Accordingly, the 2017 audit, like the 2012 study, recommended that LeBlanc "should develop formal policies and procedures for calculating release dates and consider developing a template that could assist staff in calculations." *Id.* at 9

(Recommendation 5); *see* 2012 Study, *supra* note 1, at 27 (listing "[s]tandarize . . . time computation procedures" and "[p]rovide a resource for new employees to reference" as recommendations). LeBlanc responded to the 2017 audit, acknowledging the problem and stating, "We are finalizing a new training manual with step by step instructions[.]" 2017 Audit, *supra* note 1, at A.4-A5. In addition, LeBlanc promised to introduce more frequent audits of time computations. *Id.* at A-5.

But LeBlanc produced no manual or instructions and did not institute regular audits. *See* Richard A. Webster & Emily Lane, *Louisiana Routinely Jails People Weeks, Months, Years After Their Release Dates*, Nola.com/The Times-Picayune, (Feb. 21, 2019), https://shorturl.at/gnNP4 (as of February 19, 2019, a DPSC spokesman confirmed that the manual had not been completed).[2] Furthermore, in a response to an interrogatory in one of the overdetention lawsuits, LeBlanc admitted that there had not been a single example of "discipline or adverse employment activity for [DPSC] employees who have incorrectly computed sentences or release dates, from 2000 to present." Interrogatory Responses at 5, *Grant v. Gusman*, No. 2:17-cv-2797 (E.D. La.

[2] The information provided in this brief is taken from Taylor's amended complaint and other, publicly available, sources. "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court," as long as they are "'not subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Harris v. Bd. of Supervisors of La. State Univ.*, 409 F. App'x 725, 727 n.2 (5th Cir. 2010) (citing to Fed. R. Evid. 201(b)).

Feb. 6, 2020), ECF No. 120-30. In addition, no regular audits were forthcoming. So, by the time Taylor came to DPSC staff in late 2017 telling them he was owed time served (*see* Statement of the Case, Part III, *infra*, at 14), the staff had neither the skills, nor the accountability framework, nor resources to properly evaluate Taylor's claims. And LeBlanc knew it.

iii. 2019 Audit

Another audit by Louisiana in 2019 found the same systemic problems with overdetention. *See* 2019 Audit, *supra* note 1. After reevaluating dozens of DPSC sentence computations, the 2019 audit identified multiple errors—including those related to applying credits—that, when corrected, resulted in substantially different release dates (one, as much as 248 days sooner than originally calculated). *Id.* at 2. Just like the 2012 study and the 2017 audit, the 2019 audit noted the lack of supervisory review on computations. *Id.* at 1 ("The Department does not require a supervisory review of sentence computations[.]"). LeBlanc responded by assuring auditors that, while he had so far failed to promulgate formal policies or training to ensure "review of the sentence computation by a supervisor or other experienced staff," he was "finalizing a procedure" to review "changes to sentence computation when applying credits and forfeitures." *Id.* at A.2. Apparently, he was not.

iv. 2023 DOJ Report

Finally, in 2023, the review of DPSC was outsourced to the federal government. *See* DOJ Report, *supra* note 1. A Department of Justice investigation concluded that—now more than a decade after the 2012 study—LeBlanc's DSPC still "incarcerates thousands of individuals each year beyond their legal release date in violation of the Fourteenth Amendment of the United States Constitution." *Id.* at 1. More damning still, the report concluded: "Since at least 2012, *more than a quarter* of the people set for release from [DPSC's] custody each year are instead held past their release date." *Id.* (emphasis added). Far from isolated errors, "[t]hese violations are severe, systemic, and are both caused and perpetuated by serious ongoing deficiencies in [DPSC's] policies and practices." *Id.* According to DOJ, LeBlanc's DPSC "has persisted with these unconstitutional practices despite at least a decade of notice and clear recommendations for fixing the problem." *Id.* The constitutional violations resulting from LeBlanc's failures, according to the report, "are pursuant to a pattern or practice of infringements on the constitutional rights of incarcerated persons." *Id.* And as of 2023, investigators were *still* urging LeBlanc to adopt a manual to assist with release date calculations; institute a policy of system-wide supervision and training of DPSC employees; and conduct audits of initial sentence calculations. *See id.* at 20-25 (Minimal Remedial Measures).

v. Other evidence

There is more evidence in addition to studies that demonstrates knowledge by LeBlanc and others that inmates were being kept past their release dates because of errors made by undertrained, underdisciplined, and undersupervised staff operating without as much as a standardized manual. In one particularly revealing op-ed, the current Attorney General of Louisiana stated that "there is a layer of incompetence so deep that the Corrections Department doesn't know where a prisoner is on any given day of the week or when he should actually be released from prison." ROA.94 at ¶ 74(i) (cleaned up). In one overdetention case after another, DPSC employees agreed, testifying that they "typically discovered 'one or two [inmates] a week' who were eligible for immediate release," at least for the last nine years. ROA.88 at ¶ 62(a-b); *See* Argument, Part IIA, *infra*, at 35-36. A series of lawsuits against LeBlanc and DPSC should have also rung an alarm bell. As early as 2011, inmates sued LeBlanc and his staff for failing to provide them with offsetting credits, such as good time credits and time served credits. *See* Argument, Part IIA, *infra*, at 36-37. Despite all this knowledge, LeBlanc failed to take appropriate action, urged upon him by anyone who looked into the situation in his prisons. He neither developed a standardized manual, despite promises to do so, nor instituted appropriate training, supervision, or auditing procedures.

III. As a result of LeBlanc's supervisory failings, Taylor was imprisoned for over a year past his release date.

While LeBlanc was ignoring obvious, well-documented failures to properly calculate and review release dates in Louisiana prisons, Taylor was languishing in one. Just like with so many inmates before him, DPSC miscalculated Taylor's sentence by failing to credit 602 days of time served and then failed to catch this mistake. ROA.77 at ¶ 10. As a result, Taylor should have been released on September 11, 2018, not the date DPSC calculated, which was May 5, 2020. ROA.77 at ¶ 11.

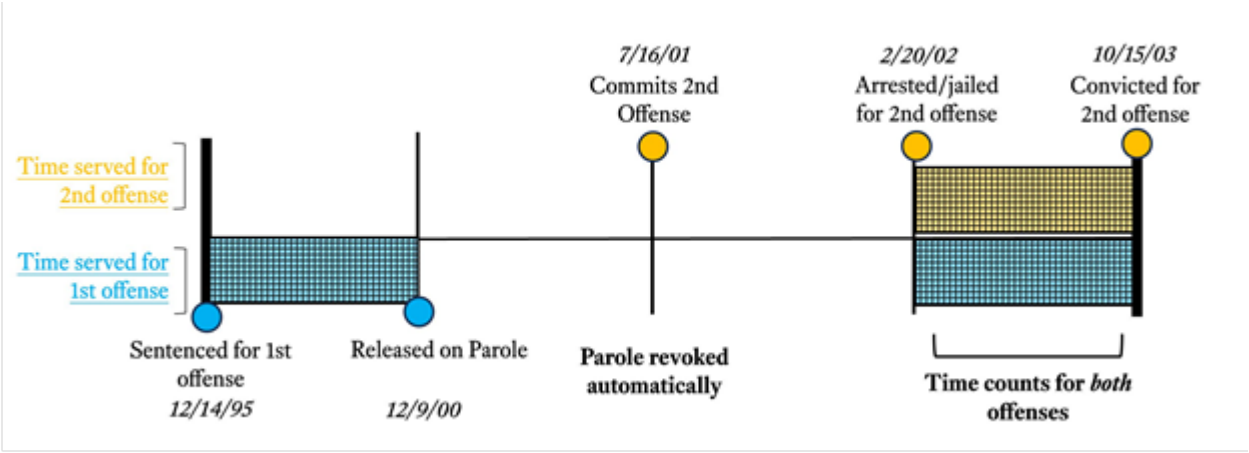
With no auditing system in place, DPSC staff never figured out that they improperly calculated Taylor's release date. It was Taylor who discovered DPSC's mistake in 2017 and began advocating for his release, including by meeting with Warden Timothy Hooper and his assistant Robin Milligan. ROA.77-79 at ¶¶ 11-19. Had, at any point since 2012, LeBlanc taken actions to fix the error-ridden time calculation system of his prisons—by issuing a standardized manual, and by appropriately training, disciplining, and supervising his employees—Hooper and Milligan would have been able to understand that Taylor was correct in his calculations. But because LeBlanc had not taken such steps—or any meaningful steps at all—when Taylor approached Hooper and Milligan about recalculating his release date, they were unprepared and unwilling to do so. *See* ROA.79 at ¶ 19 (telling Taylor on several occasions that *he* was wrong about his sentence).

Instead, on May 23, 2018, Taylor had to launch a formal grievance petition, which only resulted in his release after a state court commissioner and a district court judge found that DPSC was "manifestly erroneous" in denying Taylor 18 months of time served credits. ROA.79 at ¶ 20; ROA.109; *see* ROA.103-109 (Commissioner's Report); ROA.110 (State Court Judgment). As a result of this disregard for Taylor's constitutional rights, he was detained 525 days past the correct release date. ROA.75 at ¶ 3. Despite doing everything he could to ensure his timely release, Taylor spent 525 *more* days in prison than he was supposed to, and on each and every one of those days LeBlanc was aware of the very problem that resulted in Taylor being deprived of his liberty.

A. The wrong release date was a result of two mistakes.

Taylor was sentenced in 1995 for a drug offense and released on parole in 2000. ROA.104. But he committed a new drug offense on July 16, 2001, for which he was detained on February 20, 2002. ROA.104. So, Taylor went back to jail for two reasons: he (a) had violated his parole by committing a new crime and (b) awaited conviction for that new crime. ROA.107-108. The next 602 days Taylor spent in prison—between February 20, 2002 and October 15, 2003—were supposed to count toward

both the sentence for his old crime *and* his new one. ROA.108. See below what the law required (diagram not drawn to scale):

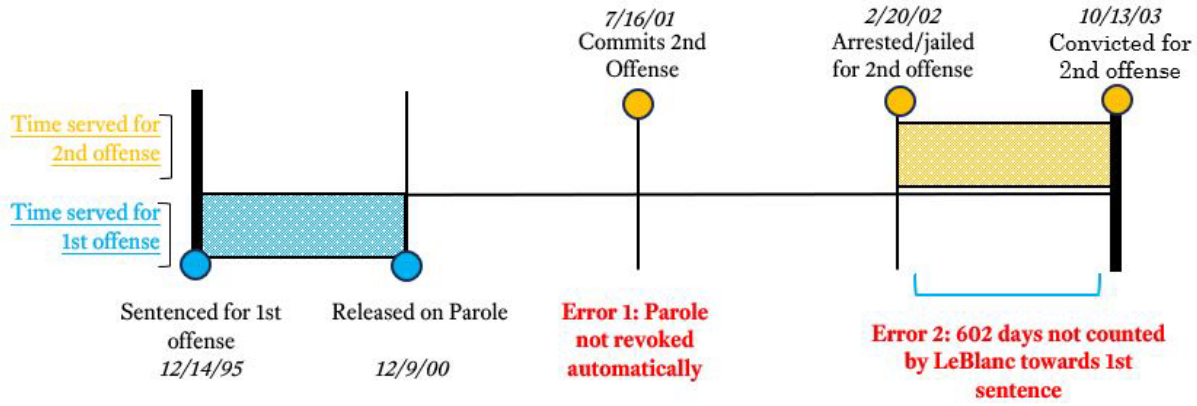


DPSC made two mistakes when, on June 14, 2006,[3] it calculated Taylor's sentence. First, DPSC only considered Taylor's parole revoked once he was *convicted* for the second offense. ROA.105. But the law said *commission* revoked it. ROA.107; *see* La. Stat. Ann. § 15:574.10 ("When a person is convicted in this state of a felony committed while on parole . . . his parole shall be deemed revoked as of the date of the *commission* of the felony . . ."") (emphasis added). Second, DPSC only counted Taylor's 602 days as time served for his *new* crime. ROA.106. But the law in place at the time[4] said it counted for *both*, 602 days served for the old crime *plus* 602 days served

[3] Taylor was initially sentenced to a term of life in prison as a habitual offender. ROA.104. His sentence was calculated on June 14, 2006, when he got twenty years plus "credit for all time served." ROA.104.

[4] The prohibition against overlapping jail credits was not implemented until August 15, 2006, two months *after* the calculation of Taylor's sentence. ROA.166.

for the new crime. ROA.106; *see* La. Code Crim. Proc. Ann. art. 880 ("A defendant shall receive credit toward service of his sentence for time spent in actual custody prior to the imposition of sentence."). See DPSC's miscalculation below:



As a result, DPSC miscalculated Taylor's release date by 602 days. ROA.108. While Taylor should have been set for release on September 11, 2018, DPSC was set to keep him in prison until May 5, 2020. ROA.77 at ¶ 11.

B. Given LeBlanc knew of the widespread sentencing errors since at least 2012, there was plenty of time to fix mistakes with Taylor's sentencing.

Because Taylor was serving a 20-year sentence, DPSC had ample time to catch and correct its mistakes before it violated Taylor's rights. ROA.104. Indeed, since LeBlanc became the secretary, he has received nonstop notices about errors in release-date calculations and calls to adopt policies, audits, and training procedures to

correct them. But LeBlanc, despite making promises, and taking some perfunctory steps,[5] did not heed those calls. *See* ROA.77 at ¶ 11.

It was Taylor who realized DPSC's error in 2017, about a year before his correct release date. ROA.77 at ¶ 11. He met with Milligan to explain: because his DPSC record did not properly account for time served for his original offense, the sentence awarded to him was too long and had to be recalculated. ROA.77-78 at ¶¶ 11, 13. Instead of trying to understand Taylor's allegations, Milligan dismissed them. ROA.78 at ¶¶ 15-16. Taylor approached Milligan at least seven-to-ten times, but she always gave him the same response: DPSC staff does not credit what inmates say, DPSC staff had calculated his release date correctly, and Taylor was supposed to remain in prison until 2020. ROA.77-78 at ¶¶ 11, 16. Taylor tried to show Warden Hooper the

[5] For example, since 2019, DPSC has technically had a formal policy of sentence calculation reviews by supervisors. 2019 Audit, *supra* note 1, at A.2; *see* DOJ Report, *supra* note 1, at 6. But the DOJ audit revealed that this is not happening in practice—there were entire sections of time computation sheets where the required "verification" check hadn't been performed. DOJ Report, *supra* note 1, at 13. Similarly, even when audits were finally instituted in January 2019, they had "incomplete sections, leaving it unclear whether the monthly auditors had actually completed the auditing process for the sampled time computations for those months." *Id.* In addition, in 2017, DPSC created a formal onboarding training for employees. *See* 2017 Audit, *supra* note 1, at A.5 (noting that DPSC "has implemented a plan to provide a basic . . . [t]ime [c]alculation training program for all new hires"). But the DOJ report still found the plan to be inadequate and in need of complete revamping. *See* DOJ Report, *supra* note 1, at 15, 24.

math, but, despite the known overdetention problem, Hooper refused to intervene. ROA.79 at ¶ 19.

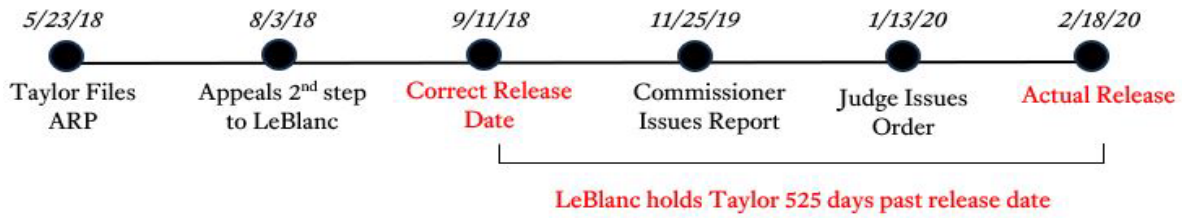
So, on May 23, 2018, Taylor filed a formal administrative remedy procedure (ARP), requesting that his record be recalculated. ROA.79 at ¶ 20. The warden assigned his ARP to be reviewed by Milligan, the very same DPSC employee who had already gotten it wrong at least seven times. ROA.79 at ¶ 21. She did so again, misunderstanding Taylor's argument to be about missing credits for the time that he spent on parole, not the time he spent in jail after his parole was revoked. ROA.105. Taylor then proceeded to the "second step" of the ARP process, appealing directly to LeBlanc. ROA.83 at ¶ 34; *see* ROA.165 n.2. But LeBlanc's office got it wrong too. ROA.106. Failing to apply the law in place at the time Taylor's sentence was calculated, an employee assigned to review Taylor's second step by LeBlanc mistakenly determined that because Taylor's sentences were consecutive, he was not "allowed overlapping jail credit on jail sentences." ROA105-106; ROA.83 at ¶ 34. DPSC made this determination on August 30, 2018, ROA.83 at ¶ 34, twelve days before the September 11 release date that Taylor was entitled to.

C. A Louisiana court determined DPSC's decision was "manifestly erroneous," but by the time it did, Taylor was already overdetained.

Following the denial of his grievance petition, Taylor appealed to a Louisiana district court, where his file was reviewed by a judicial commissioner. ROA.84 at

¶ 37; ROA.109. The commissioner—the first person not under LeBlanc's supervision to review Taylor's file—issued a report on November 25, 2019, finding DPSC's calculations to be "manifestly erroneous." ROA.108; *see* ROA.103-109 (Commissioner's Report). Taylor delivered a copy of the report to Hooper and Milligan. ROA.84 at ¶¶ 38-39. But DPSC *still* did not recalculate Taylor's sentence, and he stayed in prison further past his release date. ROA.84 at ¶ 39.

On January 13, 2020, a Louisiana judge adopted the commissioner's report and ordered that Taylor be given credit for his 602 days served. ROA.110 (State Court Judgment). As with the commissioner's report, Taylor delivered a copy of the judgment to Hooper and Milligan. ROA.86 at ¶¶ 48-50. But DPSC *still* did not recalculate Taylor's sentence, and he spent another month in prison past his release date. ROA.75 at ¶ 3. It wasn't until February 18, 2020—after he had filed yet another ARP—that Taylor was finally released. ROA.75 at ¶ 3; ROA.86 at ¶ 51. He spent a total of 525 days in Louisiana prison *after* he had completed his lawful sentence. See the timeline starting with his ARP (not to scale):



* * *

No one is more responsible for Taylor's overdetention than LeBlanc. Soon after he became the head of DPSC in 2007, LeBlanc was continuously informed about a pervasive overdetention problem in his prisons, caused in large part by widespread errors in calculating release dates. The 2012 study and 2017 report not only criticized DPSC, they also offered solutions that could have fixed those problems, such as adopting a standardized manual to reduce errors and ensure uniformity, developing comprehensive training and supervision practices, and conducting regular audits. While LeBlanc politely nodded at these suggestions and acknowledged the need for reform, he failed to effectively implement them, despite his statutory duty and responsibility to ensure policymaking for DPSC.

Had it not been for LeBlanc's manifest failures, even after an incredible amount of notice, Taylor and countless other inmates since at least 2012 would have been freed from their prison cells upon the completion of their sentences. After all these years, it is time the buck stops where it's supposed to—with LeBlanc.

IV. The district court held that LeBlanc's deliberate indifference to rampant overdetention in Louisiana prisons violated Taylor's clearly established due process right.

The same year he was finally released from prison, Taylor sued LeBlanc under 42 USC § 1983 for his failures as a supervisor of Louisiana prisons, among other claims.[6] *See* ROA.11-20 (Initial Complaint). LeBlanc first removed the case to federal court. ROA.4 (Notice of Removal). He then moved to dismiss it—arguing he was entitled to qualified immunity—and requested that Taylor file an amended complaint. ROA.53-55 (Defendant's Motion to Dismiss); ROA.64. Taylor filed the operative complaint on March 1, 2021, arguing that LeBlanc and his DPSC staff deprived Taylor of his "liberty for an extended period of time," ROA.101 at ¶ 109, through their "unwillingness to properly credit him for the time spent in custody prior to sentencing," ROA.167. *See* ROA.74-110 (Amended Complaint).

To establish a supervisory liability claim against LeBlanc, Taylor alleged that LeBlanc was the final policymaker, ROA.76 at ¶ 6, and was "personally . . . on notice of flawed procedures pertaining to sentence computation but did not take prompt corrective or responsive action," ROA.90 at ¶ 68. To show that LeBlanc knew of

---

[6] Taylor also brought a § 1983 claim of direct liability against LeBlanc. ROA.94-97. The district court granted qualified immunity on this claim. ROA.176-177. Taylor additionally sued Warden Hooper for direct (qualified immunity granted) and supervisor liability (denied), and Milligan for direct liability (denied). ROA.171-178. None of these rulings are the subject of this appeal. *See* ROA.179.

deficiencies in the way DPSC calculated and reviewed release dates, Taylor pointed to three buckets of evidence: (1) studies and reports, like the 2012 study that LeBlanc championed and the 2017 audit to which LeBlanc responded, (2) DPSC staff testimony in similar lawsuits and public statements by appointed officials acknowledging the problem, and (3) nine other individuals who brought cases against DPSC alleging unlawful detention and errors in calculating sentences. ROA.90-94 at ¶¶ 69-76; *see also Parker v. LeBlanc,* --- F.4th ---, 2023 WL 4558517 (5th Cir. July 17, 2023) (letting a case proceed past motion to dismiss because the complaint sufficiently alleged and provided evidence of LeBlanc's knowledge).

Taylor identified cases like *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) and *Porter v. Epps*, 659 F.3d 440 (5th Cir. 2011), to show that "there is a clearly established right to timely release from prison." ROA.88 at ¶ 60; ROA.95 at ¶ 78. The complaint also stated that "[a]n inmate who has already served his entire court-ordered sentence must be released within a reasonable amount of time[.]" ROA.88 at ¶ 61.

On the same day, Taylor filed his response to LeBlanc's motion to dismiss. ROA.74-124 (Plaintiff's Brief in Opposition). In addition to reaffirming his arguments from the complaint, *see, e.g.*, ROA.120, Taylor explained that because "over an extended period of time the Secretary has failed to adopt meaningful policies and

there appears to be a lack of regulations adopted by the Secretary," LeBlanc is not entitled to qualified immunity. ROA.119.

On September 13, 2021, the district court agreed with Taylor and denied LeBlanc qualified immunity, stating that "[t]aking as true the allegations as pleaded in the Complaint, the Court finds that Plaintiff has alleged facts sufficient to overcome LeBlanc's assertions of qualified immunity based on supervisory liability at the pleading stage." ROA.174; ROA.178. That's because by pointing to the three buckets of evidence to demonstrate LeBlanc's knowledge and failure to act, "Plaintiff adequately alleges that LeBlanc was aware of a pattern of similar constitutional violations but failed to correct them." ROA.174. In response to LeBlanc's argument that Taylor's examples of other instances of overdetention were not similar enough to put LeBlanc on notice, the court stated that "Plaintiff has sufficiently alleged that his unlawful detention and the patterns of unlawful detention in DPSC stem from the same source—[LeBlanc's] inadequate training and guidance," which amounted to "deliberate indifference for Plaintiff's constitutional right to timely release." ROA.175. Because the district court refused to shield LeBlanc from supervisory liability, ROA.174, LeBlanc filed this interlocutory appeal. ROA.179 (Notice of Appeal).

SUMMARY OF THE ARGUMENT

The district court correctly denied LeBlanc qualified immunity. Per the two-pronged test formalized in *Saucier v. Katz*, 533 U.S. 194 (2001) and clarified in *Pearson v. Callahan*, 555 U.S. 223 (2009), *see* Argument, Part I, *infra*, at 23-30, Taylor met his burden to overcome qualified immunity by showing that (1) LeBlanc violated Taylor's constitutional right and that (2) this right was clearly established. *Saucier*, 533 U.S. at 201-04. First, despite years of notice, LeBlanc violated Taylor's right to be timely released from prison by failing to adopt a standardized manual for calculating release dates; develop comprehensive supervision, discipline, and training mechanisms; and conduct regular audits. Had LeBlanc implemented these policies at any time between 2012 and 2018, DPSC would have credited Taylor with 602 days of time served, instead of overdetaining him by 525 days.

Second, Taylor's right to be timely released from prison has been clearly established since at least 1968 when this Court, in a case involving a sheriff who "exercise[d] a supervision and control over the jail," was denied good-faith immunity[7] because it was his "duty to effect [the inmate's] timely release." *Whirl*, 407 F.2d at

[7] At the time *Whirl* was issued, the governing qualified immunity standard was articulated by *Pierson v. Ray*, 386 U.S. 547 (1967), which allowed immunity only if the officer acted in good faith and objectively reasonably. *Id.* at 558. This standard was replaced by the Supreme Court in 1982, when, in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), it announced the now operative clearly established law standard.

792, 794. This Court has since reaffirmed that holding many times, most recently in *Crittindon v. LeBlanc*, 37 F.4th 177 (5th Cir. 2022) and *Parker v. LeBlanc*, 2023 WL 4558517. According to both cases, *since at least 2016*, LeBlanc, as a supervisor, "had fair warning that [his] failure to address [timely release from prison] would deny prisoners . . . their immediate or near-immediate release upon conviction." *Parker*, 2023 WL 4558517, at *6 (cleaned up); *see also Crittindon*, 37 F.4th at 188. As this Court noted in *Hicks v. LeBlanc*, for example, "LeBlanc knew of the DPSC's long history of over-detaining inmates" and that "he could be held liable for incompetent over-detention, such as the failure to process a prisoner's release or immediately compute an inmate's sentence after being sentenced to time served." 832 F.App'x at 842. If that's not a fair warning to LeBlanc, nothing is.

LeBlanc, relying primarily on the Supreme Court cases involving split-second decision-making, argues that "[m]erely stating the obvious—that inmates have a right to be timely released from prison—does not instruct LeBlanc how he should devise policies to potentially avoid the type of specific time computation review issue raised by Taylor's allegations." App. Br. 25. But this attempt at deflection fails for several reasons. First, there has been plenty of instruction on how to devise policies to avoid errors in calculating and reviewing release dates. Multiple government reports dating as far back as 2012 have been urging LeBlanc to adopt a standardized

manual and institute appropriate training, supervision, and auditing procedures. *See* Statement of the Case, Section II, *supra*, at 4-7.

Second, *Whirl*, *Parker*, and *Crittindon* do far more than simply state that inmates have a right to a timely release. These cases specifically pertain to supervisors and deal with these supervisors' failures to ensure that their jails have systems in place to prevent inmate overdetentions.

Third, even if these cases did nothing other than "merely state the obvious," obviousness all by itself can provide fair warning, especially in a situation involving a jailer who "unlike a policeman, acts at his leisure . . . is not subject to the stresses and split second decisions of an arresting officer, and . . . has the means, the freedom, and the duty to make necessary inquiries." *Whirl*, 407 F.2d at 792; *see also Villarreal v. Laredo*, 44 F.4th 363, 367 (5th Cir. 2022) (pending en banc review) ("[A]s the Supreme Court has repeatedly held, public officials are not entitled to qualified immunity for obvious violations of the Constitution."). The district court correctly denied qualified immunity to LeBlanc. Its ruling should be affirmed.

ARGUMENT

I. The parties agree that qualified immunity is a two-pronged test, with the second prong involving only a "purely legal issue."

LeBlanc and Taylor agree that qualified immunity is a two-pronged inquiry. App. Br. 16. The first prong focuses on whether the facts, taken with an appropriate

level of deference to the plaintiff depending on the stage of the litigation, show that the official violated a federal right. *Tolan v. Cotton,* 572 U.S. 650, 655-56 (2014); *see also* App. Br. 16. The second prong, as LeBlanc correctly states, is a "purely legal issue," App. Br. 15, focusing on the caselaw and whether it provided a sufficient warning to a reasonable official that his actions would violate that right. *Tolan*, 572 U.S. at 656 (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982) (explaining that whether the law is clearly established should be "evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court") (cleaned up). In other words, it is in prong one that the factual heavy-lifting takes place; prong two only deals with whether there are similar enough cases for the violation to be clearly established.

It is true that, at times, this Court and the U. S. Supreme Court both described the second prong of the qualified immunity test as focusing on whether a defendant's actions were objectively unreasonable in light of clearly established law. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 639 (1987);[8] *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998). This formulation, however, is not a green light to divorce the

[8] After the Supreme Court introduced the two steps in *Saucier v. Katz*, it walked away from the "objectively unreasonable in light of clearly established law" language. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) ("To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent."); *Reichle v. Howards*, 566 U.S. 658, 665 (2012).

reasonableness inquiry from the state of the law at the time of the conduct in question. "[W]hether an officer's conduct was objectively reasonable is part and parcel of the inquiry into whether the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred." *Walczyk v. Rio*, 496 F.3d 139, 167 (2d Cir. 2007) (Sotomayor, J., concurring). If a right is clearly established, then the government official by definition acted objectively unreasonably by violating that right. Nothing more and nothing less.

To the extent this formulation of the second prong is understood as allowing a court to engage in a lengthy factual consideration of whether the actions of a particular official were reasonable, *see, e.g., Porter*, 659 F.3d at 446-47, it is inconsistent with the Supreme Court precedent. This Court has acknowledged as much in two of its recent decisions. *Baker v. Coburn*, 68 F.4th 240, 251 n.10 (5th Cir. 2023) ("To be clear . . . [w]e are not adding a standalone 'objective reasonableness' element to the Supreme Court's two-pronged test for qualified immunity"); *Parker*, 2023 WL 4558517, at *5 n.1 (agreeing with *Baker*, stating that the "objectively unreasonable" language is a vestige of older case law that predates the Supreme Court's current test adopted in *Saucier* and *Pearson*).

Reichle v. Howards, 566 U.S. 658 (2012), is on point. A protester who told Vice President Dick Cheney that his "policies in Iraq are disgusting" and touched Cheney

on the shoulder was arrested by a federal agent for making a materially false statement after he denied touching Cheney. *Id.* at 661. The question that ultimately ended up before the Supreme Court was whether it was "clearly established that an arrest supported by probable cause could violate the First Amendment." *Id.* at 663. The Supreme Court explained that "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* at 664 (cleaned up). To determine this reasonableness of the conduct, courts *must* look to caselaw, making sure that "existing precedent . . . placed the statutory or constitutional question beyond debate." *Id.* The reason for looking to cases is to "ensur[e] that officials can reasonably anticipate when their conduct may give rise to liability for damages." *Id.* (cleaned up). Legal precedent is the mechanism that accounts for the reasonable anticipation. Because neither the Supreme Court nor the Tenth Circuit had settled the rule that the First Amendment prohibits officials from retaliating against people by making arrests that are supported by probable case, the law was not clearly established. *Id.* at 665.

Reichle confirms that determining the reasonableness of an official's conduct during part two of the qualified immunity inquiry has nothing to do with engaging in a factual analysis of whether the actions of a particular official were reasonable. Rather, the reasonableness determination can only be performed by looking to the

Supreme Court and circuit caselaw[9] and analyzing whether this caselaw provided fair warning to the official about the unconstitutionality of his actions. *Id.* at 665; *see also Boyd v. McNamara*, --- F.4th ---, 2023 WL 4702122, *4, *6 (5th Cir. July 24, 2023) (stating that clearly established law is evaluated based on "then-existing precedent," including the Fifth Circuit precedent) (cleaned up).

The Fifth Circuit's cases that depart from this holding by bifurcating the clearly established law and the reasonableness analysis are inconsistent with the Supreme Court's jurisprudence.[10] *Porter* is one such case. In *Porter*, a former inmate sued the Commissioner of the Mississippi Department of Corrections ("MDOC") for being deliberately indifferent to his staff's failure to correctly interpret sentencing orders. 659 F.3d at 444. The Court used its prerogative to skip part one of the qualified immunity inquiry and went straight into the determination of whether the commissioner's actions were a clearly established violation of the Constitution. *Id.* at 445. To answer this question the Court focused not on the caselaw, but on the actions of the commissioner and whether they were objectively unreasonable. *Id.* at 446. For

---

[9] *But see* the obviousness exception, Argument, Part IIB, *infra*, at 52-53.

[10] Some cases that use the phraseology are still consistent with the Supreme Court precedent because their ultimate focus is on the caselaw. *See, e.g., Roque v. Harvel,* 993 F.3d 325, 334 (5th Cir. 2021) (using the phraseology but looking only to the caselaw).

example, the Court noted that the commissioner testified that "MDOC worked with judges to make future sentencing orders more understandable," that he "placed a lawyer in the department to . . . ensure the accuracy of [sentencing order] interpretations," and that "MDOC had a records department in which staff interpreted sentencing orders in accordance with training provided by attorneys." *Id.* at 447. That showed that the commissioner did not act objectively unreasonably in light of the clearly established right to a timely release from prison, and therefore entitled the commissioner to qualified immunity. *Id.*

The intuition to separate the reasonableness inquiry from the clearly established law inquiry—and the caselaw resulting from it—likely stems from the courts' skepticism of legal fiction that government officials are kept abreast of the caselaw. *See generally* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605 (2021). It is much more meaningful to look at what the official actually did in order to determine whether it is worthy of the immunity protection. The Supreme Court tried this approach six decades ago in *Pierson v. Ray*, but walked away from it in *Harlow v. Fitzgerald* and its progeny, citing the costs associated with establishing the subjective intent of government officials in litigation as the biggest reason. 457 U.S. 800, 816 (1982). The modern-day iteration of qualified immunity has thus nothing to do with the good-faith immunity standard, where a government official had to

establish his actions were both objectively reasonable and undertaken in subjective good faith. More than that—the objective reasonableness of the actions now has to be evaluated based solely on the caselaw, and not the actions of the defendant. "If the law at that time was not clearly established, an official could not . . . fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* at 818. On the other hand, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19.

To be fair, this Court in *Porter* could have used those same facts to deny qualified immunity at step one, by holding that—given the commissioner promulgated the policies the plaintiff claimed were lacking—there was no constitutional violation in the first place. But the Court would not have been able to do so at the motion to dismiss stage, where the plaintiff's facts are assumed to be true. And even if these facts were somehow available that early in the litigation process, it is still important for a court to incorporate them into step one and not step two.

Backloading factual considerations into the second part of the inquiry has real consequences. First, by doing all the work in the second part of the test and having the discretion to skip part one of the test, courts often fail to establish constitutional rights going forward. Second, permitting courts to decide whether the official

conduct was reasonable after finding that it violated clearly established law gives the official "a second bite at the immunity apple," *Walczyk*, 496 F.3d at 169 (Sotomayor, J., concurring), making an already challenging test impossible to overcome. *See Wilson v. City of Boston*, 421 F.3d 45, 57-58 (1st Cir. 2005) (describing the second prong reasonableness test as "often the most difficult one for the plaintiff to prevail upon"). Finally, introducing fact-laden reasonableness analysis into the second prong thwarts the intention of the Supreme Court, whose goal in creating the clearly established test was to ensure that factual determinations do not infect the qualified immunity standard. *Harlow*, 457 U.S. at 816 (discussing "special costs to 'subjective inquiries' of this kind").

The good news is that the parties agree here that the second prong of the qualified immunity analysis hinges exclusively on what "this Court [or] the Supreme Court has . . . held." App. Br. 15. The parties disagree, however, on the application of this two-pronged standard.

II. LeBlanc is not entitled to qualified immunity for his deliberate indifference to overdetention problems in Louisiana prisons.

Consistent with the two-pronged test announced by the Supreme Court, Taylor showed both that (1) LeBlanc's failure to adopt policies to ensure timely prison release, to properly train, supervise, and discipline his staff, and to conduct regular audits of sentences, despite obvious notice and despite his explicit promises to do so,

violated Taylor's due process right and that (2) this right "was clearly established at the time of [the] alleged misconduct." *Parker*, 2023 WL 4558517, at *5.

At the motion to dismiss stage, Taylor's allegations must be accepted as true and all reasonable inferences must be drawn in his favor. *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). So long as the plaintiff pleads "factual content" that allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged," as Taylor has done here, he should be allowed to proceed with the case. *Morris v. Livingston*, 739 F.3d 740, 745 (5th Cir. 2012).

A. LeBlanc's deliberate indifference to overdention problems in Louisiana prisons violated Taylor's due process right.

LeBlanc argues that "[t]he Constitution does not guarantee error-free sentencing calculation." App. Br. 22. This misses the point. The Constitution does guarantee that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This means that a jailer, including the one who "exercises a supervisory control over jails" is "under an obligation, often statutory, to carry out the functions of his office," including "not only the duty to protect the prisoner, but also the duty to effect his timely release." *Whirl*, 407 F.2d at 792. *This* is the guarantee that LeBlanc broke.

To establish a constitutional violation through deliberate indifference by a supervisor, a plaintiff must show that the supervisor disregarded a known or obvious

consequence of his actions or inactions and that there is a direct causal link between an official's conduct and the deprivation of constitutional rights. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). One such inaction is a failure to adopt a policy, when it is obvious that the likely consequence of not adopting a policy would be a deprivation of constitutional rights. *Rhyne v. Henderson County*, 973 F.2d 386, 391-92 (5th Cir. 1992). Another inaction is a failure to train or supervise the subordinate, provided there is "actual or constructive notice" that "a particular omission in their training program causes . . . employees to violate citizens' constitutional rights." *Connick*, 563 U.S. at 61. To establish actual or constructive notice, plaintiffs must point to a "pattern of similar constitutional violations" due to deficient policies. *Id.* at 62. If a supervisor continues to adhere "to an approach that they know or should know has failed to prevent tortious conduct by employees," this could "establish the conscious disregard for the consequences of their action." *Id.*

In other words, to establish deliberate indifference by a supervisor, plaintiffs must show that (1) the supervisor had a constructive or actual knowledge of the problem but chose to not address it; and (2) there was a direct causal link between the action and the injury.

LeBlanc is the poster child for deliberate indifference. In his amended complaint, Taylor alleged that LeBlanc was in charge of "formulating and administering

the policies, procedures, operations, and supervision of the [DPSC]," ROA.89 at ¶ 63, and that since at least 2012, when he himself championed the 2012 study, he's "fail[ed] to adopt policy to prevent predictable overdetention," continuously reneging on his duty to ensure the timely release from his prisons, ROA.87-88 at ¶ 58. LeBlanc and his staff repeatedly acknowledged these problems, and made unfulfilled promises to address them, by, for example, adopting a comprehensive manual on proper calculations of release dates, instituting training and discipline procedures, and conducting regular audits. *See* 2012 Study, *supra* note 1, at 26-28 (recommendations and next steps); 2017 Audit, *supra* note 1, at A.1-A.7 (LeBlanc's response to the audit); 2019 Audit, *supra* note 1, at A.1-A.2 (same). But as the 2023 DOJ report shows, LeBlanc has failed to actually implement any of these changes in his prisons, resulting in Taylor and other inmates being unconstitutionally overdetained. *See* DOJ Report, *supra* note 1, at 20-25 (Minimal Remedial Measures). LeBlanc misrepresents Taylor's position as advocating for vicarious liability for LeBlanc. App. Br. 14. Far from it, Taylor has alleged substantial evidence to show that it is LeBlanc's own failures *as a supervisor* that are the most significant reason for the denial of Taylor's due process rights. Hooper and Milligan are not unique. If not them, someone else at DPSC would have made the same mistakes for the same reason: lack of proper

supervision, training, and accountability, because of LeBlanc's failure to adopt and implement appropriate policies and measures.

i. Notice

Since at least 2012 and before late 2017, when Taylor first began ringing the alarm about his unconstitutional detention, LeBlanc had a staggering amount of notice that his prisons were routinely overdetaining people, due to errors in calculating and reviewing inmate release dates, processing delays, and other systemic deficiencies, such as incompetent, indifferent, and poorly trained staff. This notice came in three forms: (1) two government-issued studies; (2) statements by DPSC employees, LeBlanc himself, and the Louisiana Attorney General; and (3) lawsuits by other overdetained individuals.

First, two government-issued studies described the problem and provided concrete recommendations to LeBlanc to improve the situation. The 2012 study, which was championed by LeBlanc, reported that over 2,200 inmates were held beyond their release date annually, due in large part to understaffing, poor training, and "inconsistencies in the quality of the work." *See* 2012 Study, *supra* note 1, at 5, 22. The study recommended that LeBlanc "design supervision" and "standardize . . . time computation procedures." *Id.* at 26-27.

Five years later, when the state of Louisiana audited DPSC prisons, LeBlanc was formally notified that not much had changed. The 2017 audit identified basic data errors at a rate of 26 errors per 100 inmates. 2017 Audit, *supra* note 1, at 6 n.5. Over 1,000 records had blank full term dates. *Id.* at 7; *see also id.* at 7 n.6. The 2017 audit again concluded that DPSC "does not have a standard method by which to perform" release date calculations, that DPSC "does not have a policy requiring initial release date computations to be reviewed by a supervisor" and that its staff are undertrained and overwhelmed. *Id.* at 9; *see id.* at 7. It even identified the specific confusion caused by mistakes—like those that affected Taylor—in calculating a sentence for "an offender who violated parole with consecutive sentences" versus "a parole violator with concurrent sentences." *Id.* at 9. Like the 2012 study, the 2017 audit recommended that DPSC "develop formal policies and procedures for calculating release dates" and "assist staff" by developing a standardized approach in form of a template. *Id.* at 9; *see* 2012 Study, *supra* note 1, at 27.

LeBlanc knew of these studies and even responded to the 2017 audit by promising "a new training manual with step-by-step instructions" as well as a regular audit of sentences. 2017 Audit, *supra* note 1, at A.4-A.5; *see* 2012 Study, *supra* note 1, at 3 (listing LeBlanc as a "project champion"). But as the 2019 audit and the 2023 DOJ review determined, in practice no such policies were forthcoming. In fact, in

2023, the recommendations were still for DPSC to develop a standardized manual, a training program, and a way to regularly audit release date calculations. DOJ Report, *supra* note 1, at 23-25.

Second, LeBlanc and other officials and employees talked about the overdetention problem years before Taylor complained about *his* overdetention. According to Tracy Tibinetto, a DPSC employee who was deposed in a state-court case, DPSC staff have discovered approximately one case of overdetention per week for the last nine years. ROA.88 at ¶ 62(a). Henry Goines, a DPSC employee testifying in the same case, said that he typically discovered "one or two [inmates] a week" who were eligible for immediate release. ROA.88 at ¶ 62(b). Yet LeBlanc himself admitted that there had not been a single example of "discipline or adverse employment activity for [DPSC] employees who have incorrectly computed sentences or release dates from 2000 to present." Interrogatory Responses, *supra* 7, at 5. And in early 2018, the Louisiana Attorney General wrote an op-ed acknowledging that "there is a layer of incompetence so deep that the Corrections Department doesn't know where a prisoner is on any given day of the week or when he should actually be released from prison." ROA.94 at ¶ 74(i) (cleaned up).

Third, numerous cases in federal and state courts against LeBlanc or his staff left no doubt about LeBlanc's error-ridden system that denied inmates their earned

freedom by failing to properly calculate or review their sentences, including by failing to account for time served, *e.g.*:

- In or around 2010, DPSC wrongfully refused to provide an inmate with double credit for time served in custody prior to sentencing. *Boddye v. DPSC*, 2010 WL 5465633 (La. App. 1 Cir. 12/22/10).
- In or around 2011, a DPSC employee failed to properly account for time served, prolonging an inmate's sentence by 56 days. *Noel v. LeBlanc*, 2011 WL 5412956 (La. App. 1 Cir. 11/9/11).
- In or around 2015, DPSC staff wrongfully refused to provide an inmate with triple credit for time served in custody prior to sentencing. *Boddye v. DPSC*, 175 So.3d 437 (La. App. 1 Cir. 6/26/15).
- In or around 2016, DPSC staff did not calculate good time credits correctly and kept the inmate in jail past his release date. *Owens v. Stadler*, 638 Fed. App'x 277 (5th Cir. 2016).
- In June 2016, a DPSC employee failed to properly credit time served, causing an inmate to be detained 27 days beyond his release date. *Grant v. LeBlanc*, 2022 WL 301546, at *2 (5th Cir. Feb. 1, 2022) (mem. op.).

- In February 2017, a DPSC employee failed to award an inmate 455 days of time served keeping him incarcerated 60 days beyond his actual release date. *Hicks*, 832 Fed. App'x at 838.
- In September 2017, another DPSC employee misclassified an inmate to be a sex offender, extending his prison detention by 337 days. *Parker*, 2023 WL 4558517, at *1.

Just like Taylor's, these cases involved errors in properly allocating offsetting credits. They provided plenty of very specific notice, ahead of Taylor's attempts to recalculate his sentence, that this particular problem needed to be solved through proper policies, training, and supervision.

Despite all this notice—demonstrated by studies, similar cases, and statements by DPSC staff and appointed officials—LeBlanc disregarded the knowledge that thousands of sentencing errors would continue to be made and did not do what he said he would: adopt a manual; ensure uniform training and supervision; and conduct regular audits to ensure that release dates are calculated and reviewed correctly. *See Parker*, 2023 WL 4558517, at *3-4 (holding that notice was properly established at the motion to dismiss stage by pointing to evidence of reports, official statements, and court testimony, even though "[w]hat LeBlanc may have done to comply with his supervisory obligations is not yet part of the record").

LeBlanc argues that this notice was not similar enough to the way Taylor's sentence was miscalculated. App. Br. 19. In other words, in LeBlanc's view, the notice about overdetention due to rampant errors by undertrained and undersupervised staff in calculating and reviewing release dates without proper manuals to guide them through the process is not specific enough to allege the requisite pattern of constitutional violations.

But such a level of exact specificity is emphatically not required. As long as there is a "pattern of *similar* constitutional violations," the standard is met. *Connick*, 563 U.S. at 62 (emphasis added). In *Connick*, for example, where prosecutors failed to disclose *blood* evidence, a failure to disclose "a crime lab report, or physical or scientific evidence of *any kind*" would have been sufficient to provide notice. *Id.* at 62-63 (emphasis added). Here, LeBlanc knew about failures to award time served in specific instances dating back to 2010. *See, e.g.*, *Boddye*, 2010 WL 5465633. They are sufficiently similar to the failure to award time served in Taylor's case to constitute a pattern. *See also Parker*, 2023 WL 4558517, at *4 (declining to limit the types of errors involved solely to those instances where individuals have been misclassified as sexual offenders).

Furthermore, the sheer amount of evidence must count for something when it comes to LeBlanc. In *Connick*, where the issue was a *Brady* violation, plaintiff

pointed to four instances of convictions being overturned in the preceding ten years due to the failures to conform with *Brady*. 563 U.S. at 62. Here, LeBlanc knew of more than 2,200 inmates being held beyond their release date annually, including specifically due to the failure to credit time served. *See* 2012 Study, *supra* note 1, at 5; *see, e.g.*, *Boddye*, 2010 WL 5465633. This is a pattern orders of magnitude larger than in *Connick* and far beyond the minimum threshold sufficient to provide notice.[11]

[11] LeBlanc cites to *Jason v. Tanner*, 938 F.3d 191 (5th Cir. 2019), to support his view that "even a repeated pattern of violence isn't by itself enough to prove deliberate indifference." App. Br. 19. But *Jason* only proves the rule that as long as there is a "pattern of similar constitutional violations," plaintiff can establish sufficient notice. In *Jason*, a prisoner wanted a supervisor to be held accountable for an incident in a prison yard, when a fellow inmate struck him on the back of the head with a sling blade. 938 F.3d at 193. The problem, however, was that, first, there were meaningful safeguards in place and, second, "[g]oing at least as far back as 2007, there had been no prior assaults by inmates with a yard tool at the prison." *Id.* (cleaned up). Moreover, "during the previous seven-year period, there had only been four incidents—three with a broom and one with a mop." *Id.* (cleaned up). As a result, the supervisor got qualified immunity, since per *Connick*, this evidence was not enough to constitute a pattern. *Id.* at 198. Here, on the other hand, there is plenty of evidence to constitute a pattern, including years of examples, specifically with errors in calculating release dates, that LeBlanc knew about and ignored. Had the inmate in *Jason* provided evidence of nonstop violence in the prison yard, plus no meaningful safeguards to prevent it, the outcome would have been different. LeBlanc's reliance on *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004) is mistaken for the same reason. *See* App. Br. 27. In *Johnson*, there also wasn't a pattern of widespread and well-documented problem over the period of many years, as is the case here. 385 F.3d at 513-14.

That is true not only because the pattern was well developed but because LeBlanc had actual notice through studies Louisiana undertook and provided to him.

ii. Causal link

There is a direct causal link between LeBlanc's failures to heed years' worth of calls for specific reform and Taylor's due process injury. Let's take one failure at a time. First, had LeBlanc conducted regular audits of sentence calculations in the five years between the 2012 study and Taylor ringing the alarm as to his release date, it is very likely that the mistake would have been discovered. After all, the error is of a very generic type: a failure to understand what to do with parole violators who are serving consecutive sentences versus parole violators who are serving concurrent sentences. *See* 2017 Audit, *supra* note 1, at 9 (discussing this *specific* error as a source of calculation mistakes: "For example, the calculation for an offender who violated parole with consecutive sentences is different than for a *parole violator with concurrent sentences and received credit for time served prior to conviction*.") (emphasis added). Had, as LeBlanc promised, DPSC performed audits, with six designated groups of auditors looking at twenty-five cases per month, the error in calculating Taylor's release date could have very well turned up. *See id.* at A.4 (Management's Response) (implementing these audits).

Second, had Milligan been properly trained and supervised, or had she had access to a comprehensive manual on calculating release dates, she would have not misunderstood Taylor's argument to be about missing credits for the time he spent on parole instead of missing credits for the time he spent in jail after his parole was revoked. Again, this is basic information she should have known or had available for crosschecking at her fingertips. But, given "there is a layer of incompetence so deep [at] the Corrections Department," ROA.94 at ¶ 74(i) (quoting the Louisiana Attorney General), it is regrettably not surprising that the seven-to-ten meetings Taylor had with Milligan were not enough to make her understand or fix the error.

Third, had the DPSC employee who reviewed Milligan's determination at the ARP's second step been properly trained and supervised, or had he had access to a comprehensive manual on calculating release dates, he would have known that Taylor's parole was revoked at the moment Taylor committed his second crime, not at the moment he was convicted for it. He would have also known that at the time Taylor's sentence was calculated, a double-credit for time served on consecutive sentences was still allowed. *See* Statement of the Case, Part III, *supra*, at 15.

Fourth, had Hooper and Milligan operated within a system where DPSC staff were held accountable for making basic or repeated errors, or disregarding inmates' valid concerns, they would have not turned him away the first several months he

spent trying to convince them that his sentence was 602 days too long. They would have also not kept him in prison after the commissioner—and then district court judge—told them that their calculations were "manifestly erroneous." They certainly would not have forced Taylor to file another ARP as his last-ditch attempt to get himself out. But as LeBlanc himself acknowledged, DPSC did not discipline any employees from 2000 to 2019 for incorrectly computing sentences or release dates. Interrogatory Responses, *supra* 7, at 5. So there was no incentive for Hooper or Milligan to take Taylor seriously, and, as a result, they didn't.

While Hooper and Milligan are at fault for causing Taylor's constitutional injury, it is LeBlanc who bears the ultimate responsibility. After all, Hooper and Milligan are two among countless DPSC staff who continue making the same mistakes because they lack access to proper manuals, guides, training, and supervision. They are also operating within a system of no accountability—with a lack of discipline and no audits of past mistakes. LeBlanc's failure to implement basic solutions over at least five years leading up to Taylor discovering his sentencing error is the true cause of the denial of due process to Taylor and thousands more prisoners whose release dates were miscalculated and not properly reviewed by DPSC.

In sum, at this early stage of litigation, Taylor sufficiently alleged that LeBlanc's deliberate indifference to overdetention problems in Louisiana prisons

violated Taylor's constitutional rights. LeBlanc knew of these problems and chose to do next to nothing to fix them. Had it not been for LeBlanc's failure to remedy these problems by instituting proper policies and training, as he was obligated to do by Louisiana law, Taylor would not have spent an extra 525 days behind bars.

B. At the time LeBlanc's failures caused Taylor's overdetention, this Court's cases provided fair warning to LeBlanc that his actions were unconstitutional.

The clearly established standard is at the heart of qualified immunity. The Supreme Court announced its modern-day iteration in *Harlow v. Fitzgerald*, to ensure that government officials have breathing room to make mistakes. 457 U.S. at 818. This breathing room, however, is not infinite. It is measured by whether there are cases in the relevant circuit court or in the Supreme Court that are close enough on the facts to provide fair warning to a reasonable official about the unconstitutionality of the conduct. *Reichle*, 566 U.S. at 664.

It is true, as LeBlanc argues, that in some situations the Supreme Court requires cases that have a high level of specificity. App. Br. 23-24. In the excessive force context, for example, when police officers make split-second decisions about how to respond to fast-developing and life-threatening events, plaintiffs are required to point to cases that are very similar. Thus, in *Mullenix v. Luna*, 577 U.S. 7 (2015)—relied on by LeBlanc—as well as more recent cases like *Rivas-Villegas v. Cortesluna*,

142 S. Ct. 4 (2021), and *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021), the Supreme Court insisted that only cases identifying their "specific conduct [as] unlawful" are sufficient to put officers on notice. *Rivas-Villegas*, 577 U.S. at 8.

But that rule of specificity is very much particular to "the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix*, 577 U.S. at 12 (cleaned up). Outside of the Fourth Amendment context, the Supreme Court is generally less concerned with a close factual similarity. *See*, *e.g.*, *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (reversing a grant of qualified immunity in a case involving police officers stopping Sause from praying, even though, according to the Tenth Circuit, 859 F.3d 1270, 1275 (10th Cir. 2017), Sause failed to "identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here").

That's because what's an "appropriate level" of specificity in situations with on-the-beat cops is different from an "appropriate level" of specificity when a bureaucrat "acts at his leisure" and "is not subject to the stresses . . . of an arresting officer." *Whirl*, 407 F.2d at 792. As Justice Thomas recently put it, why should officials "who have time to make calculated choices about enacting or enforcing

unconstitutional policies [], receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (mem. op.) (Thomas, J., statement respecting denial of certiorari); *see also Gonzalez v. Trevino*, 60 F.4th 906, 912 (5th Cir. 2023) (mem. op.) (Ho, J., dissenting from denial of en banc review) (stating that the Fifth Circuit is "getting qualified immunity backwards" by granting it to officials who have time to deliberate and denying it to "officers who make split-second, life-and-death decisions to stop violent criminals").

Especially in the prison context, the Supreme Court has repeatedly said that the kind of specificity LeBlanc insists upon is too strict. In *Taylor v. Riojas*, 141 S. Ct. 52 (2020), for example, an inmate sued corrections officers for violating the Eighth Amendment by being deliberately indifferent to the conditions of his freezing, feces-infested cells. *Id.* at 53-54. The Fifth Circuit granted qualified immunity to the officers because "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). The Supreme Court reversed, holding that even though plaintiff could point to no cases where the specific conduct of the officers was held to be unlawful, qualified immunity should still be denied because "a general constitutional rule already identified in the decisional law may apply with obvious

clarity to the specific conduct in question." *Taylor*, 141 S. Ct. at 54-55 (citing *Hope*, 536 U.S. at 741). In *Taylor*, the general constitutional rule was that certain conditions of confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment. "[A]ny reasonable officer should have realized that Taylor's conditions of confinement offended" this prohibition. *Id.* at 54; *see also Hope*, 536 U.S. at 741 (denying qualified immunity to prison guards even though the facts of the two cases the inmate relied on were not "materially similar"); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem. op.) (reversing the grant of qualified immunity to a prison guard who pepper-sprayed a prisoner even though the prisoner only pointed to "the general principle that prison officers can't act maliciously and sadistically to cause harm," 950 F.3d 226, 234 (5th Cir. 2020) (cleaned up)).

In this case, LeBlanc had ample warning in 2017 and 2018 that his failure to institute policies and implement procedures to ensure that prisoners were released on time violated the Constitution. Since at least 1968, this Court has held that it is a jailer's "duty to effect [the inmate's] timely release." *Whirl*, 407 F.2d at 792. In *Whirl*, a former inmate sued a sheriff—an officer responsible for "exercis[ing] a supervision and control over the jail"— for keeping him in jail "nine months after all charges against him were dismissed." *Id.* at 785, 794. Apparently, the inmate's name was on a list of dismissals that was never processed, resulting in his "freedom [being]

lost in a shuffle of papers." *Id.* at 786. The sheriff, like LeBlanc here, claimed ignorance, saying he "was not apprised" of the goings on in his own jail and invoked good-faith immunity under *Pierson v. Ray*. *Id.* at 785. This Court held that the jury correctly found the sheriff liable under Section 1983 and that "[t]he fact that the jailer is without personal knowledge that the prisoner is held unlawfully" cannot "exculpate [the sheriff] from liability." *Id.* at 790-91. "Ignorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom." *Id.* at 792. After all, "[a]jailer, unlike a policeman, acts at his leisure . . . [and] is not subject to the stresses and split second decisions" and "unlike his prisoner, the jailer had the means, the freedom, and the duty to make necessary inquiries." *Id.*

It is true that in *Whirl*, the sheriff was held liable for overdetaining an inmate due to "a failure of communication between the courts and the jailhouse," *id.* at 792, whereas here, LeBlanc's failure is about providing manuals, supervision, and training to his staff who are at a loss when calculating and reviewing release dates. But the fact that LeBlanc had direct control over the failures, whereas the sheriff in *Whirl* did not, provides LeBlanc all the more warning that his actions were deficient. And, given the Supreme Court's guidance on cases outside of split-second decisions, the

case is appropriately specific to provide LeBlanc with fair notice that failing to ensure that inmates are released on time is unconstitutional.[12]

There is also more recent caselaw, with LeBlanc as a defendant no less, holding that prior to late 2017—when Taylor first approached DPSC staff about his over-detention—LeBlanc had fair warning that his years-long failure to address the over-detention problem violated prisoners' due process rights.[13] *Hicks*, *Crittindon*, and

---

[12] Note that at the time *Whirl* was written, the standard for supervisory liability had not yet been fleshed out. But for a reasonable supervisor to be fairly warned that his actions would violate the Constitution, there is no need for a case to talk specifically about supervisors. It is enough that the case clearly articulates the principle of the constitutional right at issue.

That's because at the heart of qualified immunity is notice. In a case with supervisors, to overcome step one of qualified immunity, a plaintiff *already* must show that it was the deliberate indifference of the supervisor—which requires notice—that violated his right. Thus, "if [the plaintiff] succeeds in establishing that the [supervisor] acted with deliberate indifference to constitutional rights—as [he] must in order to recover under section 1983—then a *fortiori* their conduct was not objectively reasonable." *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999); *see also Crittindon*, 37 F.4th at 188 n.36(citing *Douthit v. Jones*, 619 F.2d 527, 532 (5th Cir. 1980), which is not a supervisory liability case). *But see Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994) (en banc).

[13] While *Hicks*, *Crittindon*, and *Parker* were all issued within the past year, it is the date of the events in question—not the date of the decision—that controls when the law is clearly established. For example, in *Parker*, this Court held that as of May 2017, LeBlanc had fair warning that his deliberate indifference violates due process and therefore he should not receive qualified immunity. If LeBlanc had fair warning in May 2017, then he surely had fair warning in late 2017 and 2018 when Taylor was advocating for review of his sentence calculation.

Parker—all three against LeBlanc for his deliberate indifference toward the overdetention in Louisiana prisons—are most on point.[14]

Parker involved a DPSC employee who on May 4, 2017, misclassified a prisoner (Parker) as a sex offender, leading Parker to be incarcerated for 337 days past his release date. *Parker*, 2023 WL 4558517, at *1. Among other parties, Parker sued a DPSC employee who made the mistake, as well as LeBlanc for failing to put in place procedures that would have ensured that such a mistake would not happen. *Id*. at *2. Just like in this case, LeBlanc moved for qualified immunity at the motion to dismiss stage, claiming that Parker did not show that LeBlanc had adequate notice that this particular problem would result in a denial of constitutional rights, *id*. at *4, or that Parker's rights were clearly established so as to provide LeBlanc with fair warning of the constitutionality of his conduct, *id*. at *6. LeBlanc "essentially . . . insist[ed] that there is a meaningful distinction between Parker's overdetention due to his alleged misclassification as a sex offender, as opposed to over-detention due to miscalculations of his sentence or his status generally being lost in the system" and that this distinction should drive both inquiries. *Id*. at *4, *6.

---

[14] *Porter* is also on point as it specifically says that "[t]here is a clearly established right to timely release from prison." 659 F.3d at 445. Consistent with the Supreme Court jurisprudence on qualified immunity in non-split-second situations, this is enough to provide LeBlanc with fair warning. *See* Argument, Part III, *supra*, at 45-48; *see also id*. at 48 n.13.

This Court disagreed. As to the insufficient notice argument, this Court held that Parker's complaint, by pointing to the 2012 study, the testimony of DPSC's officials in other cases, and the words of the attorney general about DPSC's general incompetence, "sufficiently alleges the requisite 'pattern' of constitutional violations by untrained employees to establish deliberate indifference for purposes of failure to train." *Id.* at *4. As to the argument about clearly established law, this Court held that because Parker alleged LeBlanc "knew of the delays in prisoners' timely releases," he, *as of May 4, 2017*, had "'fair warning' that [his] failure to address this delay would deny prisoners like Plaintiffs their immediate or near-immediate release upon conviction." *Id.* at *5 (quoting *Crittindon*, 37 F.4th at 186).

In other words, this Court already determined that LeBlanc does not get qualified immunity for mistakes his employees made prior to Taylor's appeals to DPSC staff for help. And this Court already said that distinguishing overdetention notice based on whether it was about "miscalculations of his sentence" as opposed to "misclassification as a sex offender" is wrong, since both resulted from "deficiencies of implemented policies that routinely led to errors" leading to violations of constitutional rights. *Id.* at *4.

In denying qualified immunity to LeBlanc, the Court relied on *Crittindon*, another case involving overdetentions in Louisiana prisons. *Crittindon* too constituted

clearly established law for the purposes of this case, with the Court holding, specifically as to LeBlanc, that his "awareness of this pattern" of overdetentions in the summer of 2016 and his "conscious decision not to address [them] rises to the level of deliberate indifference." *Crittindon*, 37 F.4th at 187-88.[15]

Even *Hicks*, a case that LeBlanc won, should have provided him with fair warning. That case had a broken causal chain between LeBlanc and a DPSC employee who, in February 2017, retaliated against an inmate by refusing to properly provide a time served credit. 832 F. App'x at 842. Nonetheless, this Court acknowledged that, back in 2017, "LeBlanc could be held liable for incompetent over-detention, such as the failure to process a prisoner's release or immediately compute an inmate's sentence after being sentenced to time served." *Id.* at 842. After all, "processing delays, data errors, inconsistent calculation methodologies, and unspecified deficiencies . . . speak to the incompetence of DPSC employees and the lack of adequate training and supervision." *Id.*

---

[15] Given this Court already held in *Crittindon* that, as of 2016, LeBlanc *did have* fair warning that his failure to fix overdetentions would violate due process when DPSC doesn't timely communicate with local jails about processing sentencing paperwork, 37 F.4th at 187-88, it is hard to see how LeBlanc *didn't have* fair warning that his failure to fix overdetentions would violate due process when DPSC itself makes a mistake calculating a release date, as is the case here. The latter is more in LeBlanc's control than the former. *C.f. Whirl*, 407 F.2d at 792, *supra*, at 48.

LeBlanc states that Taylor can point to nothing beyond "the obvious" constitutional principle that "inmates have a right to be timely released from prison." App. Br. 25. But he is wrong. First, Taylor has much more than that. *Whirl*, *Parker*, *Crittindon*, and *Hicks* all clearly hold that a jail supervisor can be held liable for failing to implement policies that would ensure a timely release from jail. Second, even if all that Taylor could point to was this obviousness principle, he could still defeat LeBlanc's claim to qualified immunity, because "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741 (cleaned up); *see also Villarreal*, 44 F.4th at 367 ("[A]s the Supreme Court has repeatedly held, public officials are not entitled to qualified immunity for obvious violations of the Constitution.").

In the end, LeBlanc knows that the law has been clearly established as to his unconstitutional behavior. Just two months ago, he petitioned for certiorari in *Crittindon,* in a last-ditch attempt to reverse this Court's holding that, otherwise, "is likely to have an outsized impact on the host of cases currently pending." Petition for Writ of Certiorari at 3, *Crittindon*, 37 F.4th 177 (No. 22-1171). Why is it likely to have an outsized impact? Because *Crittindon*, and now *Parker*—and *Whirl* and *Hicks* before them—all clearly establish that a jailer like LeBlanc can't fail to implement much needed policies and training despite clear notice about egregious problems and

get away with it. "The law does not hold the value of a man's freedom in such low regard." *Whirl*, 407 F.2d at 792.

CONCLUSION

The district court ruling denying LeBlanc qualified immunity at this motion to dismiss stage should be affirmed.

Dated: August 1, 2023.

Respectfully submitted,

/s/ Anna Bidwell
Anna Bidwell (TX Bar No. 24101516)
Patrick Jaicomo
Jaba Tsitsuashvili
INSTITUTE FOR JUSTICE
901 North Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org
pjaicomo@ij.org
jtsitsuashvili@ij.org

Donna Unkel Grodner
GRODNER & ASSOCIATES
2223 Quail Run Drive, Suite B1
Baton Rouge, LA 70808

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Anna Bidwell
Lead Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits of Federal Rule of Appellate Procedure 32(a)(7) because it contains 12,888 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief document complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Equity font.

/s/ Anna Bidwell
Lead Counsel for Plaintiff-Appellee