Case No. 10-15332

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORNELIUS ALSTON; GARY AULD; DARREN D. BAJO; KEVIN BROOKS; WALTER DEGUAIR; DANILO DIMAPOLIS; RANDAL GOUVEIA; FOE LIULAMA; ADRIAN LUCERNO; ERIC MILLER and JAMIE TAFOYA,

Plaintiffs-Appellees,

v.

THOMAS READ and NETTIE SIMMONS,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Hawaii
(Hon. Samuel P. King, United States District Judge)

PETITION FOR REHEARING AND REHEARING EN BANC

Jack Schweigert
LAW OFFICE OF JACK SCHWEIGERT
550 Halekauwila Street, Room 309
Honolulu, HI 96813
(808) 533-7491

Scott Michelman
Paul Alan Levy
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff-Appellee Cornelius Alston

December 28, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

RULE 35(b)(1) STATEMENT

Plaintiff-Appellee Cornelius Alston seeks en banc reconsideration because the panel decision conflicts with prior decisions of this Court, *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985) (en banc) and *Alexander v. Perrill*, 916 F.2d 1392 (9th Cir. 1990), so en banc rehearing is "necessary to secure and maintain uniformity of the court's decisions." F.R.A.P. 35(b)(1)(A).

INTRODUCTION

The Hawaii Department of Public Safety ("DPS") held Cornelius Alston in prison for nearly five months beyond the expiration of his criminal sentence because the DPS officials responsible for sentence calculations refused to investigate Alston's reasonable claim that, as part of a massive DPS project that entailed the recalculation of hundreds of state sentences, the officials had improperly postponed his release date.

In both *Haygood* and *Alexander*, this Court held that prison officials violate an inmate's Eighth Amendment rights when they overdetain him because they refuse to investigate the inmate's claim that his sentence has been miscalculated. Under *Haygood* and *Alexander*, the duty to investigate arises when an inmate makes a reasonable claim that raises a substantial question as to the correctness of his release date; an inmate's claim need not be clearly meritorious on its face in order to warrant investigation. But the panel opinion holds that prison officials do

not have a clearly established duty to investigate a reasonable overdetention claim unless the inmate comes forward with documentary evidence proving his right to release. By applying a much higher standard than this Court has applied for a quarter of a century under *Haygood* and *Alexander*, the panel opinion effectively reads those decisions out of this Court's jurisprudence.

This case presents an even clearer instance of deliberate indifference to an inmate's rights than *Haygood* or *Alexander*. In those cases, discovering the proper release date would have required prison officials to perform a complex legal analysis that required guidance from the state's highest court (*Haygood*) or to second-guess a higher Bureau of Prisons authority (*Alexander*); here, all defendants had to do was reconsider their own calculation in light of a document they could have easily found on the electronic docket. In failing to follow *Haygood* and *Alexander*, the panel replaced the rule of those cases with one of its own devising. The result is an intra-circuit conflict, which this Court should resolve en banc.

BACKGROUND

Defendant Thomas Read, the Offender Management Administrator at DPS, "is the State official ultimately responsible for determining release dates of State prisoners (or at least the official responsible for interpreting court orders or judgments that imposed terms of imprisonment)." *Alston v. Read*, 678 F. Supp. 2d

1061, 1066 (D. Haw. 2010) ("*Alston I*").[1] Effective January 1, 2005, Read changed DPS practice regarding the interpretation of judgments imposing multiple sentences on a single defendant. *Id.* at 1066-67. Prior to 2005, DPS treated sentences imposed on different dates as presumptively *concurrent* rather than consecutive. *Id.* at 1065-66. In 2005, Read reversed that presumption, apparently to bring DPS into compliance with a state statute establishing *consecutive* sentencing as the default rule for multiple sentences on different dates. *See id.* at 1065-67 (discussing the pre-2008 version of Hawaii Revised Statutes ("H.R.S.") § 706-668.5).[2] Under that statute, the presumption of consecutiveness arose only if the court did not indicate whether an individual's sentences should run concurrently or consecutively; if the court specified one or the other, the court's decision controlled. *Id.* at 1065 ("'Multiple terms of imprisonment imposed at different times run consecutively *unless the court orders that the terms run concurrently.*'" (quoting the pre-2008 version of H.R.S. § 706-668.5) (emphasis altered)). To implement its new policy, DPS recalculated sentences and altered release dates for

---

[1] Given the voluminous record, thorough fact findings by the district court, and the panel's failure to find any of those factual determinations clearly erroneous, this petition will where possible cite facts in the district court's published decision.

[2] The statute was amended in 2008 and now conforms to the *pre*-2005 DPS practice, *i.e.*, a default presumption of concurrent, not consecutive, sentences. The 2008 change is not retroactive. *See id.* at 1067 n.4.

Hawaii inmates on a broad scale; for instance, defendant Nettie Simmons, a member of Read's staff at DPS, estimated that she conducted a hundred recalculations in 2007 alone. *Id.* at 1072.

As a result of one such recalculation, the state held plaintiff Cornelius Alston in prison for nearly five months past his proper release date. In 1997, Alston was convicted of two drug offenses (hereinafter "the 1997 case"); at that time, he was already serving a 10-year sentence in a prior case ("the 1987 case"). *Id.* at 1067-68. His sentence in the 1997 case is governed both by a Judgment of Conviction issued in November 1997 (the "Judgment"), and a more specific Findings of Fact, Conclusions of Law, and Order Imposing Mandatory Minimum Term of Imprisonment for Repeat Offender Sentencing issued in December 1997 (the "Order"). *Id.* at 1068. The Judgment sentenced Alston to 10 years for Count One of the 1997 case and 5 years for Count Two, noted the applicable mandatory minimums, and stated, "Sentences are to run concurrently." *Id.* The Order elaborated that these sentences were "to run concurrent with each other and any other sentence Defendant is serving." *Id.* Then-applicable H.R.S. § 706-668.5 did not require the sentencing judge to address the concurrent/consecutive question in any particular document (Judgment or Order); he merely had to "order[]" that the sentences run concurrently, which he did in the Order. Based on Alston's

concurrent sentences for the 1987 and 1997 cases, and giving appropriate credit for time served, Alston was set to be released August 4, 2007. *Id.*

When Defendants Read and Simmons recalculated Alston's sentence in 2007 under Read's new policy, the officials were in possession of the Judgment in the 1997 case, but not the Order. *Id.* at 1068-69. Read and Simmons interpreted the Judgment's statement that "Sentences are to run concurrently" to mean that Alston's two 1997 sentences were to run concurrently with each other but not with the 1987 sentence, rather than (as clarified in the Order) that the 1997 sentences were supposed to run "concurrent with . . . any other sentence [Alston] is serving." *See id.* at 1068-69.

Less than two months before Alston's scheduled release, Defendants Read and Simmons informed Alston by letter that his release date had been changed to November 17, 2011, because the sentences from the 1997 case were to run consecutively to the sentence from 1987 case, rather than concurrently. *Id.* at 1068-69. Alston was not provided a hearing at which he could contest this change. *Id.* at 1076.

When Alston received the letter from Read and Simmons, he was serving his Hawaii sentence at a facility in Mississippi. *See id.* at 1069. In a series of letters, he protested that DPS had made a mistake and his sentences were supposed to be concurrent. *Id.* Although Alston did not attach copies of either the Judgment or the

Order, he correctly identified the error as stemming from the concurrent/consecutive distinction, and he provided the case numbers of both the 1987 and 1997 cases, his sentencing dates, and the name of his judge in the 1997 case. *Id.* As the district court found, Read and Simmons also had extrinsic reasons to take Alston's concern seriously:

> Defendants knew the prior practice [regarding concurrent and consecutive sentences] differed. They changed it. They could have inferred that prior judgments would reflect that prior practice and could be worded incompletely[.]

Id. at 1078. Moreover, "Alston's was certainly not the *first* occurrence of an 'over detention,'" *id.* at 1072 (emphasis in original)—a fact that might have put Read and Simmons on notice that problems were occurring. *See id.* at 1073.

Nonetheless, Read and Simmons did little in response to Alston's letters. They simply "'took a second look'" at what they had already reviewed. *Id.* at 1069 (quoting Simmons deposition). They did not look for any other court order regarding Alston's sentence or review the court docket sheet. *Id.* at 1070. Although they were aware that state law required an additional explanatory sentencing document in the record because of the mandatory minimum, they did not look for that document either. *See id.* at 1070 nn. 5-6 (quoting Read and Simmons depositions).

Alston ultimately obtained a court order clarifying that all of his sentences were supposed to run concurrently as ordered by the court in the 1997 case. *Id.* at

1072 & n.9. Alston was released on December 27, 2007, after serving 145 days beyond his August 4 release date. *Id.*

Alston and other similarly situated plaintiffs have sued Read and Simmons alleging (among other claims) deliberate indifference under the Eighth Amendment and denial of due process under the Fourteenth Amendment. *Id.* at 1063-64. Read and Simmons sought summary judgment as to Alston; the district court granted the motion with respect to two state-law claims but otherwise denied the motion, holding that Read and Simmons were not entitled to qualified immunity. *Id.* at 1064-65. The panel's opinion now reverses the qualified immunity ruling; the panel holds that there is no clearly established duty to investigate a claim of overdetention unless the inmate provides specific documentary evidence supporting the claim. *Alston v. Read*, No. 10-15332, slip op. at 20989 (9th Cir. Dec. 14, 2011) ("*Alston II*") (attached as an Appendix to this petition).

ARGUMENT

The panel opinion contradicts the holdings in *Haygood* and *Alexander*.

In *Haygood*, this Court, sitting en banc, unanimously held that "[d]etention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of 'deliberate indifference,'" 769 F.2d at 1354, and deliberate indifference exists where prison officials, "after being put on notice, simply refuse[] to investigate a computational error." *Id.* at 1355. Haygood (like

Alston) had written to a prison official questioning whether his sentence should be running consecutively or concurrently. *Id.* at 1353. The en banc Court upheld a jury verdict in Haygood's favor on his Eighth Amendment deliberate indifference claim, *id.* at 1354-55, even though "[t]he errors in Haygood's sequence of serving the various sentences did not become manifest until after the California Supreme Court had subjected a complex web of sentences, statutes and regulations to sophisticated scrutiny," *id.* at 1353. The Court also held that due process required state officials to provide an inmate a hearing before it could "extend his custodial period." *Id.* at 1358.

In *Alexander*, this Court reaffirmed *Haygood*'s rule—that "prison officials who are under a duty to investigate claims of computational errors in the calculation of prison sentences may be liable for their failure to do so when a reasonable request is made," 916 F.2d at 1398—and also held that this duty was clearly established such that officers who violate it do not enjoy qualified immunity. *See id.* at 1398-99. The plaintiff in *Alexander* had originally been arrested and detained in Germany, and his dispute over his imprisonment term in the United States turned on whether his time in German custody should count toward his American sentence. The Court held that prison officials could not, without further inquiry, rely on a memorandum from the Bureau of Prison's Central Office concerning the treatment of Alexander's detention in Germany;

rather, the officials had a clearly established duty to investigate Alexander's overdetention claim. *See id.* at 1394, 1398-99. Although Alexander had provided the officials with documentary evidence supporting his claim, Alexander's challenge to his sentence calculation, like Haygood's before him, "was not clearly meritorious from the face of the objections he lodged with the prison officials." *Id.* at 1398. What triggered the duty to investigate was that "a reasonable request," *id.*, had "raised a substantial question" regarding Alexander's sentence, *id.* at 1399.

The application of *Haygood* and *Alexander* to Alston's case is clear. Alston's letters told Read and Simmons the reason their calculation was incorrect, the case numbers for both his 1987 and 1997 cases, and the judge whose orders would vindicate Alston's claim. His letters constitute a "reasonable request" that "raised a substantial question" about the length of his sentence and thus triggered defendants' duty to investigate. *Id.* at 1398-99. As an inmate without access to court files, imprisoned thousands of miles away, Alston could not realistically have done more. Additionally, defendants knew that a massive recalculation program was ongoing, and they knew Alston's file should have contained an additional document. Defendants are the officials responsible for correctly calculating Alston's sentence. But "after being put on notice, [they] simply refused to investigate a computational error." *Haygood*, 769 F.2d at 1355. *Haygood* and

Alexander clearly established a duty to investigate reasonable claims of overdetention, and defendants violated that duty here.

The panel's decision is flatly inconsistent with *Haygood* and *Alexander*. Even under the panel's narrow framing of the issue—"whether a reasonable official would have known that he or she had a duty to investigate an overdetention claim in these circumstances *by obtaining the prisoner's original courthouse file*," *Alston II*, slip op. at 20988 (emphasis added)—qualified immunity was inappropriate. *Haygood* and *Alexander* do not limit the duty to investigate to a particular mode of inquiry. In fact, those cases required far *more* of state officials than would have been necessary to investigate Alston's claim. The defendants in *Haygood* would have had to perform a complex legal analysis that ultimately required guidance from the state's highest court, and the defendants in *Alexander* would have had to second-guess the office within the Federal Bureau of Prisons responsible for applying foreign jail credits. Here, all Read and Simmons had to do was reconsider their own calculation in light of a document that they could have easily discovered by looking at the state court's electronic docket system.[3]

[3] *See* CR/ER 49-27 to -31 (case docket obtained from the electronic record system). If a user visits http://hoohiki1.courts.state.hi.us, clicks "Enter," then searches for case number 1PC97-0000506, Alston's 1997 case will appear. Clicking "Document List" calls up the docket, which lists as document 38 the "Findings of Fact, Conclusions of Law, and Order Imposing Mandatory Minimum

(footnote continues next page)

The panel attempts to distinguish *Haygood* and *Alexander* on the ground that Alston presented no documentary evidence. *Id.* at 20989. But neither the presence nor the quality of evidence was a dispositive consideration in *Haygood* or *Alexander*. The *Haygood* opinion does not suggest the inmate presented any evidence at all, and *Alexander* spelled out that neither case involved a claim that was plainly meritorious *on its face*. 916 F.2d at 1398. The panel's approach would require Alston, imprisoned thousands of miles away in Mississippi, to produce or identify with precision smoking-gun evidence that would prove his claims. *See Alston II*, slip op. at 20989 (faulting Alston for "fail[ing] to present any documentary evidence" and for naming the wrong document—the Judgment, not the Order—as the source of his claim). The panel thus replaces the Court's decades-old, common sense standard for triggering a duty to investigate—a "reasonable request" that "raise[s] a substantial question" about the length of the sentence, *Alexander*, 916 F.2d at 1398-99—with a substantially different and much higher standard that would be prohibitively difficult for most incarcerated individuals to meet. Absent intervening higher authority, a three-judge panel cannot overrule the law of the Circuit. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

Term for Repeat Offender Sentencing." Once a corrections official had learned of the document's existence, he or she could surely obtain it from the court.

The panel also attempts to distinguish *Haygood* on the ground that Haygood asked his keepers to apply state law whereas Alston "argued . . . that Read and Simmons should not have applied the relevant state statute." *Alston II*, slip op. at 20989. Alston argued nothing of the kind; he simply claimed, like Haygood, that his sentence had been miscalculated. Moreover, Hawaii law's presumption of consecutiveness did *not* apply if "'the court order[ed] that the terms run concurrently.'" *Alston I*, 678 F. Supp. 2d at 1065 (quoting the pre-2008 version of H.R.S. § 706-668.5). In Alston's case, the court had done precisely this. Thus, like Haygood, Alston was simply asking state officials to apply state law.

The panel repeatedly notes that DPS did not possess the Order containing the clarifying language that *all* of Alston's sentences were to run concurrently. *See Alston II*, slip op. at 20983, 20988; *see also id.* at 20989 (noting the "file appear[ed] complete"). This fact is hardly exculpating. Under state law, it was *DPS* that had the responsibility to make sure the file was complete in the first place. *See* H.R.S. § 353-12 (providing that "the director" of DPS "shall establish a record of all facts relating to the admission, sentence [and] . . . discharge . . . of any committed person" and requiring the director to keep a file of "all warrants, mittimuses, processes, and other official papers, or the attested copies of them, by which any committed person has been committed, paroled, liberated, or retaken"). And even if DPS did not have this responsibility under state law, what *Haygood*

and *Alexander* establish is the official's constitutional duty to *investigate* the inmate's claim—a task that surely includes considering all relevant court orders.

The panel's opinion also contravenes *Haygood* by refusing to apply its due process holding to Alston's Fourteenth Amendment claim, which he argued in the district court and has maintained on appeal. In addition to recognizing the duty to investigate, *Haygood* held that an inmate whose sentence is extended is entitled to a hearing prior to this additional deprivation of liberty. 769 F.2d at 1358. It is uncontested that Alston did not receive such a hearing, *Alston I*, 678 F. Supp. 2d at 1076; defendant Read believed it would be "a wasted process," *id.* at 1076 n. 11 (quoting Read deposition). The panel grants qualified immunity without even considering defendants' violation of Alston's clearly established due process right.

This is not a borderline case in which it might reasonably be disputed whether these particular defendants are responsible. *See Alexander*, 916 F.2d at 1399-1400 (Kozinski, J., dissenting) (disagreeing not with the rule, but with its application to local officials who were "helpless" because the responsibility lay with higher BOP officials). Here, two officials with the power and responsibility of calculating correct sentences for Hawaii inmates simply ignored an inmate's reasonable claim that they had make a mistake. As the district court found, defendant Read "is the State official ultimately responsible for determining release dates of State prisoners (or at least the official responsible for interpreting court

orders or judgments that imposed terms of imprisonment)." *Alston I*, 678 F. Supp. 2d at 1066. Under *Haygood* and *Alexander*, Read and Simmons had a clear duty to investigate Alston's reasonable claim, not just reiterate their contrary position.

Of course, the *Haygood*/*Alexander* rule is not without limit. As this Court recently held in *Stein v. Ryan*, No. 10-16527, 2011 WL 5607646 (9th Cir. Nov. 18, 2011), prison officials are not charged with the responsibility of undertaking *sua sponte* review of the legality of a sentence as if they were a reviewing appellate court. *See id.* at *2-*4. Unlike *Stein*, however, Alston's case falls comfortably within the heartland of the *Haygood*/*Alexander* rule.

Although Read and Simmons cannot have known for sure whether Alston's miscalculation claim was correct without further investigation, they had at least as much reason as the defendants in *Haygood* and *Alexander*—if not more reason—to take Alston's claims seriously. Read and Simmons were in the midst of a massive recalculation of sentences, and they knew to expect many requests for reconsideration. SER 16. As the district court found, "Alston's was certainly not the first occurrence of an 'over detention.'" *Alston I*, 678 F. Supp. 2d at 1072 (emphasis deleted). Read and Simmons knew Alston's claim related to the very aspect of sentencing—the distinction between concurrent and consecutive sentences—that was the focus of the recalculation policy. They had a duty to maintain a comprehensive inmate file (which should have included the Order),

H.R.S. § 353-12, and they knew that because of the mandatory minimum the file should have contained an explanatory document in addition to the Judgment. *See Alston I*, 678 F. Supp. 2d at 1070 nn. 5-6. Alston provided them with all the information they needed to investigate his claim: all they had to do was call the court or check the electronic docket. The defendants' failure to take action in such circumstances showed deliberate indifference under *Haygood* and *Alexander*.

Under this Court's precedent, defendants were required to take reasonable steps to prevent "the kind of nightmare those of us involved in administering our penal system take great pains to avoid—undeserved punishment because of a bureaucratic blunder." *Alexander*, 916 F.2d at 1399 (Kozinski, J., dissenting). Put more simply, "'You just can't sit on your duff and not do anything.'" *Alexander*, 916 F.2d at 1395 (quoting with approval the district court's decision in that case). By granting defendants immunity for doing precisely that, the panel contravenes the holdings in *Haygood* and *Alexander*. The panel opinion thus creates an intra-circuit split regarding the standard that applies to an inmate's claim of overdetention under the Eighth Amendment. En banc rehearing is needed to set Circuit case law in order. *See* F.R.A.P. 35(a)(1).

CONCLUSION

The Court should grant rehearing en banc.

December 28, 2011

Respectfully submitted,

/s/ Jack Schweigert

Jack Schweigert
LAW OFFICE OF JACK SCHWEIGERT
550 Halekauwila Street, Room 309
Honolulu, HI 96813
(808) 533-7491

/s/ Scott Michelman

Scott Michelman
Paul Alan Levy
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff-Appellee Cornelius Alston

CERTIFICATE OF SERVICE

I certify that on December 28, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jack Schweigert

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached petition for panel rehearing and rehearing en banc is proportionally spaced, has a typeface of 14 points, and contains 3,596 words.

/s/ Scott Michelman

APPENDIX: COPY OF PANEL DECISION

Alston v. Read, No. 10-15332, slip op. (9th Cir. Dec. 14, 2011)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORNELIUS ALSTON; GARY AULD; DARREN D. BAJO; KEVIN BROOKS; WALTER DEGUAIR; DANILO DIMAPOLIS; RANDAL GOUVEIA; FOE LIULAMA; ADRIAN LUCERNO; ERIC MILLER; JAMIE TAFOYA, *Plaintiffs-Appellees,* v. THOMAS READ; NETTIE SIMMONS, *Defendants-Appellants.*	No. 10-15332 D.C. No. 1:07-cv-00266-SPK-LEK OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, Senior District Judge, Presiding

Argued and Submitted
October 13, 2011—Honolulu, Hawaii

Filed December 14, 2011

Before: Diarmuid F. O'Scannlain, Richard C. Tallman, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

John F. Molay, Deputy Attorney General, Department of the Attorney General, State of Hawaii, argued the cause for the defendants-appellants and filed the brief. Attorney General Mark J. Bennett and Deputy Attorneys General Caron M. Inagaki and Kendall J. Moser, Department of the Attorney General, State of Hawaii, were also on the brief.

Jack Schweigert, Jack Schweigert, PLC, Honolulu, Hawaii, argued the cause for the plaintiffs-appellees and filed the brief. Rory Soares Toomey, Rory S. Toomey Law Office, Honolulu, Hawaii, and Shannon Parrott, Honolulu, Hawaii, were also on the brief.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether state prison officials had a clearly established duty to seek out original court records in response

to a prisoner's unsupported assertion that he was being over-detained in violation of the United States Constitution.

I

A

Cornelius Alston was twice sentenced to a term of imprisonment in the Hawaii state prison system under two separate, unrelated sentencing orders. He was convicted of second-degree robbery in 1991. While on parole from the robbery sentence in 1997, he was convicted of two counts of promoting a dangerous drug and was sentenced to ten years in prison on the first count and five on the second. The judgment, issued November 20, 1997, stated: "Sentences are to run concurrently." Alston's release date was calculated as August 4, 2007, by the Offender Management Office of Hawaii's Department of Public Safety ("DPS").

On December 10, 1997, the sentencing judge ordered that Alston's sentences for the drug offenses "run concurrent with each other and any other sentence Defendant is serving." There is no evidence that DPS ever received a copy of this order.

Until 2005, DPS had a practice of treating sentences issued at different times for different crimes as concurrent unless the judgment for the later crime stated that they were to be served consecutively. Such practice was inconsistent with Hawaii state law, which, when Alston was sentenced, required that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently." Haw. Rev. Stat. § 706-668.5(1) (2007). To conform the Department's practice to state law, Thomas Read, the Administrator for DPS's Offender Management Office, implemented a new policy beginning January 1, 2005, that treated sentences issued at different times for different crimes as consecutive unless the judgment stated that they

were to be served concurrently. Thus, sentences of prisoners sentenced before 2005 were reviewed and, where necessary, recalculated.

In June 2007, Nettie Simmons, a litigation coordination specialist working under Read's supervision, sent Alston a letter telling him that his sentence had been recalculated to conform to Hawaii state law. His new maximum term release date was set for November 17, 2011—more than four years later than his original release date.

Alston wrote several letters complaining that his new release date was incorrect. In a July 2007 letter, he argued that because the November 1997 judgment stated that his sentences were "to run concurrently," DPS should not have applied section 706-668.5 of the Hawaii Revised Statutes when calculating his release date. In a letter signed by both Simmons and Read, Simmons explained:

> You are correct in that your sentence for Cr. No. 97-0506 [drug-related convictions] does state 'sentences are to run concurrently' which refers to the two counts in that criminal case alone, and both are running concurrently. However, pursuant to HRS § 706-668.5, the sentence term in Cr. No. 97-0506 imposed on November 20, 1997 shall run *consecutive* to Cr. No. 87-0457 [robbery conviction], which was imposed at a different time.

Alston sent two subsequent letters alleging that his November 1997 sentence and conviction were incorrect. He stated in one letter: "Judge Herbert K. Shimabukuro: On 11-20-97, sentenced me to 10 years in prison on count # 97-0506 to run 'concurrently.' . . . The mistake is that Mr. [sic] Nettie Simmons of D.P.S. applied the HRS 706-668.5 consecutive sentence statute to my case. I was not given any consecutive term." He followed this letter with another that made several new allegations not at issue here and again claimed that his

sentence was not supposed to be consecutive. Simmons, in a letter also signed by Read, responded in relevant part:

> The Department of Public Safety (PSD) interprets all legal documents received from courts according to state law and does not have any authority over the judges [sic] decisions or the judiciary.
>
> . . . [A]n audit was conducted back in June 2007 to ensure the accuracy of your sentence computation. During our review, it was determined that your sentence computation was computed in error which resulted in a wrong maximum release date.
>
> At this time, no adjustments to your maximum release date will be done. In addition, an amended judgment for Cr. No. 97-0506 is needed from the courts stating your time to 'run concurrent with any time currently serving' in order for PSD to update our records.

On Alston's behalf, the Office of the Public Defender then successfully sought an amended judgment, which was issued on December 27, 2007. Alston was released that same day.

B

Alston and a group of allegedly similarly situated state prisoners brought suit under 42 U.S.C. § 1983 against Read and Simmons in the district court for the District of Hawaii alleging that they were overdetained in violation of federal and state law. Read and Simmons moved for partial summary judgment as to Alston's claims only.

The district court granted the motion with respect to the claims of state law violations but otherwise denied it. The court found that there were genuine issues of fact as to whether Alston had been deprived of meaningful process in

violation of the Due Process Clause of the Fourteenth Amendment and whether Read and Simmons had acted with deliberate indifference in response to Alston's overdetention claim in violation of the Eighth Amendment.

The district court further concluded that it could not grant either officer qualified immunity at the summary judgment stage because there were questions of material fact as to whether Read and Simmons had conducted a proper investigation of Alston's claim that his sentence was incorrectly calculated. Read and Simmons timely filed this interlocutory appeal of the denial of qualified immunity.

II

[1] Read and Simmons contend that the district court erred in denying them qualified immunity. Alston responds that we lack jurisdiction over this appeal because the district court concluded that there were genuine issues of material fact for trial.

[2] When evaluating a denial of summary judgment on the issue of qualified immunity, our review is limited to the "purely legal issue whether the facts alleged . . . support a claim of clearly established law." *Moran v. Washington*, 147 F.3d 839, 843 (9th Cir. 1998) (internal quotations omitted). We may not review a district court's denial of summary judgment "insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* (quoting *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995)). In other words, we "lack[ ] jurisdiction over an interlocutory appeal challenging the sufficiency of the evidence supporting the trial court's conclusion that an issue of fact exists." *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) (citing *Johnson*, 515 U.S. at 313).

[3] But Read and Simmons are not contesting the district court's conclusion that genuine issues of fact exist for trial.

Rather, they are appealing the purely legal issue of whether they violated Alston's clearly established federal rights. *Compare Johnson*, 515 U.S. at 307-08, 315 (concluding that there was no "final" decision to review where the record "raised a genuine issue of fact concerning [defendants'] involvement"), *with Moran*, 147 F.3d at 844-45 (finding jurisdiction even though the district court concluded that there were genuine issues of material fact because the defendant was not asserting that there was insufficient evidence but rather that the district court had misapplied the law). Thus, we conclude that we possess appellate jurisdiction over this appeal under 28 U.S.C. § 1291. *See Moran*, 147 F.3d at 844.

III

A

[4] Government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity inquiry is two-pronged. We must ask whether "the officer's conduct violated a constitutional right" and whether "the right was clearly established" at the time of the alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). We may conduct this two-pronged inquiry in any order. *See Pearson*, 555 U.S. at 236. Alston bears the burden of showing that the right at issue was clearly established. *See Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002) (citing *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993)).

For a constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It is not sufficient to allege the violation of "abstract rights."

Id. at 639. Rather, the right the officials are alleged to have violated must be " 'clearly established' in a more particularized, and hence more relevant, sense." *Id*. at 640; *see also Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) (concluding that while the plaintiff had the right to be free from wrongful incarceration, the relevant qualified immunity inquiry was whether the plaintiff had provided any evidence that a reasonable official in the defendant's position would have known that by failing to monitor state appellate court decisions for changes to the law, he would be violating the plaintiff 's constitutional rights).

Applying these principles here, we must determine whether Read and Simmons would have understood that they were violating Alston's right to be free from wrongful incarceration by failing to review his court file to ensure that they had received all relevant court documents in his case. Viewing the facts in Alston's favor, Read and Simmons had notice only that possibly hundreds of prisoners had sentences recalculated under DPS's change in policy contrary to the unexpressed intent of sentencing judges unaware of the policy change. Alston's institutional file contained a copy of the November 1997 judgment, which was silent as to whether the sentence was to run concurrent or consecutive with previous sentences. Alston's recalculated sentence, based on the information in the judgment, conformed to Hawaii state law. The institutional file did not contain the December 10, 1997, order, of which neither the prison officers nor Alston were aware until after Alston's release ten years later.

[5] The relevant inquiry is thus whether a reasonable official would have known that he or she had a duty to investigate an overdetention claim in these circumstances by obtaining the prisoner's original courthouse file.

B

Alston contends that Ninth Circuit precedent establishes such a duty. He points first to *Haygood v. Younger*, 769 F.2d

1350 (9th Cir. 1985) (en banc), which concluded that an overdetention caused by the erroneous calculation of a prisoner's release date had violated the prisoner's Eighth and Fourteenth Amendment rights. But in that case, the defendant-officials "after being put on notice, simply refused to investigate a computational error." *Id*. at 1355 (internal quotations omitted). Here, Read and Simmons confronted materially different circumstances. Whereas Haygood challenged the officials' interpretation of the state statutes under which his sentence was calculated, *id*. at 1353, Alston argued only that Read and Simmons should not have applied the relevant state statute and failed to present any documentary evidence that Read and Simmons were misinterpreting his sentences. Indeed, Read and Simmons were trying to *correct* the computation of his sentence to make sure it conformed to unambiguous state law.

Alston also cites *Alexander v. Perrill*, 916 F.2d 1392 (9th Cir. 1990), which affirmed the denial of summary judgment on the issue of qualified immunity where a prisoner was overdetained after the defendant-officials "made no inquiries [and] conducted no investigation" in response to the prisoner's objection that his credit for time served had been erroneously reduced. *Id*. at 1393-94. Unlike the prisoner in *Alexander*, who "offered verified court documents and other proof" in support of his overdetention claim, *id*. at 1399, Alston's letters referred Read and Simmons only to the November 1997 judgment that was already in his institutional file. As Simmons and Read reasonably explained in their letter to Alston, that judgment did not support Alston's claim that his sentence was erroneously calculated.

[6] Thus, neither *Haygood* nor *Alexander* establishes a duty to obtain a prisoner's court file where the institutional file appears complete, the sentence was appropriately recalculated under state law, and the prisoner has presented no evidence to the contrary. Read and Simmons were entitled to rely on the state statute and the original judgment received from the court in their sentencing calculations and were not

required to go in search of additional courthouse records that might affect Alston's sentence beyond what was initially received from the court for inclusion in DPS's institutional file. *See Stein v. Ryan*, No. 10-16527, ___ F.3d ___, 2011 WL 5607646, at *4 (9th Cir. Nov. 18, 2011) ("Prison officials may properly assume that they have the authority to execute the sentencing orders delivered to them by the court without fear of civil liability.").

IV

[7] We conclude that there is no clearly established duty on a prison official to review a prisoner's original court records beyond those in his institutional file on the facts of this case. Thus, Read and Simmons are entitled to qualified immunity.

REVERSED and REMANDED for proceedings consistent with this opinion.