No. 09-416

IN THE

Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et. al.*,

Appellants,

v.

MARCIANO *PLATA* AND RALPH *COLEMAN*, *et. al.*,

Appellees.

Appeal from the United States District Courts
For the Eastern District of California and
The Northern District of California

JOINT MOTION TO DISMISS OR AFFIRM APPEAL OF STATE DEFENDANTS

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Counsel for Coleman Appellees

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621
Counsel for Coleman and Plata Appellees

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QUESTIONS PRESENTED

1. Whether the court below clearly erred when it found that prison "crowding is the primary cause of the violation of a Federal right," 18 U.S.C. § 3626(a)(3)(E)(i), and whether it was error for the court below to apply the legal definition of "primary cause" urged by the State appellants.

2. Whether, after finding that prison overcrowding is the primary cause of the constitutional violations, and that reducing crowding is a prerequisite to remedying the violations, the court below clearly erred by ordering the State to develop a plan to reduce the prison population.

3. Whether the single judge courts in *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger* clearly erred when they found that the factual predicates had been satisfied for establishing a three judge district court pursuant to the Prison Litigation reform Act ("PLRA"), 18 U.S.C. § 3626 (1996).

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Pursuant to Rule 18.6, appellees move to dismiss the appeal or affirm the order below on the ground that the appeal is premature and the questions raised are so insubstantial as not to need further argument.

JURISDICTION

The State invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1253. For the reasons described *supra* at 7-9, this Court lacks jurisdiction.

STATEMENT OF THE CASE

The overcrowding in California's prisons is unprecedented. The prisons were built to house 80,000 prisoners. State App. 57a. They now house nearly double that number. State App. 9a. Some prisons are crowded to 300% of capacity. State App. 10a. No other state faces a comparable crisis. In 2006, Governor Arnold Schwarzenegger declared a State of Emergency because the severe prison crowding "has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them" making prisons places of "extreme peril to the safety of persons." App. 2a, 14a. He declared that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding." App. 12a. The State of Emergency is still in effect. State App. 62a.

The most visible consequence of the gap between the number of prisoners and the capacity of the prisons is the overuse of "ugly" beds—more than ten thousand double and triple bunks "crammed into gyms and dayrooms that were never meant to be

used for housing." State App. 100a (quotation marks omitted); *see also* App. 19a-23a (photographs of ugly beds). The former head of Texas prisons testified that "'[i]n more than 35 years of prison work experience, I have never seen anything like it.'" State App. 100a.

According to a former high-ranking California prison official: "the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat.... [I]t is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time." State App. 84a-85a.

Nowhere is this risk of catastrophic failure felt more acutely than in the health care system.

California prisons are unable to provide even minimally adequate health care – there are too few clinical facilities to screen and treat the vast number of prisoners who need care, too few medical and mental health beds to house prisoners in crisis, too few primary care doctors and mental health professionals to treat ill prisoners, too few medical or mental health specialists to meet the needs of the overwhelming number of prisoners who need such care, too few custody officers to escort prisoners to medical or mental health visits, completely overwhelmed medication delivery systems and record keeping systems, and textbook breeding grounds for outbreaks of infectious diseases and for mentally ill prisoners to decompensate. As a result, the serious medical and mental health needs of prisoners are unmet, or are mistreated and prisoners become sick and die at an alarming rate. State App. 141a-142a.

1. This appeal arises out of two separate actions to remedy unconstitutional health care in the

prisons, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*. The *Plata* plaintiffs, prisoners with serious medical needs, filed suit in 2001 claiming that the State is failing to provide constitutionally adequate medical care. State App. 13a. The State agreed to a settlement in 2002, conceding that the prison conditions are unconstitutional and judicial oversight is necessary under the PLRA. 6/13/02 Stipulation and Order, ¶29 (*Plata* Docket 68). However, "defendants proved incapable of or unwilling to provide the stipulated relief." State App. 14a.

The *Coleman* plaintiffs, prisoners with serious mental disorders, filed suit in 1990 challenging the constitutionally inadequate mental health care in California prisons. State App. 32a. After trial, the district court in 1995 found the mental health care system so deficient as to violate the Eighth Amendment of the United States Constitution. State App. 33a. The district court entered well over seventy orders over the course of fourteen years in a futile attempt to remedy the violations. State App. 38a-39a, 142a.

The reason constitutional violations have persisted for decades despite intensive judicial oversight is straightforward: prison overcrowding. State App. 141a-142a, 295a-296a, 299a, 304a. The *Coleman* Special Master stated "[o]ver the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." Exh. P-35 at 16-17, State

App. 41a.[1] According to the *Plata* Receiver, "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels." Exh. P-55 at 1, 11/3/08 Order at 12 (*Plata* Docket 1757) (granting judicial notice).

2. In November 2006, after the Governor issued his state of emergency proclamation, App. 1a, the plaintiffs in both cases filed motions to convene a three-judge court to consider population reduction remedies pursuant to the PLRA. State App. 62a-63a. Both courts delayed hearing these motions to give the Receiver and Special Master an opportunity to report about the impact of overcrowding on their remedial efforts, and both courts urged the State to use the delay to identify alternative remedies for the constitutional violations or overcrowding without judicial intervention. State App. 63a, 304a.

Both the Receiver and the Special Master reported that crowding stymies their remedial efforts.

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[1] The parties submitted their full sets of exhibits at once, and each party was provided an opportunity to object. *See* Trial Tr. 650-651. For the most part, the lower court did not rule individually on the offered exhibits, Trial Tr.11, but instead overruled all objections based on relevance and cumulativeness, Trial Tr. 650-651, and admitted all evidence cited in its August 4 order. 8/4/09 Order Re Evidentiary Matters at 1-2 (*Plata* Docket 2198). As to all other objections, the court did not rule. *Id.* Pursuant to Rule 24.5, in this Motion and appellees' Motion in related Case No. 09-553, appellees cite relevant pages of the August 4 opinion or to the transcript where such exhibit was admitted, as applicable. All other exhibits cited in appellees' motions that were not expressly admitted by the court are exhibits as to which no party interposed an objection.

Exhs. P-26, State App. 86a; P-27; D-1292, State App. 41a. The State, meanwhile, failed to develop other remedies on its own.

On July 23, 2007, the *Plata* and *Coleman* courts issued separate orders requesting that a three-judge court be convened. State App. 65a. On July 26, 2007, the chief judge of the Ninth Circuit Court of Appeals ordered, without objection, that a single three-judge court be convened to consider population reduction in both cases simultaneously, in the interests of consistency and judicial economy. State App. 69a.

Despite the urgency of the issues, the three-judge court stayed discovery and delayed consideration of this matter for more than seven months, referring the matter to a settlement referee to give the State another opportunity to resolve the crowding problem on its own. State App. 69a-70a. The State again failed to do so.

3. Commencing November 18, 2008, the lower court held fourteen days of trial and two days of closing argument. State App. 70a. The court issued a tentative ruling on February 9, 2009, *id.*, and issued the order on appeal on August 4, 2009, requiring the State to draft a population reduction plan. State App. 255a-256a. Only after further proceedings will the lower court issue its final order requiring the State to reduce its prison population. *Id.*

The court found that plaintiffs have demonstrated all elements required by the PLRA for issuance of a prisoner release order. State App. 253a-254a. It found that "clear and convincing evidence establishes that crowding is the primary cause of the

unconstitutional denial of medical and mental health care to California's prisoners." State App. 82a. Defendants' mental health expert, Dr. Packer, conceded this point. Trial Tr. 1092:23-1094:6. "In [his] opinion, the primary cause of the constitutionally inadequate mental health care in California's prisons is that California 'now has many more acutely mentally ill individuals and at a level of more severity than had been anticipated when the prisons were built' and that the existing prison space was 'not designed to meet the needs' of a mentally ill population." State App. 138a (quoting Packer). The current and two past directors of CDCR all concede that crowding adversely affects nearly every aspect of prison operations, including the provision of health care. State App. 82a-84a.

The court also found and concluded that "[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future." State App. 168a (quotation marks omitted).

4. The court then addressed appropriate relief. Relying on testimony from State prison officials, county jail administrators, the former head of the California prison system, and the former heads of the Texas, Pennsylvania, Washington State, and Maine prison systems, the court concluded that "a cap of no higher than 137.5% is necessary." State App. 169a, 175a-181a. A reduction to 137.5% of design capacity amounts to a population reduction of 40,000

prisoners. 11/12/09 State Plan at 1 (*Plata Docket* 2274-1). The court ordered the State to develop a plan to accomplish such a reduction. State App. 255a-256a.

The court gave substantial consideration to potential impacts of the reduction in the prison population, and found that the evidence shows that "the state could comply with [its] population reduction order without a significant adverse impact upon public safety or the criminal justice system's operation." State App. 187a-188a.

In developing a population reduction plan, the State "would not be required to throw open the doors of its prisons, but could instead choose among many different options or combinations of options for reducing the prison population." State App. 173a-174a. Those methods include providing good time credits to prisoners; diverting low-level, low-risk offenders and parole violators who clog prison reception centers but spend very short periods of time in prison; and increasing rehabilitative programming to reduce the number of offenders coming to prison in the first place. State App. 192a-216a. Such measures have already been proposed by the Governor, and overwhelming testimony affirms that such measures "either have no impact on or reduce the recidivism rate" and therefore "would not adversely affect public safety." State App. 249a; *see also* State App. 196a-220a.

5. The State has conceded that it is possible to accomplish a reduction safely. State App. 317a. On November 12, 2009 the State submitted a plan to gradually reduce its prison population using the well-accepted, safe methods examined by the three-judge

court, among others. 11/12/09 State Plan. The parties' comments on the State's plan are due December 7, 2009. 11/18/09 Order Inviting Responses (*Plata* Docket 2275).

THIS APPEAL IS PREMATURE

The State's appeal is premature just as its request for a stay was premature. Repeating arguments from its unsuccessful stay application, the State mischaracterizes the August 4 order on appeal as a "prisoner release order." *See* State's Jurisdictional Statement ("J.S.") 2, 11. It also contends that, if allowed to stand, the three-judge court's order "will obtain no review at all." J.S. 11. These arguments fail.

The August 4 order is not a prisoner release order; it merely requires the State to develop a plan for reducing the prison population. State App. 255a-256a, 307a. It contemplates several interim steps to occur before the three-judge court issues a "prisoner release order," State App. 256a, which may affect what any such order ultimately requires. This process is underway and incomplete.

Subsequent acts since this Court's denial of the State's stay application underscore the contingencies that separate the August 4 order from an actual prisoner release order. Rather than abide by the import of this Court's denial of its stay request, the State failed to submit a population reduction plan in accordance with the August 4 order, and instead filed a grossly inadequate plan which was promptly and appropriately rejected. 10/21/09 Order (*Plata* Docket 2269). Only after the three-judge court implicitly threatened the State with contempt did the State

submit a plan that approaches compliance with the August 4 order. The three-judge court will consider the parties' comments on this plan before issuing a "prisoner release order." 11/18/09 Order Inviting Responses.

This Court correctly recognized the preliminary posture of the district court proceedings when it denied the State's stay request. See *Schwarzenegger v. Coleman*, No. 09A234, 2009 WL 2915066, at *1 (U.S. Sept. 11, 2009). This Court took "note of the fact that the three-judge court has indicated that its final order will not be implemented until this Court has had the opportunity to review the district court's decree." *Id.* This Court thus recognized that the State will have an opportunity to appeal any "final order." *Cf. Alabama Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 363 (1951) (declining to address three-judge court's issuance of temporary restraining order).

More generally, prudential concerns counsel against exercising jurisdiction. This Court has interpreted § 1253 with an eye to the "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzales*, 419 U.S. at 98; *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970). The August 4 order's description of future proceedings raises the prospect of "piece-meal appellate review" disfavored by the Court. *Goldstein*, 396 U.S. at 478. The Court's intervention at this early stage would, in effect, splinter appellate proceedings and foreclose the possibility of resolving all issues at once. *See, e.g., Citizens United v. F.E.C.*, 128 S. Ct. 1732 (2008) (dismissing appeal for want of jurisdiction after having directed briefing on

jurisdiction under § 1253); *Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring) (writ of certiorari improvidently granted because "more ... issues might well remain in this case").

The Court should decline appellate review at this juncture and dismiss the State's appeal. If and when appellants appeal from a final order, appellees will support an expedited briefing schedule in this Court to promote quick resolution.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Even if the Court has jurisdiction at this preliminary stage, the Court should summarily affirm the August 4 order.

The striking thing about this case is the narrowness and fact-intensive nature of the disputed issues. Despite the State's invocation of federalism principles, there is no question that there are federal constitutional violations that require judicial oversight of the California prison system. The only dispute is over what form the relief will take. Moreover, most of the underlying disputes are questions of degree.

This case is not about whether the State is currently violating the Eighth Amendment rights of appellees. The State admits in *Plata* that there are "current constitutional violations" and that while it challenges particular remedies, it does not seek to terminate judicial oversight. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. Sept. 16, 2009) (audio recording of oral argument at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003923, at minutes 9:53-10:13). Nor has

the State sought to terminate judicial oversight in *Coleman*. Under the PLRA, judicial oversight *must* be terminated if there are no "current and ongoing violation[s]" of federal rights. 18 U.S.C. § 3626(b)(2), (3).

The State also concedes that crowding is one cause of the current constitutional violations. Trial Tr. 2953:6-2954:5 (closing argument). Its main dispute is with the lower court's finding that crowding is the "biggest" cause. *Id.*

The State likewise agrees that crowding imperils the health of inmates, App. 14a, that reducing crowding immediately is essential, *id.*, and that it can safely reduce the prison population to 137.5% of design capacity. State App. 317a. Nonetheless, it challenges the precise contours and timeframes for an order requiring such reduction.

Finally, the State admits that the single judge district courts had previously issued orders for less intrusive relief over a period of two decades, but disputes whether the lower court was convened after giving the State a "reasonable" amount of time to comply with earlier orders.

Each of these are questions of fact, and on each the lower determinations will be reviewed for clear error. Fed. R. Civ. P. 52(a)(6); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Because the State has failed to identify a single factual finding it argues was erroneous, the order below must be affirmed.

I. The Three-judge Court Correctly Applied The State's Proposed Definition Of "Primary Cause."

The lower court's finding that overcrowding is the "primary cause" of the ongoing constitutional violations does not present a substantial question for review.

It does not involve a substantial question of *law* because the lower court's interpretation of the term "primary cause"– the "cause that is 'first or highest in rank or importance; chief; principal'"–was adopted verbatim from the definition proposed by the State. State App. 78a-79a; J.S. 19.

Nor does the State's appeal involve a substantial question of *fact*. The State has conceded here that crowding "can exacerbate the deficiencies that caused the constitutional violations." J.S. 23. Below it conceded that prison overcrowding is *one of the causes of those constitutional violations*. Trial Tr. 2953:6-2954:5 (closing argument).

The only question left is the degree to which crowding, as opposed to other factors, is causing the violations. *Id.* The State argues that "the record belies" the lower court's conclusion that crowding is the primary cause, and that in fact crowding is merely a "secondary" or "contributing" cause. J.S. 18, 19, 23. That question is highly fact-intensive, and will be reviewed for clear error. *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

A. Overwhelming Evidence Supports The Three-Judge Court's Finding That Crowding Is The Primary Cause Of The Constitutional Violations.

The three-judge court's conclusion that the evidence at trial "overwhelmingly establishes . . . that crowding creates numerous barriers to the provision of medical and mental health care that result in the constitutional violations" was not clear error. State App. 80a-81a.

The State's expert conceded that crowding is the primary cause of some of the violations at issue in this case, Trial Tr. 1092:23-1094:6, and the current and former Secretaries of California's prison system affirm that crowding is a major impediment to remedying the conditions. Trial Tr. 1683:11-20, 1684:5-16; Woodford Supp. Report ¶ 3.

One former head of corrections in California testified that she "'absolutely believe[s]'" the primary cause of the medical deficiencies is overcrowding. State App. 126a. The former head of Texas prisons agreed, as did the top corrections officials in Pennsylvania, Washington and Maine. State App. 126a-128a.

That consensus reflects the reality that the unprecedented level of overcrowding in California prisons is an insuperable obstacle to solving the problems of constitutionally deficient mental and physical health care. The following supporting findings are uncontested:

- *Crowding Causes Deadly Delays in Emergency Response.* Because of the extremely crowded living conditions, it can be nearly impossible for prison staff

to identify or respond adequately to medical emergencies. Trial Tr. 380:1-381:7, 382:14-383:3. One former Secretary of CDCR described how a prisoner was killed in the middle of a crowded gymnasium converted to overflow housing. Because the gym was so crowded, prison staff didn't even know about the death – much less provide emergency medical aid – for hours. Trial Tr. 382:2:-383:3.

• *Lack of Space to Deliver Health Care.* The three-judge court found that "[o]ne of the clearest effects of crowding is that the current prison system lacks the physical space necessary to deliver minimally adequate care to inmates." State App. 85a. One former Secretary of CDCR testified that "the lack of space is not only a housing issue, but it's impacting other factors, like delivery of healthcare services, the lack of offices, and clinical space." Tilton Dep. 80:11-15.

• *Shortage of Medical Beds for Acutely Ill Prisoners.* Defendants' expert testified that prisoners are denied adequate care because of a shortage of medical housing for acutely ill prisoners. Exh. D-1019 at 11, State App. 82a; State App. 91a-92a. With shocking regularity during 2007 and 2008, mentally ill prisoners killed themselves days or weeks after clinicians prescribed immediate placement in crisis beds that the prisoner never reached because there were too few crisis beds for the number of prisoners who need them. *See, e.g.*, Exh. P-447-R at 215-19; Stewart Report ¶ 173; P-564-R; Stewart Supp. Report ¶¶ 100, 109-110; P-575-R.

• *Mental Health of Prisoners Deteriorates in Crowded Prisons.* Prisoners' mental health deteriorates when they live in the packed, noisy,

dangerous conditions caused by overcrowding, and this in turn increases the demand for mental health services in an already overwhelmed system. The mental health bed shortages "have created a destructive feedback loop that is now endemic to the CDCR's mental health care delivery system. Inmates denied necessary mental health placements 'are decompensating and are ending up in mental health conditions far more acute than necessary .... creat[ing] a cycle of sicker people being admitted, with greater resources necessary to treat them, which then creates even further backlog in an already overwhelmed system.'" State App. 99a.

• *Increased Lockdowns Due to Crowding Impede Access to Care.* Because the prisons are so crowded, inmate control becomes more difficult, and prison administrators rely heavily on lockdowns to exert control. State App. 116a-117a. During lockdowns, prisoners are unable to leave their housing units to go to health clinics; instead, medical staff must go cell-to-cell to see prisoners. State App. 117a-118a. This results in serious delays in access to care, and inadequate care. State App. 116a-188a.

• *Crowding Exacerbates Mental Illness.* Also during lockdowns – and in crowded prisons generally – mentally ill prisoners decompensate or become suicidal, placing further strain on mental health resources. State App. 118a, 121a-123a. Both State and plaintiff experts described in detail the deteriorating mental health of prisoners subjected to extended lockdowns and crowded conditions, some of whom attempted suicide, and all of whom required crisis level care but could not receive it because the prisons are so crowded there are simply not enough

beds. Haney 8/15/08 Report ¶¶ 164-167, 257-260; Trial Tr. 354:25-355:17, 1105:13-1106:25, 1107:1-20.

• *Crowding Results in Inadequate Screening of New Prisoners.* Prison reception centers, where prisoners are processed on arrival, are so crowded that they have no place to properly screen new prisoners. As a result, prisoners' "health needs are not identified" and "cannot be treated. In addition, inmates whose needs are not identified may be placed in a setting that will exacerbate existing but unidentified health problems." State App. 89a, 87a-88a.

• *Spread of Infectious Diseases.* As the Governor proclaimed, overcrowded living conditions increase the risk of transmission of infectious diseases. App 2a; State App. 101a-102a.

• *Shortages of Health Care Staff.* Because the prisons are overcrowded, there are simply too few health care practitioners to address the basic needs of prisoners. State App. 104a-109a. Overcrowded prisons provide such "uninviting" working conditions that prisons cannot recruit or retain enough staff. State App. 154a.

• *Overwhelmed Medication Management Systems, Medical Records Systems, and Specialist Referral Systems.* The sheer number of prisoners housed in institutions built for half that number has overwhelmed the prisons' medication management system, its medical records system, and its ability to provide specialty medical care. State App. 112a-121a. As a result, the prisons are unable to deliver the right medication to the right prisoner in a timely manner, State App. 112a-114a, to identify what health care services a prisoner may need. State App.

118a-121a, or to provide urgent specialty care to prisoners who need it. State App. 114a-116a.

• *Prisoners Are Dying From Inadequate Care.* As a direct result of all of these problems caused by crowding, there are "unacceptably high numbers of both preventable or possibly preventable deaths, including suicides, and extreme departures from the standard of care." State App. 123a. Prison suicides have been steadily rising in California, with crowding-related causes among the major contributing factors. Exh. D-1014 at 2, D-1281 at 680, State App. 124a. Within days of each other in early 2007, two prisoners hanged themselves at the prison system's highest-acuity mental health unit; the cells where they were housed were in such high demand due to crowding that the prison could not take them off line to remove "attachment points" for hanging that were involved in prior suicides. Trial Tr. 769:5-775:17, 778:19-779:13; Exhs. P-588-589.

In sum, the evidence overwhelmingly establishes and the lower court correctly found that the "[t]he crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace." State App. 140a. The "only conclusion that can be drawn from the wealth of clear and convincing evidence . . . is that the unconstitutional denial of adequate medical and mental health care to California's inmates is caused, first and foremost, by the unprecedented crowding in California's prisons." State App. 143a.

B. The State Fails To Raise Any Substantial Question Regarding The Definition Of "Primary Cause."

The State attempts to manufacture a legal dispute about the meaning of the statutory term "primary cause." J.S. 18-23.

For the first time in this litigation, the State now argues that "primary cause" means the "but for" cause. J.S. 20. But it is far too late for the State to be proposing a new definition. After all, the three-judge court adopted verbatim the definition of "primary cause" proposed by the State below. State App. 78a-79a. The State cannot now argue for a different definition. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Even if the Court could consider a legal argument raised for the first time on appeal, the new definition of "primary cause" proposed by the State is not consistent with the statute. And even if the State's new definition were correct, it is satisfied here: the lower court's findings demonstrate that the violations would not have continued but for the overcrowding. *See, e.g.,* State App. 145a, 155a.

The State argues that because crowding exacerbates constitutional violations, it must be merely a "secondary" cause. J.S. 23. Not only does this point defy logic, but it raises a question of fact that the lower court resolved against the State.

The State also contends that overcrowding cannot be the "chief" cause of the constitutional violations because there are other causes of the violations. J.S. 19. But the State acknowledged that to satisfy the statute, crowding need not be the "only" cause, it must simply be the "biggest cause." Trial Tr.

2960:12-15 (closing argument). As the three-judge court correctly found, the PLRA's use of the term "primary" to modify "cause" indicates that Congress understood that there can be multiple causes. State App. 79a.

Finally, the State argues that crowding cannot be the primary cause because reducing the population will not, by itself, "largely" cure the constitutional violations. J.S. 19-21. Under those circumstances, according to the State, crowding can only be a "contributing factor" or a "secondary" cause. J.S. 19, 23. But that argument too ignores the possibility of multiple causes, each of which contribute to the problem. Congress did not prohibit courts from granting relief from overcrowding unless that remedy alone would cure all constitutional deficiencies, and its "primary cause" language recognizes the possibility of multiple contributing causes.

The State's construction would lead to absurd results and raise questions about the statute's constitutionality because it would prevent a court from remedying the main cause of a constitutional violation unless the relief would also simultaneously resolve all deficiencies. That was not Congress' intent.

The three-judge court put it succinctly: "The PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional deficiencies found to exist in *Plata* and *Coleman*. All that the PLRA requires is that a prisoner release order be a necessary part of any successful remedy. If all other potential remedies will be futile in the absence of a prisoner release order, 'no other relief will remedy the violation.'" State App. 144a (quoting

18 U.S.C. § 3626(a)(3)(E)(ii)). The statute is satisfied when a prisoner release order is *necessary* but not *sufficient* to remedy the violation. State App. 134a.

Nonetheless, as a practical matter, eliminating crowding will "largely extinguish" the constitutional violations. J.S. 21. Once crowding is reduced, the *Plata* Receiver and the State will be able to implement court orders already in effect, and to correct ongoing constitutional violations. *See* State App. 158a-159a.

C. The State Was Not Prohibited From Gathering Or Introducing Any Evidence About Current Conditions.

The State complains, falsely, that it was "prohibited from gathering and introducing evidence" regarding current conditions in the prisons, and "prevented" from "showing that the previously existing federal violations had been mitigated or even remedied in the interim by measures directed at other causes." J.S. 25.

At the same time, however, the State concedes in *Plata* that there are "current constitutional violations" and it has never sought to terminate judicial oversight in either *Plata* or *Coleman*, as would necessarily occur if the constitutional violations had been remedied. 18 U.S.C. § 3626(b)(2), (3).

The State does not cite to any point in the record where it was barred from introducing a single item of evidence. *See* J.S. 24 (citing State App. 77a (court declined to rule on constitutionality), 78a n.42 (court declined to permit evidence "relevant *only* to determining whether the constitutional violations

found by the *Plata* and *Coleman* courts were 'current and ongoing'")) (emphasis added); J.S. 25 n.8 (citing similar statements by court during pretrial conference and trial); *see also* 8/4/09 Order Re Evidentiary Matters (*Plata* Docket 2198).

The State introduced voluminous evidence about current conditions within the prisons in connection with its contentions that overcrowding is not the primary cause of some of the violations and that other relief will remedy the violations. The lower court admitted this evidence and considered it for those proper purposes.

The State's medical and mental health experts toured the prisons, including only weeks before trial; viewed the medical facilities; interviewed medical personnel and other prison staff, as well as prisoners; and reported and testified about the conditions they found. *See, e.g.*, Exhs. D-1016, D-1017, D-1019, State App. 82a, D-1020; Trial Tr. 1071-1143, 1191-1253. The State introduced evidence about current health care statistics, current medical and mental health care staffing, and institutional populations. *See, e.g.*, Exhs. D-1233; D-1149, D-1259-1, D-1235-2; Trial Tr. 1272:12-21. The State also introduced into evidence the reports of the *Coleman* Special Master and the *Plata* Receiver, which include extensive discussion of current conditions in the prisons. *See, e.g.*, Exhs. D-1087-D-1100, State App. 150a, D-1106, D-1224-1231, D-1110-1112, D-1292, State App. 41a, D-1293, D-1294, D-1108, State App. 49a. State witnesses, including key officials in charge of prisons and prison medical and mental health care, presented exhaustive testimony about current conditions, including the extent of overcrowding in the system,

staffing levels, the use of ugly beds, medication management problems, suicides and other deaths, and health care expenditures. *See, e.g.*, Exhs. D-1000-1002, D-1004-1008, Trial Tr. 836-944, 1891-1940, 1668-1709, 1734-1772, 755-823, 724-754; Brewer Dep. 135:5-138:5.

Having failed to identify a single piece of evidence on this point that was not admitted, and having never made an offer of proof as to any such evidence, the State cannot prove any error or prejudice from the three-judge court's evidentiary or discovery rulings.

Nor was the State precluded from *gathering* any evidence about current conditions in the prisons. State officials control the prisons and its documents and information; the State's experts had full access to tour the prisons, to talk to prison medical staff, and to review all relevant data and information in the possession of the prison medical staff and Receiver. *See, e.g.*, 9/5/08 Fama Decl. ISO Plf's Response to Def. Request for Evidence ¶¶ 2-5 & Exh. A (*Plata* Docket 1453); Thomas 2008 Report at 1; Packer 8/15/08 Report at 1-2.

Indeed, the State neglects to mention that it obtained the fifteen specific items of data that it claimed were the "best evidence" of the current "status of the delivery of medical care and the Receiver's plans for implementing improvements in medical care." 8/29/08 Def. Req. for Evidence at 4 (*Plata* Docket 1436). The Receiver issued a public report that provided each item of data requested by the State, and the court held that such report would be admissible at trial. 9/5/08 Order (*Plata* Docket 1450). Thus, the State was not prevented from

obtaining or submitting any of the information it described as the "best evidence" of current conditions.

While the three-judge court allowed the State to gather and introduce evidence about current conditions within the prisons, it nonetheless properly limited the scope of its review to the question of remedy.

Under the PLRA, the proceedings in the three-judge court were solely about whether to enter a prisoner release order to remedy the ongoing constitutional violations that the single judge courts had found to exist. 18 U.S.C. § 3626(a)(3)(E). The questions whether there is a constitutional violation in the first place, whether there is still an ongoing constitutional violation after the passage of time, and whether prospective relief should be maintained or terminated, are questions reserved to the single judge district courts. 18 U.S.C. § 3626(a), (b), (e). Accordingly, the three-judge court held that it did not have authority to re-determine the underlying liability question. State App. 77a-78a. The State does not contest this legal conclusion.

That is not to say that the State was precluded from proving that it had eliminated the constitutional violations: any such arguments were properly directed at the single judge district courts. The three-judge court invited the State, if it contended that the constitutional violations had been remedied, to bring that matter before the single judge district courts in an appropriate proceeding. Pretrial Conf. Tr. 28-29 (Nov. 10, 2008); *see also* 18 U.S.C. § 3626(b). The State still has not done so.

II. The Order Below Provides The Least Intrusive Means To Remedy The Constitutional Violations, And Is Narrowly Tailored.

1. The State's charge that the court "invad[ed] [] the State's managerial prerogatives" and violated fundamental principles of federalism because it "direct[ed] the prisoner release order at *all* prisoners in California" (J.S. 28) is plainly wrong. The lower court did not direct its order at any prisoners – it acted consistent with the procedures adopted by this Court in *Bounds v. Smith*, 430 U.S. 817, 832-833 (1977) and refined in *Lewis v. Casey*, 518 U.S. 343, 361-363 (1996), by deferring to the State to determine the method by which the population will be reduced, and hence which prisoners will be affected. State App. 255a-256a. As the lower court correctly found, this approach provides "the deference to state expertise required by the PLRA and *Lewis* and limits this court's intrusion into 'the minutiae of prison operations.'" State App. 175a (citations omitted). This Court directed the lower courts to employ this approach precisely because it allows the State to exercise "wide discretion within the bounds of constitutional requirements." *Lewis*, 518 U.S. at 363 (citation omitted).

The State benefitted from the deference and flexibility provided by the lower court, and it submitted a plan that would reduce the population of all prisoners, not just class members. State App. 312a, 339a. Accordingly, it can hardly claim that its

prerogatives have been infringed or that principles of federalism have been violated.[2]

2. The State next complains that the three-judge court exceeded its authority by "impos[ing] an inflexible population cap" and timeframe for implementing the cap. J.S. 26. But in the court below, the State argued that the three-judge court *must* impose a precise population cap and set the timeframe for implementing the cap, and that the court could not in its order defer to the State to recommend appropriate limits. Trial Tr. 2970:8-14, 2968:18-23. The court followed the State's suggestion, and set just such a cap. The State cannot now claim that what it invited was legal error.

The lower court specifically requested that the parties inform the court what an appropriate cap would be, and how long it would take to implement it. Trial Tr. 2857:17-21; 2858:22-2859:1. The State never provided any such information. Only plaintiffs submitted evidence and argument on this point. 1/28/09 Plfs' Corr. Proposed Findings of Fact at 172-178 (*Plata* Docket 2038).

Nor does the State have any basis for contesting the court's determination to cap the population at 137.5% of design capacity. The State does not argue that 137.5% is the *wrong* cap; its complaint is about the methods the lower court used to reach 137.5%. But the court's methods were sound.

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[2] Furthermore, an appropriate remedy for a systemwide violation caused by overcrowding could include reducing the overall prison population. *See* appellees' Joint Motion to Dismiss or Affirm in Case No. 09-553 at 20-21.

First, numerous current and former corrections administrators testified that even at 100% of design capacity, the prisons would face serious difficulty providing constitutionally adequate health care. State App. 176a-197a. State prisons were built to provide health care at 100% of design capacity, and must operate below that level to preserve space to transfer medically-needy prisoners to appropriate beds. State App. 176a-179a.

Nonetheless, the former Secretary of California's prison system testified that the maximum level of crowding at which the State could provide adequate health care is 130% of design capacity. Woodford Supp. Report ¶ 3. 130% is also the absolute maximum crowding level identified by a key State official in charge of prison facilities. State App. 180a. The former heads of state prison systems in Texas, Pennsylvania, Maine and Washington likewise testified that 130% is the maximum crowding level at which the State could provide constitutionally adequate health care. State App. 180a-181a.

In light of the evidence at trial, the three-judge court would have been well within its discretion to set the population cap at 130% of design capacity. Nonetheless, in an abundance of caution, and out of deference to the State, the court set a still more conservative cap of 137.5%. State App. 184a.

The State's quarrel is with the calculus by which the court *increased* the cap from the 130% level identified by all experts who testified about the subject. That the court acted conservatively, in order to preserve as much discretion as possible to the State, does not present a substantial question warranting this Court's review.

3. The State's claim that the lower court erred by failing to give adequate consideration to public safety is also meritless.

The PLRA requires that courts considering granting any prospective relief in prison cases "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). The lower court did just that. It found that methods exist by which the State could reduce its prison population without adversely affecting public safety or the criminal justice system. State App. 185a-187a. Those methods include, among others, good time credits that shorten length of stay in prison, and diverting certain low-level, low-risk offenders away from prison. State App. 192a-216a. The State does not claim that these findings were erroneous, and indeed proposes to reduce the prison population using precisely these methods. 11/12/09 State Plan.

The State has already admitted that it can "safely reach a population of 137.5%" of design capacity, and the Governor has proposed a plan to the State legislature to do just that. State App. 317a; J.S. 11. The State does not deny that the Governor has recently declared that it could be done safely in two years. *See* Matthew Cate, *Prisons: It's Time to Reform and Reduce the Population, Capitol Weekly, August 13, 2009*, 10/8/09 Evenson Decl., Exh. B (*Plata* Docket 2258) (editorial by head of California prisons explaining Governor's plan to reduce prison population by 37,000 prisoners over two years). And the State concedes that the Governor would not propose any population reduction measures that are not safe. Trial Tr. 2984:7-2985:15.

Without acknowledging the findings made by the lower court – or its own admission about the safety of a gradual population reduction – the State posits that the lower court "candidly acknowledged that crime was likely to increase without substantial investment in 'evidence based, rehabilitative programming.'" J.S. 32. The opposite is true. State App. 185a-187a. The court found that "the state can comply with our order in a manner that will not adversely affect public safety." State App. 186a. The State does not claim that this, or any other finding, was in error.

The three-judge court found that though the population can be reduced without adversely impacting public safety, increasing rehabilitative programs–an idea espoused by the Governor, the State legislature, and all the local law enforcement intervenors–would "increase public safety over its current level." State App. 252a-253a. The State currently releases 10,000 prisoners every month without providing meaningful rehabilitation. State App. 128a-129a. Nevertheless, the court properly let the State decide whether to fund more rehabilitation programs. "Although California's prison population could be reduced without adopting or strengthening such local programs, the benefit to the State of investing in them would be considerable. Whether or not to make such an investment, however, is . . . a matter for state officials, not the court, to decide." State App. 235a; *see also* State App. 252a-253a (same).

III. The State's Jurisdiction Arguments Are Baseless, And This Court Has No Jurisdiction To Decide Them.

1. The State contends that the three-judge court did not have jurisdiction because the single judge *Plata* and *Coleman* courts erred when they found that the State had been given "a reasonable amount of time" to comply with their earlier, less intrusive orders. 18 U.S.C. § 3626(a)(3)(A)(ii). But any error by the single judges did not deprive the three-judge court of jurisdiction.

The three-judge court proceeding is not a separate action for which jurisdiction must be established anew, it is a remedial proceeding for the underlying *Plata* and *Coleman* cases. 18 U.S.C. § 3626(a)(3). The State does not dispute that the *Plata* and *Coleman* courts have jurisdiction. That being so, the three-judge court's jurisdiction is not in dispute.

The PLRA provides that if a court has previously entered an order for less intrusive relief, and "the defendant has had a reasonable amount of time to comply with the previous court orders," 18 U.S.C. § 3626(a)(3)(A), then a party seeking a prisoner release order can petition the district court to convene a three-judge court to consider a prisoner release order. 18 U.S.C. § 3626(a)(3)(C). These are merely procedural requirements, not jurisdictional mandates.

In this respect, the PLRA is very different from 28 U.S.C. § 2284(a), which provides that a three-judge court "shall be convened" in other types of actions. In cases brought pursuant to § 2284, the three-judge court considers the entire matter

presented, and the original single judge district court has no jurisdiction to consider the matter. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

In cases brought pursuant to the PLRA, the single judge district court has jurisdiction to consider all liability questions and all remedy questions save one (prisoner release order), and the only role of the three-judge court is to answer the narrow question whether a prisoner release order is an appropriate remedy. 18 U.S.C. § 3626(a), (a)(3).

It is undisputed that the single judge district courts followed the proper procedures in convening the three-judge court here. At issue, then, is whether the two single judge district courts each erred in their separate factual findings that the State had "a reasonable amount of time" to comply with the previous *Plata* and *Coleman* court orders. 18 U.S.C. § 3626(a)(3)(A)(ii).

That dispute, however, is a matter governed by this Court's certiorari jurisdiction, not its appellate jurisdiction. 28 U.S.C. § 1253 provides this Court with appellate jurisdiction only over "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Factual determinations in the single judge district courts' decisions to convene the three-judge court do not fall within this definition. Those are not determinations "granting or denying" an injunction, and they are not "required by any Act of Congress to be heard and determined by a district court of three judges." To the contrary, the PLRA

specifically reserves those questions to single judge district courts. 18 U.S.C. § 3626(a)(3)(C), (D).

Accordingly, the State's disputes with the single judge district courts' findings related to convening the three-judge court are matters to be resolved by the court of appeals, not this Court. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 99 (1974) (three-judge court's dismissal of matter for lack of standing is decision that could have been made by single judge district court, and therefore an appeal lies in the court of appeal, not the Supreme Court); *see also Dove v. Bumbers*, 497 F.2d 895, 896 ("a Court of Appeals has jurisdiction to determine whether a three-judge court was properly convened."); *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970) (same).[3] "While issues short of the merits – such as justiceability, subject-matter jurisdiction, equitable jurisdiction, and abstention – are often of more than trivial consequence, that alone does not argue for [this Court's] reviewing them on direct appeal." *Gonzalez*, 419 U.S. at 99. Instead, the matter should be heard by the court of appeals in the first instance,

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[3] Underscoring this point, two years ago the State appealed the single judge orders convening the three judge court to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal as premature, noting that the orders "can be effectively reviewed following the entry of a final order by the three-judge district court." *Coleman v. Schwarzenegger*, No. 07-16361, 2007 WL 2669591 at *1 (9th Cir. Sept. 11, 2007). The State did not seek certiorari. *C.f. Idlewild,* 370 U.S. 713 (considering on certiorari appellate court's determination that single-judge court correctly denied application to convene three-judge court).

and "[d]iscretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals." *Id.*[4]

2. Even if this Court had jurisdiction to consider the matter, the State's appeal fails to present a substantial question. The three-judge court conducted a lengthy trial in 2008, and issued its decision in 2009. Two years after its convening the court identified serious ongoing problems with medical and mental health care. *See, e.g.*, State App. 8a, 9a, 10a, 30a, 52a, etc. Indeed, the State has conceded in *Plata* that there are "current constitutional violations," *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. Sept. 16, 2009) (audio recording at 9:53-10:13), and it has never contested the *Coleman* court's findings of ongoing constitutional violations.

Thus, the State has had more than a reasonable amount of time to comply with the single judge courts' earlier orders, and the passage of time has made no difference. The State is still violating the constitutional rights of the plaintiff class members, and the courts need not wait even more time before ordering a remedy.

3. The State's argument that the *Coleman* court acted "prematurely" after issuing more than seventy-seven substantive orders over the course of fourteen years of post-judgment proceedings makes a mockery of the PLRA. J.S. 18, State App. 38a-39a.

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[4] Even if the question were one that this Court could resolve, the matter cannot be raised now, as this is an appeal from an interlocutory order.

It is undisputed that "defendants' mental health care delivery system has not come into compliance with the Eighth Amendment at any point since this action began [in 1990]." State App. 294a. Still, the *Coleman* court did not rush to convene the three-judge court. After plaintiffs filed the motion, the court stayed the matter and asked the Special Master for his opinion about the impact of crowding on his remedial efforts. He reported that crowding has resulted in shortages of programming space, beds for mentally ill inmates, and mental health staff, all of which result in the State's inability to meet even the basic mental health needs of prisoners, State App. 68a-69a, and that, "[o]ver the past 11-plus years, much has been achieved, and many of the achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair." Exh. P-35 at 16-17, State App. 41a.

The State contends that the lower court should have given it even more time to remedy mental health staffing shortages, develop alternate "bed plans," and address suicide prevention, as ordered by the court in 2006. J.S. 16-17. However, the passage of more time would have made no difference. Even at the time of trial in late 2008, there were still "staffing shortages 'at all clinical levels' of the CDCR's mental health care delivery system," including vacancies in the psychiatrist positions ranging from 30.6 percent to 54.1 percent. State App. 108a. Similarly, even though the *Coleman* court has issued more than a dozen orders aimed at eliminating the severe shortage of specialized beds for prisoners in need of higher levels of mental health treatment, State App. 43a-44a, the severe shortages persist today and "the

State has no current viable bed plan [and] is uncertain as to when [one] can be developed . . ." 3/5/09 Order 1:24-2:3 (*Coleman* Docket 3540); 9/24/09 Order at 3 (*Coleman* Docket 3686).

4. The State's arguments with respect to the *Plata* case are similarly unavailing.

In 2002, by stipulation, the *Plata* court entered an injunction designed to ensure minimally adequate medical care. 6/13/02 Stipulation and Order. However, "defendants proved incapable of or unwilling to provide the stipulated relief." State App. 14a.

In 2004, the *Plata* court, again by stipulation, entered another order requiring the State to remedy the unconstitutional conditions. 9/17/04 Stipulation and Order (*Plata* Docket 229). Again, the conditions were not remedied.

Over the intervening years, the district court employed myriad efforts to bring the State into compliance. State App. 17a-24a; 5/10/05 Order to Show Cause at 4-8 (*Plata* Docket 294); 10/3/05 Findings of Fact at 38-39 (*Plata* Docket 371).

It is true, as the State asserts, that plaintiffs *filed* their motion to convene the three-judge court seven months after the Receiver was appointed. What the State fails to mention is that the court did not *convene* the three-judge court for more than a year, and then only after the Governor had issued his emergency proclamation and the Receiver had stated that "[i]t will not be possible to raise access to, and quality of, medical care to constitutional levels with overpopulation at its current levels." Exh. P-55 at 1, 11/3/08 Order at 12 (*Plata* Docket 1757) (granting judicial notice).

The *Plata* court found that the conditions for convening a three-judge court had been met because "the Receiver will be unable to eliminate the constitutional deficiencies at issue in this case in a reasonable amount of time unless something is done to address the crowded conditions in California prisons," State App. 286a, and "'[t]he Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed.'" State App. 279a (citation omitted); State App. 281a-282a.

The *Plata* court was right on both counts. It is now three and a half years since the Receiver first took office, and the Receiver has still been unable to remedy the constitutional violations. Indeed, the State concedes that unconstitutional conditions remain, and that judicial oversight remains necessary. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. Sept. 16, 2009) (audio recording at 9:53-10:13).

In an ironic twist, at the very same time that the State is arguing here that the district court should have given the Receiver more time to fix the violations, the State is also arguing in the Ninth Circuit Court of Appeals that the district court must terminate the Receivership and the Receiver's plans on the grounds that both are prohibited by the PLRA. *Plata v. Schwarzenegger*, No. 09-15864 (9th Cir. oral argument held Sept. 16, 2009). If the State were right that the PLRA prohibits receivers, it could not also be true that the PLRA requires a district court to provide a receiver time to implement his remedies before convening a three-judge court to consider a

prisoner release order. The positions are simply inconsistent.

IV. This Case Will Have Limited Impact Beyond California.

The State asserts that any summary affirmance by this Court will have precedential affect. But it is well recognized that "[t]he Court gives less deference to summary dispositions." *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n*(1990); *see also Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979) (same); *see also Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 95 (1974) ("in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded considerably less than its usual weight").

Because the level of overcrowding in California is unprecedented, there are no serious legal issues in the case, no circuit splits, and the disputes between the parties are largely factual, a summary affirmance will have no significant impact beyond California.

On the other hand, a summary affirmance would protect the constitutional rights, as well as the lives and health, of the tens of thousands of plaintiff class members. For decades the State has dragged its heels and flouted the orders of the *Plata* and *Coleman* courts, and plaintiff class members have continued to suffer. As the lead defendant, Governor Schwarzenegger, stated:

> I don't blame the courts for stepping in to try to solve the health care crisis that we have, the overcrowding crisis that we have, because the fact of the matter is, for decades the state

of California hasn't really taken it seriously. It hasn't really done something about it.

Exh. P-384, Trial Tr. 650-51.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in appellees' Motion to Dismiss or Affirm in Case No. 09-553, the appeal should be dismissed or the order below should be affirmed.

Respectfully submitted,

Michael Bien
Jane E. Kahn
Ernest Galvan
Amy Whelan
Lisa Ells
ROSEN, BIEN & GALVAN, LLP
315 Montgomery St., 10th Fl.
San Francisco, CA 94104

Donald Specter
Counsel of Record
Steve Fama
Alison Hardy
Sara Norman
Rebekah Evenson
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, CA 94710
(510) 280-2621

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