No. 09-1232

IN THE
Supreme Court of the United States

CALIFORNIA STATE REPUBLICAN LEGISLATOR INTERVENORS, *et al.*,
Appellants,

v.

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

On Appeal from Orders of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

JURISDICTIONAL STATEMENT

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April 12, 2010

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QUESTIONS PRESENTED

1. Whether the three-judge court properly determined that crowding was the "primary cause" of continuing violations of prisoners' constitutional rights to adequate medical and mental health care, and that no remedy existed other than issuance of a prisoner release order pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, where the court simply assumed the continuing existence of violations based on determinations made years prior, refused to hear evidence regarding current prison conditions at the time of trial and disregarded evidence that constitutional levels of care could be achieved at the current prison population level.

2. Whether the system-wide prisoner release orders ("Prisoner Release Orders") issued by the three-judge court are "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [are] the least intrusive means necessary to correct the violation of the Federal right" in compliance with the PLRA, 18 U.S.C. § 3626(a)(1)(A).

3. Whether the three-judge court properly gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system" in ordering a reduction in population of approximately 46,000 inmates within two years in light of the existing seventy-percent recidivism rate for inmates in California and the lack of any mechanism in the Prisoner Release Orders to mitigate the effect of the ordered release.

PARTIES TO THE PROCEEDING

The California State Republican Senator and Assembly Intervenors (collectively the "Legislator Intervenors") appealing the Three-Judge Court's August 4, 2009 Opinion and Order and January 12, 2010 Order to Reduce Prison Population include the following California State Senators: Senators Samuel Aanestad, Roy Ashburn, James F. Battin, Jr., John J. Benoit, Robert Dutton, Dennis Hollingsworth, Bob Huff, Abel Maldonado, George Runner, Tony Strickland, Mimi Walters and Mark Wyland; and the following California Assemblymembers: Michael N. Villines, Anthony Adams, Joel Anderson, Bill Berryhill, Tom Berryhill, Sam Blakeslee, Connie Conway, Paul Cook, Chuck DeVore, Michael D. Duvall, Bill Emmerson, Jean Fuller, Ted Gaines, Martin Garrick, Danny Gilmore, Curt Hagman, Diane Harkey, Shirley Horton, Guy S. Houston, Kevin Jeffries, Rick Keene, Steven Knight, Dan Logue, Doug La Malfa, Bill Maze, Jeff Miller, Brian Nestande, Jim Nielson, Roger Niello, Sharon Runner, Jim Silva, Cameron Smyth, Todd Spitzer, Audra Strickland, and Van Tran.

The District Attorney Intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order and January 12, 2010 Order to Reduce Prison Population include the following: Rod Pacheco, District Attorney County of Riverside, Bonnie M. Dumanis, District Attorney County of San Diego, Tony Rackauckas, District Attorney County of Orange, Jan Scully, District Attorney County of Sacramento, Christie Stanley, District Attorney County of Santa Barbara, Michael A. Ramos, District Attorney County of San Bernardino, Robert J. Kochly, District Attorney County of Contra Costa, David W. Paulson, District Attorney County of Solano, Gregg Cohen, District

Attorney County of Tehama, Todd Riebe, District Attorney County of Amador, Bradford R. Fenocchio, District Attorney County of Placer, John R. Poyner, District Attorney County of Colusa, Michael Ramsey, District Attorney County of Butte, Gerald T. Shea, District Attorney County San Luis Obispo, Edward R. Jagels, District Attorney County of Kern, Gregory Totten, District Attorney County of Ventura, Vern Pierson, District Attorney County of El Dorado, Clifford Newell, District Attorney County of Nevada, Ronald L. Calhoun, District Attorney County of Kings, and Donald Segerstrom, District Attorney County of Tuolumne.

The Sheriff, Police Chief, Probation Chief and Corrections Intervenors appealing the Three-Judge Court's August 4, 2009 Opinion and Order and January 12, 2010 Order to Reduce Prison Population include the following: Amador County Sheriff-Coroner Martin Ryan, Butte County Sheriff Perry Reniff, Calaveras County Sheriff Dennis Downum, El Dorado County Sheriff Jeff Neves, Fresno County Sheriff Margaret Mims, Glenn County Sheriff Larry Jones, Inyo County Sheriff William Lutze, Kern County Sheriff Donny Youngblood, Lassen County Sheriff Steve Warren, Los Angeles County Sheriff Lee Baca, Merced County Sheriff Mark Pazin, Mono County Sheriff Rick Scholl, Monterey County Sheriff Mike Kanalakis, Orange County Sheriff-Coroner Sandra Hutchens, Placer County Sheriff Edward Bonner, San Benito County Sheriff-Coroner Curtis Hill, San Diego County Sheriff William Gore, San Joaquin County Sheriff-Coroner Steve Moore, San Luis Obispo County Sheriff Pat Hedges, Santa Barbara County Sheriff Bill Brown, Santa Clara County Sheriff Laurie Smith, Solano County Sheriff-Coroner Gary Stanton, Stanislaus County Sheriff-Coroner

Adam Christianson, Sutter County Sheriff- Coroner J. Paul Parker, Tehama County Sheriff Clay Parker, Tuolumne County Sheriff-Coroner James Mele, Ventura County Sheriff Bob Brooks, Yolo County Sheriff Ed Prieto, Yuba County Sheriff Steve Durfor, City of Fremont Police Chief Craig Steckler, City of Fresno Police Chief Jerry Dyer, City of Grover Beach Police Chief Jim Copsey, City of Modesto Police Chief Michael Harden, City of Pasadena Police Chief Bernard Melekian, City of Paso Robles Police Chief Lisa Solomon, City of Roseville Police Chief Michael Blair, Contra Costa County Chief Probation Officer Lionel Chatman, Fresno County Chief Probation Officer Linda Penner, Mariposa County Chief Probation Officer Gail Neal, Sacramento County Chief Probation Officer Don Meyer, San Luis Obispo Chief Probation Officer Jim Salio, Solano County Chief Probation Officer Isabelle Voit, Stanislaus County Chief Probation Officer Jerry Powers, and Ventura County Chief Probation Officer Karen Staples.

Plaintiffs Below:

Gilbert Aviles
Steven Bautista
Ralph Coleman
Paul Decasas
Raymond Johns
Joseph Long
Clifford Myelle
Marciano Plata
Leslie Rhoades
Otis Shaw
Ray Stoderd

California Correctional Peace Officers' Association, Intervenor-Plaintiff

District Court Defendants, and Appellants in Related Proceeding, Case No. 09-A234:

Governor Arnold Schwarzenegger
Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation

John Chiang, California State Controller
Michael Genest, Director of the California Department of Finance
Stephen W. Mayberg, Director of the Department of Mental Health

Other Intervenor-Defendants Below:

County of San Mateo
County of Santa Barbara
County of Santa Clara
County of Solano
County of Sonoma

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

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On Appeal from Orders of the Three-Judge Court in the United States District Courts for the Northern District of California and the Eastern District of California

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The three-judge court's August 4, 2009 Opinion and Order (Docket No. 2197 in C 01-1351 TEH; Docket No. 3641 in S-90-0520-LKK-JFM P) is not reported in an official publication. It may be found at 2009 WL 2430820 (E.D. Cal/N.D. Cal. Aug. 4, 2009). It is reprinted in the Appendix at 1a-256a.[1] The three-judge court's January 12, 2010 Order to Reduce Prison Population (Docket No.2287 in C 01-1351

[1] Citations to the "Appendix," or "App." in abbreviated format, refer to citations to Appellants' Appendix to the Jurisdictional Statement filed concurrently herewith.

TEH; Docket No. 3767 in S-90-0520-LKK-JFM P) is not yet reported in an official publication. It may be found at 2010 WL 99000 (E.D. Cal/N.D. Cal. Jan. 12, 2010). It is reprinted in the Appendix at 257a-266a.

JURISDICTION

The three-judge court entered its Opinion and Order on August 4, 2009. App. 1a-256a. That order granted injunctive relief pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626. In its August 4, 2009 Opinion and Order, the three-judge court ordered defendants to draft a prison population reduction plan. The defendants submitted a proposed population reduction plan on September 18, 2009, which would have reduced the prison population to 137.5% of design capacity within three years, as opposed to the two-year reduction dictated in the August 4, 2009 order. The three-judge court rejected the plan and the defendants submitted a revised plan on November 12, 2009. On January 12, 2010, the three-judge court issued an order implementing the revised plan. App. 257a-266a. The California State Republican Legislator Intervenors, the District Attorney Intervenors, and the Sheriff, Police Chief, Probation Chief, and Corrections Intervenors filed their notice of appeal on January 20, 2010. App. 355a. The jurisdiction of this Court rests on 28 U.S.C. § 1253, providing for a direct appeal from decisions of three-judge courts.

STATUTORY PROVISIONS INVOLVED IN THE CASE

This appeal concerns the interpretation and application of the Prison Litigation Reform Act, 18 U.S.C. § 3626. The relevant provisions are reproduced at App. 359a-361a.

STATEMENT OF THE CASE

The plaintiffs in the class action lawsuits *Plata v. Schwarzenegger,* District Court for the Northern District of California, Case No. C 01-1351 TEH, involving claims of constitutionally inadequate provision of medical care in state prisons, and *Coleman v. Schwarzenegger*, District Court for the Eastern District of California, Case No. S-90-0520-LKK-JFM P, involving claims of constitutionally inadequate provision of mental health care in state prisons, moved to convene a three-judge court to consider the issuance of a prisoner release order pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA"). Both courts had previously determined that the California Department of Corrections and Rehabilitation ("CDCR") failed to provide prison inmates with constitutionally adequate medical and mental health care. To remedy these constitutional violations, the *Coleman* court appointed a special master ("Special Master") to oversee development and implementation of a plan to remedy the unconstitutional provision of mental health care, App. 36a. In early 2006, the *Plata* court appointed a receiver ("Receiver") to take control of all aspects of the CDCR relating to the provision of medical care, and to bring the CDCR into constitutional compliance. App. 29a-30a. District Court Judges Henderson and Karlton granted the respective plaintiffs' motions to convene a three-judge court on July 23, 2007. *See* App. 62a-69a.

Shortly after the establishment of the three-judge court, Appellants moved to intervene as of right in the proceedings, which motions the three-judge court granted. *See* App. 69a.

To issue a prisoner release order pursuant to the PLRA, a properly convened[2] three-judge court must find "by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

The PLRA further mandates that prospective relief may be afforded only when it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). In fashioning the relief, the three-judge court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system cause by the relief." *Id.* Implicit in the directive that relief be narrowly tailored and weighed against potential adverse effects is the underlying recognition of the existence of present and ongoing constitutional violations, and that relief beyond what is required unnecessarily impacts public safety and the criminal justice system.

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[2] A plaintiff must establish two prerequisites to properly convene a three-judge court pursuant to the PLRA. First, a district court must have entered an order for less intrusive relief, which relief failed to remedy the violation of the federal right sought to be addressed through the prisoner release order. Second, the defendant must have had a reasonable amount of time to comply with previous court orders. 18 U.S.C. § 3626(a)(3)(A). Appellants acknowledge that the defendants in the three-judge court proceedings challenge the propriety of the three-judge court's jurisdiction on the grounds that plaintiffs did not establish these two essential requirements, and Appellants reserve the right to comment on this challenge should the appellate proceedings be consolidated.

Trial commenced on November 18, 2008, with final oral argument concluding on February 3 and 4, 2009. The three-judge court determined, in an opinion and order dated August 4, 2009, that overcrowding was the primary cause of the constitutionally inadequate provision of medical and mental health care and that no other relief could remedy the violations. *See* App. 78a-168a.

Accordingly, the three-judge court ordered defendants to create and file "a population reduction plan that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity." App. 255a. On September 18, 2009, the defendants submitted a population plan that provided for a population reduction to 137.5% in three years, based on the defendants' concerns that "reducing the prison population to 137.5% within a two-year period cannot be accomplished without unacceptably compromising public safety." Defendants' Population Reduction Plan at App. 272a. On October 21, 2009, the three-judge court rejected this population reduction plan. *Coleman* Dkt. No. 3711; *Plata* Dkt. No. 2269. Defendants submitted a revised plan on November 12, 2009, which the three-judge court subsequently adopted in its January 12, 2010 Order to Reduce Prison Population. *See* App. 309a-354a; App. 257a-266a. Together with its August 4, 2009 order, this January 12, 2010 Order to Reduce Prison Population implements a "Prisoner Release Order" under the terms of the PLRA. Jan. 12, 2010 Order at App. 257a-266a. The August 4, 2009, and January 12,

2010 orders (collectively the "Prisoner Release Orders") are the subject of this appeal.[3]

Issuing such extreme and unprecedented prisoner release orders gravely threatens public safety in California. Worse still, the mass release order may be entirely unnecessary for two independent reasons. First, the three-judge court simply assumed that constitutional violations indentified years prior to issuance of the Prisoner Release Orders continued unabated, and refused to permit evidence at trial to the contrary. The need for the orders and the scope of the orders may have been mooted by the substantial efforts of Receiver and Special Master. Second, even if such violations did exist at the time of trial, no release order was necessary in light of the public statements of the court-appointed Receiver and the testimony of plaintiffs' own expert, that constitutional levels of care could be achieved at the current population level. In sum, the Prisoner Release Orders are exactly the type of overreaching and

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[3] On October 5, 2009 and November 2, 2009, respectively, defendants and defendant-intervenors filed appeals to this Court of the three-judge court's August 4, 2009 Opinion and Order. Supreme Ct. Case Nos. 09-416, 09-553. On January 19, 2010, this Court dismissed those appeals. See *California State Republican Legislator Intervenors v. Plata*, 130 S.Ct. 1142, __ U.S. __, (Jan. 19, 2010); *Schwarzenegger v. Plata*, 130 S.Ct. 1140, __U.S. __ (Jan. 19, 2010). As referenced in the Court's dismissal, the three-judge court issued its Order to Reduce Prison Population after Defendant and Defendant-Intervenors filed their appeals to the Supreme Court. Although the appeals filed by defendants and defendant-intervenors anticipated the January 12, 2010 final order by the three-judge court, Defendant-Intervenors filed this appeal to fully address the Prisoner Release Orders that the three-judge court implemented through the August 4, 2009, and January 12, 2010 orders.

overbroad remedy that Congress sought to curtail when it enacted the PLRA.

This Court recognized well in advance of the PLRA that federal courts are ill-equipped to entangle themselves in the operation of state prison systems. Management of state prisons is "peculiarly within the province of the legislative and executive branches of government. . . ." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). "[C]ourts are ill equipped to deal with the increasingly urgent problems of the prison administration and reform." *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 364 (1996) (Thomas, J., concurring) ("too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree.").

Congress agreed and enacted the PLRA to further restrain judicial interference with the management of state prisons. "When Congress enacted the PLRA, it sought to oust the federal judiciary from day-to-day prison management." *Taylor v. United States*, 181 F.3d 1017, 1027 (9th Cir. 1999) (*en banc*) (Wardlaw, J., dissenting); *see also Woodford v. Ngo*, 548 U.S. 81, 93 (2006) ("The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons. . . ."); *Miller v. French*, 530 U.S. 327, 347 (2000) ("The PLRA has restricted courts' authority to issue and enforce prospective relief concerning prison conditions. . . ."). Congress was particularly skeptical and demanded higher scrutiny of population caps and prisoner release orders such as the one ordered by the three-judge court below. *See Castillo v. Cameron County, Tex.*, 238 F.3d 339, 348 (5th Cir. 2001) (noting that the

legislative history of the PLRA reveals Congress' apprehension regarding population caps); *Gilmore v. California*, 220 F.3d 987, 998 & n.14 (9th Cir. 2000) (same); 141 Cong. Rec. S14408-01, S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap."); 141 Cong. Rec. S2648-02, S2649 (daily ed. Feb. 14, 1995) (statement of Sen. Huchinson) ("This bill will curb the ability of Federal Courts to take over the policy decisions of State prisons. . . .").

This appeal presents substantial questions regarding when a federal court has the authority to issue a prisoner release order and what the proper scope of any such order should be. The Prisoner Release Orders issued below are the first such orders made over a defendant's objection since enactment of the PLRA. The unprecedented nature and extraordinary scope of the orders, as well as the public importance of settling disputes regarding the interpretation and the application of the PLRA, make it particularly appropriate for this Court to note probable jurisdiction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal will determine whether the three-judge court properly ordered that the California prison population be reduced by the release or non-incarceration of tens of thousands of duly arrested, convicted and sentenced criminals, and how the impact of such an order on millions of law-abiding California residents should be taken into account. The Appellants—police chiefs, sheriffs, probation officers, district attorneys and legislators from across California—joined this litigation for the express

purpose of opposing such a system-wide "prisoner release order" and to ensure appropriate consideration of public safety.

Together, the Appellants represent millions of California citizens. On behalf of those citizens, and the millions more Americans affected by the orders of the three-judge court below should they gain precedential value, Appellants urge this Court to note probable jurisdiction for the following reasons:

I. THE PRISONER RELEASE ORDERS SHOULD NOT HAVE BEEN ISSUED BECAUSE THERE WAS NO SHOWING THAT PAST VIOLATIONS WERE CURRENT AND ONGOING AND BECAUSE ALTERNATIVE REMEDIES EXISTED.

Under the PLRA, a three-judge court "shall enter a prisoner release order only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). The Prisoner Release Orders issued below fail to satisfy either requirement, much less both.

Congress drafted the PLRA in the present tense, permitting issuance of prospective prisoner release orders only to correct current and ongoing violations of Federal rights, not to provide a remedy to plaintiffs to compensate them for past wrongs or to address overcrowding in prisons simply to alleviate overcrowding. Notwithstanding this fact, the three-judge court prohibited the introduction of evidence and argument on the issue of whether past violations were "current and ongoing" at the time of the trial. App. 78a n.42; *see also* App. 77a. Instead of deter-

mining whether any current violations existed, the three-judge court's analysis focused only on "whether . . . requiring a reduction in the population of California's prisons was necessary to remedy the previously identified constitutional violations[.]" App. 77a.

As a result, by the time that the three-judge court made its initial August 4, 2009 order, no determination had been made regarding alleged violations since July 2007. App. 77a. Indeed, neither the *Coleman* nor the *Plata* single-judge courts had held evidentiary hearings regarding the state of the prisons and ongoing violations since September 13, 1995 (*Coleman*) and June 9, 2005 (*Plata*). *See* App. 23a, 33a. Had the three-judge court permitted such evidence and argument at trial, the Appellants, as well as the State defendants, would have provided compelling evidence regarding massive increases in spending and the allocation of resources resulting in substantial overall improvements in medical and mental health care. *See, e.g.*, Pre-Trial Hr'g Tr. at 28:16-29:2 (E.D. Cal./N.D. Cal. Nov. 10, 2008) (*Coleman* Docket No. 3541.1; *Plata* Docket No. 1786); Trial Tr. at 6:24-7:9, 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* Docket No. 3541.2; *Plata* Docket No. 1829). At a minimum, an understanding of the current nature of any constitutional violations should have affected the three-judge court's determination as to the scope of the orders and the depth of the intrusion into state affairs the court deemed necessary. Utilizing stale evidence as a yardstick for remedial measures in the present time, particularly in light of the single-judge courts' appointments of the Receiver and the Special Master to ensure constitutional delivery of medical and mental health care, ignores the intent of the PLRA and, as discussed

below, the statutory and common law mandate that the relief afforded only go as far as necessary.

Second, and equally important, the three-judge court ignored evidence from its own appointed Receiver and Special Master, as well as plaintiffs' expert that a prisoner release order was not necessary to achieve and maintain constitutional levels of care. Specifically, the *Plata* Receiver stated that under his control, the California prison systems could provide constitutional levels of care regardless of population. He stated in a public address that "I'm just not seeing difficulty in providing medical services no matter what the population is." Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* Docket No. 3173; *Plata* Docket No. 1656). The Receiver continued, stating "we believe we can provide constitutional levels of care no matter what the population is." *Id.* at 31:20 minutes. Similarly, the *Coleman* Special Master acknowledged that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished" and releasing even 50,000 inmates would not bring the staffing resources into compliance. App. 157a-158a. Finally, plaintiffs' expert, Dr. Shansky, testified that California could provide constitutionally adequate care for more than 172,000 inmates if other reforms were implemented. Shansky Dep. at 144:3-14 (Dec. 10, 2007); *see also* Trial Tr. at 491:19-492:08 (E.D. Cal./N.D. Cal. Nov. 21, 2008) (*Coleman* Docket No. 3541.5; *Plata* Docket No. 1840) (Dr. Shansky admits that additional changes beyond those set forth in the Receiver's "Turnaround Plan" (*Plata*, No. C01-1351-TEH (N.D. Cal. June 6, 2008) (Docket No. 1229))

were not needed to bring the CDCR's provision of medical care into compliance, and that the "Turnaround Plan" did not envision a population reduction).

Congress intended a prisoner release order be "the remedy of last resort." H.R.Rep. No. 104-21, at 25 (1995). Based on the evidence above, there can be little doubt that the Prisoner Release Orders were not the remedy of last resort, and that the three-judge court erred when it held that no alternative to a prisoner release order existed.[4]

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[4] Moreover, the three-judge court improperly rejected a number of viable alternatives to a prisoner release order on the grounds that such alternatives were too speculative or would take too long to implement. App. 145a-162a. One such alternative was the possibility of transferring California inmates to out-of-state facilities. App. 159a-161a. The three-judge court rejected the alternative because "we conclude that the transfer of inmates to out-of-state facilities would not on its own begin to provide an adequate remedy for the constitutional deficiencies in the medical and mental health care provided to California inmates." App. 161a. Ironically, the three-judge court then issued the August 4, 2009 order, while acknowledging that such an order would not necessarily correct current Constitutional violations, if any. App. 134a, 143a. Although it appears the three-judge court has determined a prison population reduction alone will not remedy any asserted constitutional violation, at minimum, additional out-of-state transfers and transfers to federal custody should have been ordered prior to issuance of a system-wide prisoner release order.

II. THE PRISONER RELEASE ORDERS FAIL TO SATISFY THE PLRA'S REQUIREMENT THAT ANY SUCH RELIEF BE BOTH NARROWLY DRAWN AND THE LEAST INTRUSIVE MEANS TO REMEDY VIOLATION OF THE FEDERAL RIGHT.

Under the PLRA, any prisoner release order issued by a three-judge court is valid only if the order "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The Prisoner Release Orders here fail in at least four respects.

First, because the three-judge court refused to hear evidence or argument regarding whether constitutional violations continued at the time of trial, the resulting Prisoner Release Orders were not narrowly tailored to correct current violations, if any. This refusal is particularly troubling because the August 4 Order was issued another six months after trial, several years since any determination that conditions in the California prison system violated any Federal right, and many years since holding an evidentiary hearing on the existence of constitutional violations. Accordingly, the remedy ordered goes far beyond what is necessary or reasonable in light of the conditions as they currently exist.

Second, the Prisoner Release Orders are overbroad because they require a system-wide reduction in California's inmate population and are not targeted at correcting possible violations of the federal rights of members of the *Coleman* and *Plata* plaintiff classes. Indeed, the three-judge court acknowledges that the Prisoner Release Orders are "likely to affect inmates

without medical conditions or serious mental illness." App. 172a. Citing with approval plaintiffs' expert Dr. Pablo Stewart, the three-judge court acknowledged that a reduction of the prison population by 50,000 inmates would only affect 10,000 *Coleman* class members. App. 238a-239a. 40,000 inmates, or eighty-percent of those to be released, would not have suffered a constitutional violation. "'[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.'" *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995) (citation omitted). The overwhelming majority of those benefitting from the Prisoner Release Orders are not affected by the purported constitutional violations, and alleviating overcrowding simply because there may be overcrowding is impermissible. For these reasons, the Prisoner Release Orders violate the requirement of 18 U.S.C. § 3626(a)(1)(A) that any such relief "extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *See Hines v. Anderson*, 547 F.3d 915, 922 (8th Cir. 2008) (affirming dismissal of an order under the PLRA that was not tailored to the specific violation at issue because it addressed medical conditions generally rather than "a particular medical issue that existed at the time.").

Third, just as the Prisoner Release Orders extend to individuals far beyond the plaintiff classes, it also reaches far beyond the medical and mental health issues that were the basis of the underlying action. Under the PLRA, a narrowly-tailored order would focus directly and exclusively on medical and mental health issues such as staffing ratios, equipment and facilities, and record-keeping. Indeed, the decision of the three-judge court to issue a broad prisoner

release order, rather than a more targeted order focused directly and exclusively on medical and mental health care, raises the very real possibility that the Prisoner Release Orders will not correct the prior violations. *See* App. 143a ("We recognize that other factors contribute to California's failure to provide its inmates with constitutionally adequate medical and mental health care, and that reducing crowding in the prisons will not, without more, completely cure the constitutional violations the *Plata* and *Coleman* courts have sought to remedy."); App. 157a-158a (noting the Special Master's finding that "even the release of 100,000 inmates would likely leave the defendants with a largely unmitigated need to provide intensive mental health services to program populations that would remain undiminished. . . ."); Receiver's Report re: Overcrowding at 42:24-43:1, *Plata* No. C01-1351-TEH (N.D. Cal. filed May 15, 2007, Docket No. 673), *available at* http:///www.cprinc.org/docs/court/ReceiverReportReOvercrowding451507.pdf ("those who believe that the challenges faced by the Plan of Action are uncomplicated and who think that population controls will solve California's prison health care problems, are simply wrong.").

Fourth, the Prisoner Release Orders issued by the three-judge court set a population cap of 137.5% of the correctional system's "design capacity" to be achieved within two years, without providing a justifiable basis for the percentage chosen, utilizing the archaic and misleading measure of "design capacity," over an arbitrary time frame, and without any provision for limiting a continued population reduction in the event constitutional violations have been resolved at a higher population level. For these reasons as well, the Court should note probable jurisdiction.

III. THE PRISONER RELEASE ORDERS VIOLATE THE PLRA BECAUSE THEY NOT ONLY FAIL TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, THEY INAPPROPRIATELY DELEGATE THE RESPONSIBILITY OF TAKING PUBLIC SAFETY INTO CONSIDERA-TION AND AFFIRMATIVELY THREATEN PUBLIC SAFETY.

Just as the three-judge court failed to narrowly tailor the Prisoner Release Orders to reduce prison population, it also failed to consider meaningfully the adverse impacts on public safety that the orders would necessarily cause, abdicating its statutory responsibility and delegating it to the State. 18 U.S.C. § 3626(a)(1)(A); App. 75a-76a, 185a, 259a-261a. No prisoner release order should ever issue without appropriate protection of the public. *See* 18 U.S.C. § 3626(a)(1)(A); *see also* H.R. Rep. No. 104-21, at 9 (1995); 141 Cong. Rec. at S14418 (statement of Sen. Hatch). The three-judge court's order does violence to this important protection mandated by the PLRA.

The three-judge court first asserts that a reduction of approximately 46,000 prisoners "could" be accomplished "without a significant adverse impact upon the public safety or the criminal justice system's operation." App. 187a-188a, 201a. At the same time, it also acknowledges that limiting such negative impacts depends on appropriate programs being "properly implemented." App. 195a, *see also* App. 211a, 215a-216a, 259a-261a. Inexplicably, however, the three-judge court fails to order any of the protections that it identifies as necessary to protect public safety. *See* App. 210a ("the CDCR could use risk

assessment. . . ."; "The state might also consider implementing. . . ."), 224a ("if a risk assessment instrument were used. . . ."), 232a- 233a (leaving it to the state to decide whether to divert resources to fund community rehabilitative programs), 235a (same), 253a ("a failure by the state to comply with the experts' recommendations to take these steps would . . . be contrary to the interests of public safety"). In the end, the three-judge court admits, as it must, that its orders cannot be implemented without compromising public safety because "[s]uccessful implementation of such programming will, of course, require space that is currently not available in California's prisons." App. 215a n.80. Moreover, the three-judge court never addresses meaningfully the issue of funding for the programs that it believes are necessary to mitigate the risk of the massive prisoner release, other than to acknowledge that counties "may well require additional resources from the State in order to ensure that no significant adverse public safety impact results from the State's population reduction measures," App. 261a, and subsequently ordering the State to engage in speculation by ordering it to "calculate the amount of additional funds that the counties may require from the State in order to maintain the level of public safety at or about the existing level." App. 264a.

The three-judge court attempts to downplay the incredible risk to the public of its Prisoner Release Orders by diverting attention from the additional crimes that will inevitably be committed with the release of 46,000 prisoners, and criticizing the present California prison system as being criminogenic, noting that the system itself causes an adverse impact on public safety. App. 188a, 191a-192a. The court, citing plaintiffs' and intervenor-defendants'

expert witnesses, states that "high risk inmates do not rehabilitate and low-risk inmates learn new criminal behavior." App. 190a; *see also* App. 212a ("'with high risk individuals, they don't naturally get better. They gravitate up. So when they come out, they are worse off'"). According to the August 4 Prisoner Release Order, each year 123,000 or 134,000 offenders are returning to their communities "often more dangerous than when they left" and "without the benefit of any rehabilitation programming." App. 191a, 199a. Even if the three-judge court's assessment is accurate and incarceration has had a negative effect on many prisoners, it still does not follow that public safety will remain uncompromised by the release of 46,000 "criminogenic" inmates in a two year period. This is particularly true because, as set forth above, the Prisoner Release Orders contain no provision to ensure violent and dangerous inmates are not released, to promote rehabilitation and a decrease recidivism, or to protect public safety in any way.

At the same time, the three-judge court disregarded the opinions of all experts who concluded a prisoner release order would adversely affect public safety. App. 193a-195a, 201a, 220a-222a, 233a-234a, 246a-248a. The court's stated reason for doing so was that such opinions were not credible because they did not take into account potential mitigating factors and assumed that prisoners would be indiscriminately released into the general population. *Id.* But again the Prisoner Release Orders do not contain any potential protections for the public such as mandatory use of risk assessment tools or creation of local rehabilitative programs. This oversight, together with the refusal of the three-judge court meaningfully to acknowledge the temporal and fiscal

realities currently faced by the State of California, virtually assures that crime will spike in California as a result of the Prisoner Release Orders, proving the disregarded experts right.

More troubling still are the wishful, but unrealistic conclusions of the three-judge court that early release of the above-discussed "criminogenic" prisoners will likely reduce recidivism, and that its Prisoner Release Orders will not increase the number of crimes committed by those released. App. 201a, 203a. The most the three-judge court will acknowledge is that early release of inmates will permit those released to commit the same crimes at an earlier date. App. 201a. The court's reasoning fails to take into account that inmates released early will have more time in the community to commit additional crimes and also fails to recognize the basic fact that crimes that would not have occurred because of the continued incapacitation of prisoners during their incarceration, will occur if the Prisoner Release Orders are implemented and inmates gain early release.

Ultimately, the court abdicates its responsibility for ensuring a population reduction complies with the PLRA by delegating full responsibility for considering adverse impacts to public safety to the State defendants in implementing the reduction. App. 260a ("it is appropriate for the State to exercise its discretion in choosing which specific population reduction measures to implement, and, in doing so, to bear in mind the necessity for ensuring the public safety."), *id.* (we "trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction."). In doing so, the court shirked its duty to ensure that any population reduc-

tion is effectuated consistent with meaningful consideration of the public's safety, circumventing a crucial provision of the PLRA. Indeed, the three-judge court states "[s]hould the State determine that any of the specific measures that it has included in its plan cannot be implemented without significantly affecting the public safety or the criminal justice system, we trust that it will substitute a different means of accomplishing the constitutionally required population reductions." App. 260a. In other words, and as a practical matter, the court has ordered the State to reduce the population to 137.5% of design capacity regardless of how that reduction is achieved, and has completely and impermissibly eschewed its statutory responsibility for ensuring that the methods selected to do so are consistent with public safety.

As set forth above, this appeal raises a number of substantial questions worthy of review by this Court. The Prisoner Release Orders issued below are unprecedented in size and scope, contrary to the plain language of the PLRA and will unduly endanger California families.

CONCLUSION

The Court should note probable jurisdiction, reverse the determination of the three-judge court, and remand for further proceedings in accordance with guidance from this Court.

Respectfully submitted,

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April 12, 2010

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