No. 09-1233

IN THE
Supreme Court of the United States

GOVERNOR ARNOLD SCHWARZENEGGER, *et al.*,
Appellants,

v.

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

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

RESPONSE OF INTERVENORS

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RESPONSE OF INTERVENORS

INTRODUCTION

The Prisoner Release Order issued below poses a grave and immediate threat to public safety in the State of California by requiring the release or non-incarceration of tens of thousands of California prisoners over the next two years. To protect the ability of states to operate and maintain their own criminal justice systems and to protect public safety, Congress enacted the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA"). Congress acted to ensure that such prisoner release orders could be made only as a remedy of last resort and designed three primary protections against improvident prisoner release orders into the PLRA.

First, Congress required that a three-judge court issue a prisoner release order only if plaintiffs prove, by clear and convincing evidence, that "(i) crowding is the primary cause of the violation of the Federal right;" and "(ii) no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). In doing so, Congress employed the present tense for its "primary cause" analysis and, accordingly, required that three-judge courts make a determination regarding the relationship between current violations of a Federal right, if any, and crowding. The court below violated the PLRA by not only refusing to make a determination regarding the existence and scope of current violations, if any, but also by barring Appellant-Intervenors from providing evidence and argument on the issue. The court below committed further error by finding that "no other relief will remedy the violation of the Federal right" notwithstanding viable alternative remedies.

Second, Congress mandated that a prisoner release order be issued only if such 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. § 3826(a)(1)(A). The court below erred by issuing a sweeping prisoner release order that is not targeted at the remediation of current violations of federal law, if any, and would effectuate the release or non-incarceration of tens of thousands of non-class member inmates.

Third, Congress also required that a court contemplating a prisoner release order give "substantial weight" to any adverse impact on public safety or the operation of a criminal justice system. 18 U.S.C. § 3626(a)(1)(A). The court below erred because it not

only failed accord "substantial weight" to adverse impacts on public safety and the operation of a criminal justice system, it declined explicitly to evaluate the individual elements of the Prisoner Release Order that it ultimately issued for their impact on public safety. The result is an order that both violates the PLRA and affirmatively threatens public safety in California.

Appellees' primary response is to dodge these critical issues of statutory interpretation and application and to focus instead on untimely and inapplicable evidence and arguments regarding past conditions in the California prison system. Worse still, Appellees also offer a series of erroneous assertions regarding the current state of the California prisons in a desperate attempt to justify the release of tens of thousands of inmates notwithstanding the refusal of the court below to make a finding regarding what current violations of federal law, if any, existed at the time of trial. For example, Appellees claim that prisoners are dying unnecessarily at the rate of one every eight days. This assertion is simply not accurate. In reality, the very document cited by Appellees places the number of "likely preventable" deaths for the entire year of 2009 at 3. *See* California Prison Receivership, Analysis of Year 2009 Death Reviews (Sept. 2010), *available at* http://www.cphcs.ca.giv/docs/resources/ORTES_DeathReviewAnalysisYear2009_20100907.pdf. Accordingly, even crediting Appellees' assertion with the benefit of "likely" preventable results – as opposed to proven results – the statistics show, at most, one unnecessary death every four months, not one every eight days.

Similarly, Appellees assert that "the prisons are about as crowded now as they were when the Gover-

nor first proclaimed the State of Emergency, which continues to the day." *Plata* Brief at 2-3.[1] Not so. In reality, from October 2006 to October 2010 the population of the 33 adult facility prisons in California has decreased by 14,832 inmates. *See* California Department of Corrections and Rehabilitation, Monthly Population Report, *available at* http://www.cdcr.ca.gov/reports_research/offender_information_services_Branch/monthly/TPOP1A/TPOP1Ad1010.pdf. This decrease has been achieved largely through the transfer of inmates to out-of-state facilities and it belies Appellees' assertion of a current "crisis" with respect to medical and mental health care in the California prisons caused by overcrowding.

Finally, Appellees fail to provide a meaningful response to the public safety concerns raised by issuance of the Prisoner Release Order. This failure to respond is particularly troubling in light of the candid admission of the court below that "we have not evaluated the public safety impact of each element of the State's proposed plan." JS2-App. 3a. Had the requisite "substantial weight" been given to the adverse impact that this Prisoner Release Order would have on public safety and the operation of the criminal justice system in California, it would never have been issued.

In sum, no volume of references to past conditions or to the Governor's 2006 emergency proclamation can justify the Prisoner Release Order issued here in light of the current conditions in the California prisons, the evidence presented at trial and the strict limitations on prisoner release orders imposed by Congress in the PLRA.

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[1] The merits briefs of the *Plata* and *Coleman* Appellees are referred to respectively as the "*Plata* Brief" or "*Coleman* Brief."

I. MEDICAL AND MENTAL HEALTH CARE IN THE CALIFORNIA PRISON SYSTEM MUST BE CONSIDERED IN CONTEXT

The court below and Appellees suggest that California has an atypical and unusual penal system, characterizing the State's penal laws as "inflexible" and "harsh" and the increase in prison population as "massive." *See* JS1-App. 254a. However, in many ways, California has a very typical prison system compared to other states. In 2008, the last year for which comparative state incarceration rates are currently available, California had the 17th highest incarceration rate (467 per 100,000 residents, only slightly higher than the national average or 445 per 100,000 residents).[2] Significantly, California was one of only twelve states whose incarceration rate fell between 2000 and 2007,[3] and California also experienced the largest decrease in inmate population of any state in 2008-2009.[4] California ranks 16th among the states in terms of the state prison population as a percentage of highest capacity, according to 2008 federal statistics.[5] California does not, on average, impose particularly long sentences

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[2] Congressional Quarterly, CRIME STATE RANKINGS 2010, Congressional Quarterly (2010) at p. 54; the original source data is United States Department of Justice, Bureau of Justice Statistics, "Prisoners in 2008," (December 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

[3] United States Department of Justice, Bureau of Justice Statistics, "Prisoners in 2007," (December 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p07.pdf.

[4] Pew Center on the States, "Prison Count 2010" (April, 2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880.

[5] *Id.*

by national standards either.[6] In the fourth quarter of 2008, the average sentence imposed was 49 months and the average sentence served was 24.9 months in California.[7]

Similarly, California's medical outcomes are in the mainstream when compared to those in other states. Indeed, federal studies demonstrate that state prison inmates experience a lower mortality rate than the comparable age cohort of the public at large[8] and that California inmates have consistently had lower mortality rates than inmates in most other state prison systems.[9] In a recent six year federal study, the composite mortality rate for California prison inmates was lower than inmate mortality in 37 other

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[6] Joan Petersilia, "Understanding California Corrections," University of California, California Policy Research Center (May 2006) at pp. 7-8, *available at* http://ucicorrections.seweb.uci.edu/pdf/understandingcorrectionspetersilia20061.pdf.

[7] California Department of Corrections and Rehabilitation, Fourth Quarter 2008 Facts and Figures, *available at* http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/docs/Fourth_Quarter _2008_Facts_and_Figures.pdf.

[8] United States Department of Justice, Bureau of Justice Statistics, Christopher J. Mumola, "Brief: Medical Causes of Death in State Prisons 2001-2004," (January 2007), *available at* http://bjs.ojp.usdoj.gov/context/pub/pdf/mcdsp04.pdf. This report reflects an average citizen mortality rate of 308 per 100,000 and an inmate mortality rate of 250 per 100,000 per year. This phenomenon is summarized in a U.S. Department of Justice press release entitled "Death Rates Lower in State Prisons Than in the General Population," United States Department of Justice, Office of Justice Programs, January 21, 2007, *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2007/BJS07010.htm.

[9] U.S. Department of Justice, Bureau of Justice Statistics, "State Prison Deaths 2001-2009," (Table 7) (2010).

states.[10] In contrast, the Pennsylvania state prison system, which produced two of the expert witnesses upon whom the court below and Appellees rely, produced the second highest inmate mortality rate among the 50 states.[11]

Finally, California spends a disproportionately high amount per prisoner on medical and mental health care and, in addition, has significantly expanded staffing and expenditures for inmate healthcare, nearly doubling per inmate funding under the federal Receivership.[12] Most recently, the Receiver spent $1.8 billion in fiscal year 2008-09 to provide medical care to the inmate population.[13]

II. THE PRISONER RELEASE ORDER SHOULD NOT HAVE ISSUED BECAUSE THERE WAS NO DETERMINATION 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

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[10] *See id*.

[11] *See id.*

[12] *Plata* D.E. 1632 ¶¶ 7-9; *see also* Trial Tr. (Todd Jerue, Program Budget Manager, California Dept. of Finance) 734:13-736:25 (E.D. Cal./N.D. Cal Nov. 21, 2008) *Plata* D.E. 1845.

[13] Office of the Inspector General, California Prison Health Care Receivership Corporation Use of State Funds for Fiscal Year 2008-09, at 1 (June 2010), *available at* http://documents.reportingtransparency.ca.gov/Common/Document.ashx?ID=6384&TB_iframe=true.

the Federal right." 18 U.S.C. § 3626(a)(3)(E). The Prisoner Release Order issued below failed to meet either of these requirements.

First, the PLRA is written in the present tense and permits issuance of prospective prisoner release orders only to correct current and ongoing violations of Federal rights. Notwithstanding this mandate, the three-judge court refused to determine whether past violations remained "current and ongoing" at the time of the trial, and did not identify any specific ongoing violations. JS1-App. 78a n.42; *see also* JS1-App. 77a. The assumption by the three-judge court that "the previously identified constitutional violations" were ongoing contravenes the PLRA. JS1-App. 77a. It is no answer to this argument to assert, as Appellees do, that (1) Appellees need not "re-litigate" the issue of "liability", (2) the State defendants have conceded constitutional violations of varying degrees both before and after the three judge court was convened, or (3) "[t]he State does not point to any evidence that was excluded, which demonstrates that there was no error and no prejudice." *Plata* Brief at 33-37; *Coleman* Brief at 33-35.

Appellees assert incorrectly that Appellant-Intervenors seek an interpretation of the PLRA that would require three-judge courts to "re-determine liability" or "re-litigate the existence of the underlying constitutional violations." *Plata* Brief at 33; *Coleman* Brief at 33. Not so. Prior single judge liability determinations made in the past remain in place as they relate to conditions as they existed at that time. However, it cannot be said that requiring the three-judge court to determine whether current violations exist constitutes the "re-litigation" of liability determinations made in the past. For example,

requiring the three-judge court here to determine what current violations of federal law, if any, existed at the time of issuance of the Prisoner Release Order could not possibly constitute re-litigation of the single judge determinations because those initial determinations were made long before based on conditions then in existence. Moreover, it is contrary to both the plain text and the purpose of the PLRA for a three-judge court to simply assume that the prior determinations of a single judge court regarding conditions as they existed years earlier remain valid years later and to issue a prisoner release order on that basis because the PLRA is written in the present tense and requires a determination of whether crowding "is" – not "was" – the primary cause of violation of the Federal right. 18 U.S.C. § 3626(a)(3)(E).

Nor does any concession by the State preclude the Appellant-Intervenors from raising, and the Court from enforcing, the obligation of the three-judge court under the PLRA to determine what, if any, constitutional violations existed at the time of trial. This is true because the PLRA specifically grants the Appellant-Intervenors the ability to intervene as of right in this proceeding based on the recognition by Congress that the statutory intervenors play a crucial role in protecting public safety and have a legitimate interest in opposing issuance of a prisoner release order independent of positions adopted by the State. Moreover, the primary concession cited by Appellees is the Governor's 2006 proclamation, which was years old by the time of trial and, accordingly, did not address current conditions at the time that the court below made its primary cause determination. The undisputed fact is that the 2006 proclamation found overcrowding based on the then-current fact that the California prison system exceeded its operational

capacity by approximately 15,000 inmates.[14] As discussed previously, prison population within California's 33 adult facility prisons has decreased by 14,832 inmates since the month the proclamation was issued. Accordingly, while the population still exceeds "design capacity" under California's unique one-prisoner-per-cell definition, the population within the 33 adult prisons is now very close to its "operational capacity."

Nor can Appellees assert that there is "no evidence that was excluded" below. *Plata* Brief at 36. Appellant-Intervenors specifically requested from the three-judge court a determination of what constitutional violations, if any, remained at the time of trial and offered to present evidence and argument

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[14] As acknowledged by the three-judge court, there is a significant difference between "operational capacity" and "design capacity" and California employs an atypical definition of the term "design capacity." The court cited to Plaintiffs' Exhibit 4 at page 123 (DJA Vol. V at 1760-61):

> "Design capacity" is the term used for the past 50 years to designate the number of inmates a prison is designed to accommodate according to standards developed by the Commission on Accreditation and the American Correctional Association. [Footnote omitted.] The number can be based on any combination of single-occupancy cells, double-occupancy cells, single- or double-bunked multiple occupancy rooms, or dormitories. The standards take into account the need for humane conditions, as well as the need to prevent violence and move inmates to and from programs, such as mental health care, education classes, and drug abuse treatment.
>
> . . . *In California, design capacity is based on one inmate per cell, single bunks in dormitories, and no beds in space not designed for housing*.

JS1-App. 56a-57a (emphasis added).

that there were no such ongoing violations. The request and the offer of Appellant-Intervenors were vehemently refused by the three-judge court. Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* D.E. 3541.2; *Plata* D.E. 1829) ("Twice this court has said we will not receive that *evidence* [of the absence of current constitutional violations]. (emphasis added). You have made as clear a record as you can."); DJA Vol. VI 2081-2087.[15]

Second, a prisoner release order may issue only if a plaintiff demonstrates – by clear and convincing evidence – that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E). Here, the three-judge court's conclusion that no other alternatives to the Prisoner Release Order existed is belied by the court-appointed *Plata* Receiver who stated that, under his control, the California prison systems would not have any "difficulty in providing medical services [to the entire prison population] no matter what the population is." Trial Declaration of Assemblymember Todd Spitzer, ¶ 28 and Exhibit D thereto, at 30:00 minutes and 31:20 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* D.E. 3173; *Plata* D.E. 1656); DJA Vol. IV 1222-1236. Contemporaneous to the trial, the Receiver also stated "there is genuine reason for some hope that CDCR's health care system can be fixed, and that the Receiver is

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[15] Had Appellant-Intervenors been given the opportunity, they would have presented compelling testimony, evidence and argument regarding the absence of current violations. Given the clear focus of the PLRA in guaranteeing that prisoner release orders remain a remedy of last resort for addressing current and ongoing violations of a Federal right, the Prisoner Release Order below should be reversed and Appellants should be given the opportunity to demonstrate the absence of current violations.

the right instrument for completing the fix in a reasonable period of time and at a reasonable cost." Ninth Quarterly Report of the Federal Receiver's Turnaround Plan of Action (Sept. 15, 2008) at DJA Vol. III 1209. Appellees fail to come to terms with this crucial evidence and try to minimize its importance because it was not made via live testimony in the course of the trial below. *Plata* Brief at 36 n. 8. However, the parties were limited to such "out-of-court" evidence from the Receiver because the three-judge court refused to permit discovery on the Receiver and refused to have him testify in court. *See* Protective Order re Deposition of Receiver (E.D. Cal./N.D. Cal. Nov. 29, 2007) (*Coleman* D.E. 2577; *Plata* D.E. 988). Nothing in the three-judge court's opinion or the Appellees arguments reconciles the issuance of the Prisoner Release Order with the uncontroverted evidence adduced from the Receiver that no such order is necessary and that alternatives exist.[16]

Congress intended a prisoner release order be "the remedy of last resort." H.R. Rep. No. 104-21, at 25 (1995). The court below erred by issuing the Prisoner Release Order here notwithstanding viable, promising alternatives that are currently underway

[16] It is also significant that while the Receiver has filed his own brief in this action, he never asserts that his statements made regarding the ability to provide constitutional levels of care "no matter what the population is" offered into evidence during the trial below were incorrect or that no alternative to the Prisoner Release Order exists. Presumably, if the Receiver believed that the Prisoner Release Order issued below were necessary and appropriate, he would have filed his brief in support of Appellees and stated such a conclusion plainly. Since he did not do so, it is entirely appropriate to conclude that the Receiver believed his statements were true when made and remain true.

including, but not limited to, the continued work of the Court-appointed Receiver and Special Master and the ongoing transfer of inmates to out-of-state facilities.[17] Appellant-Intervenors also presented evidence of additional alternatives at trial.[18] Accordingly, the Prisoner Release Order fails to comply with the PLRA's requirement that such release orders may be issued only when "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3)(E).

III. THE PRISONER RELEASE ORDER FAILS 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

Any prisoner release order issued pursuant to the PLRA 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. § 3826(a)(1)(A). For two reasons, the Prisoner Release Order does not satisfy the requirement mandated by Congress.

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[17] California continues to contract for additional transfer of inmates. *See, e.g.*, http://cdcrtoday.blogspot.com/2010/11/cdcr-enters-contract-with-geo-group-inc.html.

[18] Additional potential alternatives to the Prisoner Release Order include: (1) ordering additional hiring of medical staff and allocation of treatment space and mental health beds; (2) expedited construction pursuant to AB 900 facilitated by court waivers of state law; and (3) ordering the federal prison system to take custody of California inmates who are subject to deportation.

First, the court below refused to determine whether previously-identified constitutional violations still existed at the time of trial and, if so, the current scope of such violations. Trial Tr. at 57:11-58:13 (E.D. Cal./N.D. Cal. Nov. 18, 2008) (*Coleman* D.E. 3541.2; *Plata* D.E. 1829) ("Twice this court has said we will not receive that evidence [of the absence of current constitutional violations]. You have made as clear a record as you can."); DJA Vol. VI 2081-2087. Nor did the three-judge court endeavor to determine which, if any, of the 33 facilities within the California prison system currently fail to provide constitutional levels of care. *Id.* The result is an overbroad and overreaching system-wide release order that fails to adequately identify or correct a present violation of the Federal rights 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."). Neither the court below, nor Appellees, adequately identify what current violations existed at which California prison facilities at the time of trial, much less how this unprecedented system-wide Prisoner Release Order is narrowly-tailored to any particular medical issue.

Second, under the PLRA, a narrowly-tailored prisoner release order would not simply reduce the overall prison population but would instead focus directly and exclusively on medical and mental health treatment issues such as staffing ratios, equipment and facilities, and record-keeping. In addition, this approach is consistent with the position of the Receiver who claimed an ability to provide constitutional care "no matter what the population

is." Spitzer Trial Decl., *supra*, ¶ 28 and Exhibit D, at 30:00 minutes (E.D. Cal./N.D. Cal. Oct. 30, 2008) (*Coleman* D.E. 3173; *Plata* D.E. 1656); *see also id.* at 31:20 minutes ("We believe we can provide constitutional levels of care no matter what the population is."); DJA Vol. IV 1222-1236.

In response, Appellees make no real effort to demonstrate that the Prisoner Release Order is narrowly-tailored. Instead, they rely on the fact the State has been given a level of discretion with respect to how the population will be reduced and which prisoners will be released. *Plata* Brief at 55-56; *Coleman* Brief at 54. This argument is particularly unpersuasive given that the Prisoner Release Order, as issued, will indisputably impact – and directly benefit – thousands of inmates that are not even members of the plaintiff classes and because the court below rejected the State's initial plan which contemplated population reduction over a five-year period.

IV. THE PRISONER RELEASE ORDER VIOLATES THE PLRA BECAUSE IT NOT ONLY FAILS TO GIVE SUBSTANTIAL WEIGHT TO ANY ADVERSE IMPACT ON PUBLIC SAFETY, IT AFFIRMATIVELY THREATENS PUBLIC SAFETY

The PLRA requires any three-judge court contemplating issuance of a prisoner release order to give "substantial weight" to any adverse impact on public safety or the operation of a criminal justice system. 18 U.S.C. § 3626(a)(1)(A). The three-judge court's disregard of this requirement threatens the safety of millions of California citizens and violates the PLRA.

Although the court below acknowledged that Congress intended release orders as "the remedy of last resort," the three-judge court (and Appellees) failed to properly consider the impact that the release of tens of thousands of prisoners will have on public safety in California. Instead, the three-judge court, without record support, asserted "that means exist by which the defendants can accomplish the necessary [release of approximately 46,000 prisoners] without creating an adverse impact on public safety or the operation of the criminal justice system." JS2-App. 2a.

As a preliminary matter, the conclusion of the three-judge court regarding the possibility of a 46,000 inmate release being implemented without an adverse impact on public safety is impossible to reconcile with the undisputed trial testimony that California has an approximately 70% recidivism rate and that research shows that each inmate commits approximately 12 crimes before being apprehended, tried, convicted and sentenced to state prison. *See* Trial Tr. (Police Chief Jerry Dyer) 2315:04-2318:20 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Coleman* D.E. 3541.13; *Plata* D.E. 1939; DJA Vol. VI 2526-28.

Moreover, this Court has never defined what a three-judge court must do in order to comply with the PLRA's requirement that "substantial weight" be given to any adverse impacts on public safety and the criminal justice system. If the requirement means anything, it must require, at a minimum, the three-judge court to evaluate carefully the impact each element of a proposed release order would likely have on public safety. In this case, the three-judge court admits it has not done so and instead confirms the opposite: "we have not evaluated the public

safety impact of each element of the State's proposed plan." JS2-App. 3a. In addition to not evaluating the individual elements of the implementation plan for the Prisoner Release Order, the three-judge court also emphasizes that, "we are not endorsing or ordering the implementation of any of the specific measures contained in the State's plan, only that the State reduce the prison population to the extent and at the times designated in this Order." JS2-App. 5a. This approach fails to give substantial weight to public safety and, therefore, violates the PLRA.

Finally, the three-judge court acknowledges concerns regarding implementation of its order and funding of programs necessary to promote public safety, but its Prison Release Order includes no provision whatsoever designed to ensure public safety. Instead, the three-judge court holds that the State, rather than the Court, should evaluate whether counties will need additional funding to ensure that the Prisoner Release Order does not jeopardize public safety.[19] Most significantly, the Prisoner Release Order lacks any provision whatsoever to account for the return to California communities of the approximately 46,000 prisoners to

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[19] The three-judge court observes that "Counties may well require additional financial resources from the State in order to ensure that no significant adverse public safety impact results from the State's population reduction measures." JS2-App. 5a. But the three-judge court refuses to address that issue and instead leaves it to the State, stating, "whether public safety requires such a reallocation demands serious consideration by the State, both under its general responsibilities to the public and in accord with the PLRA." *Id.* However, it is the three-judge court – not the State of California – that has a responsibility to ensure that any prisoner release order is in accord with the PLRA.

be released. In sum, the three-judge court's failure to give any weight, let alone substantial weight, to public safety prior to issuing the Prisoner Release Order is contrary to the PLRA.

In response, Appellees offer a series of evasions. First, Appellees claim that the court below did not disregard public safety because "[t]he court examined hundreds of exhibits related to public safety and devoted nearly ten days of trial." *Coleman* Brief at 58. But, regardless of how many exhibits were submitted, the fact remains that the court below admits, "we have not evaluated the public safety impact of each element of the State's proposed plan." JS2-App. 3a. Also, the court below issued a Prisoner Release Order which, on its face, contains no provisions for the protection of public safety. This too, is far more important than how many exhibits were submitted or how long trial lasted. Next, and contrary to their above position, Appellees assert that the State failed to "bring forth any evidence below of the public safety concerns it now emphasizes." *Coleman* Brief at 59. Even if Appellees were correct about the evidence presented by the State, which they are not, Appellees ignore entirely the compelling evidence presented by the Appellant-Intervenors regarding the very real threat this Prisoner Release Order poses to public safety and the operation of California's criminal justice system. *See, e.g.,* Trial Tr. (Dep. District Attorney Lisa Rodriguez) 978-1016 (E.D. Cal./N.D. Cal. Dec. 2, 2008) *Plata* D.E. 1877; Trial Tr. (Chief Probation Officer Jerry Powers) 1017-1060 (E.D. Cal./N.D. Cal. Dec. 2, 2008) *Plata* D.E. 1877; Trial Tr. (Chief Probation Officer Jerry Powers) 1144-1191 (E.D. Cal./N.D. Cal. Dec. 3, 2008) *Plata* D.E. 1879; Trial Tr. (Acting County Executive Gary Graves) 2244-2287 (E.D. Cal./N.D. Cal. Dec. 11, 2008) *Plata*

D.E. 1935; Trial Tr. (Police Chief Jerry Dyer) 2296-2371 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Plata* D.E. 1939; Trial Tr. (District Attorney Rod Pacheco) 2372-2404 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Plata* D.E. 1939; Trial Tr. (District Attorney Bonnie Dumanis) 2408-2423 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Plata* D.E. 1939; Trial Tr. (Nancy Pena, Director of the Menatal Health Department of the Santa Clara Valley Health and Hospital System) 2424-2457 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Plata* D.E. 1939; Trial Tr. (California Assemblyman Todd Spitzer) 2457-2484 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Plata* D.E. 1939; Trial Tr. (Robert Garner, Director of Alcohol and Drug Services, Santa Clara County) 2484-2501 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Plata* D.E. 1939; Trial Tr. (Alexander Yim, Divisional Chief, Los Angeles County Sheriff's Department) 2631-2657 (E.D. Cal./N.D. Cal. Dec. 18, 2008) *Plata* D.E. 1969; Trial Tr. (Sheriff Adam Christianson) 2657-2681 (E.D. Cal./N.D. Cal. Dec. 18, 2008) *Plata* D.E. 1969; Trial Tr. (Sheriff Martin Ryan) 2682-2708 (E.D. Cal./N.D. Cal. Dec. 18, 2008) *Plata* D.E. 1969; Trial Tr. (California Senator George Runner) 2723-2753 (E.D. Cal./N.D. Cal. Dec. 19, 2008) *Plata* D.E. 1972; Trial Tr. (Chief Probation Officer Donald Meyer) 2753-2794 (E.D. Cal./N.D. Cal. Dec. 19, 2008) *Plata* D.E. 1972. Appellees cannot simply wish away public safety evidence offered by those in the best position to provide it – active law enforcement officers, probation officers, prosecutors and legislators.[20] Nor can Appel-

[20] Appellees also fail to address, much less distinguish, the research findings and scholarly work cited by the Appellant-Intervenors with respect to public safety and the adverse impact the Prisoner Release Order will have on public safety and operation of the criminal justice system in California if not reversed. While *Amici*, Center on the Administration of Crimi-

lees simply assume that there will be no adverse effect on public safety because "[d]ozens of other jurisdictions throughout the country have safely implemented reductions in prison and jail populations without seeing increases in recidivism or crime." *Coleman* Brief at 60; *see Plata* Brief at 58-59. This Prisoner Release Order is unprecedented in size and scope and is made at a time when California has an a multi-billion dollar deficit and lacks the resources to provide the kind of expansive and costly rehabilitative re-entry programs that might soften the devastating impact that this order will have on California communities if permitted to stand. Moreover, Appellees fail entirely to account for California's approximately 70% recidivism rate in comparing this Prisoner Release Order to reductions in populations made elsewhere. With respect to this particular Prisoner Release Order, there is no assurance whatsoever of safe implementation because the court below did not even "evaluate[] the public safety impact of each element of the State's proposed plan." JS2-App. 3a. Nor can Appellees justify the issuance of a prisoner release order as consistent with public safety by reference to "the continuing constitutional violations, resulting from inundated prison facilities" where, as here, the court below fails to make findings regarding

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nal Law and 30 Criminologists, at least address the scholarly literature, the fact remains that the second edition of the authority *Amici* cite, on page 17 footnote 32, from noted expert James Q. Wilson underscores the point made by Appellant-Intervenors: "We are more confident than we once were that the rate at which offenders are sent to prison, other things being equal, will affect the crime rate: The higher the probability of punishment, the lower the crime rate." James Q. Wilson, "Crime and Public Policy," in CRIME (James Q. Wilson & Joan Petersilia, eds., 2002), at pp. 537-538.

what current violations, if any, exist at the time the release order is issued. *See Coleman* Brief at 60. Moreover, the Prisoner Release Order will also ironically compromise the health and increase the mortality rate of the inmates themselves. An extensive study of inmate mortality, published in the *New England Journal of Medicine*, illustrates starkly that the Prisoner Release Order issued here is likely to have a deadly impact on any released inmates.[21]

None of the assertions offered by Appellees demonstrate that the court below complied with the PLRA's requirement that substantial weight be given to any adverse impact on public safety or the operation of a criminal justice system when it issued this Prisoner Release Order. *See* 18 U.S.C. § 3626(a)(1)(A). On the contrary, the record demonstrates that the court below abdicated its responsibility under the PLRA with respect to public safety by failing to evaluate for public safety impact the elements that comprise State's plan to comply with the Prisoner Release Order issued here. The result is an unprecedented, massive prisoner release order that denies the reality that early release and failure to incarcerate tens of thousands of inmates over a two year period in State with a 70% recidivism rate is a recipe for a public

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[21] Ingrid A. Binswanger, M.D. *et al*., "Release from Prison – A High Risk of Death for Former Inmates," *New England Journal of Medicine*, 356;2, January 11, 2007, *available at* http:// www.nejm.org/doi/pdf/10.1056/NEJMsa064115 (Finding not only that the mortality rate for former inmates far exceeds that of the general public when controlled for "age, sex and race" but also that "[f]or nearly all causes of death, the rates among former inmates were substantially higher than those among inmates.").

safety disaster.[22] This is exacerbated by the fact local California county jails have no capacity to incarcerate additional inmates. Twenty of California's counties, are under court-ordered population caps and another 12 have self-imposed population caps.[23] This total represents over 60% of the jail capacity in the state.[24] Nearly 13,000 jail inmates are currently being released per month due to lack of space.[25] As such, there is no significant excess capacity for county jails to house released state inmates who commit additional crimes or are diverted from state prison.

Because the court below failed to give any weight – much less the "substantial weight" required by Congress – to the adverse impact on public safety and operation of a criminal justice system, this Prisoner Release Order violates the PLRA and must be reversed.

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[22] Research and evidence presented at trial shows on average that inmates commit on average 12 offenses prior to being apprehended, tried, convicted and sentenced. *See* Trial Tr. (Police Chief Jerry Dyer) 2315:04-2318:20 (E.D. Cal./N.D. Cal. Dec. 12, 2008) *Coleman* D.E. 3541.13; *Plata* D.E. 1939; DJA Vol. VI 2526-28.

[23] California State Association of Counties, Governor's Proposed 2010-11 Budget: Counties Respond," *available at* http://www.counties.org/images/users/1/CountiesRespondAoJ.pdf.

[24] California Corrections Standards Authority, Legislative Report – Local Corrections in California, 2008, at 12, *available at* http://www.cdcr.ca.gov/CSA/Admin/Docs/2008_LegislativeReport.pdf.

[25] California Corrections Standards Authority, Jail Population Survey, First Quarter 2010, *available at* http://www.cdcr.ca.gov/CSA/FSO/Docs/2010_1st_Qtr_JPS_full_report.pdf.

CONCLUSION

For all these reasons, the Court should reverse the Prisoner Release Order issued below.

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