

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.

*ON APPEAL FROM THE UNITED STATES
DISTRICT COURTS FOR THE NORTHERN
DISTRICT OF CALIFORNIA AND FOR THE
EASTERN DISTRICT OF CALIFORNIA*

**MOTION FOR LEAVE TO FILE OUT OF TIME
AMICUS CURIAE BRIEF OF J. CLARK KELSO,
RECEIVER FOR MEDICAL HEALTHCARE FOR
THE CALIFORNIA STATE PRISONS AS AMICUS
CURIAE SUPPORTING NEITHER PARTY**

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**MOTION OF J. CLARK KELSO, RECEIVER
FOR MEDICAL HEALTHCARE FOR THE
CALIFORNIA STATE PRISONS, FOR LEAVE
TO FILE OUT OF TIME A BRIEF AS AMICUS
CURIAE SUPPORTING NEITHER PARTY**

J. Clark Kelso, Receiver for Medical Healthcare for the California state prisons, respectfully moves this Court for leave to file the accompanying brief, as amicus curiae in support of neither party. Under Supreme Court Rule 37.3(a), the deadline to file amicus briefs in support of neither party was September 3, 2010.

Letters from counsel for the parties consenting to the filing of amicus briefs have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). In addition, counsel for Appellants Governor Schwarzenegger, et al. (“the State”), Intervenors California State Republican Legislators, et al. (“the Intervenors”), and Appellees do not oppose this motion for leave to file out of time an amicus brief on behalf of the Receiver in support of neither party. Thus, no party opposes the filing of this amicus brief out of time.

On August 27, 2010, the State and the Intervenors filed their opening briefs in this Court. Those briefs rely on statements made by amicus and purport to draw conclusions from those statements. They do not, however, provide a proper context for the statements.

Before the filing of these briefs, amicus had no knowledge that the State and the Intervenors

intended to rely on his statements. Accordingly, amicus did not have sufficient time in which to prepare and file a brief in support of neither party, pursuant to Supreme Court Rule 37.3(a), within 7 days of the filing of Appellants' brief.

Amicus seeks to provide this Court with the proper context and explanation of the statements he made on which the parties rely. This context will better enable this Court to properly resolve the case. Moreover, no party will be prejudiced by amicus' filing. This brief is being filed on the due date for amicus briefs supporting Appellees. The State and the Intervenors, who do not object to the late-filing of this brief, will be able to reply to amicus' brief in their reply briefs. Appellees, the only parties that will be unable to respond to amicus' brief, have consented to the late-filing of this specific brief.

Accordingly, amicus respectfully requests leave to file out of time the accompanying brief in support of neither party.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY OF AR- GUMENT.....	3
ARGUMENT.....	4
THE RECEIVER'S OFFICIAL STATEMENTS IN COURT-ORDERED REPORTS ARE THE BEST SOURCE FOR THE RECEIVER'S VIEWS ON THE IMPACT OF OVER- CROWDING ON THE DELIVERY OF CON- STITUTIONAL HEALTHCARE.....	4
CONCLUSION.....	13

TABLE OF AUTHORITIES

	Page
Intervenors' Brief.....	5, 10
N.D. Cal. Docket.....	<i>passim</i>
State's Brief	5, 10, 11

INTEREST OF AMICUS CURIAE¹

Amicus J. Clark Kelso (“the Receiver”) is the Receiver for delivery of medical health care services to prisoners confined by the California Department of Corrections (“CDCR”), having been appointed to that position by the district court in *Plata v. Schwarzenegger*, No. C01-1351-TEH (N.D. Cal.) on January 23, 2008. (N.D. Cal. Dkt. #1063), Order Appointing New Receiver.² Mr. Kelso succeeded Receiver Robert Sillen, who was appointed by the court on February 14, 2006, to serve effective April 17, 2006. *Id.* at 1.

¹ Pursuant to Rule 37.3(a), the parties have consented to the filing of amicus briefs. Copies of letters consenting to the filing of briefs by the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

² Biographical information regarding Mr. Kelso is appended to the district court’s order appointing him. *Id.* at 7. As there noted, Mr. Kelso is a Professor of Law and former Director of the Capital Center for Government Law and Policy at the University of the Pacific McGeorge School of Law in Sacramento, California. *Id.* As further noted by the court, Mr. Kelso came “to the California Prison Health Care Receivership with over fifteen years of experience in a wide variety of positions in all three branches of state government,” including work with the California Judicial Council and Administrative Office of the Courts, service as interim Insurance Commissioner for the California Department of Insurance, and Chief Information Officer for the State of California. *Id.*

In filing this amicus brief, the Receiver takes no position on the merits of this appeal or the three-judge district court's Order to Reduce Prison Population. The Receiver files this brief solely to provide the Court with the relevant context for statements that he has made that have been quoted by the parties in their briefs to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants Governor Schwarzenegger, et al. (“the State”) and Intervenor California State Republican Legislators, et al. (“the Intervenor”) argue in their briefs to this Court that certain statements by the Receiver support the conclusion that overcrowding is not a primary cause of the unconstitutional health-care conditions in California’s prisons. They rely on statements the Receiver made (1) at a Sacramento Press Club luncheon in 2008 with respect to an \$8 billion proposal to improve and expand prison health-care facilities and reduce overcrowding (a plan which the State ultimately rejected as infeasible and too costly in light of declining State revenues), and (2) in a letter to legislators in 2010 where the Receiver was seeking support for the State’s significantly-reduced construction plan.

That reliance is misplaced. The Receiver’s views regarding the relationship between overcrowding and the provision of constitutional healthcare are best understood by reference to his official reports to the *Plata* district court, which have addressed that issue on a number of occasions. Statements made by the Receiver at a luncheon speech and in letters seeking legislative support for construction funding, when removed by the State and Intervenor from their real-world context, are easily misinterpreted. The Receiver’s 2008 Sacramento Press Club statement was made in the context of a proposed \$8 billion plan to address overcrowding and healthcare facilities’

inadequacies within California's prisons. The State refused to fund that plan as infeasible and unaffordable, and it is no longer under consideration. The Receiver's 2010 statements in support of the State's significantly reduced construction plan do not support a conclusion that this planned construction, if it ever happens, would be sufficient, by itself and in the absence of the population reduction ordered by the three-judge court, to bring about sustainable constitutional healthcare. The Receiver said only that the construction would be a significant step forward, not that the construction would, by itself, be sufficient.

The State and Intervenors would have this Court believe that the Receiver thinks construction is a viable alternative to a population reduction order. That simply is not the case. The \$8 billion plan discussed in 2008 was, by the State's own reckoning, infeasible and unaffordable, and the Receiver has never said current construction plans would be sufficient absent a reduction in prison overcrowding.

ARGUMENT

THE RECEIVER'S OFFICIAL STATEMENTS IN COURT-ORDERED REPORTS ARE THE BEST SOURCE FOR THE RECEIVER'S VIEWS ON THE IMPACT OF OVERCROWDING ON THE DELIVERY OF CONSTITUTIONAL HEALTHCARE.

In their opening briefs, the State and the Intervenors repeatedly quote and rely on the Receiver's

statement in answer to a question at the Sacramento Press Club on August 13, 2008, that “‘we believe we can provide constitutional levels of care *no matter what the population is.*’” State’s Br. 17 (emphasis added by the State); *see also id.* at 34 (“the Receiver concluded that the State could ‘provide constitutional levels of care *no matter what the population is*’ once his plan was fully implemented”); *id.* at 11 (three-judge court found that overcrowding was primary cause of Eighth Amendment violations “despite the Receiver’s statements that the State could ‘provide constitutional levels of care *no matter what the population is.*’”); *id.* at 39 (Receiver has “acknowledged that full implementation of the Receiver’s plans *alone* will be sufficient to ensure Eighth Amendment care.”); *id.* at 3 (“The court ordered this massive release despite, *inter alia*, the Receiver’s confirmation that care satisfying the Eighth Amendment can be provided notwithstanding prison overcrowding * * * ”); Intervenor’s Br. 5 (“The Receiver stated, approximately a month before the trial began, ‘I’m just not seeing difficulty in providing medical services no matter what the population is.’”); *id.* at 10 (“The *Plata* Receiver stated that, under his control, the California prison systems [sic] would not have any ‘difficulty providing medical services (to the entire prison population) no matter what the population is.’”).

The Receiver’s official reports to the district court are a better representation of his views on the relationship between overcrowding and the provision of

constitutional healthcare than (1) a single answer to a question at the Sacramento Press Club two years ago in the context of a proposed \$8 billion construction plan that has long since been rejected by the State and abandoned by the Receiver as infeasible and unaffordable, and (2) statements made in letters to legislators seeking support for a significantly reduced construction plan.

For example, the Receiver's most recent filing in the district court concludes that "there are too many prisoners for the healthcare infrastructure." (N.D. Cal. Dkt. #2317), Fifteenth Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action, September 29, 2010 at 7. That is the most recent of many reports, which have repeatedly emphasized the central role that overcrowding plays in preventing the delivery of adequate healthcare. *See, e.g.*, (N.D. Cal. Dkt. #524), Receiver's First Bi-Monthly Report, July 5, 2006 at 3 (characterizing "System Long Term Overcrowding" as a "very serious impediment" rendering "the Receiver's assignment difficult, if not impossible, to complete"); (N.D. Cal. Dkt. #547), Receiver's Second Bi-Monthly Report, September 19, 2006, at 2 (noting that "severe overcrowding" is the "root cause" of "constitutionally inadequate medical care"); (N.D. Cal. Dkt. #673), Receiver's Report re Overcrowding, filed May 15, 2007; (N.D. Cal. Dkt. #705), Receiver's Supplemental Report re Overcrowding, filed June 11, 2007; (N.D. Cal. Dkt. #705), Tenth Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action, January 20, 2009, at 2 (discussing overcrowding);

(N.D. Cal. Dkt. #2011), Thirteenth Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action, January 15, 2010 at 6 ("CDCR's prisons remain significantly overcrowded, and the lack of adequate facility space and appropriate beds for medical and mental health purposes continues to impede efforts to improve care."); (N.D. Cal. Dkt. #2289), Fourteenth Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action, May 27, 2010 at 6, 54 ("Construction and population reduction remain of critical importance to our efforts since the continuing overcrowding that exists within CDCR's adult institutions stands as a significant obstacle to the delivery of care."); (N.D. Cal. Dkt. #2317), Fifteenth Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action, September 29, 2010 at 59 ("[T]he Office of the Inspector General in his 'Summary and Analysis of the First 17 Medical Inspections of California Prisons,' suggests that, notwithstanding our efforts, overcrowding remains an obstacle to delivering healthcare to the inmate population.").

In addition, the statements referenced in the State's and Intervenor's briefs have been taken out of context and misinterpreted. When read in context, none of these statements about the importance of healthcare-related construction supports the conclusion that construction alone can result in constitutional healthcare absent a reduction in population.

In 2008, the Receiver and the State discussed the possibility of funding an \$8 billion plan to reduce overcrowding and construct and improve healthcare

facilities within California's prisons. In a question and answer period at a 2008 Sacramento Press Club luncheon, a participant posed a compound question to the Receiver, which asked about physician recruitment and its relation to prison overcrowding:

It's been suggested pretty strongly by a lot of people in this arena that the reason that the prison system can't deliver constitutionally adequate healthcare is because of the huge growth in the prison population and that it's not just a matter of beds and facilities, but also being able to deliver services. Like I understand in a lot of rural counties it's very hard to get doctors and clinical personnel. And I'm just wondering if you, as the Receiver, do you have an official position on what we should do about the prison population?

(N.D. Cal. Dkt. #1656, Ex. D (DVD)), Statement of J. Clark Kelso, Aug. 13, 2008, at 28:26-29:00.

The Receiver first addressed the recruitment issue, commenting that: "We're not having that much difficulty in recruiting clinical personnel anywhere in the state. It turns out when you raise compensation to private sector levels, people will come." *Id.* at 29:09-29:23. He went on to discuss the challenges of recruiting in the desert portion of the state versus the state's coastal areas, where "the expenses of living * * * are a little higher," and concluded his discussion of the recruitment issue by stating:

So I'm just not seeing difficulty in providing medical services no matter what the population is. It's a question of how much you are willing to spend for it.

Id. at 30:01-30:17.

The Receiver then turned to the overcrowding part of the question and answered in full as follows:

Now, the overcrowding, without doubt, overcrowding creates additional, not just expenses, but complications in providing medical services because, frankly, everything in the prisons is made more difficult by overcrowding. They can't provide any sort of program, for example, in many prisons. They just don't have room to provide any sort of programs, so everybody is sitting around. Well that by itself creates healthcare problems.

If you ever walked up and down the gymnasiums where they are bunked three high, I have absolutely no doubt that the conditions of overcrowding by itself contributes to greater morbidity. It's like birds on a wire who are crammed too close together. It creates additional stress. I'm confident that's happening. Is it happening to any huge and great extent that we can't respond to? I'm less sure about that. I think we've discovered that you actually can provide care and certainly *our Plan and Turnaround Plan*, believe we can provide constitutional levels of care no matter what the population is.

Id. at 30:19-31:28 (emphasis added).

The Receiver's reference to the "Plan and Turn-around Plan" was to the Receiver's then-current plan, which included a proposal to reduce overcrowding and expand and improve prison healthcare facilities at a capital cost of \$8 billion (which did not include the ongoing costs of operating the new facilities).

The Legislature rejected the \$8 billion plan in late 2008, the State withdrew its support for that plan, and the Receiver has abandoned the \$8 billion proposal as infeasible and unaffordable. Thus, the Receiver's 2008 remarks at the Sacramento Press Club are irrelevant today, since they were premised upon a plan that the State and Receiver have abandoned as infeasible and unaffordable.

The State and the Intervenors also rely on statements made by the Receiver in 2009 and 2010 with regard to the State's significantly revised and reduced construction plan, which calls for \$2.35 billion in healthcare related construction. The State notes that the Receiver referred (in a newsletter) to the State's submission to the *Coleman* court of its revised plan as "'an extraordinary milestone.'" State's Br. 37. The Intervenors quote a May 17, 2010 letter from the Receiver to an assembly member, written as part of the effort to obtain legislative funding for the new plan, which stated that "[a]pproval of AB 552 in order to fund our negotiated construction plan will represent a significant step towards conclusion of the Federal Receivership." Intervenors' Br. 11 n.8.

These statements were true when made and remain true today. By any measure, \$2.35 billion in funding to expand and improve healthcare facilities at existing prisons is a significant step forward, assuming the construction actually happens.³ Given the desperate need of the California prison healthcare system for additional facilities and overcrowding reduction, it is certainly better than *no construction* at all. However, the assessment reflected in these statements is in no way equivalent to a conclusion that the current compromise on construction will result in sustainable constitutional healthcare at current population density levels.

Finally, the State also quotes the Receiver as stating that “because ‘[p]atient-inmate access to health care has markedly improved,’ ‘we are projecting that control of the Health Care Access Units *can be transferred back to CDCR* as early as next year, with a target for July 2011.’” State’s Br. 19. This statement reflects the fact that one small element of the Receiver’s plan involving the use of custody

³ Implementation of the construction plan is dependent upon approvals yet to be secured from a legislative committee and from several state boards. That such approvals may ultimately not be forthcoming is apparent from the most recent denial by the Joint Legislative Budget Committee of one part of the plan involving construction of mental health and medical beds at a prison facility located in Chico, California. (N.D. Cal. (No. 90-cv-00520-LKK-JFM) Dkt. #3941), Defendants’ Update to Court re: Construction and Funding of Defendants’ Amended Stark Plan, October 19, 2010 at 6.

officers to facilitate inmate access to care for previously scheduled appointments appears to have been successful. Success on that one small element does not guarantee that all other elements of the plan will be equally successful at current population density levels. Indeed, as noted in the Receiver's most recent report to the *Plata* court:

[o]vercrowding also is a primary factor causing the comparatively low [Office of Inspector General] score in the Access to Providers and Services category, which essentially focuses upon the timeliness of care pursuant to CDCR policies * * * our Health Care Access teams continue to be highly effective in facilitating inmate access to scheduled appointments. However, the sheer number of inmates at each facility frustrates our effort to meet the required timelines for access to physicians and specialty providers * * * . [T]he OIG scores highlight the overriding challenge of trying to provide medical care in the context of a highly overcrowded prison system where there are too many prisoners for the healthcare infrastructure, and there is a high incidence of overcrowding-related violence resulting in lockdowns and modified programs that interfere with the efficacy of the medical system.

(N.D. Cal. Dkt. #2317), Fifteenth Tri-Annual Report of the Federal Receiver's Turnaround Plan of Action, September 29, 2010 at 6-7.

CONCLUSION

The Receiver does not intend by filing this brief to take any position on the merits of the legal issues before the Court. He does seek to give the Court the proper context to understand statements attributed to him in the briefs submitted by the State and the Intervenors. As demonstrated above, those statements do not express a belief that the State's and Receiver's current efforts will result in constitutional healthcare at existing population density levels.

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