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

BRIEF OF *PLATA* APPELLEES

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

October 25, 2010

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. § 1253 to review the single-judge court's decision to convene the three-judge court and, if jurisdiction exists, whether, given the gravity of the continuing Eighth Amendment violations caused by crowding in California's prisons and the State's manifest failure to remedy the violations despite numerous prior orders over the past eight years, the court abused its discretion when it found that it had afforded the State a "reasonable" amount of time to comply with its prior orders before considering a crowding reduction order.

2. Whether the three-judge court clearly erred in concluding that the conditions for a prison population cap under 18 U.S.C. § 3626(a)(3)(E) were satisfied based on its fact-intensive determinations that (i) prison overcrowding is the primary cause of California's failure to provide inmates with constitutionally adequate mental and medical healthcare, and (ii) in light of numerous unsuccessful previous court orders spanning years of failed remedial efforts, "no other relief" would remedy the ongoing constitutional violations.

3. Whether the three-judge court's order requiring California to bring its prison population to within 137.5% of its prisons' total design capacity, while affording State officials broad discretion to choose which remedial measures will safely and effectively address the prison overcrowding crisis, is narrowly drawn, extends no further than necessary, is the least intrusive means necessary to correct the ongoing violations of inmates' federal constitutional

rights, and properly gives substantial weight to public safety considerations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

JURISDICTION

This Court has jurisdiction over the State's appeal from the January 12, 2010, injunction issued by the three-judge court pursuant to 28 U.S.C. § 1253. However, the Court lacks appellate jurisdiction over the State's challenge to the July 23, 2007, order of the single-judge court, because that order concerns a matter that is required by statute to be decided by a single-judge district court, and it is not an injunction.

INTRODUCTION

Medical care in California's prisons is in crisis despite eight years of judicial oversight. Prisoners are dying unnecessarily at the alarming rate of one every eight days because they do not receive basic medical care from the State. Prisoners are not properly screened for communicable and other serious diseases because there is no space in the overcrowded prisons to do so. If they are properly diagnosed they often do not receive timely medicine because the medication distribution system is so overburdened by the vast number of prisoners in a system designed for half as many. And if they need to see a specialist for a life-threatening condition, such as malignant cancer, they must often wait until it is too late because there are too few specialists for such a large population. Even when prisoners present extreme symptoms, such as recurrent severe abdominal pain and vomiting over a five week period, they are too often left untreated, and die. This appeal demonstrates far too well that "[t]o a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even

terrifying. Survival itself [is] at stake." *Barber v. Thomas*, 130 S.Ct. 2499, 2517 (2010) (Kennedy, J., dissenting).

The reason why these horrifying conditions have lasted so long and prior judicial orders have been so ineffective is clear – prison overcrowding.

The Governor recognized in 2006 that overcrowding causes "extreme peril" to the lives of prisoners and prison staff, and declared a Prison Overcrowding State of Emergency. The State now concedes overcrowding causes prisoners to suffer deprivations of their Eighth Amendment right to minimally adequate medical care. Former heads of corrections from Texas, Washington State, Pennsylvania, Maine and California all testified that it was the *primary cause*, as did the experts offered by the State, the defendant-intervenors, and plaintiffs.

The court-appointed Receiver overseeing the prison medical system reported that his efforts to provide minimally adequate care cannot be successful with this level of overcrowding. The court came to the same conclusion after trial, finding that "overwhelming evidence" supports the conclusions that the primary cause of the current Eighth Amendment violations is overcrowding and that no other remedy will be successful until that condition is alleviated.

The State offers no hope of any remedy for these intolerable conditions for the indefinite future. Despite the Governor's best efforts to reduce the population by 37,000 prisoners, the legislature has shown little interest in such a politically sensitive subject. As a result, the prisons are about as

crowded now as they were when the Governor first proclaimed the State of Emergency, which continues to this day.

Despite the political gridlock that paralyzes California's government on this issue, the State appeals the trial court judgment which provides the only viable avenue to remedy the ongoing violations. The State's appeal does not acknowledge the hard facts identified here and by the trial court, or its own long history of failing to comply with its constitutional obligations.

Instead the State distorts the record evidence beyond recognition, completely ignores the clear error standard of review and seeks from this Court de novo review of the evidence. The State's legal positions fare no better. The State mischaracterizes crucial evidentiary rulings of the trial court, and urges on this Court a construction of a key term that is incompatible with the plain language of the statute and that conflicts with the position it took below. The Court should reject these meritless claims.

The three-judge court employed a remedy explicitly approved by Congress, requiring the State to reduce crowding at its prisons over two years. The court did not order the release of a single prisoner. Instead, the order allows the State to reduce crowding by methods of its own choosing, which may include building more prisons, transferring prisoners to other jurisdictions or adopting any of the methods for reducing the population that the Governor recently proposed and that in other jurisdictions have proven to be safe and effective.

The court's order respects the State's right to make policy decisions on how to remedy the grave and harmful conditions. It is the only effective remedy to a prison crisis that has plagued the State for nearly a decade. The judgment of the three-judge district court should be affirmed.

STATEMENT

A. California's Prison System Is "Collapsing Under Its Own Weight."

California's prisons house twice as many prisoners as they were built to hold. They are so overcrowded that they are incapable of performing their essential functions. Lead appellant Governor Arnold Schwarzenegger recently acknowledged that the entire prison system is "collapsing under its own weight." D.E. 2280 Appendix A at 1.[1] That the prison healthcare system is one of the casualties is beyond dispute.

1. The Governor Has Declared A "Prison Overcrowding State Of Emergency."

In 2006, Governor Arnold Schwarzenegger declared a "Prison Overcrowding State of Emergency" because overcrowding "has caused

---

[1] The record in *Plata*, No. C01-1351-TEH (N.D. Cal.) is cited by docket entry (*i.e.*, "D.E. __"). Cites to "JS1-App." refer to the appendix filed by appellants in Case No. 09-416. Cites to "JS2-App." refer to the appendix filed in support of appellants' Jurisdictional Statement in this case. Trial transcripts are cited as "Tr." and trial exhibits are cited by party and number (*i.e.,* Def. Ex. __ and Plf. Ex. __).

substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them." JS1-App. 61a; Plf. Ex. 1. The State of Emergency is still in effect.

More than ten thousand double and triple bunks are "crammed into gyms and dayrooms that were never meant to be used for housing." JS1-App. 100a. According to a former high-ranking California prison official: "the risk of catastrophic failure in a system strained from severe overcrowding is a constant threat.... [I]t is my professional opinion this level of overcrowding is unsafe and we are operating on borrowed time." JS1-App. 84a-85a.[2]

The former head of the Texas prison system toured California's crowded prisons and declared that "'[i]n more than 35 years of prison work experience, I have never seen anything like it.'" JS1-App. 100a.

In short, because of the dangerous levels of overcrowding, the State has become unable to meet its "first obligation," that is, "to ensure the safety of guards and prison personnel, the public, and the prisoners themselves." *Wilkinson v. Austin*, 545 U.S. 209, 211 (2005).

---

[2] Trial exhibits containing vivid depictions of the vastly overcrowded prisons, and the Governor's speeches about them, are reproduced at http://www.rbg-law.com/home-page-2/news/selected-coleman-plata-trial-materials/.

2. The State's Political Process Is Incapable of Meaningful Reform.

Although Governor Schwarzenegger declared in 2006 that "immediate action is necessary to prevent death and harm caused by California's severe prison overcrowding," JS1-App. 61a, the State has still failed to take any meaningful action.

Over the last two decades, the State has convened *more than a dozen* blue ribbon panels to study the prison crisis. JS1-App. 55a. Each panel has come to the same inevitable conclusion: to provide essential services, the State must reduce prison crowding. Each group of experts also made "essentially the same" recommendations about how to reduce crowding. *Id.* These recommendations were ignored. The prison population kept growing, and crowding worsened.

At the same time, the Governor repeatedly urged the State legislature to enact prison population reduction measures. Those measures were rejected or gutted by the legislature. Plf. Ex. 1 at 3-8; Tr. 1680:18-1681:5, 1694:19-1698:12. In his last major effort in this respect, the Governor proposed a bill in 2009 to reduce the prison population by 37,000 prisoners over two years (essentially the same amount as ordered by the trial court). D.E. 2258 Exh. B. The legislature failed to enact the proposal, and the population is largely unchanged.

It is at this juncture, after every other effort failed, that the Governor described why judicial relief is necessary:

> I don't blame the courts for stepping in to try to solve the health care crisis that we have,

> the overcrowding crisis that we have, because the fact of the matter is, for decades the state of California hasn't really taken it seriously. It hasn't really done something about it.

Plf. Ex. 384 at 1:59-2:14.

3. Overcrowding Causes Eighth Amendment Violations That Produce Serious Injury And Cost Lives.

Under the Eighth Amendment, the State is required to provide care consistent with "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Accordingly, the government has an "obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

As a direct result of overcrowding, California state prisoners are not provided constitutionally adequate care, resulting in "unacceptably high numbers" of deaths, suicides, and extreme failures to provide basic care. JS1-App. 123a; Def. Ex. 1233 at 10-12; *see also* Cal. Prison Receivership, *Analysis of Year 2009 Death Reviews* at 11-14 (Sep. 2010) ("2009 Death Reviews"), *available at* http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2009_20100907.pdf (continuing high rate of preventable and possibly preventable deaths at a rate of one every eight days). The State concedes both that it is violating the prisoners' Eighth Amendment right to adequate medical care, and that crowding is one of the causes. *Plata v. Schwarzenegger*, 603 F.3d. 1088, 1097-98 (9th Cir.

2010); Oral argument at 9:53-10:13, *Plata,* Ninth Cir. No. 09-15864, *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003923; Tr. 2953:6-2954:5 (closing argument); Tr. 46:17-19 (opening statement).

The following are undisputed findings and supporting facts:

- Prison reception centers, where prisoners are processed on arrival, are currently so crowded that they are unable to properly screen new prisoners. JS1-App. 87a-89a. As a result, serious "health needs are not identified" and "cannot be treated." *Id.* This is a leading cause of prisoner deaths. Def. Ex. 1233 at 11-13, 19; *see also* 2009 Death Reviews at 8-9. For example, one prisoner with "abnormal chest x-rays, shortness of breath, and low oxygen saturation" died after prison medical staff failed "to properly evaluate/manage 'red flag' symptoms . . . ." Def. Ex. 1233 at 14.

- The overcrowded housing units make it nearly impossible for prison staff to identify or respond adequately to medical emergencies. JS1-App. 110a-111a; Tr. 380:1-381:7, 382:14-383:3. A former head of California's prison system described how a prisoner was assaulted in the middle of a crowded gymnasium converted to overflow housing. Because the gym was so crowded, prison staff didn't even know about the injury – much less provide emergency medical aid – until hours after the prisoner was already dead. Tr. 382:14:-383:3 (Woodford).

- The sheer number of prisoners has overwhelmed the prisons' system for providing medicine to prisoners. As a result, the prisons are

unable to deliver the right medication to the right prisoner in a timely manner. JS1-App. 112a-114a; Def. Ex. 1233 at 13 (describing prisoner who died after being prescribed the wrong medicine in "error"); *see also* 2009 Death Reviews at 9, 11-15.

- Overcrowding has also overwhelmed the prisons' medical records system, making it "impossible" for the prisons to provide essential healthcare functions appropriately. JS1-App. 118a-121a. For example, one prisoner died after he was discharged from the hospital without any communication between the discharging physician and the receiving physician about his ongoing course of medication. Def. Ex. 1233 at 14.

- Overcrowding has also eclipsed the prisons' ability to provide urgent specialty medical care to prisoners who need it. JS1-App. 114a-116a. The need for such care simply "exceeds the capacity of the [available] providers." JS1-App. 114a. This, too, leads to serious harm and death of prisoners. For example, one prisoner was found to have died because of a "five week delay in referral to specialist for patient with recurrent severe abdominal pain, vomiting, and known bilateral inguinal hernias." Def. Ex. 1107 at 6; *see also* 2009 Death Reviews at 13 (death could have been prevented by timely specialist care).

- "One of the clearest effects of crowding is that the current prison system lacks the physical space necessary to deliver minimally adequate care to inmates." JS1-App. 85a. As the Receiver has reported, "'available clinical space is less than half of what is necessary for daily operations.'" JS1-App. 93a (citation omitted).

- Because the prisons are so overcrowded, inmate control is difficult, and prison administrators rely heavily on lockdowns to exert control. JS1-App. 116a-117a. During lockdowns, prisoners are unable to leave their housing units to go to health clinics. JS1-App. 117a-118a.

- The overwhelmed medical staff and the excessive lockdowns cause serious delays in the time it takes for prisoners to access essential medical care. JS1-App. 116a-118a. Delayed care can have serious, and often fatal, results. In a review of prisoner deaths in 2007, experts found twenty instances of delays so severe they were considered "sufficient to result in harm to the patient." Def. Ex. 1233 at 12. A similarly high number of deaths due to delays in care was found the prior year, Def. Ex. 1107, and last year. 2009 Death Reviews at 9, 11-15. The examples are illuminating. In one case, a prisoner died because of a "two year delay in diagnosis of testicular cancer in . . . patient with chronic testicular pain, [which was] metastatic at time of eventual diagnosis . . . ." Def. Ex. 1107 at 6. Another prisoner died after suffering "an 8 hour delay in access to MD evaluation while experiencing 'constant and extreme' chest pain on the day of death." *Id.*

B. The Single-Judge Court Proceedings

Plaintiffs in the *Plata* case filed their complaint in this action in 2001, alleging that the California Department of Corrections and Rehabilitation (CDCR) had failed to provide constitutionally adequate medical care in California's prisons in violation of the Eighth Amendment prohibition against cruel and unusual punishment. D.E. 1, 20.

In 2002, the State conceded that its prisons were violating prisoners' constitutional rights, admitted that judicial oversight was necessary, and stipulated to an injunction designed to provide minimally adequate medical care. D.E. 68 ¶¶ 4, 29. The State has never sought to terminate the decree or to end judicial oversight of the prison medical system.

1. The State Never Complied With The Court's Orders.

As part of the 2002 stipulated injunction, the State agreed to implement remedial measures at each of its 33 prisons. D.E. 68 ¶¶ 4-5. By 2004, the State had not complied with the order, and court-appointed experts identified an "emerging pattern of inadequate and seriously deficient physician quality" throughout the prisons. D.E. 294 at 3 (citation omitted).

The State stipulated to further court-ordered relief, including a 2004 order aimed at improving the quality of patient care and reducing serious staffing shortages. D.E. 229.

By mid 2005, "not a single prison" had successfully implemented the measures required by the 2002 remedial plan, and the State had utterly failed to comply with the 2004 Patient Care Order. D.E. 294 at 3. The State conceded that the "most" it was able to do was "to attempt to institute some 'stop gap' measures." *Id.* at 8. The court found that "even some of those appear beyond their capability." *Id.*

In late 2005, after a six-day trial, the district court imposed a receivership over the prison medical care system, finding:

> The Court has given defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed. Indeed, it is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system

D.E. 371 at 1-2. The court specifically noted that these failures developed "during a period of exponential growth in the prison population." *Id.* at 43.

2. The Receiver Is Unable To Provide Constitutional Medical Care.

The Receiver faced insurmountable roadblocks as a result of overcrowding.

By 2006, the prisons, built to house approximately 80,000 prisoners, housed double that number. JS1-App. 57a, 9a. Some prison units were (and remain) crowded to 300% of capacity. JS1-App. 10a.

The Receiver's first report to the court, filed on July 5, 2006, states that "systemic long-term overcrowding" may "render the Receiver's assignment difficult, if not impossible, to complete."

D.E. 524 at 3. "Unless and until . . . the overpopulation experienced system-wide is effectively addressed, the Receiver will be impeded in applying systemic and even some ad hoc remedies to the medical care system." *Id.*

The Receiver's second report, filed on September 19, 2006, described "severe overcrowding" as "the root cause of many of the prison system's ills, including constitutionally-inadequate medical care." D.E. 547 at 2.

In February 2007 the Receiver reported in more detail how crowding has "especially adverse consequences concerning the delivery of medical, mental health and dental care" and "interferes with the Receiver's ability to successfully remedy the constitutional violations." Def. Ex. 1092 at 1, 24; *see also id.* at 24-31. Although the Receiver declared that "[f]ailure is not an option," he also said that "the time this process will take, and the cost and the scope of intrusion by the Federal Court cannot help but increase, and increase in a very significant manner, if the scope and characteristics of CDCR overcrowding continue." Def. Ex. 1092 at 41.

After the end of the Receiver's first year in office, he came to understand the impossibility of his task under the severe strains caused by overcrowding. He issued a supplemental report in June 2007 describing how overcrowding impedes his remedial efforts and especially how crowding-caused problems "are now assuming a size, scope and frequency that will clearly extend the timeframes and costs of the receivership and may render adequate medical care impossible . . ." Def. Ex. 1094 at 10.

3. Prison Medical Care Remains Inadequate.[3]

One hundred and twelve prisoner deaths during the last two years are attributed to inadequate medical care. 2009 Death Reviews at 18.

In an August 2010 report, the California Inspector General reported deficiencies that cut to the core of the medical system. He found that "nearly all prisons were ineffective at ensuring that inmates receive their medications," that prisoners are not seen by medical personnel "for routine, urgent, and emergency medical needs according to timelines set by CDCR policy," that care at both ends of the spectrum – preventative care and urgent specialty care – is inadequate, and that *none* of the prisons updated prisoner medical records appropriately. [4]

The Receiver explained that these failures are the result of overcrowding. D.E. 2337-2 (Receiver's Amended Fifteenth Triannual Report, Oct. 4, 2010). The prisons continue to be "ineffective at ensuring

---

[3] The State cites extra-record reports to suggest that the constitutional violations have been remedied. This Court's review should be limited to the record before it. Nonetheless, if the Court considers extra-record evidence, it should also consider the recent reports of the State's Inspector General and the Receiver.

[4] Cal. Inspector General, *Summary and Analysis of the First Seventeen Medical Inspections of California Prisons* 2-3 (Aug. 2010), available at http://www.oig.ca.gov/media/reports/MIU/Summary%20and%20Analysis%20of%20the%20First%2017%20Medical%20Inspections%20of%20California%20Prisons.pdf.

that inmates receive their medications" even though the quality of the nursing staff has improved, because of "the significant overcrowding within the prisons combined with the high frequency of overcrowding-related custody controls, such as . . . lockdowns, that interfere with medication management processes." *Id.* at 6. "Access to providers and services" remains poor because "the sheer number of inmates at each facility frustrates our efforts to meet the required timelines for access to physicians and specialty providers. There are only so many hours in the day, so many slots for appointments, and so much treatment space available to handle the population." *Id.* at 7.

The ongoing failures reflect "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 . . . ." *Id.*

C. The Three-Judge Court Proceedings To Address Prison Crowding

1. *The Single-Judge And Three-Judge Courts Proceeded Reluctantly And Cautiously.*

In November 2006 plaintiffs filed a motion to convene a three-judge court to consider a crowding-reduction remedy. D.E. 561.

The district court did not resolve plaintiffs' motion immediately. It ordered the Receiver to issue a report describing whether overcrowding impacts his remedial efforts. JS1-App. 63a. At the same time, the court urged the State to use this delay to remedy the problems on its own. *Id.*

In July 2007 – more than a year after the Receiver took office, and months after the Receiver reported that crowding has "especially adverse consequences" on his ability to effectuate his remedial plans – the *Plata* court issued an order requesting that a three-judge court be convened. JS1-App. 65a.

The *Plata* court found that all of its previous "order[s] for less intrusive relief . . . [have] failed to remedy" the constitutional violations. JS1-App. 278a-279a; *see* 18 U.S.C. § 3626(a)(3)(A). A reasonable amount of time had elapsed, and the State had proven unable to comply with those orders. JS1-App. 278a-281a.

The court found that "the Receiver will be unable to eliminate the constitutional deficiencies at issue in this case in a reasonable amount of time unless something is done to address the crowded conditions in California's prisons." JS1-App. 286a. Accordingly, as a last resort, the single-judge *Plata* court recommended that a three-judge court be convened. *Id.*

Once constituted, the three-judge court moved cautiously, staying discovery and delaying consideration of plaintiffs' motion for more than seven months to give the State still more time to resolve the prison crisis. JS1-App. 69a-70a. The State again failed to do so.

Even after the trial court had determined that all legal requirements for entering a prisoner release order had been met, the court delayed entering a final order, virtually begging the State to resolve the crisis on its own. D.E. 2066 at 9-10. Again, however, the State failed to take any action.

2. The Trial

During the fourteen days of trial, the court heard testimony from nearly 50 live witnesses and more by written testimony, and admitted hundreds of documents into evidence. JS1-App. 70a.

1. Although the State moved to exclude various categories of evidence about current conditions in the prisons, D.E. 1236 at 3, D.E. 1574, D.E. 1576, D.E. 1566, D.E. 1559, D.E. 1561, D.E. 1564, the court rejected those motions, and the parties submitted voluminous evidence about existing conditions.

Plaintiffs' medical expert, Dr. Ronald Shansky, conducted extensive tours of the state prisons in 2007 and then again just before trial, spoke with prison staff, interviewed prison healthcare workers and reviewed voluminous medical files. D.E. 1714-13 ¶¶6-8; Tr. 423:18-426:16. 500:22-501:7. His reports and testimony detailed the conditions that he observed. *See, e.g.,* D.E. 1714-13 ¶¶12-135. His ultimate conclusion based on all the evidence was that "overcrowding is the primary cause of the constitutional violations in the CDCR for *Plata* class members." JS1-App. 129a-130a.

The former Secretary of corrections in California testified that prison overcrowding made it impossible to provide required healthcare. Plf. Ex. 186 at 1; Tr. 368:1-11. She explained that "[o]vercrowding in the CDCR is extreme, its effects are pervasive and it is preventing the Department from providing adequate mental and medical health care to prisoners.'" JS1-App. 84a. The current Secretary of corrections concurred that "'overpopulation makes everything we do more difficult.'" *Id.*

Doyle Wayne Scott, the former director of the Texas Department of Criminal Justice, testified that overcrowding in California prisons "engenders a state of perpetual crisis that causes management failures" and "overwhelms management infrastructure" that is "needed to adequately organize and track prisoner transfers for specialized medical and mental health care and public health related needs . . . ." JS1-App. 82a-83a.

Jeffrey Beard, then-head of Pennsylvania corrections, explained that the overcrowding reverberates throughout the entire complex prison infrastructure, contributing to widespread system failures and impacting the "ability to properly deliver any service" including medical care. Tr. 215:14-216:12, 217:18-218:25. "[S]evere overcrowding," he said, is "the biggest inhibiting factor right now in California being able to deliver appropriate mental health and medical care." JS1-App. 128a.

Joseph Lehman, who ran state prison systems in Washington State, Maine and Pennsylvania, explained that crowding "is the primary cause of the inability to provide [medical and mental health] services. It's overwhelming the system . . . in terms of sheer numbers, in terms of the space available, in terms of providing healthcare." JS1-App. 127a.

Similarly, the defendant-intervenors' expert David Bennett agreed that the unconstitutional healthcare in California prisons is due to overcrowding, and that a reduction in crowding is necessary in order to provide constitutionally adequate healthcare. Tr. 2190:16-2191:2, 2201:24-2202:6; D.E. 1990-2 at 75:10-17, 75:24-76:13.

The State's mental health expert conceded that the primary cause of the violations is that there are "many more" ill prisoners than the prisons were designed to hold. JS1-App. 138a.

2. The three-judge court devoted approximately half of the trial to consideration of public safety. Key to that examination was an analysis of what happened in other states and localities that have reduced their prison population. Dozens of jurisdictions throughout the country (including within California) have reduced their prison and jail populations without any resulting impact on crime rates. JS1-202a-203a, 2103:20-2105:21, 2107:15-2109:1, 2110:6-2111:21, 2112:17-20.

Although the State argued that a generic "early release" of thousands of prisoners would increase crime, *all the parties agreed* that there are crowding reduction methods available to the State that would have no adverse impact on public safety.[5] Those

---

[5] Tr. 1994:12-1995:20 (State expert "is confident" that there are safe means for the State to reduce prison population); *see also* JS1-App. 174a, 192a-219a; Tr. 3044:7-9, 3045:5-12 (Law Enforcement Intervenors' closing argument); Tr. 3022:24-3023:11 (District Attorney Intervenors' closing argument); Tr. 3063:10-24 (San Mateo County Intervenors' closing argument); Tr. 1007:21-1008:4 (Intervenor San Diego County Deputy District Attorney); D.E. 1737 § III (Intervenor Stanislaus County Chief Probation Officer); Tr. 2771:4-10 (Intervenor Yolo County Chief Probation Officer); D.E. 1664 ¶¶ 60-80 (Intervenor Sonoma County corrections expert); D.E. 1667 at 5-6 (same); D.E. 1711 ¶¶ 16-20 (Intervenor San Diego District Attorney); D.E. 1745 ¶¶ 17-27 (Intervenor Los Angeles County Sheriffs' Department, Director of Bureau of Operations for Bureau of Offender Programs and Services); D.E. 1698 ¶ 3 (Intervenor San Mateo County Chief Probation Officer).

measures include building more prison facilities and transferring prisoners to other jurisdictions. They also include reducing the prison population through carefully targeted measures such as diversion and enhanced good time credits for low-risk offenders.

- *Good Time Credits.* The State and plaintiff experts agreed that the State could safely reduce its prison population by granting prisoners more "good time" credits against their sentences.

The Governor has proposed expanding "good time" credits on various occasions over the past two years (Tr. 1680:18-1681:5, 1694:19-1697:20; D.E. 2258 Exh. B), and two separate expert panels convened by the State also proposed reducing the prison population by expanding good time credits (Plf. Ex. 2 at 12, 92-93; Plf. Ex. 4 at 122, 130), as did all independent experts who testified in this case, including experts for defendant-intervenors. D.E. 1664 ¶ 79 (Bennett Report); D.E. 1667 at 1 (Bennett Supp. Report); *see also* D.E. 1676 ¶ 12 (Sonoma County Sheriff-Coroner); Tr. 1015:21-1016:2 (San Diego Deputy District Attorney); D.E. 1698 ¶ 5 (San Mateo County Chief Probation Officer).

- *Diverting Technical Parole Violators.* State and plaintiff experts also agreed that the State could safely reduce its prison population by diverting technical parole violators to alternative sanctions instead of prison.

Technical parole violators are individuals who have violated the terms of their parole, but have not been convicted of a new offense. JS1-App. 204a-205a.

Diversion of a portion of the State's technical parole violators has long enjoyed the support of the

Governor, key State prison officials, and the State's Expert Panel. JS1-App. 206a-207a; Plf. Ex. 328 at 178 (Governor proposal); Plf. Ex. 2 at 47-49, 77-79 (State's expert panel report), JS1-App. 55a; Plf. Ex. 113 at 75-91 (Governor's Strike Team Report); Plf. Ex. 3 at 31 (California Little Hoover Commission); Plf. Ex. 4 at 122, 144-155 (Deukmejian Report); D.E. 1633 ¶¶ 18-25 (State parole chief); Tr. 1993:6-14 (State's public safety expert).

- *Diverting Low Risk Offenders With Little Time To Serve.* State, defendant-intervenor, and plaintiff experts also agreed that the prison population could safely be reduced by diverting certain low-risk offenders from prison. JS1-App. 210a-214a; Tr. 1087:4-22 (State expert); D.E. 1667 ¶ 79 (defendant-intervenor expert).

The State has long supported such diversion plans as a safe means to reduce the prison population. *See, e.g.,* Plf. Ex. 780 at 18 (Governor's proposal to convert certain felonies to misdemeanors, so offenders do not go to prison).

- *Expanded Rehabilitation Programs.* In addition, the parties introduced evidence showing that expanding rehabilitative programs would reduce the prison population without adversely affecting public safety. JS1-App. 214a-216a; D.E. 2031 at 44-46.

D. The Three-Judge Court's Orders

On August 4, 2009, the court issued an opinion and order finding that plaintiffs had demonstrated all elements required by the PLRA for issuance of a "prisoner release order."

The court affirmed the findings of the single-judge courts that the State had been given a "reasonable amount of time" to comply with the earlier orders for less intrusive relief, JS1-App. 74a, and found that "clear and convincing evidence establishes that crowding is the primary cause of the unconstitutional denial of medical and mental health care to California's prisoners." JS1-App. 82a.

The court further found that "[r]educing the population in the system to a manageable level is the only way to create an environment in which other reform efforts, including strengthening medical management, hiring additional medical and custody staffing, and improving medical records and tracking systems, can take root in the foreseeable future." JS1-App. 168a (citation omitted).

The court also canvassed the various proposals for "other relief" that were presented by the State and defendant-intervenors, as well as all other evidence on the subject, and found that "all other potential remedies will be futile in the absence of a prisoner release order." JS1-App. 144a-145a.

The court next addressed appropriate relief. Relying on testimony from State prison officials, county jail administrators, the former head of the California prison system, and the former heads of the Texas, Pennsylvania, Washington State, and Maine prison systems, the court concluded that "a cap of no higher than 137.5% is necessary . . . ." JS1-App. 169a, 175a-185a.

The court gave substantial consideration to potential impacts of its order and found that other jurisdictions have safely reduced prison crowding and that California can do the same "without a

significant adverse impact upon public safety or the criminal justice system's operation . . . ." JS1-App. 187a-188a.

To reduce crowding, the State "would not be required to throw open the doors of its prisons . . . ." JS1-App. 173a-174a. The State could, for example, increase prison capacity or transfer prisoners to other facilities. Or, it may employ population reduction methods that have already proven successful in other jurisdictions, and have previously been proposed by the Governor. Overwhelming testimony affirmed that there are population-reducing measures that "would not adversely affect public safety." JS1-App. 249a; *see also* JS1-App. 196a-220a.

The court did not find, as the State asserts, that a population reduction "is likely to cause a statistically significant increase in crime" unless the State funds rehabilitative programs. State Br. 8. Rather, the court found that "even if" the State did not fund additional rehabilitation programs, "population reduction could be accomplished without any significant adverse impact on public safety or the operation of the criminal justice system." JS1-App. 187a.

In response to the August 4, 2009, order, the State conceded that it is possible to "safely" reduce prison crowding. JS1-App. 317a. Although the State's first plan called for reducing prison crowding to 137.5% of capacity by 2013, it submitted a second plan on November 12, 2009, to gradually reduce prison crowding by 2011, using many of the well-accepted, safe methods examined by the three-judge court. JS2-App. 32a-70a. In its November 2009

plan, the State set forth six-month crowding reduction benchmarks. *Id.* 70a.

On January 12, 2010, the three-judge court issued a final order requiring the State to reduce prison overcrowding over a period of two years from the order's effective date. Contrary to the State's suggestion, State Br. 9, the court did not order the State to implement the measures set forth in the November 2009 plan. Rather, the court ordered the State to meet the six-month crowding reduction benchmarks from the State's plan, but gave the State broad discretion to choose which crowding reduction measures it will use to reach those benchmarks. JS2-App. 3a-6a.

The court stayed implementation of its order pending this appeal. JS2-App. 8a-9a.

SUMMARY OF ARGUMENT

This Court is not called upon to resolve the myriad factual discrepancies in the State's brief. Aside from those arguments not properly raised here, the State's brief actually presents only a few straightforward challenges to the trial court's findings of fact, findings which this Court reviews under the deferential "clear error" standard. Fed. R. Civ. P. 52(a)(6). The State has failed to show any clear error, and the order below should be affirmed.

1. This case is not about whether the State is currently violating the Eighth Amendment rights of its prisoners. The State has already admitted that there are current constitutional violations and that while it challenges a particular remedy, it does not seek to terminate judicial oversight.

Nor is this case about whether crowding causes the constitutional violations. The State concedes that the inadequacies in the medical care system are caused in part by prison crowding. Tr. 46:17-19 (opening statement), Tr. 2953:6-2954:5 (closing argument). The State's dispute is with the trial court's finding that crowding is the "*primary*" cause of the violations.

The State's legal argument fails because the three-judge court accepted the State's definition of "primary cause." Its arguments here that "primary cause" means "but for" and/or "proximate cause" are inconsistent with its position below and the plain meaning of the statute. The State's factual argument also has no merit because its premise – that the court excluded evidence of current conditions – is false.

The trial court correctly found by clear and convincing evidence that crowding is the primary cause of the constitutional violations and that no other relief will remedy the violations. The State makes no attempt to show that the court's factual findings are clearly erroneous, and the evidence it does cite – out-of-context excerpts plucked from the record – do not undermine the court's findings. To the contrary, the findings are based on the extensive record below, and supported by "overwhelming" evidence that includes the testimony of the appellants themselves as well as their experts.

2. The State's contention that it was not given a "reasonable amount of time" to comply with earlier court orders is similarly misplaced.

The State admits that the *Plata* court had previously issued orders for less intrusive relief that

failed to remedy the constitutional violations. What the State disputes is the finding that the State had a "reasonable" amount of time to "comply" with the latest order appointing the Receiver. But by the time of trial, the Receiver had been operating for more than two and a half years, and the trial court found by clear and convincing evidence that "a reduction in the present crowding of the California prisons is necessary if the efforts of the *Plata* Receiver . . . are *ever* to succeed." JS1-App. 158a-159a (emphasis added). That finding is supported by the vast weight of expert testimony, as well as the Receiver's statement – affirmed in four separate reports – that overcrowding "will clearly extend the timeframes and costs of the receivership and may render adequate medical care impossible . . ." Def. Ex. 1094 at 10; JS1-App. 66a

No further delay in addressing the overcrowding crisis is required.

3. The court below had an obligation to resolve the primary cause of current and ongoing federal constitutional violations. It is precisely under the circumstances presented by this case – where individuals continue to suffer constitutional deprivations after decades of attempts at lesser remedies have proven unsuccessful – that the federal judiciary has the most important role to play.

The three-judge court ordered the least intrusive crowding remedy available: it required the State to reduce overcrowding, but left to the State full discretion about which methods to employ. Despite the State's pretense, the order will have no adverse effects on crime rates. Numerous other jurisdictions have safely reduced their prison populations, and the

trial court correctly found that the State can employ the same techniques in California to reduce prison crowding without an adverse effect on the public's safety. The court's order in fact mirrors the governor's own proposal to reduce prison crowding by 37,000 prisoners.

ARGUMENT

I. The State Has Been Given A "Reasonable Amount Of Time" To Comply With The Prior Court Orders.

Under the PLRA, a "prisoner release order" may not issue, nor may a three-judge court be convened, unless:

> (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and
>
> (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

18 U.S.C. §§ 3626(a)(3)(A), (C), (D).

Both the single-judge and three-judge courts determined that each of these requirements were satisfied. The State challenges only whether the single-judge court afforded the State a "reasonable amount of time to comply" with the court's prior orders, under subsection 3626(a)(3)(A)(ii). This Court does not have appellate jurisdiction to review the findings of the single-judge courts in these cases. *See* Brief of *Coleman* Appellees Sec. II(A); Brief of CCPOA Appellees Sec. I(B)(3). Although the Court

has jurisdiction to review the three-judge court's ruling, the State has not raised that issue in its opening brief and thereby has waived any claim of error. Therefore, the Court need not reach this issue at all.

If the Court should reach the merits, the State's argument fails because the lower courts' rulings that the State had a "reasonable" amount of time to comply with the district court's orders is well within the bounds of the courts' discretion. The single-judge and three-judge courts' determinations of "reasonableness" are based on the totality of the circumstances and the full procedural history of this ten-year-old case, including the gravity of the constitutional violations and the State's inadequate efforts at compliance. JS1-App. 65a-67a, 74a. A determination of this kind is entitled to great deference, and should be reviewed only for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990). The trial court is best positioned to decide this type of matter. *Id.* at 403. Only deferential review will give the trial court "the necessary flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.* at 404 (quoting *Pierce v. Underwood*, 487 U.S. 593, 561-562 (1988)). The State fails to show error under any standard of review.

There is no dispute that the *Plata* court has issued multiple orders for less intrusive relief, in 2002 (D.E. 68, order for injunctive relief), 2004 (D.E. 229, quality of care order), 2005 (D.E. 371, establishing receivership) and 2006 (D.E. 473, appointing individual receiver), and that all previous

orders have "failed to remedy" the constitutional deprivations. As the court correctly found, it gave "defendants every reasonable opportunity to bring its prison medical system up to constitutional standards, and it is beyond reasonable dispute that the State has failed." JS1-App. 279a (citation omitted); *see also* JS1-App. 74a.

Not only did the single-judge court correctly find that it had given the State a reasonable opportunity to comply with all prior orders, but the three-judge court also found after a full trial that clear and convincing evidence establishes that "a reduction in the present crowding of the California prisons is necessary if the efforts of the *Plata* Receiver . . . are ever to succeed." JS1-App. 158a-159a; *see also* JS1-App. 168a ("no relief other than a prisoner release order is capable of remedying the constitutional deficiencies").

The three-judge court explicitly agreed with and adopted the single-judge court's decision regarding "a reasonable amount of time," finding anew that the *Plata* court has "previously entered orders for less intrusive relief that have failed to remedy the constitutional deprivations . . . despite the reasonable time given to defendants to comply with those orders." JS1-App. 74a.

The Receiver's inability to remedy the constitutional violations in the overcrowded conditions was the critical factor in both the decision to convene the three-judge court in July 2007, more than a year after the Receiver was appointed, and in the three-judge court's August 4, 2009, decision to issue a crowding reduction order. *See, e.g.*, JS1-App 281a (single-judge court: "[h]ad the Receiver

reported to the Court that he did not view overcrowding to be a substantial impediment to implementing the reforms required in this case, the Court may well have reached a different conclusion"); JS1-App. 155a (three-judge court: "the *Plata* Receiver has determined that adequate care cannot be provided for the current number of inmates at existing prisons and that additional capacity is required to remedy the medical care deficiencies").

The judgment that the Receiver could not accomplish his assigned task in the absence of a reduction in crowding was supported by abundant evidence, including the opinion of the Receiver, prison healthcare experts, and the former directors of five state prison systems, and was well within the proper bounds of discretion.

The Receiver's reports showed that overcrowding was having an adverse impact on every element of his plans from the outset. The Receiver's first report, filed in July 2006, explained that "systemic long-term overcrowding" may "render the Receiver's assignment difficult, if not impossible, to complete." D.E. 524 at 3. His second report, issued two months later, described "severe overcrowding" as "the root cause" of the "constitutionally inadequate medical care." D.E. 547 at 2.

The experts concurred. One former head of California prisons testified that because overcrowding compromises every aspect of prison operations, the prisons will "never" be able to provide constitutionally adequate medical or mental health care until overcrowding is reduced. JS1-App. 162a-163a. The former head of Texas prisons

testified that unless crowding is substantially reduced, "the state will remain in crisis verging on catastrophe and will remain utterly unable to provide adequate medical and mental health care to the prisoners in its custody." JS1-App. 162a. The then-current head of corrections in Pennsylvania echoed that sentiment, as did the former Secretary of corrections in Maine, Pennsylvania and Washington. JS1-App. 163a. Plaintiffs' medical expert Dr. Shansky, himself a former receiver of the Washington, D.C. jails, likewise agreed that neither the State nor the Receiver can "simultaneously develop a competent medical care system in facilities that lack necessary space and staffing, and address the growing needs of an ever-increasing number of patients." JS1-App. 163a; *see also* 164a-166a (listing additional experts who concurred).

The State's argument that the trial court "wrongly believed" that the State's prior failures alone were enough to warrant a three-judge proceeding, irrespective of the receivership, State Br. 16, is mistaken. Both the single-judge and the three-judge courts considered and rejected any contention that the Receiver could remedy the constitutional violations without a reduction in prison crowding. JS1-App. 155a-156a, 158a-159a, 280a-283a

The State notes that the Receiver has made *improvements* to the prison medical system. Congress, however, authorized a single judge to convene a three-judge court – and a three-judge court to issue a crowding reduction order – when an order fails to "*remedy* the deprivation of the Federal right. . . ." 18 U.S.C. § 3626(a)(3)(A) (emphasis added). The changes identified by the State in its

brief – increased healthcare spending, increased staffing, and planning to build new healthcare facilities – have proved insufficient, and the Receiver's latest report identifies the reason: there are "simply too many prisoners for the healthcare infrastructure." D.E. 2337-2 at 5-7.[6]

The State claims a "reasonable amount of time" had not elapsed between one version of the Receiver's long term plans and the single-judge court's decision to convene the three-judge court. State Br. 16. But the Receiver's plan is not an order for injunctive relief and is not a static document; it is a continually developing set of goals and timelines that the Receiver has drafted and revised regularly over the course of years. *See, e.g.,* D.E. 658 at 3 (May 10, 2007, plan: "a living, growing document" that "encompasses a number of remedial measures begun prior to the Receivership as well as activities initiated by the Receiver"); D.E. 929 at 1 (Nov. 15, 2007, plan is the "second iteration" of the Receiver's plans and sets forth different goals); D.E. 1229 at iv (June 6, 2008, plan sets forth new sets of goals of receivership); D.E. 2337-2 at 5-7 (describing elements of Receiver's plans that have not been achieved because of overcrowding).

---

[6] The Receiver's inability to cure the constitutional violations despite the increase in funding and staffing further demonstrates that crowding must be addressed for the Receiver's work to succeed. Further, the State's boast about increased healthcare spending rings hollow now, since the Governor just cut the prison healthcare budget by $820 million. *See* http://www.ebudget.ca.gov/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf at 16.

By the close of trial, two and a half years into the receivership, the overwhelming evidence showed that no matter how much time is given, the Receiver does not have a reasonable chance of success in California's overcrowded prisons. JS1-App. 155a-156a, 158a-159a. Requiring the trial court to wait even longer before convening a three-judge court or issuing a remedy would serve no purpose.

II. The Three-Judge Court Correctly Found That Crowding Is The Primary Cause Of The Constitutional Violations And That No Other Relief Will Remedy Them.

A. The Trial Court's Findings Are Based On Current Evidence.

The State's "current evidence" argument conflates the three-judge court's statutory obligation to make its findings based on current evidence with a statutory construction that would require the court to re-determine liability during the remedial phase. The State's arguments fail because the PRLA does not require the court in this remedial proceeding to decide liability anew, and the three-judge court did consider all relevant evidence of current conditions before issuing relief.

1. The State argues that when deciding whether to issue a "prisoner release order" the three-judge court must again decide whether the State is violating plaintiffs' constitutional rights. State Br. 27-28.

The State's position is not supported by the language or structure of the PLRA, and would be both impractical and a waste of judicial resources.[7] The PLRA regulates the court's role in various aspects of prison litigation, but it requires a three-judge court in only one circumstance – when a prisoner release order is being considered. The three-judge court correctly held – and the State does not dispute – that the single-judge *Plata* and *Coleman* courts have jurisdiction to determine whether the State is violating plaintiffs' constitutional rights, and, conversely, to terminate relief when the constitutional violations are remedied. JS1-App. 77a-78a.

The position the State takes would vest jurisdiction with both the three-judge court and the single-judge court over the same issue at the same time. In a case such as this where the court has continuing jurisdiction for long periods of time, a construction that required two courts to simultaneously have jurisdiction over liability could result in inconsistent rulings and would most certainly cause duplication of judicial effort. The State points to nothing in the PLRA that would suggest Congress intended such a radical change in the procedure of the federal courts.

2. The State contends that the three-judge court must decide whether to issue crowding relief in light of conditions current at the time of trial. Plaintiffs

---

[7] Even if it were correct, it does not matter here since the State conceded after trial that it was continuing to violate plaintiffs' constitutional rights.

agree, and the court did just that. The State's contention that the court improperly excluded evidence about current conditions is false. State Br. 27.

Although the court cut short arguments relevant *only* to the question whether the current conditions were constitutional, it left no doubt that it would consider all evidence relevant to the issues before it –the cause of the current violations, and the appropriate scope of relief for them – even when such evidence was also relevant to the existence of continuing constitutional violations. Tr. 836:5-25.

Indeed, the State's experts toured the prisons just weeks before trial, examined prison medical facilities, interviewed medical personnel, prison staff and prisoners, and testified about the current conditions they found. *See, e.g.,* Def. Ex. 1017 at 1-2; Def. Ex. 1020; Tr. 1077-1080, 1192-1195, 1203-1204. The State introduced exhibits with the most current healthcare statistics available, including information about prisoner deaths, medical and mental health staffing levels, and institutional populations. *See, e.g.,* Def. Exs. 1203, 1233, 1235-1, 1235-2. The State also introduced the reports of the *Coleman* Special Master and the *Plata* Receiver, which included their most current discussion of conditions. *See, e.g.*, Def. Exs. 1098-1100, 1111-1112; JS1-App. 150a; Def. Exs. 1225-1231; JS1-App. 41a; JS1-App. 49a. State witnesses testified at length about current conditions, including the extent of overcrowding, staffing levels, the need to house prisoners in gyms and dayrooms, medication management problems, healthcare expenditures, and prisoner deaths. *See, e.g.*, Def. Exs. 1000-1002, 1004-1008; Tr. 756-767,

776-777, 787-789, 794, 807-808 (State mental health official); Tr. 836-856, 860, 864, 880-881, 896-897, 904-905, 910, 924-925 (State's Chief Deputy Secretary of Correctional Healthcare Services); Tr. 1671-1673, 1678-1709 (Secretary of Corrections); Tr. 1735-1739, 1754-1755, 1762-1763, 1768 (State Parole Chief); Tr. 1891-1900, 1906-1909, 1915-1917 (Undersecretary of Operations for State prisons).

The State does not point to any evidence that was excluded, which demonstrates both that there was no error and that there was no prejudice. In any event, the State cannot be heard to complain because it was the party that moved to exclude evidence of current conditions at trial. *See* D.E. 1236 at 3 (requesting that the court prohibit plaintiffs' experts from gathering evidence of prison conditions in 2008); D.E. 1574 (motion to exclude evidence of the prison overcrowding state of emergency); D.E. 1576 (motion to exclude evidence about prison conditions, including current conditions); D.E. 1566 (motion to preclude testimony of guards, who have direct knowledge of current conditions); D.E. 1559 (motion to exclude evidence about suicides in prison, including current data); D.E. 1561 (motion to exclude all evidence about certain prisons); D.E. 1564 (motion to exclude all evidence about State department that provides mental health care, including current evidence). [8]

---

[8] The State also contends that it was "prohibited" from obtaining the Receiver's testimony at trial. State Br. 28. However, the State did not identify the Receiver as a potential trial witness, or call the Receiver as a witness at trial, *see, e.g.*,

(continued)

3. Underlying the State's claim about "current" evidence is an insinuation that conditions had improved so much that, by the time of trial, there were no longer constitutional violations.[9] There is no factual support for such an allegation, and the recent reports of the Receiver and the State Inspector General make that clear. *Supra* 14-15.

Nonetheless, if the State believes there are no longer any constitutional violations, it has a remedy under Federal Rule of Civil Procedure 60(b)(5)[10] and 18 U.S.C. § 3626(b). To date, however, the State has never accepted the three-judge court's invitation to bring that matter before the single-judge district courts by an appropriate motion. Pretrial Conf. Tr. 28-29 (Nov. 10, 2008).

D.E.1724 at 37 (State's witness list), and its argument is therefore waived.

Instead of asking the Receiver to testify, the State took a safer route and submitted into evidence the Receiver's reports about the impact of crowding on the delivery of medical care. Def. Exs. 1092-1095. Moreover, though it was not permitted a deposition, the State also obtained all of the information from the Receiver that it had sought via discovery (evidence it claimed would constitute "accurate and updated evidence . . . regarding the current status of medical care at CDCR institutions statewide"). D.E. 1436 at 9, 1450 & Def. Ex. 1100.

[9] The State claims that plaintiffs' expert "*admi[tted]*" the lack of violations, State Br. 27, but in fact in the testimony that the State cites, plaintiffs' expert merely agrees to the non-controversial assertion by the State's counsel that "*it is possible* that some units" within some prisons provide constitutionally adequate care. Tr. 456:11-15 (emphasis added).

[10] *See Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 378 (1992).

B. The Trial Court Properly Defined And Applied "Primary Cause."

1. The State concedes that the trial court used the State's proposed definition of primary cause, which is the "cause that is 'first or highest in rank or importance; chief; principal.'" State Br. 32; *see also* D.E. 1577 (State's motion *in limine* regarding definition of primary cause). That is also the dictionary definition of the phrase. D.E. 1577 at 3. But the State argues here that primary cause means something else – though it does not clearly explain its proposed definition. *See* State Br. 30-32 (referring to various definitions of primary cause, including "but for cause," "proximate cause" and one that is very close to the definition it offered below: "'superior or controlling'" cause).

Whatever the State now intends, it is barred from arguing for a new definition under the doctrine of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001). The State's position about the definition of primary cause is "clearly inconsistent" with its earlier position in this same case. *Id.* at 750. The State persuaded the three-judge court to adopt its earlier-proposed definition of primary cause, and it thereby gained an unfair advantage because plaintiffs tailored their evidence and argument to the State's legal standard. *Id.* at 749. Even apart from estoppel, the State has waived its argument about the definition of "primary cause." A party waives new arguments and claims by not raising them below. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).

2. Even if the State could propose a new definition for primary cause, its argument fails

because the statute uses the term "primary cause," not "but for cause" or "proximate cause" – both of which are standards commonly applied by Congress and the courts in other contexts. The Court should presume that Congress meant what it said, and not impose a different standard here. *BedRoc Limited LLC v. United States*, 541 U.S. 176, 183 (2004). Thus, the Court should interpret the term "primary cause" according to its "'ordinary and popular'" meaning. *Id.* at 184 (quoting *Amoco Production Co. v. Southern Ute Tribe*, 526 U.S. 865, 873 (1999)). As the State itself argued to the trial court, the "ordinary" meaning of "primary cause" – the dictionary definition – is "the chief or principal cause," precisely the definition adopted by the court. D.E. 1577 at 3 (State's motion *in limine*).

3. The State contends that the three-judge court "treated 'primary cause' as if it were synonymous with a 'contributory cause,'" State Br. 32, but there is no support for this assertion.

The State points out that the court acknowledged that there are multiple causes of the Eighth Amendment violations in this case. State Br. 32-33. But the existence of other causes does not transform the "chief" or "principal" cause into a "contributory" cause. As the three-judge court correctly found, the PLRA's use of the term "primary" to modify "cause" indicates that Congress understood that there may be multiple causes, one of which is primary. JS1-App. 79a. The State acknowledged below that to satisfy the statute crowding need not be the "only" cause, it must simply be the "biggest cause." Tr. 2960:12-15 (State's closing argument). Even the State's new proposed definitions of primary cause –

"but for" cause and "proximate" cause – presume the possibility of other, lesser causes. Thus, there is no merit to the contention that a factor cannot be the primary cause simply because there are other causes.[11]

The State further suggests that, buried somewhere in the phrases "primary cause" or "no other relief," is a requirement that curing crowding must by itself remedy all the violations. State Br. 33-35. The statute, however, imposes no such requirement, and the State's construction would raise serious questions about the statute's constitutionality, because it would prohibit courts from remedying the main cause of a constitutional violation unless the relief would simultaneously resolve all deficiencies.

The three-judge court put it succinctly: "The PLRA does not require that a prisoner release order, on its own, will necessarily resolve the constitutional

---

[11] The statutes cited by the State, State Br. 30 n. 10, further demonstrate that in using the term "primary cause," Congress contemplated that there could be multiple causes of the violations. In Pub. L. No. 110-180, § 2(5), 121 Stat. 2559, 2560 (2008), Congress found that there are two primary causes of "the delay in NCIS background checks." Congress also identified multiple "primary causes" of homelessness (Pub. L. No. 111-22, § 1002(a)(1), 123 Stat. 1663, 1664 (2009) ("a lack of affordable housing and limited scale of housing assistance programs are the primary causes of homelessness"); 42 U.S.C.A. § 14043e (finding domestic violence to be "a primary cause of homelessness"). *See also* 42 U.S.C. § 9607(b) and (c)(2) (referring to "sole[]" cause in one subsection (§ 9607(b)), and "primary" cause in another (§ 9607(c)(2)); 49 U.S.C.A. § 24313 (requiring Amtrak to document both "primary and secondary causes" of accidents).

deficiencies. . . . All that the PLRA requires is that a prisoner release order be a necessary part of any successful remedy. If all other potential remedies will be futile in the absence of a prisoner release order, 'no other relief will remedy the violation.'" JS1-App. 144a (quoting 18 U.S.C. § 3626(a)(3)(E)(ii)). The statute is satisfied when a prisoner release order is *necessary* regardless of whether it is in itself *sufficient* to remedy the violation. JS1-App. 134a.

But in any event, the State's argument is unlikely to have any practical significance in this case. Once the crowding problem is resolved, the State should be able to meet prisoners' healthcare needs as required by the Eighth Amendment. The *Plata* court has already issued numerous orders aimed at improving medical care, through, *e.g.*, "recruitment and retention of qualified personnel, medical leadership, medical equipment, screening systems, systems to track patients with needs, record keeping, and institutional culture." J.S. 20-21. Once crowding is reduced, the Receiver and the State will be able to implement those other orders to cure the constitutional deficiencies. At present, however, it is the crowded conditions in the State's prisons that prevent them from doing so.

4. The above demonstrates that the State's legal arguments about the meaning of "primary cause" have little substance. In reality, however, the State's contentions are directed at the trial court's factual findings on primary cause (even while the State concedes that crowding is a significant cause of the constitutional violations). But the three-judge court's findings, which cannot be overturned except for clear error, are well supported.

The three-judge court found that the "only conclusion that can be drawn from the wealth of clear and convincing evidence . . . is that the unconstitutional denial of adequate medical and mental health care to California's inmates is caused, first and foremost, by the unprecedented crowding in California's prisons." JS1-App. 143a.

That determination required the court to analyze the entire record and make credibility determinations about the various expert witnesses, and it also "involve[d] application of law to fact, which is left to the factfinder, subject to limited review." *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) (appellant must make "'a very obvious and exceptional showing of error'" to merit appellate review).

Surveying the record, the court found (and the State does not contest) the following facts:

- Crowding causes potentially deadly delays in emergency response. JS1-App.110a-111a.
- Crowding increases the transmission of infectious diseases. JS1-App. 101a-102a.
- Having too many prisoners for the prison infrastructure has crippled the prisons' ability to provide the right medication to the right prisoner. JS1-App. 112a-114a.
- The sheer number of prisoners has overwhelmed the prisons' medical records system. JS1-App. 118a-121a.
- There are not enough medical facilities to provide medical care to the vast number of prisoners who need it. JS1-App. 85a-95a.

- There is no place to properly screen the tens of thousands of new prisoners to see if they have serious medical conditions. JS1-App. 87a-89a.
- There are not enough beds to house medically needy prisoners in appropriate settings. JS1-App. 95a-97a.
- There are not enough medical specialists to treat the large number of prisoners who urgently need specialty care. JS1-App. 114a-116a.
- Crowding-caused lockdowns lead to serious delays in providing medical care. JS1-App. 116a-118a.
- Crowding contributes to an unacceptably high number of prisoner deaths. JS1-App. 142a.

The three-judge court summed up the evidence this way: "[t]he crushing inmate population has strained already severely limited space resources to the breaking point, and crowding is causing an increasing demand for medical and mental health care services, a demand with which defendants are simply unable to keep pace." JS1-App. 140a.

The court's primary cause findings are explicitly supported by both the State's expert and plaintiffs' experts, JS1-App. 129a-130a, 138a, by a former head of California's prison system, JS1-App. 126a, and by the former heads of prison systems in Texas, Pennsylvania, Washington and Maine. JS1-App. 126a-128a. Even the current director of California's prison system, an appellant in this case, acknowledges that "overpopulation makes

everything we do more difficult" and "continues to 'severely hamper'" the delivery of adequate medical care. JS1-App. 84a; Tr. 1683:11-20, 1684:5-16.

The State quotes one out-of-context snippet from a speech given by the Receiver to show that the Receiver can remedy the violations without a crowding reduction order. State Br. 11, 17, 34.[12] The trial court had ample reason not to draw the inference the State suggests. The quoted comment refers to the Receiver's ability to hire medical staff if he has limitless money to spend. In the next breath, the Receiver states "Now, the overcrowding–without doubt overcrowding creates not just additional expenses but complications in providing medical services, because frankly everything in the prisons is made more difficult by overcrowding." D.E. 1656 Exh. D at 28:19-31:29 minutes. The Receiver's full views on the question are set forth in his formal reports to the court, which, combined with the expert testimony in this case, leave no doubt that overcrowding has prevented him from curing the constitutional violations. *See* Def. Exs. 1092, 1094; D.E. 2337-2.

---

[12] The State also quotes plaintiff's expert Dr. Shansky in support of that proposition. But Dr. Shansky testified strongly that crowding is the primary cause of the violations, as the district court observed. JS1-App. 129a-130a (quoting Dr. Shansky stating "CDCR's medical delivery system cannot provide a constitutional level of care because the prison system incarcerates far more prisoners than can be adequately treated with the resources, staffing and facilities available in the CDCR. In short, it is my opinion that overcrowding is the primary cause of the constitutional violations . . .").

The State also relies on a brief comment by Judge Henderson before trial, stating that he thought that prison crowding is not the "core issue" in *Plata*, and that the Receivership will continue to be necessary once prison crowding is reduced. State Br. 12, 35. The comment does not undermine the court's ultimate findings, because the "core issue" in *Plata* has always been medical care (though the primary cause of the inadequacies is overcrowding), and the parties agree that the Receivership will still be necessary for at least some time once crowding is reduced. In any event, a statement made by a single member of the panel before any evidence was introduced sheds no light on the correctness of the three-judge court's findings reached after the close of trial.

C. No Other Relief Will Remedy the Violations.

Closely related to the finding that crowding is the "primary cause" of the constitutional violations is the three-judge court's conclusion that "no other relief" will remedy the violations. JS1-App. 144a-145a. The PLRA defines "relief" as "all relief in any form that may be granted or approved by the court . . ." 18 U.S.C. § 3626(g)(9).

The court canvassed the various proposals for "other relief" that were presented by the State and defendant-intervenors, as well as all other evidence on the subject, and concluded that "clear and convincing evidence" establishes that "the constitutional deficiencies in the California prison system's medical and mental health system cannot be resolved in the absence of a prisoner release order." JS1- App. 145a. As the former director of

California prisons testified, unless the State reduces overcrowding, it will "never" be able to provide or sustain constitutionally adequate medical or mental health care. JS1-App. 163a.

Like the "primary cause" findings, the three-judge court's "no other relief" findings are fact-based, and should be reviewed for clear error. Fed. R. Civ. P. 52(a)(6). The State does not claim (much less demonstrate) clear error.

1. The State argues that construction of prisons and transferring inmates to out-of state prisons are less intrusive remedies that the court could have ordered. State Br. 36.[13] But both of these measures, which increase prison capacity, are ways of complying with the court's order because both reduce crowding. JS2-App. 70a; JS1-App. 154a. Also, an order to transfer prisoners would itself be a "prisoner release order" under the terms of the statute. 18 U.S.C. § 3626(g)(4) (defining "prisoner release order" as one that "has the purpose or effect of reducing or limiting the prison population, or that directs the release from . . . a prison").

In any event, the court had ample reason to doubt that prison construction would resolve overcrowding – and thus remedy the constitutional violations – within any reasonable time. The court correctly found that the State's current construction plans have been plagued by so many years of delays, and have been scaled back so dramatically, that they are

---

[13] This argument conflicts with the State's contention below that the court has no power to order construction. D.E. 2039 (motion to terminate construction plans).

not a viable "alternative" to a court order. *See, e.g.*, JS1-App. 149a-154a.

2. The State also argues that hiring additional staff is a "less intrusive form of relief" that would remedy the violations, and that the prisons are fully staffed. State Br. 37-38. If both of these assertions were true the constitutional violations would be cured. Yet that is not the case.[14]

The effect of overcrowding on the prison healthcare system is not just a matter of too many prisoners for the number of doctors. There are also too many prisoners for the entire prison infrastructure, including physical space, medication management and recordkeeping systems, screening processes, appointment scheduling systems, and specialist care providers. Overcrowding also heightens the levels of violence and chaos in the prisons to such a degree that "management spends virtually all of its time fighting fires" and makes "short-sighted decisions that create even more crises." JS1-App. 82a (quoting former head of California prisons).

The three-judge court thus correctly found that ordering the State to complete additional hiring, without reducing crowding, would be ineffective. "Even if staff could be hired, they would have almost nowhere to work because CDCR's facilities lack the physical space required to provide medical and

---

[14] The State's claim of full staffing is belied by the record. At the time of trial, the statewide vacancy rate for primary care providers (physicians, surgeons, nurse practitioners, and physician assistants) was 30%. Def. Ex. 1235-2.

mental health care." JS1-App. 154a-155a. The State does not dispute this finding. Nor does the State dispute that, once hired, it is difficult to retain staff: "many potential staff members are unwilling to work" in these overcrowded conditions. *Id.* Moreover, as the Receiver recently reported, despite improved staffing levels, "access to providers" continues to be "poor" because of "the sheer number of inmates . . . There are only so many hours in the day, so many slots for appointments, and so much treatment space available to handle the population." D.E. 2337-2 at 6-7.

3. The State also argues that the Receiver is an alternative form of relief. [15] Simply relying on the Receivership is not a viable alternative when crowding must be reduced for the Receiver's efforts to succeed. *See supra* 29-33.

4. After almost two decades of remedial efforts, minimally adequate care in California's prisons remains an unfulfilled promise, not a reality. Improvements have been made, but the systemic violations are far from cured.

The lead appellants in this case – the Governor and the head of California's prison system – both acknowledge that crowding stands in the way of a remedy. They could scarcely assert otherwise. Crowding has caused the plaintiff classes to suffer years of unnecessary death and serious injury. The State continues to offer promises of improvement,

---

[15] This argument, too, conflicts with the State's argument below that the court has no power to appoint a receiver. D.E. 2039 (motion to replace receiver with special master).

but the record convincingly demonstrates that without resolution of the crowding problem the unconstitutional conditions – and the suffering that flows from them – will continue unabated.

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

The constitutional violations in this case exist throughout the State prison system. JS1-App. 82a-126a (describing systemwide deficiencies). The State has declared that it is in a statewide "Prison Overcrowding State of Emergency" that requires immediate action to reduce crowding. JS1-App. 61a; *see also* Tr. 856:2-5, 880:24-881:3 (head of prison healthcare services concedes that "overcrowding has negative effects on everybody in the prison system: inmates and staff, mentally ill, not mentally ill, medical, all of them" and "the impact of overcrowding affects prisoners throughout the prison system"). This is, in short, a case where a systemwide remedy is not just appropriate, it is essential to cure the ongoing constitutional violations.

The three-judge court arrived at an appropriate systemwide remedy consistent with the evidence before it, which included the reasoned opinions of experts who have themselves run state prison systems, and the opinion of the State's own prison facilities chief. JS1-App. 175a-185a. The remedy the court ordered is remarkably similar to the remedy proposed by the Governor himself, who asked the legislature for authority to reduce the prison population by 37,000 prisoners – a reduction

that would bring the State almost precisely to 137.5% of design capacity. D.E. 2258 Exh. B.

At trial, the State never countered any of the plaintiffs' evidence or expert testimony establishing the maximum level of crowding at which minimally adequate healthcare could be provided. The State offered no evidence of what it believed to be the maximum capacity; it never argued for or against an order that applied to the system as a whole or to individual prisons; and it never suggested that the use of design capacity as a measurement was improper or that another method would be superior. Instead the State appellants held their tongues, leaving the district court without the benefit of their guidance.

Nonetheless, the court conducted an independent analysis of the evidence before it, rejecting the plaintiffs' proposal to cap the population at 130% of design capacity. Its determination to set the cap at 137.5% of design capacity is the product of a reasonable exercise of informed discretion based upon the voluminous evidence properly before it; as such, it is entitled to deference here.

1. When the three-judge court ordered that crowding be limited to 137.5% of design capacity, it had before it substantial evidence that crowding should be reduced even further. Although the State declined to present any evidence on this subject at trial, its internal evaluation revealed that the maximum capacity of the prisons is 130% of design capacity. The head of the Governor's prison facility "Strike Team" found after considerable study of the question that "the department's long term goal must

be to operate all of its prisons at design bed capacity" (100%), and that 130% of design capacity should be seen only as the "acceptable level of *emergency overcrowding*." Plf. Ex. 123 (emphasis added).[16]

The former head of California's prison system considered this opinion – along with her own analysis of the prison system based on her decades of employment within California's prisons – to arrive at the conclusion that the maximum level of crowding at which the State could provide adequate healthcare is 130% of design capacity. D.E. 1714-15 ¶¶1-4; JS1-App. 180a.

Former heads of state prison systems in Texas, Pennsylvania, Maine and Washington – most of whom had been chosen by the State of California as experts to analyze California's prison system –

---

[16] The State argues that the court's order is not narrowly tailored because the court ordered the State to reduce crowding using "design capacity" as a measure of crowding. State Br. 42-43. Design capacity is the figure that the State itself uses to measure the level of crowding in its prisons. Def. Ex. 1203. Design capacity is a useful benchmark because it measures the available space for all necessary services, not just sleeping space for inmates. Thus, while some cells were designed for one but are large enough for two, the space for health services was designed as if each cell would hold only one prisoner, and the prisons would operate at 100% of design capacity. Def. Ex. 1007 ¶ 72. With double-celling the norm, the State's expert testified, "even the newest of California prisons have inadequate space for care." Tr. 1224:5-7.

The State also suggests that the court erred because housing two prisoners in a cell designed for one ("double celling") is not itself unconstitutional. State Br. 42-43. That is a red herring – the court did not even consider, much less find, that double-celling violated the Eighth Amendment.

likewise testified that 130% is the crowding level at which the State could provide constitutionally adequate healthcare. JS1-App. 180a-181a.[17] The Texas official testified that when the Texas prisons were severely overcrowded, Texas experienced "much of the same problems" as California, and found itself unable to provide timely or appropriate medical care. Tr. 143:21-144:14. The Pennsylvania expert testified that when his state's prisons were crowded at a level far less extreme than California, healthcare was compromised and "most of our institutions were having difficulties operating." Tr. 209:11-16 210:1-14; *see also* Tr. 213:8-19 (prison at 200% of capacity not manageable).

The court also considered evidence that called for a higher cap. A panel of experts convened by Governor Schwarzenegger and chaired by former Governor George Deukmejian found that crowding at 145% of design capacity was the "maximum operable capacity" of the prisons. Plf. Ex. 4 at 124. That figure does not stand alone because the

---

[17] The State sets up a straw man when it contends that plaintiffs chose the 130% figure because it is the federal standard for crowding. State Br. 43. As just explained, a host of credible experts who were intimately familiar with California's prisons determined that 130% was the maximum level of crowding at which adequate healthcare could be provided to California prisoners. The State's prison facilities "Strike Team" considered the federal standard, but it arrived at the 130% figure based on its own "study of the question." D.E. 1995-6 at 94:13-24. Actual crowding levels in BOP prisons – which employ a different measure of crowding – are irrelevant to this case, and no evidence on this point was presented at trial. State Br. 43-44.

Deukmejian Report's definition of "maximum operable capacity" did not take into account the resources needed to provide constitutionally adequate healthcare, JS1-App. 181a-182a; *see also* D.E. 1991-6 at 108:3-109:21, and also assumed that the State would stop housing prisoners in gymnasiums, classrooms, dayrooms and hallways, which it has not done. Plf. Ex. 4 at 161; Tr. 1919:24-1921:5, 1915:13-1918:7; Def. Ex. 1252-2. Thus, the court found, the 145% estimate "clearly exceeds the maximum level at which the state could provide constitutionally adequate medical and mental health care in its prisons." JS1-App. 182a-183a.

The court nonetheless rejected plaintiffs' proposal to limit the population to 130% because the Deukmejian Report suggests that the medical system "might" be able to provide adequate care with a somewhat higher level of crowding. JS1-App. 181a. The court chose 137.5%, candidly recognizing that "choosing the percentage of design capacity to which the prison population should be reduced is 'not an exact science.'" JS1-App. 175a (citation omitted). This is true of much of the work that courts must accomplish, and courts must therefore rely upon the evidence before them to craft the narrowest possible remedy. The three-judge court did just that.

The State attempts to undercut the court's findings by showing that plaintiffs' medical experts (who were not asked to analyze the maximum crowding level) could not "assess" the maximum

crowding level, State Br. 45-46,[18] and that plaintiffs' correctional experts (who are not medical doctors and were not asked to analyze medical care) were unaware of the particulars of medical care in the prisons. State Br. 47. Nothing in the experts' testimony demonstrates that the trial court clearly erred.

2. The State argues that the three-judge court erred because "[t]here is no basis for a systemwide remedy," State Br. 50, but it omits mention of the trial court's findings on this point.

The three-judge court found that a "systemwide remedy is appropriate" in this case because "the constitutional violations identified by the *Plata* and *Coleman* courts exist throughout the California prison system and are the result of systemic failures in the California prison system." JS1-App. 171a; *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996). The court cited the numerous reports of the *Plata* Receiver and the *Coleman* special master that "document the systemic nature" of the violations. JS1-App. 171a.

The State asks this Court to make a *de novo* finding to the opposite effect based on one sentence from the cross-examination of one of plaintiffs' experts that proves nothing. State Br. 50, *citing* Tr.

---

[18] The State quotes Jeanne Woodford, a former head of California's prison system, for the fact that she was unaware of a *study* conducted on this point. State Br. 46. Given her decades of work experience within the State's prisons, including as a warden and as a head of the entire prison system, Ms. Woodford was well qualified to give an opinion on the subject regardless of the existence of a formal study.

456:11-15 (Q. In your opinion . . . *it is possible* that some units in California's prisons are currently providing constitutional levels of care to inmate patients, correct? A. *That's possible*.") (emphasis added). The State also attempts to show that conditions in some prisons are better than others. State Br. 52. Such variation shows that conditions are not identical in all prisons, but it does not demonstrate that the violations are not systemic.

3. The State's fallback argument – that principles of federalism prohibit the court's order in this case – is similarly misplaced.

Our federal system requires federal courts to exercise restraint in matters reserved to the states, but it also requires federal courts to take necessary action when states violate the federal constitutional rights of citizens. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring) ("That the States may not invade the sphere of federal sovereignty is as incontestable, . . . as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States").

Here, the State has acknowledged that it is violating the federal Constitution. Its violations pose an immediate and everyday threat to prisoners' lives and health. The federal courts have an obligation under our federal system of government to remedy those violations. *See* Brief of *Coleman* Appellees Sec. I.

The three-judge court made the narrowest ruling possible under the circumstances. It deferred completely to the State to determine the method by

which the crowding will be reduced, and hence which prisoners will be affected by its order. JS2-App. 2a-10a; JS1-App. 255a-256a (adhering to *Bounds v. Smith*, 430 U.S. 817, 832-833 (1977) and *Lewis,* 518 U.S. at 361-363).

Nevertheless, the State argues that the order is overbroad because it will result in the release of prisoners who are not members of the plaintiff classes. In fact, the court left it to the State to determine whether the population should be reduced at all and, if it chooses to do so, which prisoners will be affected. Moreover, the State is not required to shorten the confinement time of any prisoners to comply with the order; it is free to construct new prisons or to transfer prisoners to other jurisdictions and private prisons, or it can do some combination of these things. But more generally, the State overlooks the fact that, if overcrowding is the primary cause of a constitutional violation, then the violation can only be remedied by reducing crowding. By authorizing relief from overcrowding when crowding itself is not the constitutional violation, Congress necessarily understood that prisoners who were not directly suffering from the constitutional deprivation might be affected by the relief.

As the three-judge court correctly found, its narrow approach provides "the deference to state expertise required by the PLRA and *Lewis* and limits [the] court's intrusion into 'the minutiae of prison operations.'" JS1-App. 175a (citations omitted). This Court directed the lower courts to employ such an approach precisely because it allows the State to exercise "wide discretion within the bounds of

constitutional requirements." *Lewis*, 518 U.S. at 363 (citation omitted).

The State benefitted from the deference and flexibility provided by the three-judge court, and it submitted a plan that would reduce crowding by building more prisons, transferring some prisoners to other jurisdictions, and moderately reducing the number of low-risk inmates in prison (not just class members). JS2-App. 70a. Accordingly, the State cannot substantiate its claim that its prerogatives have been infringed or that principles of federalism have been violated.

IV. The Trial Court's Finding That The Order Can Be Implemented Without Any Adverse Impact On Public Safety Is Supported by Abundant Evidence From The Record.

The PLRA requires courts considering any form of prospective relief to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1)(A). Congress did not intend this to be a prohibition against orders that limit prison crowding. When codifying the court's authority to issue a "prisoner release order" Congress understood that circumstances might exist where the law compels a court to issue a "prisoner release order" notwithstanding a potential adverse impact on public safety. "While prison caps must be the remedy of last resort, a court still retains the power to order this remedy despite its intrusive nature and harmful consequences to the public if, but only if, it is truly necessary to prevent an actual violation of a prisoner's federal rights." H.R. Rep. No. 104-21, § 301, at 25 (1995).

The three-judge court took extreme care to perform its obligations under the statute by devoting more than half of the trial and fifty pages of its opinion to the public safety question. JS1-App. 185a-256a. The court demonstrated that crowding in California's prisons can be reduced without jeopardizing public safety, and it gave the State broad discretion to determine how to comply with its order so that public safety could be protected. JS1-App. 248a-249a.

Despite this record, the State argues that the court failed to give public safety substantial weight. The premise of the State's argument – and that of the defendant-intervenors and the State's *amici* – is that the three-judge court ordered the State to *release prisoners*. In fact, the court did not order the release of any prisoners. The order below does not even require the State to cap its prison population – it requires only that the State reduce prison *crowding*. The State can do that by increasing prison capacity or by transferring prisoners to other prison systems. It can also, if necessary, reduce the prison population by diversion and good time credits (without just "opening the prison gates").

Not surprisingly, no party takes issue with the fact that prison construction and transfers can be accomplished without any adverse impact on public safety. And while the State and its *amici* make various arguments about the safety of reducing the prison population, their briefs do not even allude to the court's findings and the evidence on which they were based.

First, the court found that dozens of jurisdictions throughout California and the nation

have implemented prison population reductions; none has experienced an increase in recidivism or crime. JS1-App. 202a-203a, 243a-246a; *see also* Tr. 2103:20-2105:21, 2107:15-2108:17, 2108:19-2109:1, 2110:6-2111:8, 2111:10-21, 2112:17-20. Thus, the court correctly found, historical data shows that "it is possible to lower the prison population without an adverse impact on crime or public safety." JS1-App. 243a; *see also* D.E.1714-3 ¶¶ 19-26; Tr. 2160:20-2162:7; Plf. Ex. 842, Tr. 2815, 2842. The State does not dispute either of these findings.

The three-judge court carefully reviewed the extensive testimony and evidence presented by State witnesses, intervenors, and plaintiffs, and correctly concluded that the evidence "overwhelmingly showed that there are ways for California to reduce its prison population without . . . an adverse impact [on public safety], and that a less crowded prison system would in fact benefit public safety and the proper operation of the criminal justice system." JS1-App. 248a-249a.

The State's public safety expert, as well as the public safety officials who intervened on the State's behalf, described several methods that the State could use to safely reduce the prison population. JS1-App. 192a-193a ("[t]here was overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is 'absolutely' possible to reduce the prison population in California safely and effectively") (quoting defendant-intervenor's public safety expert); *see also supra* n. 5 (all parties agreed at trial that there are safe crowding reduction methods).

These well-accepted population reduction methods include providing additional "good time" credits to prisoners for good conduct and for participation in work or education programs thus shortening their length of stay in prison by a few months, JS1-App. 196a-204a; diverting technical parole violators and low-level offenders away from prison, JS1-App. 204a-214a; and expanding rehabilitative programs. JS1-App. 214a-216a; *supra* 19-21. The State could accomplish these programs using its "risk assessment" program to target only those prisoners with the lowest risk of re-offending. JS1-App. 224a (low risk prisoners have 17% recidivism rate).

The State wrongly asserts that the court required the State to implement an unsafe crowding reduction plan "under compulsion of a court order." State Br. 54. In fact, the court did not "order" the State to follow any particular plan to reduce crowding. JS2-App. 5a ("we are not endorsing or ordering the implementation of any of the specific measures contained in the State's plan"). All that the court did was to order the State to reduce crowding at its 33 prisons, using numerical benchmarks that the State proposed in its plan. JS2-App. 5a-6a. The court examined in detail all of the crowding reduction measures identified during trial (including each of the major elements of the State's plan), and found that safe means exist to reduce the prison population. JS1-App. 248a. That satisfied its burden to give "substantial weight" to public safety matters.

Nor did the court find, as the State argues, that reducing prison crowding without expanding

rehabilitation programs would harm public safety. State Br. 54-55. On the contrary, it found that "even if" the state did not fund additional rehabilitation programs, "population reduction could be accomplished without any significant adverse impact on public safety or the operation of the criminal justice system." JS1-App. 187a; *see also* JS1-App. 247a-248a ("We credit the testimony from experts who . . . arrived at the opinion that a population reduction, through a combination of earned credits, parole reform, and diversion, could be accomplished in a manner that preserves public safety and the operation of the criminal justice system"). The court properly left public policy decisions about whether to fund rehabilitation programs in the hands of State politicians.

As the court noted, State officials have proposed various methods to reduce prison crowding, including by reducing the prison population, and have proclaimed that these methods will not harm the public. JS1-App. 197a, 207a, 219a.[19] Yet here the State says those remarks are irrelevant because the proposals were made in response to fiscal concerns. State Br. 54. Quite the opposite. If the State believes a reduction in the prison population is safe when it is looking to save money, surely the same can be said when the goal is to cure constitutional violations and save lives.

---

[19] The court also noted that by the State's own accounting it would save more than half a billion dollars per year by reducing the prison population. JS1-App. 251a.

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

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

Counsel for the Plata Appellees

October 25, 2010