

In The
Supreme Court of the United States

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

v.

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

**On Appeal From An Order Of The Three-Judge
Court In The United States District Courts
For The Northern District Of California
And The Eastern District Of California**

**BRIEF FOR THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE SUPPORTING APPELLEES
AND CORRECTIONAL OFFICER INTERVENORS**

STEPHEN N. ZACK
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
abapresident@abanet.org

Of Counsel:

PIERRE H. BERGERON
GEORGE H. KENDALL
MARGARET COLGATE LOVE
CARINE M. WILLIAMS

Counsel for Amicus Curiae American Bar Association

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**STATEMENT OF INTEREST OF *AMICUS*
CURIAE, AMERICAN BAR ASSOCIATION (ABA)¹**

Amicus curiae American Bar Association (“ABA”) respectfully submits this brief in support of Appellees and the Correctional Officer Intervenors. Based on its forty-five years of study of prisoner incarceration, release, and recidivism issues, the ABA requests that the Court affirm the lower court’s population reduction order.

The ABA is the largest national voluntary membership organization of the legal profession. Its approximately 400,000 members include attorneys in private practice, government service, and public interest organizations, as well as legislators, law professors, and judges.² As practitioners and judges, many ABA members strive to make the criminal justice system work efficiently and fairly. Some members represent the government in seeking incarceration, some represent criminal defendants facing incarceration; and some, as judges, decide the sentences of convicted defendants. Other members represent prisoners

¹ Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed their written consent to the filing of *amicus* briefs pursuant to Rule 37.3.

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in the preparation of this brief, or in the adoption or endorsement of the positions in this brief.

challenging conditions of their confinement, or counsel penal institutions on legal compliance.

The ABA began a comprehensive study of the criminal justice system in 1964, under the aegis of then-ABA President (and later Justice) Lewis F. Powell, Jr. When the first full edition of the ABA STANDARDS FOR CRIMINAL JUSTICE was published in seventeen volumes, Chief Justice Warren E. Burger called them “a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual.” Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251-52 (1974).³

Today, the ABA continues to develop, refine and publish updated volumes of the Standards.⁴ Those concerned with the treatment of prisoners were

³ The current Standards and a history of their development are available on the ABA website at <http://www.abanet.org/crimjust/standards/home.html>. See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009), available at <http://www.abanet.org/crimjust/standards/marcus.pdf>.

⁴ The Standards become official ABA policy when they are adopted by vote of the ABA House of Delegates. The ABA House of Delegates is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. See ABA General Information, <http://www.abanet.org/leadership/delegates.html> (last visited Oct. 29, 2010).

substantially revised and adopted as ABA policy in February 2010.⁵ Participating in this work were prosecutors, defenders, judges, current and former chief administrators and the general counsel of major correctional systems, and liaisons from the American Correctional Association and the U.S. Department of Justice, among others.

In addition, the ABA has studied the issues of over-reliance on incarceration, as well as the high rates of recidivism that result from legal and practical barriers to prisoner reentry, and from high rates of parole revocations. In 2003, responding to the call by Justice Anthony M. Kennedy to the ABA to “help start a new public discussion” on “the inadequacies – and the injustices – in our prison and correctional systems,” the ABA established the Justice Kennedy Commission (“Kennedy Commission”).⁶ Anthony M. Kennedy, *Speech at the A.B.A. Annual Meeting* (Aug. 9, 2003).

In 2004, the ABA House of Delegates adopted the Kennedy Commission’s report, which concluded that, while there was no universally accepted view of the goal or purpose of punishment, there was a growing consensus that (a) incarceration, while appropriate

⁵ ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS (2010), *available at* <http://abanet.org/crimjust/standards/treatmentprisoners.html>.

⁶ Justice Kennedy did not participate in the work of the Commission or endorse any of its positions.

for many crimes, should not be the only option; (b) when incarceration is imposed, society and offenders benefit when offenders are prepared to reenter society; (c) there is a place for harsh punishment, but also for rehabilitation; and (d) community-based treatment alternatives may be both cost-effective and conducive to safer communities. ABA JUSTICE KENNEDY COMMISSION, REPORTS AND RECOMMENDATIONS TO THE HOUSE OF DELEGATES 5 (2004) (hereinafter “Kennedy Comm’n Rep.”).⁷

The ABA Commission on Effective Criminal Sanctions continued this work, conducting hearings across the country.⁸ Its report, *Second Chances in the Criminal Justice System, Alternatives to Incarceration and Reentry Strategies*, is a compendium of the two commissions’ work. Its recommendations, approved as ABA policy in 2007, were based on consensus views on what can be done to reduce reliance on incarceration and to reduce recidivism.⁹ Its recommendations on community-based alternatives to incarceration and improvements to parole and probation supervision have been endorsed by the National District Attorneys Association, the National

⁷ Available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

⁸ The minutes of the Commission’s public hearings are available at <http://www.abanet.org/cecs/secondchances.pdf>.

⁹ The 2007 recommendations are available at <http://www.abanet.org/cecs/secondchances.pdf>.

Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association.

These and other ABA commissions and task forces have heard and considered input from prosecutors, defenders, judges and academics, as well as officials and members of criminal justice organizations and correctional systems, and individuals with criminal records. Accordingly, the ABA respectfully suggests that its views may assist the Court as it considers whether the lower court's order should be affirmed.



SUMMARY OF ARGUMENT

When a state holds a person in custody, it has a duty to provide that person with constitutionally adequate medical and mental health care. Prison overcrowding has been shown to have a number of deleterious effects on the medical and mental health of those who are held in prisons and jails, as well as those who work in these institutions. There are, however, many cost-effective prison population-reduction measures that may be safely and immediately implemented without need for legislative change, including (1) early release on exceptional and humanitarian grounds; (2) increased use of alternatives to incarceration for offenders, including those with substance abuse and/or mental illness problems, who are deemed to pose no substantial risk to public safety; (3) more effective parole and probation

supervision policies that rely on graduated sanctions rather than automatic returns to prison; and (4) rehabilitative and reentry services aimed at reducing recidivism. Because the lower court appropriately left to California and its prison administrators the discretion to determine which methods to use to reduce its prison population without compromising public safety, the lower court's order should be affirmed.



ARGUMENT

I. Overcrowding Has Been Shown to Have a Number of Deleterious Effects on the Medical and Mental Health of Prisoners.

The Eighth Amendment requires that a government provide medical care for those whom it has incarcerated. “An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also DeShaney v. Winnebago County Dep’t. of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic needs – *e.g.*, food, clothing, shelter, medical care and reasonable safety – it transgresses the substantive

limits on state action set by the Eighth Amendment and the Due Process Clause.”).¹⁰

Prison overcrowding has long been shown to have a number of deleterious effects on the medical and mental health of prisoners and, once prisoners have been released, they “carry the effects or consequences of that harm back” to the communities to which they return. Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U.J.L. & POL’Y 265, 265 (2006). Earlier studies establish, for example, an association between crowding and elevated blood pressure and stress; and with elevated death rates in general and elevated suicide and violent death rates in particular. Terrence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effect*, 35 HASTINGS L. J. 313, 344 and 351 (1983); see also Verne C. Cox, Paul B. Paulus, and Garvin McCain, *Prison Crowding Research: The Relevance for Prison Housing Standards and a General Approach Regarding Crowding Phenomena*, 39 AM. PSYCH. 1156 (1984) (finding correlation between

¹⁰ See also ABA STANDARDS ON THE TREATMENT OF PRISONERS Standard 23-3.1(b) (2010) (“Government authorities . . . should take necessary steps to avoid crowding that exceeds a correctional facility’s rated capacity or adversely affects the facility’s delivery of core services at an adequate level, maintenance of its physical plant, or protection of prisoners from harm, including the spread of disease.”), available at <http://www.abanet.org/crimjust/standards/treatmentprisoners.html>.

prison crowding and increased rates of death, suicide, disciplinary infraction, and psychiatric commitment).

Further, “[u]nidentified and untreated mentally ill prisoners in mainline prison populations not only are more likely to deteriorate themselves, but also to have a significant adverse effect on the prisoners with whom they must live and interact.” Haney, *supra*, at 273. One reason why these prisoners have become a larger proportion of the prison population was discussed in an ABA report in 2004, which cited one Chicago-based study that showed that people with mental illness were almost twice as likely to be arrested as people without mental illness for the same behavior. ABA, REPORT WITH RECOMMENDATION No. 116 4-5 (Policy adopted Feb. 2004).¹¹

Overcrowding exacerbates other problems as well. It not only creates extra demand for medical and mental health services but it also causes a prison’s facilities to deteriorate faster, further taxing its ability to provide for basic human needs. Wayne N. Welsh, *The Dynamics of Reform Litigation: A Comparative Analysis of Litigation in California Counties*, 26 LAW & SOC’Y REV. 591, 604-05 (1992). Overcrowding has also been shown to have a detrimental impact on the mental and physical well-being of prison staff. James Austin, *Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy*, 32 CRIME & DELINQUENCY 404, 411 (1986).

¹¹ Available at <http://www.abanet.org/leadership/2004/dj/116.pdf>.

As this data-driven literature makes plain, overcrowded correctional facilities produce environments that have deleterious effects on the medical and mental health of prisoners, and can result in grave contraventions of the Eighth Amendment.

II. Cost-Effective Measures Exist to Reduce Prison Populations Consistent with Public Safety.

In studying the problems generated by expanding prison populations nationwide, the ABA has identified specific, cost-effective measures that jurisdictions can take to safely reduce overcrowding, without need for legislative change. The recommendations of the ABA's Commission on Effective Criminal Sanctions and the Kennedy Commission include the following, each of which is discussed below: (1) early release on exceptional and humanitarian grounds; (2) increased use of alternatives to incarceration for offenders, including those with substance abuse and/or mental illness problems, who are deemed to pose no substantial risk to public safety; (3) more effective parole and probation supervision policies that rely on graduated sanctions rather than automatic returns to prison; and (4) rehabilitative and reentry services aimed at reducing recidivism. Kennedy Comm'n Rep., *supra* 4, note 8, at 22-24, 29-34, 64-71, 76-86; ABA COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO

INCARCERATION AND REENTRY STRATEGIES 12-27 (2006) (hereinafter, “Alternatives to Incarceration”).¹²

The implementation of such measures has resulted in prison population reductions in a number of states, with no adverse effect on public safety. *See, e.g.*, JUDITH GREENE & MARC MAUER, *THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES* (2010) (hereinafter “Greene & Mauer”) (reviewing methods by which substantial prison population reductions have been safely achieved in New Jersey, Michigan, New York and Kansas).¹³ In fact, data indicate that, in 2009, the prison population was reduced in 26 states, and for the first time in 38 years, the overall number of people in state prisons nation-wide declined by .3%. PEW CENTER ON THE STATES, *PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS* (2010) (hereinafter “Prison Count 2010”).¹⁴ In 2009, Michigan, for example, safely reduced its prison population by 6.7% by reducing the number of prisoners who serve more than 100% of their minimum sentence, decreasing parole revocation rates and enhancing reentry planning and supervision through the Michigan Prisoner Reentry Initiative. *Id.* at 3.

¹² Available at <http://www.abanet.org/cecs/secondchances.pdf>

¹³ Available at http://www.sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf.

¹⁴ Available at http://www.pewcenteronthestates.org/report_detail.aspx?id=57653.

The following methods to reduce crowding could be safely and promptly implemented by California with changes in policy or an expansion of already existing state authority:

Early Release on Exceptional and Humanitarian Grounds. Sentence reduction should be broadly available in exceptional circumstances arising after sentencing, including old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering. The ABA recommends that states “establish standards and provide an accessible process by which prisoners may request [such] a reduction of sentence” and “ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves.” Kennedy Comm’n Rep., *supra* 4, note 8, at 64. In accordance with these recommendations, many states employ administrative or judicial sentence reduction mechanisms, while others rely upon executive clemency to secure a prisoner’s early release. See VERA INSTITUTE OF JUSTICE, *IT’S ABOUT TIME: AGING PRISONERS, INCREASING COSTS AND GERIATRIC RELEASE* (2010);¹⁵ see also Cecelia M. Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. (forthcoming Nov. 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1576131.

¹⁵ Available at <http://www.vera.org/content/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release>.

In Michigan, for example, sentence commutations have played a key role in prison population reduction in the last two years. Bethany Biron, *Granholm Approves 100 Commutation Requests in the Past Two Years*, *The Mich. Daily*, Oct. 1, 2010.¹⁶ In Wisconsin, responding to fiscal constraints, the legislature expanded the category of those eligible for sentence reduction beyond those that are elderly or ill, and provided new administrative procedures to supplement the courts' existing authority. Gregory J. O'Meara, *Compassion and the Public Interest, Wisconsin's New Compassionate Release Legislation*, 23 *FED. SENT. RPTR.* 33, 34 (2010).

In California, Governor Schwarzenegger recently signed into law SB 1399, authorizing the California Board of Parole Hearings to grant immediate parole based on certain medical indications.¹⁷ The new law provides for medical parole for incapacitated prisoners who are permanently unable to perform activities of basic daily living and require 24-hour care, provided that the Board determines the prisoner not to reasonably pose a threat to public safety. *Id.* California could consider extending this parole authority to other extraordinary circumstances.¹⁸

¹⁶ Available at <http://www.michigandaily.com/content/granholm-approves-100-commutation-requests-past-two-years>.

¹⁷ Available at http://info.sen.ca.gov/pub/09-10/bill/sen/sb_1351-1400/sb_1399_bill_20100928_chaptered.pdf.

¹⁸ The most recent draft of the American Law Institute's MODEL PENAL CODE: SENTENCING recommends a variation of this
(Continued on following page)

Increased Use of Sentencing Alternatives for Offenders Who Are Deemed to Pose No Substantial Risk to Public Safety. Increased use of sentencing alternatives can be safely implemented to reduce the number of offenders added to existing prison populations. The ABA recommends that states develop, with the assistance of prosecutors and others, community-based diversion or deferred adjudication and supervision programs for offenders who are deemed to pose no substantial threat to the community. These include community-based treatment programs for offenders whose crimes are related to substance abuse and/or mental illness. The ABA suggests that these types of programs will be most effective when offenders are provided, in appropriate cases, with an opportunity to complete a program without a criminal record, since the collateral consequences of conviction can make it difficult for offenders to get a job or housing or, generally, to put their lives back on track. *Alternatives to Incarceration*, *supra* 10, note 13, at 12. The ABA also recommends that jurisdictions not exclude offenders with drug or mental health issues because they have a prior conviction or a history of

humanitarian parole by providing for judicial sentence reduction for prisoners who are aged and infirm, or whose situation otherwise presents other compelling circumstances. *See* § 305.7, Council Draft #3 at 85 (October 1, 2010) (“Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmary, Exigent Family Circumstances, or Other Compelling Reasons”), *available at* http://extranet.ali.org/docs/Model%20Penal_Code_CD3_Booked%20-%20entire.pdf.

minor violence, since relapse is often a predictable part of recovery. *Id.* New York and New Jersey recently implemented such diversionary programs to reduce prison population. New York's *Drug Treatment Alternative to Prison Program* diverts drug users charged with non-violent crimes to treatment for addiction, while in New Jersey, plea negotiation guidelines were revised to allow "open pleas" in lower-level drug-free zone cases, giving judges greater discretion to consider drug treatment as an alternative to incarceration. Greene & Mauer, *supra* 10, note 14, at 3; *see also* Alternatives to Incarceration, *supra* 10, note 13, at 10-15 (discussing programs). California already permits diversionary programs. *See, e.g.*, Cal. Penal Code § 17(b)(4).

Improvements in Parole and Probation Supervision. Improvements to parole and probation supervision can contribute substantially to reducing prison populations and recidivism: parole and probation violators account for more than one-third of all prison admissions, and more than two-thirds of those admissions were for a violation of the conditions of release, rather than commission of a new offense. Alternatives to Incarceration, *supra* 10, note 13, at 20. Revocations often follow minor violations of the terms of supervised release and do not reflect conduct posing a threat to the community. *Id.* The ABA urges, instead, the use of graduated sanctions, which return an offender to prison only on commission of a new crime or when the offender poses a danger to the community. *Id.*

Some states have safely conserved supervision resources by avoiding the over-regulation of low-risk offenders and targeting higher-risk offenders. *Maximum Impact: Targeting Supervision on Higher Risk People, Places and Times*, PUBLIC SAFETY POLICY BRIEF (Pew Ctr. on the States, Washington, D.C.), July, 2009.¹⁹ Kansas, Georgia, and New Jersey have reduced revocations for rule violations without an increase in new criminal behavior by parolees. *When Offenders Break the Rules – Smart Responses to Parole and Probation Violations*, PUBLIC SAFETY POLICY BRIEF (Pew Ctr. on the States, Washington, D.C.), Nov. 2009, at 5, n.21;²⁰ *see also* Alternatives to Incarceration, *supra* 10, note 13, at 20-24 (discussing programs).

In addition, some states have developed mechanisms for increasing the number of prisoners who can be safely paroled. Michigan and New Jersey use risk assessment tools to distinguish such inmates from those who need to remain behind bars. *See, e.g.*, Greene & Mauer, *supra* 10, note 14, at 4. Texas has similarly increased its parole grant rate and

¹⁹ This brief is available on the Pew Center's website, at http://www.pewcenteronthestates.org/uploadedFiles/Maximum_Impact_web.pdf.

²⁰ This brief is available on the Pew Center's website, http://www.pewcenteronthestates.org/report_detail.aspx?id=32104.

shortened probation terms. Prison Count 2010, *supra* 11, note 15, at 3-4.²¹

Rehabilitative and Reentry Services To Reduce Recidivism. The ABA recognizes that additional resources are often not available to provide expanded services during the early weeks of re-entry. However, the ABA recommends that existing resources should be reallocated to those offenders with the greatest need. Research has shown that some offenders do not need intensive supervision and may be better off without it. Alternatives to Incarceration, *supra* 10, note 13, at 21-22. Focusing resources, instead, on high-risk offenders who pose the greatest risk of returning to criminal behavior holds the opportunity to reduce overall recidivism and to promote public safety. *Id.*

Many states have adopted measures to help prepare offenders to live law-abiding lives upon release. See generally *Reentry Programs Database*, REENTRY POLICY COUNCIL, <http://www.reentrypolicy.org/reentry-program-examples/reentry-programs-start> (last visited Oct. 29, 2010). Michigan, for example, developed the Michigan Prisoner Reentry Initiative, which provides services in areas like housing,

²¹ The Pew Center also reported that advances in supervision technology, such as Global Positioning System monitors, rapid-result drug tests and ATM-like reporting kiosks give authorities greater confidence that they can protect public safety and hold offenders accountable with sanctions other than incarceration. *Id.* at 6.

employment, and substance abuse to avoid recidivism. See MICHIGAN PRISONER REENTRY INITIATIVE, <http://www.michpri.com> (last visited Oct. 29, 2010). Programs such as these have increased the success rates of offenders transitioning from prison into the community and have reduced the number of recidivists. As the Attorney General recently noted, “sound science and evidence-supported strategies” guide model reentry programs across the nation; “public safety can improve, and taxpayers can see significant savings, when people who commit crimes are served by high-quality community supervision and programs where services and sanctions work in unison.” Eric H. Holder, Speech at the European Offenders Employment Forum (Oct. 8, 2010), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101008.html>.

There are many other cost-effective measures that can be implemented without unduly jeopardizing public safety or the operation of a jurisdiction’s criminal justice system. In the present case, the lower court appropriately left to California and its prison administrators the discretion to determine which methods to use, while mandating that those methods be consistent with public safety and that California provide constitutionally required conditions for prison inmates. The ABA therefore submits that California can and should reduce its prison population consistent with that order.



CONCLUSION

For the foregoing reasons, *amicus curiae* American Bar Association requests that the judgment of the three-judge court below be affirmed.

Respectfully submitted,

STEPHEN N. ZACK
Counsel of Record

PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
abapresident@abanet.org

Of Counsel:

PIERRE H. BERGERON
GEORGE H. KENDALL
MARGARET COLGATE LOVE
CARINE M. WILLIAMS

Counsel for Amicus Curiae American Bar Association

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