



CALIFORNIA LEGISLATIVE OFFICE  
1127 Eleventh Street, Suite 534  
Sacramento, CA 95814  
Telephone: (916) 442-1036  
Fax: (916) 442-1743

August 23, 2013

Governor Edmond G. Brown  
California State Capitol, Room  
Sacramento, California 95814

Re: Proposed funding for expanded inmate housing to reduce state prison population, as required by the Three Judge Panel in *Plata/Coleman v. Brown*: Oppose

Dear Governor Brown:

The ACLU of California writes to express our strong opposition to the Administration's proposed plan to allocate hundreds of millions of dollars to transfer thousands of state prison inmates to city, county, and privately-owned correctional facilities – both in and out of state. The ACLU of California is also opposed to proposed language that would eliminate the July 2015 sunset date on the use of county to county transfer of inmates. We strongly request a noticed hearing before the Budget Committees of both houses before any action is taken.

As a preliminary matter, California now sits in this unenviable position because it failed to address a prison crisis that is now into its third decade. This is not an instance where an overbearing federal court is placing unreasonable demands on our state. Just two months ago, facing yet another court order, the State was unable or unwilling to move 2,600 inmates who were at serious risk of contracting Valley Fever, claiming that moving inmates would be too complicated and difficult.<sup>1</sup> Valley Fever has killed approximately 60 inmates in Central Valley prisons over the past several years.<sup>2</sup> Yet, the State was unwilling to move at-risk inmates. This incident demonstrated once again that systemic problems persist in our state's corrections' system.

For years, California's elected officials have rejected even the most modest cost-effective proposals that would reduce population with no impact to public safety. Now, the State proposes exhausting the small savings we managed to generate after the worst economic catastrophe since the Great Depression in order to buy and staff more prison beds. Instead, the state should implement long overdue reforms that will safely reduce the prison population, and use the hundreds of millions now in the reserve fund to further improve public safety by funding education and health services.

<sup>1</sup> Richard K. de Atley, "Valley Fever: Inland inmates may replace transferred prisoners," Press-Enterprise, Aug. 6, 2013; Toshio Meronek, "State to Send More Inmates to Fungal-Infected Prisons," East Bay Express, Aug. 14, 2013.

<sup>2</sup> *Id.*

**The State has already submitted a plan to the Court that will effectuate the required reduction of inmates, making the proposed allocation of hundreds of millions dollars to transfer inmates unnecessary:**

**Administration's current court-mandated plan:**

According to the State's most recent status update to the Three Judge Panel, the California Department of Corrections and Rehabilitation (hereinafter "CDCR") is in the process of implementing the following: (1) Expanded use of fire camps; (2) Increased application of inmate credits; (3) Expanded use of medical parole; (4) Establishing a new parole process for low risk elderly inmates; and (5) Slowing the return of out-of-state inmates.<sup>3</sup> This plan will result in a reduction of approximately 10,604 inmates.<sup>4</sup> In order to reach the required 137.5 percent, the State need only reduce 9,636 inmates, meaning this plan will effectively comply with the Court's order by December 31, 2013.<sup>5</sup> The proposal will result in inmate reduction as follows:

<b>Court Mandated Reduction Measures</b>	<b>Number of Inmates</b>
Fire Camps	1,250
Expanding Parole – Medical/Elderly	400
Out-of-state prisoners not to be returned	3,569
Full expansion of good time credits (prospectively and retroactively for all prisoners)	5,385
<b>Total Reduction</b>	<b>10,604</b>
<b>Total needed to meet 137.5%</b>	<b>9,636</b>

Additionally, the State has already expanded the use of fire camps and declined the return of inmates currently housed out of state.<sup>6</sup> This means that the State has already reduced population by 4,819 inmates; approximately half of the reduction needed to meet the Court's order.<sup>7</sup> The State need only demonstrate a reduction of 4,817 more inmates.

**Administration's Plan will not have any adverse effect on public safety:**

It is important to clarify that the plan recommended by the State and ordered by the Court on June 20, 2013, does not provide for the "early release" of inmates. The application of additional credits will be limited to those who have demonstrated successful completion of specified programming or otherwise earned credits through their behavior in prison, and are deemed to be low risk. All of these inmates will have earned the credits awarded, through

<sup>3</sup> Defendants' Status Report in Response to June 30, 2011, April 11, 2013, and June 20, 2013 Orders, *Coleman/Plata et al. v. Brown*, No. 01-1351 (E.D. Cal. Aug. 15, 2013).

<sup>4</sup> Opinion and Order Requiring Defendants to implement Amended Plan, *Coleman/Plata et al. v. Brown*, No. 01-1351 (E.D. Cal. Jun. 20, 2013) at 28, 37.

<sup>5</sup> June 20 Order, *supra* note 4 at 26.

<sup>6</sup> Status Report, *supra* note 3 at 2, 4.

<sup>7</sup> Declaration of Jeffrey Beard in Support of Defendants' Status Report in Response to June 30, 2011, April 11, 2013, and June 20, 2013 Orders, *Coleman/Plata et al. v. Brown*, No. 01-1351 (E.D. Cal. Jul. 18, 2013) at 2 (CDCR has extended the use of out-of-state contracts for an additional three years).

their behavior, and the Governor's plan contemplates a careful review process. Moreover, many of the elderly inmates being considered for parole are years – even decades – past their minimum parole eligibility date. Granting parole to specified elderly inmates could not possibly be considered early release, when release should have been granted long ago. A more accurate description for the plan filed by the State on August 15, 2013 is “earned release” not “early release.”

Furthermore, the proposals proffered by the Administration in its August 15, 2013 status update were fully vetted at trial and demonstrated to have no negative impact on public safety.<sup>8</sup> On June 20, 2013, the Court ordered the State to apply a program of credit changes, both prospectively and retroactively, that will result in a reduction of 5,385 prisoners by December 31, 2013 – more than adequate, along with other court-ordered measures, to achieve 137.5 percent capacity by the end of the year.<sup>9</sup> In fact, this single measure is sufficient to remedy the 4,170 prisoner deficiency in the state's previously submitted plan.<sup>10</sup>

The Court also rejected the State's contention that applying credits retroactively would threaten public safety.<sup>11</sup> Instead, the court held that the State's assertions were “contrary to the express factual findings that this Court had already made and that have been affirmed by the Supreme Court.”<sup>12</sup>

The Court heard extensive testimony at trial in 2009, from leading national experts, all of whom – including now CDCR Secretary Dr. Jeffrey Beard – testified that expanding good time credits could be done safely, both prospectively and retroactively.<sup>13</sup> Moreover, even the defendants' expert agreed that there was no relationship between earned release resulting from good time credits and recidivism.<sup>14</sup> Thus, the Court concluded that retroactive application of expanded credits would not threaten public safety.<sup>15</sup> This determination was also affirmed by the United States Supreme Court.<sup>16</sup>

Notably, the three-judge court made clear that it was possible for the state to expand credits to meet the December 31, 2013 benchmark of 137.5 percent without the release of inmates serving time for violent offenses.<sup>17</sup> In fact, a number of other states, as well as counties in California, have safely used the expansion of good time credits to reduce their prison populations in the past.<sup>18</sup>

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<sup>8</sup> See Status Report, *supra* note 3; *see, e.g.*, June 20 Order, *supra* note 4 at 37-39.

<sup>9</sup> See June 20 Order, *supra* note 4 at 37.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 37-38.

<sup>12</sup> *Id.* at 37.

<sup>13</sup> *Id.*; *see also* About CDCR, Secretary Dr. Jeffrey Beard, CDCR (2013), [http://www.cdcr.ca.gov/About\\_CDCR/Secretary.html](http://www.cdcr.ca.gov/About_CDCR/Secretary.html).

<sup>14</sup> See June 20 Order, *supra* note 4 at 37.

<sup>15</sup> *Id.* (“We therefore concluded that the expansion of good time credits is fully consistent with public safety, and the Supreme Court affirmed this determination.”).

<sup>16</sup> *Brown v. Plata*, 131 S.Ct. 1910, 1947 (May 23, 2011)

<sup>17</sup> See June 20 Order, *supra* note 4 at 40-41.

<sup>18</sup> *Id.*, at 40 n. 26.

More spending is unnecessary and will cost millions in years to come:

Hence, the Administration has already undertaken safe and effective efforts to reduce population in a manner approved by the Three Judge Panel, and no further action is required to reach the required population cap. It makes little sense to contract with city, county, and private correctional facilities to house the same number of inmates at considerable state expense. Additionally, the proposed funds to transfer said inmates will not be onetime costs, but will instead require continual appropriations in out years to maintain those facilities and pay correctional staff.

Given the short time frame, the State may have to offer more favorable terms to entice these facilities to house State inmates and may seek to avoid public transparency in the bidding process. This will no doubt cost even more money and will not operate as a short term solution – but rather a long term expense.

Several alternatives are available to reduce state prison population by December 2013 and beyond, with no risk to public safety and at overall cost savings:

Although the State has already committed to a plan for reducing population by December 2013, several alternatives exist to reduce population that will not require significant state funds and will result in a lasting population reduction. These types of proposals will make termination of receivership much more likely in the near future. Simply moving inmates around will likely result in continued federal oversight for years to come because the State will not be able to demonstrate sustained population reduction.<sup>19</sup> Some of the alternatives suggested below were recommended by numerous experts, and were demonstrated to have no impact on public safety.<sup>20</sup>

Parole low risk lifers who have long surpassed their minimum parole eligibility date:

According to declarations filed in January 2013, there are approximately 9,000 lifers with the possibility of parole who are low risk and well past their minimum parole eligibility date (hereinafter “MPED”). This class of inmates was demonstrated to pose the lowest risk to public safety based on recidivism studies completed by CDCR.<sup>21</sup> Additionally, these inmates are considerably more expensive than the average per annum cost of \$52,000, because most are elderly and have increased medical needs.<sup>22</sup> Even at \$52,000 per inmate, the cost savings would be \$468 million.

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<sup>19</sup> Cite to the June 20 order

<sup>20</sup> Declaration of James Austin in Support of Plaintiffs’ Statement in Response to October 11, 2012, Order Regarding Population Reduction, *Coleman/Plata et al. v. Brown*, No. 01-1351 (E.D. Cal. Jan. 7, 2013) at 10.

<sup>21</sup> *Id.*

<sup>22</sup> Legislative Analyst’s Office, *California’s Criminal Justice System: A Primer* (2013) at 50.



Misdemeanor possession of a controlled substance: There are currently approximately 4,100 inmates in CDCR serving time for simple possession of a controlled substance.<sup>23</sup> The cost to house 4,100 inmates a year is approximately \$213 million. The current penalty for possession of methamphetamine is an alternate felony/ misdemeanor, and the penalty for possession of cocaine and heroin is a felony.<sup>24</sup> If the maximum penalty were a misdemeanor, this would reduce the inflow of new inmates to state prison by several thousand, resulting in long term population reductions and net savings to the state.

Expansion of Proposition 36 (2000): Changes to the eligibility criteria for enrollment in the Substance Abuse and Crime Prevention Act of 2000 (hereinafter SACPA) will reduce the number of inmates being admitted to state prison. Specifically, Penal Code section 1210.1, subdivision (b) prohibits any person with a strike in the past five years from participating in treatment under SACPA. Either eliminating that prohibition, or reducing the exclusion to those with a strike in the past two years, will result in a reduction of as many as 4,100 inmates in state prison. When fully funded, SACPA ran at a success rate of between thirty and forty percent, meaning the state will see population reductions and net savings even if some individuals referred to treatment fail out. Additionally, when eligibility for federally funded healthcare (Medi-Cal) is expanded to most low-income adults on January 1, 2014, California will gain access to significant federal dollars for drug treatment, and could re-invigorate Proposition 36 probation after going unfunded in 2007.

**The Governor's proposal to eliminate the sunset date on the use of inter-county inmate transfers is counterproductive, works against family connection and successful reentry, and encourages counties to ineffectively manage jail population:**

Allowing counties to transfer inmates out of county is contrary to the goals of Realignment and may fundamentally interfere with the defendant's access to his or her counsel and family.<sup>25</sup> There is significant evidence that inmates are more likely to successfully integrate into the community, after release, if they are kept close to home.<sup>26</sup> However, the proposed language will allow counties to move inmates sentenced to county jail hundreds of miles away - indefinitely. This is precisely what happens when offenders are sentenced to state prison. Enacting these provisions will create nothing more than a county operated statewide prison system. When this section was amended as part of last year's budget, advocates, including the ACLU of California, deliberately included a sunset date so as to emphasize that this is a short term solution. Eliminating the sunset date will encourage poorly performing counties to simply ship their inmates to other facilities and will result in additional harm to the families of inmates, particularly the children.

Additionally, inmates held pre-trial, but who have not yet been convicted, may also be transferred out of county - possibly miles away from their counsel. This will prevent or at

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<sup>23</sup> CDCR, Prison Census Data as of December 31, 2012, Table 2, Total Institution Population, Offenders by Controlling Offense Group and Gender.

<sup>24</sup> Cal. Health & Saf. Code §§ 11377(a), 11350(a) (West 2013).

<sup>25</sup> Cal. Penal Code § 17.5 (West 2013).

<sup>26</sup> See, e.g., Mark T. Berg & Beth M. Huebner (2011): Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism, Justice Quarterly, 28:2, 382-410.

least substantially inhibit a defendant's ability to communicate with his or her attorney, and will interfere with the preparation of his or her defense. It will also place an enormous burden on an already beleaguered court system, because cases may have to be continued simply because the defendant is not available.

**Allocation of significant state resources should be properly vetted through the Legislature with a hearing before the Budget Committees in both houses:**

The ACLU of California calls upon the Administration and the Legislature to hold noticed hearings before the Budget Committees of both houses wherein the actual language may be reviewed and debated. It is crucial that this policy receive a complete and thorough review giving constituents and stakeholders a chance express their opinions about this significant expenditure of tax payer dollars.

We implore you to reconsider this ill-advised expenditure of critical tax dollars, and instead embrace the alternatives offered by the ACLU of California and others. We would greatly appreciate an opportunity to discuss the proposed plan in greater detail. We have language prepared for our alternative proposals, and have further documentation of cost savings, and the impact those changes may have on the prison population. Please do not hesitate to contact us should you have any questions or concerns.

Sincerely,



Francisco Lobaco  
Legislative Director



Kimberly A. Horiuchi  
Criminal Justice & Drug Policy Advocate

cc: Members, California State Assembly and Senate