

A Status Report:

Reducing Prison Overcrowding in California

MAC TAYLOR • LEGISLATIVE ANALYST • AUGUST 2011

Executive Summary

On May 23, 2011, the U.S. Supreme Court issued a ruling in a lawsuit against the state involving prison overcrowding. Specifically, the court upheld the ruling of a federal three-judge panel requiring the state to reduce overcrowding in its prisons to 137.5 percent of its “design capacity” within two years. Currently, the state prison system is operating at roughly 180 percent of design capacity—or about 34,000 inmates more than the limit established by the three-judge panel. The ruling, however, did not specify the particular measures that the state must implement to comply. On June 7 and July 21, the administration submitted reports to the three-judge panel describing specific measures that were recently taken, as well as those in the process of being implemented, to reduce overcrowding in California prisons.

As we discuss in this brief, the administration’s reports to the court do not preclude the Legislature from assessing the measures identified by the administration and considering its own strategy for compliance with the court ruling based on its priorities. The Legislature has already taken an important first step in complying with the court’s ruling by recently approving a package of legislation to shift the responsibility for certain low-level offenders from the state to counties. Although this realignment of services would significantly reduce prison overcrowding upon full implementation, and go a long way to complying with the court mandates, it may fall several thousand inmates short of meeting the requirements within the deadlines. Based on the information and data available to us at the time of this analysis regarding how realignment will reduce the prison population, we recommend that the Legislature:

- Encourage the administration to request additional time from the court to comply with its mandate to reduce overcrowding in California’s prisons.
- Direct the California Department of Corrections and Rehabilitation (CDCR) by statute to report on the justification of each prison construction project that it now proposes (including projects that have already been approved) in light of the inmate population reductions that will occur because of the three-judge panel ruling and the enactment of the realignment plan. Entering into contracts for these projects would be put on hold until the Legislature received and reviewed the report in January.
- Change state law to authorize CDCR to continue to transfer prison inmates involuntarily to out-of-state contract beds at least until the court’s requirements are met.

Background

Federal Three-Judge Panel Reviews Prison Overcrowding. In November 2006, plaintiffs in two ongoing class action lawsuits—*Plata v. Brown* (involving inmate medical care) and *Coleman v. Brown* (involving inmate mental health care)—filed motions for the courts to convene a three-judge panel pursuant to the U.S. Prison Litigation Reform Act. The plaintiffs argued that persistent overcrowding in the state’s prison system was preventing CDCR from delivering constitutionally adequate health care to inmates. In July 2007, the federal courts convened such a three-judge panel to determine whether (1) prison overcrowding was the primary cause of CDCR’s inability to provide constitutionally adequate inmate health care and (2) a prisoner release order was the only way to remedy these conditions.

Court Panel Orders State to Reduce Prison Overcrowding. On August 4, 2009, the three-judge panel declared that overcrowding in the state’s prison system was the primary reason that CDCR was unable to provide inmates with constitutionally adequate health care. Specifically, the court ruled that in order for CDCR to provide such care, overcrowding would have to be reduced to no more than 137.5 percent of the design capacity of the prison system within two years. (Design capacity generally refers to the number of beds that CDCR would operate if it housed only one inmate per cell and did not “double-bunk” in dormitories.) The court required the state to reduce overcrowding to specific design capacity limits at six-month intervals leading up to the two-year deadline. The court also required the state to submit a plan identifying what measures it would implement to reduce overcrowding. The court ruling applies to the number of inmates in prisons operated by CDCR, and does not preclude the state from

holding additional offenders, in other public or private facilities, as we discuss later in this analysis.

In response to the above ruling, the Schwarzenegger administration initially submitted a plan that included various compliance measures, such as changes in parole practices, expanded use of contract prison facilities, and the construction of new prisons. However, the court rejected this plan because it would have only reduced overcrowding to 151 percent of design capacity within two years. At the request of the court, the Schwarzenegger administration submitted a revised plan in November 2009 that kept the prior measures, but also included additional sentencing law changes to meet the 137.5 percent population limit. On January 12, 2010, the three-judge panel issued a final ruling that the state’s revised plan met its requirements, but left it up to the state to decide which specific measures to implement so long as its overall target for reduction of the inmate population was met. The court also required the state to report at specific intervals on its progress. However, the court stayed implementation of all aspects of this ruling while the state appealed the decision of the three-judge panel to the U.S. Supreme Court.

U.S. Supreme Court Upholds Ruling. On May 23, 2011, the U.S. Supreme Court upheld the three-judge panel’s ruling, declaring that “without a reduction in overcrowding, there will be no efficacious remedy for the unconstitutional care of the sick and mentally ill” inmates in California’s prisons. However, the high court indicated that the state could request the three-judge panel to modify certain aspects of its ruling. For example, the high court said that, given potential public safety concerns and ongoing efforts to improve medical care in the prisons, the state “may wish to move for modification of the three-judge court’s order to

extend the deadline for the required reduction to five years.” On June 7 and July 21, 2011, the administration submitted reports to the three-judge panel updating the court on steps taken thus far to reduce prison overcrowding. The administration has not yet requested any modifications to the three-judge panel’s order, but noted in its most recent report to the court that within a few weeks it will “advise the Court if modifications to the benchmark schedule appear to be warranted.”

How Does the Court Ruling Limit the State’s Inmate Population?

Currently, CDCR operates 33 prisons with a design capacity of about 80,000 beds. This means that the department will only be allowed to house 110,000 inmates in the prisons it operates within two years. However, the court did not specify that *each* prison must be at or below the 137.5 percent limit for design capacity, but rather that the *system as a whole* must be below that limit. In other words, if certain prisons were significantly below the design capacity limit, the state could continue to overcrowd the other prisons above the limit, while still maintaining a systemwide design capacity of 137.5 percent. Based on a current population of about 144,000 inmates housed in state-run prisons and the existing capacity at these prisons, the state would have to reduce its inmate population by roughly 34,000 inmates within two years. (The state also houses about 14,000 inmates in contract facilities run by either local public agencies or private companies in California and other states, and holds about

4,000 inmates in fire camps managed jointly by CDCR with the California Department of Forestry and Fire Protection. Neither the contracted facilities nor the fire camps are subject to the three-judge panel ruling.)

As previously mentioned, the three-judge panel ruling requires the state to reduce overcrowding to specific design capacity limits at six-month intervals leading up to the two-year deadline. The design capacity allowed for the prison system is reduced in a series of steps over that period to 137.5 percent. Figure 1 shows, for each six-month interval, the design capacity limit ordered by the court, the corresponding number of inmates that the state could house in its prisons, and the incremental inmate population reductions necessary to meet the court’s population limit. For example, based on the existing capacity of the prison system, the state would have to reduce its inmate population by about 11,000 inmates by December 27, 2011 relative to the number the state held in CDCR’s institutions at the time of this analysis.

How Does CDCR Plan to Comply With the Ruling?

In its June 7 and July 21 reports to the federal court, the administration described what measures have already been undertaken, or are in the process

Figure 1
Estimated Inmate Population Reductions to Meet Federal Court Ruling

Court-Imposed Deadlines	Design Capacity Limit	Population Limit	Population Reduction ^a
December 27, 2011	167.0%	133,000	11,000
June 27, 2012	155.0	123,000	10,000
December 27, 2012	147.0	117,000	6,000
June 27, 2013	137.5	110,000	8,000
Two-Year Total			34,000

^a Relative to July 13, 2011 state prison population of 143,493.

of being implemented, to reduce overcrowding. These measures include the following:

➤ ***Various 2009-10 Statutory Changes.***

The administration noted in its reports to the court that 2009-10 budget legislation (Chapter 28, Statutes of 2009 [SBX3 18, Ducheny]) amended state law to: (1) make ineligible for revocation to prison violations by certain parolees with no serious, violent, or sex offenses; (2) increase the credits that inmates can earn to reduce their prison stay; (3) increase the dollar threshold for certain property crimes to be considered a felony, thus making fewer offenders eligible for prison; and (4) establish parolee reentry courts to help prevent certain parolees from returning to prison. The administration also noted other legislation—such as Chapter 608, Statutes of 2009 (SB 678, Leno)—a separately enacted policy bill that provides counties fiscal incentives to reduce the number of probationers sent to prison.

- ***Out-of-State Transfers.*** In October 2006, Governor Schwarzenegger issued a proclamation declaring a state of emergency on the basis that the level of overcrowding in the state prison system posed a substantial health and safety risk to inmates and staff. The proclamation—which is still in effect today—waived certain provisions of state law, thereby allowing CDCR to immediately contract with and involuntarily transfer inmates to out-of-state correctional facilities. Subsequently, in May 2007, the Legislature changed certain provisions of state law to allow CDCR to involuntarily transfer inmates out of state. This legislative authorization expired on July 1, 2011. Nevertheless, CDCR continues to house inmates out of state pursuant to

the Governor's emergency order. Currently, about 10,000 inmates are in such facilities in addition to the roughly 4,000 inmates that are housed in contract facilities located in California.

- ***AB 900 Prison Construction Plan.*** In 2007, the Legislature enacted Chapter 7, Statutes of 2007 (AB 900, Solorio), which, among other provisions, authorized about \$6.5 billion for the construction of additional inmate housing. The administration reports that several projects funded from AB 900 are currently being planned, designed, or constructed. These projects include (1) a new inmate health care facility in Stockton, (2) new mental health facilities at two existing prisons, (3) the conversion of former juvenile facilities to adult facilities, and (4) reentry facilities for inmates within one year of being released from custody. The administration stated in its June 7 report that it would also ask the Legislature to reconsider some of the projects that have been rejected by the Legislature in the past.
- ***Realignment of Certain Adult Offenders and Parolees.*** As part of the 2011-12 budget package, the Legislature enacted Chapter 15, Statutes of 2011 (AB 109, Committee on Budget) and Chapter 39, Statutes of 2011 (AB 117, Committee on Budget). Taken together, these measures shift responsibility for certain low-level offenders, parole violators, and parolees from the state to counties. The realignment plan, which takes effect October 1, 2011, also provides counties with funding to carry out their new responsibilities.

What Effect Will These Measures Have on Prison Overcrowding?

As part of its June 7 report to the court, the administration indicated that it was too soon to know precisely how fast and at what rate overcrowding would be reduced as a result of the measures identified in its report. The administration said this would be hard to determine until the realignment plan approved by the Legislature is implemented and additional AB 900 prison beds are constructed. In its July 21 report, the administration provided the court with preliminary estimates on how the realignment plan passed by the Legislature would reduce the state prison population and indicated that it would provide updated population estimates within a few weeks.

We concur with the administration that it is difficult to know with certainty how exactly the various policy changes described above will affect overcrowding in the prison system over the next several years. However, we believe some conclusions can be drawn at this time in regard to the general magnitude of the effects on overcrowding of these measures. We discuss our major findings below.

Past Population Reduction Measures Unlikely to Have Further Impacts. In its July 21 report, the administration stated that some of the 2009-10 population reduction measures “will continue to reduce overcrowding.” We agree that these measures have clearly had some initial impact, such as a reduction in the inmate population by several thousand inmates over the past two years. It also appears that the measures have slowed the ongoing rate of growth in the inmate population. However, according to CDCR’s most recent baseline projections, which do not take into account the effects of the realignment plan, the state’s inmate population would stay relatively flat over the next two years. In other words, CDCR’s projections assume that

these past measures are unlikely to further reduce the inmate population and that the effect of these measures has already been captured in the trend data that CDCR uses to create the projections. In fact, the department’s baseline projections show that the inmate population would actually increase by a few thousand inmates over the next five years. Given these projections, it appears unlikely that the recently implemented policy changes will have much additional impact on reducing prison overcrowding in the future.

Reducing Contract Beds Would Increase Overcrowding. In its report to the courts on June 7, the administration noted that prior CDCR efforts to contract for out-of-state beds had significantly reduced overcrowding in the state prison system. The Governor’s January 2011 budget plan included a proposal to expand the number of these beds by 5,000 (from 10,000 to 15,000). However, the *2011-12 Budget Act* includes statutory language sought by the administration that would run counter to this increased reliance on out-of-state beds by capping the number of these beds in the budget year at roughly 10,000. Moreover, the administration indicated in its June 7 report to the court that it would seek to reduce the number of inmates in out-of-state beds in the future.

In addition, the budget act included statutory language requiring that funding for most of the 4,000 in-state contract beds be eliminated upon implementation of the realignment plan. The administration indicates that this provision was intended to permit the department to eliminate beds that would no longer be needed because these facilities house the type of lower-level offenders who will now be kept in local custody under realignment.

AB 900 Projects Unlikely to Add Much Capacity in Next Two Years. Although it has been four years since the enactment of AB 900, little progress has been made on the planned

construction of most of the facilities contemplated by the measure. The CDCR has not yet delivered any AB 900 projects that have significantly increased inmate housing capacity. The few projects that are close to completion together provide about 100 health care beds as well as additional treatment space. According to information provided to us by the department based on its current plan for AB 900 construction, the design capacity of the state's prison system would increase by about 600 beds by July 2013 and by 13,500 beds by 2018. This means that the department's current prison construction plan would likely have little impact on the state's ability to comply with the three-judge panel's ruling in the next two years—although it could have a much larger impact in the longer term.

Realignment of Offenders to Significantly Reduce Inmate Population. According to the administration, the realignment of certain lower-level offenders, parole violators, and parolees will reduce the inmate population by nearly 40,000 inmates upon its full implementation in 2015. However, not all of these types of offenders are placed in the department's prisons (the facilities that fall under the order of the three-judge panel). Some of them are typically housed in contract beds and inmate fire camps. For example, in its July 21 report to the court, the CDCR noted that currently there are only roughly 32,000 inmates in its 33 prisons who would qualify for placement under local jurisdiction under the realignment law. This means that as much as one-fifth of the inmate population reduction that results from the realignment plan may result in the placement of fewer inmates in contract beds and fire camps, rather than resulting in a reduction in overcrowding in regular state prison institutions. In addition, potential changes in the practices of district attorneys in what charges they choose to bring against criminal offenders could result in fewer offenders being shifted to the counties than

anticipated and more such offenders being sent to state prison facilities.

Even taking these factors into account, however, the realignment plan will likely shrink the size of the state prison population by at least the low tens of thousands of inmates over the next two years and beyond. This is because, in setting its criteria regarding which offenders were eligible to be kept at the county level, the realignment package approved by the Legislature shifts a sizeable group of drug and property offenders and parole violators out of the state prison system. This means the realignment plan will go a long way toward reducing overcrowding in the next several years.

Bottom Line: Current Plan Will Significantly Reduce Overcrowding, but Not Enough in Two Years. As we noted above, there is significant uncertainty regarding how quickly prison overcrowding will be reduced in the next two years. Based on the information available to us at this time, even though the prison population will be dramatically reduced through the realignment plan, it appears likely that the department will fall short of meeting the court's deadlines for reducing the population of the institutions to 137.5 percent of their design capacity *within two years*.

For example, the administration estimated in its July 21 report to the court that roughly 32,000 lower-level inmates and parole violators currently in state prison would be reduced from the current in-state prison population as a result of realignment. Even if this target were fully achieved, that would mean overcrowding will have been reduced to 141 percent of design capacity—missing the 137.5 percent benchmark. However, our analysis indicates that it will take much longer than two years for the full effects of the realignment plan to be realized on the prison population. Thus, even the administration's 141 percent estimate overstates the population reduction that is likely to occur within two years.

Other factors make it even less likely that the court's population reduction deadlines can be met within the court's deadline. Under the terms of the realignment legislation, for example, counties would be permitted to contract back with CDCR to hold their lower-level offenders in state prison. To the extent that counties exercise this option to address their jail capacity problems, it could make it even harder for the state to meet the federal targets to reduce prison overcrowding. Finally, if the number of out-of-state contract beds were reduced in the future—as indicated in the administration's plans—the state's inmate population would likely be further above the limit set by the court, as these inmates would have to be transferred back to state-run prisons.

**LAO Recommendations to
Balance the Court's Requirements,
Public Safety, and the State's Fiscal Concerns**

As noted earlier, the federal court is not ordering the state at this time to implement specific measures to reduce overcrowding in its prisons. Rather, the court is providing the state with the flexibility to determine how best to limit the population in the prison system to 137.5 percent of design capacity within two years. Although the administration recently submitted two reports to the court on how the state is reducing overcrowding, these reports do not preclude the Legislature from assessing the measures identified by the administration and considering additional solutions to alleviate overcrowding.

We believe this independent review by the Legislature is particularly important, given the possibility that the administration's plan is likely to fall short in meeting the court-ordered population limit in the timeframe required by the court. Moreover, as the high court itself noted, how the state achieves compliance with the inmate population targets involves some important policy

choices about how to achieve compliance with federal court orders at the least risk to the safety of the public. The Legislature thus has the opportunity to help shape state decision making in a way it feels would best preserve public safety.

Encourage Administration to Request More Time to Comply. The Legislature has already taken an important first step toward complying with the federal court ruling by enacting Chapter 15 and Chapter 39 and shifting the responsibility of lower-level offenders and parole violators from the state to the local governments. Our office has long argued that such a realignment of lower-level offenders and parolees, accompanied by appropriate state financial resources, could lead to better criminal justice system outcomes. For example, this shift will provide counties a greater incentive to ensure that offenders released back into the community after incarceration receive mental health and substance abuse treatment services that could break their recurrent cycle of recidivism and parole failure.

Although this realignment of criminal justice responsibilities recently approved by the Legislature will significantly reduce prison overcrowding over time, the state likely will still fall short of meeting the court's requirement within two years, as discussed above. Thus, we believe that it would be appropriate for the Legislature to encourage the administration to request that the three-judge panel modify its compliance deadlines in order to provide the state with additional time to meet the required population limits.

Given the dramatic policy changes the Legislature has already approved, we believe the state has a strong case to make to the courts for a grant of more time to implement this complex realignment of responsibilities from the state to counties. The shifting of tens of thousands of inmates and parolees will require dramatic changes in policies and procedures for both the state and counties. For example, the Legislature must still

determine how to permanently allocate the tax resources made available to counties for these new duties. Moreover, the administration has not indicated to the Legislature under what terms and conditions it would allow counties to contract back with CDCR to hold inmates, or what new arrangement if any would be made to continue the operation of inmate firefighting camps. A careful implementation of criminal justice realignment could help minimize the potential risk to public safety unavoidably inherent in such major changes. Moreover, the state faces the prospect of having to implement further unidentified actions if the federal courts were to hold the state to meeting the deadlines that are now scheduled to apply for the first two years. The U.S. Supreme Court suggested in its recent court ruling that such a request for more time to the federal three-judge panel would be reasonable. Under the circumstances discussed above, we believe such a request is warranted.

Reconsider the AB 900 Construction Plan.

The administration has advised the three-judge panel that part of its plan to comply with the population reduction targets is to build additional prison beds, potentially even including projects the Legislature has already rejected. Given the significant reduction in overcrowding that will occur in response to the court ruling, however, we believe that CDCR should reevaluate the number, types, and scope of prison construction projects it plans to deliver. Instead of revising projects the Legislature has already turned down for various reasons, it may wish to reconsider the projects for which it has received legislative approval in light of these dramatic new circumstances posed by the high court ruling.

For example, the department currently plans to add dormitory beds for low-level inmates, as well as new program space for inmate health care. However, these types of construction projects may no longer be needed. This is because further

analysis may show that the deficiencies identified by the *Plata* and *Coleman* courts would best be met by building additional higher-security level beds (such as cells) rather than dormitory space and by utilizing the program and treatment space that will be “freed up” at existing prisons as a result of reduced overcrowding. Revisiting these decisions is reasonable, in our view, given the very significant potential future cost to the state (as much as \$1.6 billion annually) to operate and pay debt service for these new facilities and the state’s severe ongoing fiscal difficulties. This does not necessarily mean that these projects need to be cancelled, but rather that the types of facilities CDCR plans to build may require modification.

In view of the above, we recommend that CDCR be directed, through statute, to report to the Legislature upon the release of the Governor’s budget on January 10, 2012 regarding the (1) justification for each AB 900 prison project that the Legislature has approved but has not yet gone under contract for construction and (2) possible modifications to those projects. We further recommend that the Legislature specify in statute—through urgency legislation to take effect immediately—that CDCR could not enter into contracts for these construction projects until it has satisfied this reporting requirement and the Legislature has had an opportunity to review the information. Under our approach, if the Legislature took no additional action by February 10, 2012, the CDCR would be allowed to continue with the projects as planned. We would note that the administration recently took a similar approach with respect to the construction of a new condemned inmate complex at San Quentin State Prison, which it ultimately decided to halt.

Maintain Out-of-State Contract Beds for Now. Using out-of-state contract facilities to house California inmates on a long-term basis to meet the state’s institutional space needs raises several

policy and legal issues that are worthy of legislative consideration and debate. For example, the Legislature should explore: (1) whether out-of-state facilities do a better or worse job of rehabilitating inmates than the state's regular prison facilities, and (2) the overall cost-effectiveness of this approach. However, we recommend that the Legislature continue (and possibly expand) the out-of-state program at least until such time as CDCR is able to comply with the court-ordered inmate population reduction targets. The administration's push to reduce the number of these out-of-state beds while at the same time reducing overcrowding in the prisons makes little sense at the present time in our view. This is especially the case given the tight schedule of deadlines for compliance with the court orders, the likelihood that realignment alone would fall short of meeting these deadlines in the short term, and the fact that it will take much longer than two years for CDCR to expand its current prison capacity.

In light of the above, we recommend that in future budgetary actions, the Legislature provide CDCR with more flexibility to expand the out-of-state transfer program to help meet the court's deadlines. In addition, although the department continues to involuntarily transfer inmates out of state, we would note that the state law authorizing it to do so expired on July 1, 2011. Given that the out-of-state transfer program will likely be necessary to meet the court's present deadlines, we recommend that the Legislature extend this sunset

date at least until July 1, 2015. By that time, the Legislature would have an additional opportunity to evaluate the effectiveness of the out-of-state transfer program on a policy basis. Also, during that period, it is possible that the Legislature might choose to proceed with the construction of additional prison beds that could take the place of the out-of-state transfers.

Conclusion

The U.S. Supreme Court's decision will almost certainly result in some of the most dramatic changes to the state's prison system in decades. As we have discussed in this brief, the realignment plan that the Legislature recently enacted could go a long way toward meeting the court's requirements. Our analysis, however, indicates that the realignment plan alone is unlikely to reduce overcrowding sufficiently within the two-year deadline set by the court. This indicates to us that, as the U.S. Supreme Court suggested, a somewhat longer timeframe is warranted. In addition, we recommend that the Legislature consider how the overcrowding reduction will affect the types of prison facilities CDCR has planned to build. Finally, we recommend that the Legislature provide CDCR with more flexibility to use contract beds in order to manage overcrowding, particularly in the near term. Addressing these issues would help to better plan for a dramatically reduced state inmate population within the state's current fiscal situation.

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This report was prepared by Paul Golaszewski, and reviewed by Anthony Simbol. The Legislative Analyst's Office (LAO) is a nonpartisan office which provides fiscal and policy information and advice to the Legislature.

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