No. C100274

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CRIMINAL JUSTICE LEGAL FOUNDATION, SAMANTHA CARTER, RIZPAH BELLARD, AND MINA MOYNEHAN,

Plaintiffs, Respondents, and Cross-Appellants,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; JEFFREY MACOMBER, Secretary of CDCR; AND CALIFORNIA BOARD OF PAROLE HEARINGS,

Defendants, Appellants, and Cross-Respondents.

Appeal from the Sacramento County Superior Court,
Honorable Jennifer K. Rockwell
Case No. 34-2022-80003807-CU-WM-GDS

RESPONDENTS'/CROSS-APPELLANTS' ANSWER TO PLO AMICUS BRIEF

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INTRODUCTION

The Prison Law Office (PLO) has filed an amicus brief claiming that the historical context and purposes of Proposition 57 support interpreting it to empower the California Department of Corrections and Rehabilitation (CDCR) to trump the statutory limits on credits by mere regulations, an inversion of the hierarchy of laws that has existed ever since quasi-legislative authority was invented. The picture that PLO paints looks like a jigsaw puzzle with half the pieces missing. The crime rates that are central to the history are completely absent. The public safety purpose that was first and foremost in the initiative's statement of purposes is glossed over lightly, with no credible justification for the claim that releasing thousands of additional violent felons will somehow magically improve rather than detract from public safety.

In addition, PLO relies on statements in the press of the kind uniformly rejected as legislative history for interpretation of enactments. Ballot materials are regarded as legislative history for initiatives in California, but outside statements are not.

Much of PLO's arguments are really just disagreements with the Legislature and the people regarding the desirability of limits on credits. Most of the limits on credits at issue in this case were enacted by the Legislature and can be changed by it. The Legislature could submit the provision on credits for murderers in Penal Code section 190, subdivision (e) to the people again, as it did in 1998. PLO's policy disagreements should therefore be submitted to the Legislature.

ARGUMENT

I. The historical context does not support a drastic interpretation of article I, section 32.

PLO leads off its historical context discussion with a common statistical trick. It is common to "invite readers to reach conclusions by comparing a reported statistic with some other that supposedly represents a natural baseline. But the proposed baseline may be anything but natural." (Barnett, How Numbers Can Trick You, 97 MIT Tech. Rev. 38, 44 (Oct. 1994).)[1] PLO compares the increase in prison population from 1980 to 2006 with the increase in the state's general population. (PLO Brief 15-16.) The general population is irrelevant, given that most people have not committed crimes that warrant going to state prison.

Missing from this picture is the horrific increase in crime in the period preceding the prison population increase. The six-fold increase in prison population matched, with a time lag, the six-fold increase in violent crimes from 1966 to 1992. (See California Department of Justice, Criminal Justice Statistics Center, Crime in California 2023, p. 12 (2024).) The increase in prison population is the result of both increased crime and stronger policies adopted to address that enormous increase. And those policies worked. While crime is a complex phenomenon, and rises and falls cannot be traced to a single factor, the stronger sentencing policies were one of the major factors that brought crime down dramatically in the 1990s. (See Levitt, Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not, 18 J. Econ. Perspectives 163, 177-179 (2004).)

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1. This device has also been called the Fallacy of the Irrelevant Denominator. (See Scheidegger, "Disparity" Debunked, Crime and Consequences Blog (Jan. 15, 2021) <https://www.crimeandconsequences.blog/?p=2778> [by counsel for Respondents].)

The prison overcrowding that led to the *Plata* litigation was not the result of the prison population being out of proportion to crime but rather the failure of the Legislature to fund enough expansion to match the crime increase and the measures needed to fight it. In 2008, the people of California imposed an explicit constitutional duty on the Legislature to fund the capacity needed for inmates to serve their full terms "except for statutorily authorized credits which reduce those sentences." (Cal. Const., art. I, § 28, subd. (f)(5).) The Legislature failed to do its constitutional duty.

Three years later, under pressure from federal litigation, the Legislature made a massive shift in California sentencing law, changing what it means for a crime to be a felony. Under the Realignment Act, AB 109 of 2011, a large number of felons on lower tiers of felony offenses would serve their time in county jails instead. In addition, sending parole violators back to prison was curtailed. (See Lofstrom & Martin, Public Safety Realignment: Impacts So Far (2015) Public Policy Institute of California, p. 2.) The prison population had been at 190 percent of "design capacity"[2] at the time of the *Plata* prisoner release order (*id.* at p. 1), but it dropped to 150.5 percent of design capacity within a year and to 140.9 percent within three years. Aided by the Three Strikes reform, Proposition 36 of 2012, the opening of a new health care facility in Stockton, and the passage of Proposition 47 in 2014, California met the *Plata* target in January 2015. (*Id.* at p. 2.)

PLO states that the cap was reached in the fall of 2016 (PLO Brief 19-20), on the eve of the vote on Proposition 57. That is not true. It was reached nearly two years before the vote (Lofstrom &

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2. "Design capacity" is an artificially low number. Prisons can safely operate substantially above that number. (See *Brown v. Plata* (2011) 563 U.S. 493, 539-540.)

Martin at p. 2), as Respondents previously briefed. (Cross-Appellants' Reply 24; 1 AA 197.) To eliminate any doubt on this point, Respondents are concurrently requesting judicial notice of CDCR's February 17, 2015 status report to the three-judge federal district court, Attachment 1 to the Request for Judicial Notice. Exhibit B, ¶ 3 of the status report notes as additional elements of a durable solution Propositions 36 and 47, noted above, and the youth offender parole law enacted in 2013. Paragraph 5 notes the use of nonviolent parole, which would be expanded in a provision of Proposition 57 not challenged in this case. (See Cal. Const., art. I, § 32, subd. (a)(1).) Paragraphs 7 and 8 noted programs for release of medically incapacitated inmates and parole for inmates over 60 years old, both of which would be codified and expanded by later statutes. (See Pen. Code, §§ 1172.2, 3055.)

On top of all these changes, California was also benefitting from the decline in crime that continued beyond the 1990s to a low in 2014 of only 44 percent of the 1992 peak. (Crime in California, *supra*, at p. 12.) This decline, in significant part a result of prior strong sentencing policies, would necessarily produce reductions in prison population over time on top of any reductions resulting from policy changes.[3]

A durable solution to the problems that brought about the *Plata* order were thus already in place well before Proposition 57, and both the parts of that initiative not challenged and subsequent acts of the Legislature added to them.

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3. From the 2014 low to 2023, violent crime has increased 32 percent in total number and 30 percent in rate per 100,000 population. (See *id*. at pp 12-13.) This increase coincides with a marked softening of punishment for crime, though a casual connection has not yet been demonstrated.

II. The ballot pamphlet is the legislative history of an initiative, not other statements in the press.

In the combined Respondents' Brief and Cross-Appellants' Opening Brief (RB), we explained how the proponents' ballot arguments — promising that Proposition 57 would "[k]eep[] the most dangerous offenders locked up" and emphatically denying that it would "authorize parole for violent offenders" — contradicted an interpretation that the initiative blew off credit caps for violent criminals and authorized early parole for murderers. (See RB 27, 34, 51-52.) PLO seeks to contradict these clear indications with statements in a newspaper article, a post on a radio station's website, and a position paper by an advocacy organization. (See PLO Brief 20-21.) PLO cites no relevant authority that such statements are cognizable legislative history for the purpose of interpreting an initiative. (Cf. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.) They are not.

California precedents establish that when the language of an enactment is not clear on its face, courts may turn to the legislative history for clarification. (See, e.g., *Horwich* v. *Superior Court* (1999) 21 Cal.4th 272, 277.) It is also well established that the ballot pamphlet, also known as the voter information guide, is the equivalent of the legislative history for an initiative. (See *Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 866.) The Supreme Court has repeatedly rejected efforts to drag in other materials for the same purpose. (See *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 764, fn. 10; *Horwich*, *supra*, at p. 277, fn. 4; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 904–905 & fn. 15; *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 26.)

In *Kaufman & Broad*, *supra*, 133 Cal.App.4th at page 30, this court explained the principle governing what is cognizable legislative history and what is not:

> "Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature *as a whole*. (See *California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 701 ....) Thus, to pick but one example, our Supreme Court has said, 'We have frequently stated … that the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation. [Citations.]' (*Quintano v. Mercury Casualty Co*. (1995) 11 Cal.4th 1049, 1062 ....)" [Italics in original.]

In its listing of what is not cognizable, *Kaufman & Broad* at page 38, paragraph H, includes magazine articles, citing *Cortez v. Purolator Air Filtration Products Co*. (2000) 23 Cal.4th 163, 168 [fn. 2].) The same principle noted above would also exclude newspaper articles, radio programs, internet web pages, and position papers put out by organizations. (See *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 891, fn. 7 [newspaper article not legislative history].) Not only is there no evidence that such materials are considered by the people *as a whole*, they certainly are not. In today's fragmented media environment, newspapers are far less important than they were in the past. "Many Americans may not remember the last time they stopped by a newsstand to pick up a magazine or newspaper." (Grundy, Internet Crushes Traditional Media: From Print to Digital (U.S. Census Bureau, June 7, 2022) <https://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html>.) Websites are so numerous that it is unlikely that a blog post, on-line article, or posted paper will be seen by more than a tiny fraction of the electorate. In contrast, the voter information

guide is mailed to every registered voter in the state. (Elec. Code, § 9094.)

Nor does the fact that some of these sources quote Governor Brown lend them any additional weight. As noted in the *Kaufman & Broad* quote, *supra*, it is well established that statements of a bill author carry no special weight for legislative statutes, and the same principle applies to initiative sponsors. Even for statements in the voter information guide, the Supreme Court has rejected the argument that statements of the Governor as proponent carries special weight. (*In re Gadlin* (2020) 10 Cal.5th 915, 942.)

Against this established body of contrary authority, PLO at page 22 cites *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1037–1043 for the sweeping proposition that "Governor's public statements" can be considered. That case does not support anything anywhere near that broad. The court was interpreting a constitutional amendment proposed by the Legislature and approved by the people in the 1911 special election. (*Id*. at p. 1038.) The Governor's statement in question was not just any "public statement," it was his inaugural address. (*Id*. at p. 1039, 1041.) And it was not just any inaugural address. It was the address of Governor Hiram Johnson following the progressive movement's electoral sweep of 1910 (see *id*. at pp. 1038–1039), among the most important events in the history of California government. The speech was certainly known to the legislature as a whole, which proposed the amendment, and, in these unique circumstances, it is a fair inference that it was as least as well known to the people as today's voter information guide.

The statements that PLO asks this court to consider are not remotely close. PLO has cited a mountain as precedent for a molehill.

As previously briefed, in the voter information guide the proponents squarely and emphatically promised the people that Proposition 57 would not authorize parole for violent felons. This promise cannot be reconciled with an interpretation that makes murderers eligible for parole years earlier than under prior law. (See RB 12.) They also repeatedly promised that Proposition 57 would keep the most dangerous offenders locked up. (See RB 52.) This promise cannot be reconciled with an interpretation that would grant determinately sentenced rapists, robbers, and torturers an entitlement to release additional years before the end of their terms, without any kind of screening to determine if they are still dangerous. The statements that PLO cites are not cognizable legislative history and have no weight in the interpretation.

III. Shortening sentences of murderers and other violent felons is contrary to Proposition 57's public safety and indiscriminate release purposes and not necessary to the others.

PLO argues that CDCR's contrary-to-statute regulations are necessary to meet Proposition 57's objectives. (PLO Brief 23.) This argument follows the same pattern of missing pieces and misleading statistics that actually mean nothing.

A. Court-Ordered Indiscriminate Releases.

PLO asserts that one of the purposes of Proposition 57 was to prevent federal court release orders, repeating that claim four times. (PLO Brief 14, 23, 26, 29.) But what Proposition 57 actually says is that one of its purposes is to "[p]revent federal courts from *indiscriminately* releasing prisoners." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, subd. 3, p. 141, italics added.) The word that PLO omits four times is the key to the purpose. Whether the releases are authorized by court orders or some other authority is less important than whether

prisoners are being released indiscriminately. This is confirmed by the proponents' ballot argument, which noted the *Plata* case and then warned that we "risk a court-ordered release of dangerous prisoners." (*Id*. at p. 58, argument in favor of Prop. 57.) The proponents also promised the people that, in contrast to this risk, Proposition 57 would "keep dangerous criminals behind bars." (*Id*. at p. 59, rebuttal to argument against Prop. 57.)

This purpose, this warning, and this promise would all make no sense if Proposition 57 simply authorized the same release policies that the state was in danger of having ordered by the federal court. From the record of the three-judge court proceedings in the *Plata*/*Coleman* case there is no doubt that the primary indiscriminate release policy at issue was the expanded credits for violent felons. Respondents have previously noted this history (see RB 15, 52), but in light of PLO's arguments, a deeper dive may be in order to make this even more clear.

The initial order set a population cap of 137.5% of design capacity with a direction to the defendants to prepare a plan to reach that number. (See *Coleman v. Schwarzenegger* (ED & ND Cal. 2009) 922 F.Supp.2d 882, 1004 (*Coleman I*).)[4] This was the order affirmed by Supreme Court. (*Brown v. Plata* (2011) 563 U.S. 493, 510, 545.) The obvious solution was for the State to do its duty under the California Constitution and build sufficient capacity (see *supra*, at p. 8), but that was deemed unfeasible due to the time required. (*Id*. at p. 510.)

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4. The three-judge court was formed to consider the prisoner release issue from two cases, an Eastern District case named *Coleman* and a Northern District case named *Plata*. (See *id*. at p. 888 & fn. 2.) The short titles of opinions in the case are sometimes *Coleman* and sometimes *Plata* as the lead plaintiff, and the successive governors as defendants. Two opinions four years apart are published consecutively in volume 992 of Federal Supplement, Second.

After further proceedings on remand, the three-judge court directed the defendants to make a list of all proposals made by either party or the court up to that point. (*Coleman v. Brown* (ED & ND Cal. 2013) 922 F.Supp. 1004, 1054-1055 (*Coleman II*).) That list, with the accompanying state plan, is Attachment 2 to respondents' request for judicial notice (RJN) filed concurrently with this brief. Item 4 was changes to prison credits, with item 4.d. being an increase in credits to 34% for violent felons outside the Three Strikes Law. (See RJN, Atch. 2, pp. 12-13.) This was the most hotly contested item.

The state's plan included credit expansion for non-violent felons, whether "non-strike" or "two-strike." (*Id.* at pp. 29-30.) It also included medical parole and elderly parole. (*Id.* at pp. 31-32.) However, the state declined to include expanded credits for violent felons. "Defendants believe that legislative credit increases for offenders convicted of violent felonies would jeopardize public safety by expediting their release. (Beard Decl. ¶ 15.) Defendants are unwilling to risk public safety by hastening the release of these offenders. (*Id.*)" (*Id.* at p. 35.) The objection was based on the declaration of Secretary Beard that we previously briefed. That is, such credits " 'pose an undue risk to public safety and do not reflect sound correctional practice.' " (RB 15, quoting declaration of Secretary Beard, 1 AA 110.)

On June 20, 2013, the three-judge court ordered adoption of the state's plan plus item 4 from the list. (See *Coleman v. Brown* (ED & ND Cal. 2013) 952 F.Supp.2d 901, 904.) The state defendants appealed. On February 10, 2014, the court backed off and issued a new order with a new list of measures, minus the expanded credits for violent felons. (See Appellants' Request for Judicial Notice, Exh. 1, p. 3.) The defendants agreed not to appeal that order (*id.* at p. 2), and the parties stipulated to dismissal of the prior appeal. (RJN, Atch. 3.)

This history demonstrates beyond genuine dispute that expanded credits for violent felons was the one measure that was seriously threatened in *Plata*/*Coleman* litigation that CDCR at the time regarded as a real threat to public safety. It is the sole measure that fits the warning in the proponents' ballot argument of "a court-ordered release of dangerous prisoners." (See *supra*, at p. 14.) This measure is the exemplar of the *indiscriminate* release of prisoners by federal court order that Proposition 57 was aimed at preventing.

The notion that Proposition 57 was intended to prevent indiscriminate releases by federal courts by authorizing substantially the same indiscriminate releases by CDCR regulation defies common sense. That cannot be the correct interpretation.

B. Public Safety.

1. Legislative judgment.

Purpose number one of Proposition 57 was to "[p]rotect and enhance public safety." (Voter Guide, text of Prop. 57, § 2, subd. 1, p. 141.) This purpose is closely related to the purpose of preventing *indiscriminate* releases of prisoners for the obvious reason that such releases are threats to public safety, as discussed in Part III.A, *supra*.

In 2009, the Legislature convened in a Third Extraordinary Session to deal with the State's fiscal emergency. (See Micheli, Historical Look at Special Sessions in the California Legislature (Oct. 6, 2023) Cal. Globe, <https://californiaglobe.com/articles/historical-look-at-special-sessions-in-the-california-legislature/> [as viewed Mar. 3, 2025].) As a part of this effort in Senate Bill X3-18, the Legislature extensively rewrote the main credit statute, section 2933 of the Penal Code, converting it from an incentive to work into an automatic credit subject to denial for misconduct under section 2932. (See Stats. 2009, 3d Ex. Sess., ch. 28,

§ 38.) The same bill also added section 2933.05, creating program credits for the first time (*Id.* § 39), and it added to the credit program for inmate firefighters.) (*Id.* § 41.) The bill also reduced the return of parole violators to prison. (*Id.* § 48.)

Even in a fiscal emergency, however, the Legislature did not abandon limits on credits for violent criminals but instead reaffirmed those limits with conforming amendments where needed. (See *id.* §§ 40, 43, 44.) This decision is consistent with the later testimony of Secretary Beard that expanding credits for violent felons is a danger to public safety. (See *supra* at p. 15.)

2. Coleman court findings.

PLO cites *Coleman I* for the sweeping proposition that reducing the length of prison stays via expansion of credits "would not adversely affect recidivism rates," with the implication that such a step is consistent with public safety. (PLO Brief 18-19.) On closer examination, *Coleman I*'s findings are much more limited. In the passage that PLO cites, the court was discussing proposals to "allow[] inmates to shorten their lengths of stay in prison *by a few months*." (*Coleman I*, 922 F.Supp.2d at p. 976, italics added.) The court cited the testimony of the plaintiffs' expert, Dr. Austin, that "reducing the length of stay by a 'very moderate period of time' — four to six months — would have no effect on recidivism rates." (*Ibid.*) The court went on to state that this kind of "*moderate* reduction in an inmate's length of stay in prison would not affect the deterrence value of imprisonment." (*Ibid.*, italics added.)[5]

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5. Although the court did not expressly say so, its repeated references to moderate reductions of months, not years, imply that it was contemplating a temporary and relatively brief program of expanded credits.

If CDCR had made a moderate shortening of prison stays of six months or less, as contemplated by the *Coleman* court, respondents would never have brought this action. This case is about a multi-year child abuser getting out eight years early (Declaration of Samantha Carter, 1 AA 249) and a murderer getting out five years early. (Declaration of Mina Moynehan, 1 AA 254.) The findings of the *Coleman* court regarding the public safety implications of far shorter reductions have no bearing on the massively greater reductions at issue in this case.

3. Recidivism rates and crimes committed.

The public safety implications of shortening prison stays for persons who committed major crimes[6] involve many factors, including recidivism rates, time at large following release, age at release, clearance rates, deterrence, and the effectiveness of rehabilitation programs. The simplistic statistics that PLO proffers (PLO Brief 31-35) do not come close to making the case that the present regulations enhance rather than harm public safety.

First, there is a difference between reoffending and recidivism as it is usually measured. Reoffending includes "all criminal acts committed by a person following ... imprisonment." (Nagin, Cullen, & Johnson, *Imprisonment and Reoffending* (2009) 38 Crime and Justice 115, 120 (Nagin).) Reoffending considers the rate and number of crimes committed, rather than a simple yes/no. (*Ibid*.) Recidivism is measured by deciding on a time window and determining if a given event — arrest, conviction, or return to prison — did or did not occur within that window. (See *ibid*.; U.S. Sentencing Commission, Recidivism of Federal Violent

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6. Between probation and Realignment, nearly everyone going to state prison has committed a major crime, has an extensive criminal history, or both. (See Beard Declaration, 1 AA 110.)

Offenders Released in 2010 (2022) pp. 9-10 (USSC).) The choice of event is controversial (Nagin, *supra*, at p. 120) and has a major impact on the rate, as discussed below. The follow-up also matters. Long follow-ups are more accurate and produce higher rates. (USSC, *supra*, at p. 10.)

PLO quotes recidivism rates as if they were they rates at which released prisoners *commit* new crimes. (PLO Brief 33.) This is simply wrong. Most obviously, the recidivism calculation "depend[s] on an offender's detection by the state." (Nagin, at p. 120.) This is one of the reasons that longer follow-up periods yield higher rates. Released criminals who return to crime but escape detection for most of their crimes may only be caught in later years. In California in 2023, only 40% of violent crimes and 7.8% of property crimes known to police were cleared by arrest. (California Department of Justice, Criminal Justice Statistics Center, Crime in California — 2023 (2024) table 15, p. 22.) Even if the experienced criminals released from CDCR were no better than average at escaping detection, 60% of the violent crimes and 92% of the property crimes they commit would not show up in recidivism statistics simply because they did not get caught. In reality, they probably are better than the rookies, and the real proportion of undetected crimes is higher.

The understatement problem goes even deeper than that. Of the two decisions for defining recidivism noted above, California made both in the direction that lowers the numbers. While the U.S. Sentencing Commission uses arrests and an eight-year follow up period (USSC, at p. 10), the California Board of State and Community Corrections defined recidivism using convictions and a short three-year follow up. (See California Department of Corrections and Rehabilitation, Recidivism Report for Individuals Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2018-19 (2024) p. 58 & fn. 32 (CDCR

Recidivism Report).) Both of these dubious choices lower the rate separately, but they also have a compound effect that lowers it even further. During the three-year follow-up period for the cohort in the CDCR Recidivism Report, about a third of felony cases took more than a year to process, and between a third and a half of misdemeanor cases took more than four months to process. (California Judicial Council, 2025 Court Statistics Report: Statewide Caseload Trends (2025) p. 86 <https://courts.ca.gov/system/files/file/2025-court-statistics-report.pdf> [as viewed Mar. 17, 2025].) A released prisoner arrested for a felony in the last year or for a misdemeanor in the last four months of the follow-up period might not be convicted before the window closes (see CDCR Recidivism Report, at p. 59) and therefore would be falsely counted as a non-recidivist. When the delay from crime to arrest is added, this problem becomes even worse.

In short, the number of crimes committed by released prisoners are substantially greater than the recidivism figures that PLO incorrectly cites for crimes committed. But PLO's statistical errors do not stop there. The inferences PLO draws from comparisons of numbers are also unsubstantiated.

4. Rate trends and causal inferences.

PLO claims that CDCR's regulations are working well and cites trends in recidivism rates in support of this claim. (PLO Brief 30, 32-33.) These claims do not survive even the most basic scrutiny for casual inferences.

PLO cites data from the 1990s and 2000s using an obsolete measure of recidivism, return to prison, but does not make any comparison to any recent data by this measure. (PLO Brief 32.) Even if they did, the comparison would not be meaningful because policies on returning released prisoners to prison have changed dramatically in the interim, particularly with SB18X3 of

2009 (see *supra* at p. 16) and Realignment (CDCR Recidivism Report, p. vii), so changes in this rate do not reliably indicate changes in the released prisoners' behavior.

Next, PLO compares the recidivism rates measured by convictions in the nine years preceding the regulations with the single most recent year. Leaping from these numbers to the conclusion that the regulations are the cause of the change commits the classic fallacy of *post hoc ergo prompter hoc*, that A causes B merely because B follows A. (See Aldisert, Logic for Lawyers (3d ed. 1997) p. 199.) To find another possible cause of the small drop in the most recent year, one need only look in the same report that PLO cites for the numbers.

> "The last two release cohorts (FY 2017-18 and 2018-19) saw the introduction of a new factor influencing recidivism rates: the COVID-19 pandemic. The pandemic began just before the final year of follow-up for the FY 2017-18 release cohort and the final two years of follow-up for the current FY 2018-19 release cohort. Sudden changes to local policing practices, crime rates, court closures, the transfer of court proceedings to electronic/remote proceedings, and the temporary suspension of intakes and transfers to CDCR are only a few factors that likely influenced all three measures of recidivism (arrests, convictions, and returns to prison) downward with the last two cohorts of releases." (CDCR Recidivism Report, at p. viii.)

5. Unproven rehabilitation programs.

PLO cites the fact that people who participate in programs have somewhat lower recidivism rates than those who do not (PLO Brief 33), thereby committing the rookie methodology error of selection bias. Comparing the outcomes of treatment and nontreatment groups to determine the efficacy of the treatment is valid only if one knows that the two groups are the same before treatment. (See Gorman & VerBruggen, Cognitive Behavioral Therapy for Criminal Offenders (2024) p. 5 <https://media4.

manhattan-institute.org/wp-content/uploads/cognitive-behavioral-therapy-for-criminal-offending.pdf>.) The "gold standard" is the randomized controlled trial , in which participants are randomly assigned to the treatment group or the control group. (See *id.* at p. 6; Nagin, at p. 131.) Absent an effective control, we cannot "account for the possibility that those who participate are simply more motivated to change than those who do not participate." (Gorman & VerBruggen, at p. 5; Byrne, The Effectiveness of Prison Programming: A Review of the Research Literature Examining the Impact of Federal, State, and Local Inmate Programming on Post-Release Recidivism (2019) 84 Fed. Probation 3, 9-10 (Byrne, Effectiveness).) At the opposite end of the spectrum from randomized controlled trials is self-selection, where the participants themselves have decided to take the treatment or not. That is what CDCR has. Is the group of prisoners who choose to participate in programs the same, overall, as the group that does not with regard to their likelihood of "going straight" after prison, with or without the program? That is highly unlikely.

In study methodology, randomized controlled trial is the gold standard, and uncontrolled self-selection is the garbage bin. (See Byrne, Effectiveness, *supra*, at p. 8 [noting many studies are "poor quality" due to "selection bias"].) The recidivism rates of self-selected participants versus non-participants tell us nothing.

The reality is that "overall correctional treatment effects are very small and likely not clinically or socially meaningful." (Logan, Wright, & Meyers, Why "Rehabilitating" Repeat Criminal Offenders Often Fails (2025) p. 10.) Most studies claiming to show substantial effects are either poor quality, conducted by researchers with an interest in a positive result, or both. (*Ibid.*)

6. Incapacitation, age, and time at large.

Punishment reduces crime through deterrence and incapacitation. The deterrence debate[7] is too complex to discuss here, but incapacitation is obvious. Imprisonment largely eliminates the capacity of a criminal to commit crimes on people outside the prison.[8] Shortening a sentence eliminates the incapacitation effect for the period of time between the shortened release date and the original release date. Beyond dispute, some of the criminals released early commit crimes during this period that would not have happened if they had remained in prison. (See Brief for the Sacramento District Attorney as *Amicus Curiae* 31-33.) Two-thirds of prisoners released by CDCR are arrested for new crimes within three years. (CDCR Recidivsim Report at p. vii.)

In the course of discussing proposals to shorten sentences by only a few months (see *supra*, at p. 17), the *Coleman I* court made this statement: "Shortening the length of stay in prison thus affects only the timing and circumstances of the crime, if any, committed by a released inmate—i.e., whether it happens a few months earlier or a few months later." (*Coleman I*, 922 F.Supp. at p. 977.) Note the singular "crime." The implication is that the conviction and sentence for a crime committed when an inmate would otherwise be in prison for his first offense prevents him from committing a crime that he would have committed after his

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7. See, e.g., Kessler & Levitt, Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation (1999) 42 J. L. & Econ. 343, 343 [finding Penal Code section 667, subdivision (a) enhancement reduced targeted crimes 4-8 percent].

8. We say largely because a few prisoners are able to commit crimes on the outside by proxy. (See, e.g., *People v. Allen* (1986) 42 Cal.3d 1222, 1235-1244 [murderer sent hit man after witnesses to his first murder].)

original release date. This could be true *if* the first crime committed by a released criminal is known to the police, *if* the police solve the crime and arrest the criminal, *if* he is convicted for that crime, and *if* he is sent back to prison for a sentence extending longer than his original release date. That is a lot of "ifs."

The reality of low clearance rates (see *supra*, at p. 19) means that most of the released inmates who return to crime will commit many crimes before they are caught, convicted, and sentenced. Even for those who are eventually caught and returned to prison, the decline of violent crime with age means that incarceration later rather than now means that they are incapacitated at a stage of life when they are less likely to commit violent crimes anyway.

A study by the U.S. Sentencing Commission found substantially greater recidivism among violent offenders compared to non-violent offenders. (See USSC, at p. 5.) Yet there is also evidence that those convicted of the most severe violent crimes have lower recidivism rates than those who committed lesser crimes. The most likely explanation for this seemingly paradoxical result involves sentence length and age. One "treatment" that we know works for many criminals is age. In the USSC study, "rearrest rates decreased steadily for violent and non-violent offenders with increasing age at release." (*Id.* at p. 26.)

Specifically, violent criminals released in their 40s had a 58.7% recidivism rate, those released in their 50s had a 46.0% rate, and those released in their 60s and beyond had a 25.1% rate. (*Ibid.*) There was also a decline with age for non-violent offenders, but not as steep.

"The recidivism rates are lowest for conviction offense types that are more likely to result in lengthy sentences. Consequently, individuals convicted of these offences are likely on average to be

older upon release." (Nagin, at p. 137.) The low recidivism rates of people who have received long sentences and been released late in life is not evidence that they are harmless and that we have been incarcerating them too long, as PLO would have the court believe. (See PLO Brief 28-29.) These numbers actually show just the opposite. Keeping the most violent criminals in prison until their later years, preferably over 60, is effective in protecting innocent people from the horrors of the crimes they would commit if released earlier.

Given that the bulk of life-term inmates are murderers (see RB 30), that murder without special circumstances generally has a 15 or 25 year minimum before parole eligibility (Pen. Code, § 190, subd. (a)), and that before the regulations murderers were unable to use credits to shorten that time (Pen. Code, §§ 190, subd. (e), 2933.2), it is not surprising that they have low recidivism rates to date. (See PLO Brief 34.) They tend to be old when they get out. This is a feature, not a bug.[9] But the granting of lavish credits and their use to reduce the minimum time for parole threatens to erode this successful crime-prevention feature over time. People sentenced to 25-to-life 25 years ago have spent the bulk of that time in the no-credit era and been able to shave off a relatively small percentage of their sentence. Those being sentenced for murder this year would be able to cut off much more of their sentence if these regulations were upheld.

Respondents previously noted that the public safety purpose of the initiative did not support giving CDCR the power it claimed, and appellants had not made a case that it did. (RB 50-53;

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9. PLO's comparison of indeterminate term releasees' recidivism with the overall crime rate fails to account for age, the difference between recidivism and reoffending, and clearance rates. It is therefore meaningless.

Cross-Reply Brief 23-24.) Now *amicus* PLO has tried and failed to make any substantial argument to that effect.

C. Wasteful Spending.

PLO claims that giving CDCR power to override the credit-limiting statutes is necessary to Proposition 57's goal of reducing *wasteful* prison spending (PLO Brief 23), but there is nothing in the brief other than what is refuted in Parts III.A and III.B to indicate that the spending in question is wasteful. No doubt in PLO's prisoner-focused, victim-oblivious viewpoint all prison spending is deemed wasteful, so reduction in prison population, capacity, and budget alone can be counted as "achievement." (See PLO Brief 25-26.) But the opinions of *amici* and the parties are not what matters. What matters is what the people of California were told they were voting on.

The proponents' arguments refute the notion that reducing "wasteful spending" means simply maximizing releases. They repeatedly promised quite the opposite. The lead-off argument was that "Prop. 57 focuses resources on keeping dangerous criminals behind bars ...." (Voter Guide, argument in favor of Proposition 57, p. 58.) "Saves taxpayer dollars by reducing wasteful spending on prisons" is immediately followed by "Keeps the most dangerous offenders locked up." (*Ibid*.) These promises are repeated, emphatically, in the proponents' rebuttal argument. (*Id*. at 59.)

PLO complains that the Board of Parole Hearings paroles too few of the prisoners under the undisputed portion of Proposition 57 to make a big dent in prison population. (PLO Brief 24.) That simply means that few prisoners in the current population are deemed safe to release, the same point Dr. Beard made back in 2013. (See RB 15.) Is the answer to increase the number of violent prisoners who are automatically entitled to release without any

determination that they are safe to release? That is the implication of PLO's argument, but it is directly contrary to the promise made by Proposition 57's proponents. "*No one is automatically released, or entitled to release from prison, under Prop. 57.*" (Voter Guide, argument in favor of Proposition 57, p. 58.)

Keeping the violent prisoners "locked up" until completion of their sentences, reduced only by credits authorized by statute, is fully consistent with the proponents' argument of what Proposition 57 would focus resources on. This is not "wasteful spending" within the meaning placed before the voters.

D. Rehabilitation.

PLO's case for the need for credits to encourage rehabilitation is nothing but a bit of general dictum regarding the overall purpose of credits (PLO Brief 30, citing *People v. Brown* (2012) 54 Cal.4th 314, 317) and anecdotal hearsay from a story on a website. (PLO Brief 35-36.) This is far too weak to have any influence on the proper interpretation of the enactments at issue in this case.

Respondents have already shown in Part III.B.5, *supra*, that there is no solid evidence that CDCR's rehabilitation programs have any significant effect on recidivism. PLO has also made no case that existing incentives are insufficient to encourage participation, and that the larger incentives are needed.

California courts have long recognized that credits are not needed as incentives for good behavior for indeterminately sentenced prisoners, as they have a strong incentive to behave to convince the parole board to grant parole. (RB 22-23.) All felons whose crimes are not on the artificially narrow list of "violent felonies" in section 667.5, subdivision (c) have a statutory basis for program credits. (Pen. Code, § 2933.05.) That leaves only 667.5(c) "violent" inmates with determinate sentences. Yet most

of them also have an incentive to qualify for parole. The Legislature has provide parole for "youth offenders," defined as those who were under 26 at the time of crime. (Pen. Code, § 3051.) It has also provided parole for "elderly" inmates, defined more broadly than nearly anyone defines "elderly" for any other purpose, including all those presently over 50. (Pen. Code, § 3055, subd. (a).) Between the two, prisoners with long determinate sentences are likely to be eligible for one or the other at some point. Finally, those who genuinely want to go straight have an incentive to seek out and participate in programs that will actually help them do so, credits or none.

The case for lavish credits exceeding the limits that the Legislature imposed by statute is weak. As a matter of policy, it is debatable, but this is not a policy debate. The need for such credits is far too weak to support the drastic alteration of the separation of powers or the contradiction of the proponents' promises to the people that would be needed for appellants' position to prevail.

CONCLUSION

The judgment of the superior court should be affirmed as to the portion granting the writ of mandate and reversed to the extent it denied the writ. The case should be remanded to the superior court to issue a writ granting the relief previously denied.

Date: May 12, 2025

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Respondents and Cross-Appellants

CERTIFICATE OF COMPLIANCE

**Pursuant to California Rules of Court,
Rule 8.204, subd. (c)(1)**

I, Kent S. Scheidegger, hereby certify that the attached **RESPONDENTS'/CROSS-APPELLANTS' ANSWER TO PLO AMICUS BRIEFS** uses a 13-point Century Schoolbook font and contains 6766 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: May 12, 2025

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Respondents and Cross-Appellants

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

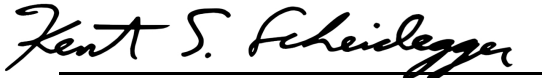
The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On the date below, I electronically filed the attached document, **RESPONDENTS'/CROSS-APPELLANTS' ANSWER TO PLO AMICUS BRIEFS**, by transmitting a true copy using the TrueFiling system. All participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

In addition, I served on each person named below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows and by electronically emailing a digital copy to the email addresses indicated:

Sacramento County Superior Court
For: Honorable Jennifer K. Rockwell
Gordon D. Schaber Sacramento County Courthouse
Department 4, 2nd Floor
720 9th Street
Sacramento, CA 95814
Email: dept4@saccourt.ca.gov

Executed on May 12, 2025, Sacramento, California.



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