1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ARNOLD SCHWARZENEGGER, GOVERNOR OF:

4   CALIFORNIA, ET AL.,   :

5   Petitioners   :   No. 09-1233

6   v.   :

7   MARCIANO PLATA, ET AL.   :

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9   Washington, D.C.

10   Tuesday, November 30, 2010

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:10 a.m.

15   APPEARANCES:

16   CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf

17   of Appellants.

18   DONALD SPECTER, ESQ., Berkeley, California; on behalf of

19   Appellees.

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1   C O N T E N T S

2   ORAL ARGUMENT OF   PAGE

3   CARTER G. PHILLIPS, ESQ.

5   ORAL ARGUMENT OF

6   DONALD SPECTER, ESQ.

8   REBUTTAL ARGUMENT OF

9   CARTER G. PHILLIPS, ESQ.

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1   P R O C E E D I N G S

2   (11:10 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument in the Case 09-1233, Schwarzenegger v. Plata,

5   and the related cases.

6   Mr. Phillips.

7   ORAL ARGUMENT OF CARTER G. PHILLIPS

8   ON BEHALF OF THE APPELLANTS

9   MR. PHILLIPS: Thank you, Mr. Chief Justice,

10   and may it please the Court:

11   What this Court has under review today is an

12   extraordinary and unprecedented order issued by a 3-

13   judge district court requiring the release of between

14   36,000 and 45,000 inmates currently incarcerated in the

15   California penal system within a 2-year period.

16   The order in this particular case is made

17   particularly remarkable because it strikes me that at a

18   minimum it is extraordinarily premature. That -- it may

19   come at some point in this process that an order,

20   probably substantially smaller in scope than this one,

21   may become appropriate. But this is supposed to be an

22   order or remedy of last resort, and what the district

23   court has done here is leapfrogged a series of steps

24   that should have been taken ahead of going this

25   particular route.

1   JUSTICE GINSBURG: One case, Mr. Phillips,

2   is pending for 20 years; is that not so.

3   MR. PHILLIPS: Yes, that is correct, Justice

4   Ginsburg.

5   JUSTICE GINSBURG: So it seems to me -- and

6   there were something like 70 orders from the district

7   court, the single-judge district court in that case.

8   MR. PHILLIPS: That is absolutely true,

9   Justice Ginsburg.

10   JUSTICE GINSBURG: And no -- no change. So

11   how much longer do we have to wait? Another 20 years.

12   MR. PHILLIPS: No, Justice Ginsburg. I

13   think, obviously, the length of time you have to wait in

14   some ways depends on what the state of the remedial

15   phase is in the particular case. And in this case and

16   in recognition, frankly, of the substantial problems

17   that were inherent in the penal system as it existed

18   during the 1990s and up until the early 2000s, a

19   receiver was appointed, specifically in the Plata class,

20   but there was also connections between the receiver and

21   the special master even in the Coleman class before the

22   three-judge panel was convened.

23   And under those circumstances and given the

24   extraordinary powers that the receiver had been

25   accorded, what should have -- the most logical course if

4

1   this is supposed to be a remedy of last resort was to

2   allow the receiver an opportunity to implement the

3   extraordinary powers that were conferred upon him, and

4   then see -- because if it turns out that we are not

5   making progress --

6   JUSTICE SOTOMAYOR: Excuse me. Could you

7   tell me -- from your briefs, I just haven't understood

8   what the alternative steps are. The court below talked

9   about some proposals like construction and said the

10   legislature has struck them down. There's -- the fiscal

11   crisis has gotten worse, so construction is really not

12   an option. I don't see how you wait for an option that

13   doesn't exist. They talked about hiring more staff, but

14   the conclusion was that even if you maximize the staff,

15   you don't have the facilities to add more staff, which

16   is what you need to cure the constitutional violation.

17   So tell me what specific steps outside of

18   this order should have been given time to be

19   implemented, because the receiver has basically said,

20   I've tried, and the small progress we made has been

21   reversed because the population just keeps growing. So

22   we can never get ahead of the problem. So slow down

23   from the rhetoric and give me concrete details about

24   what the least restrictive means would have been, other

25   than to say, throw it back to a receiver and special

5

1 master who are saying, we don't have a solution outside

2 of reducing overcrowding.

3   MR. PHILLIPS: I don't think that's a fair

4 characterization of what the receiver said. The

5 receiver said that at any population he would in fact

6 get you --

7   JUSTICE SOTOMAYOR: Oh, counsel, that was

8 one statement years ago. If that is all you are relying

9 on --

10   MR. PHILLIPS: No, no. That's not all I'm

11 relying on. All I'm suggesting --

12   JUSTICE SOTOMAYOR: That may be your weakest

13 argument. Tell me -- give me concrete steps that are

14 least -- less restrictive.

15   MR. PHILLIPS: All you have to do is look at

16 what the receiver has done over the course of the period

17 of time since his appointment, and particularly when the

18 second receiver was put in place. First of all, A.B.

19 900 has been enacted. There is significant

20 construction. There has been ground broken. There are

21 substantial facilities in place.

22   Second, the receiver has had extraordinary

23 success in the hiring process. We are at close to

24 90 percent --

25   JUSTICE GINSBURG: Is there in fact less

6

1   overcrowding? Because I thought what this case was all

2   about was that the receiver has said, the special master

3   has said, we can't make any progress at all until there

4   are fewer people; we have no place to put clinics.

5   The first step, not the last step, but given

6   what we are dealing with here, the potential first step,

7   is that we have fewer people so there is more room for

8   these health facilities, more room for staff to operate.

9   MR. PHILLIPS: Justice Ginsburg, the

10   fundamental issue in this case seems to me as -- what is

11   the real cause of the constitutional violation here?

12   And the real cause of the constitutional violation here

13   has always been the culture of disregard for the inmate.

14   What the receiver was put in place for, the reason he

15   was appointed, and properly so -- this was with the

16   State's consent; this is not over our objection -- was

17   to change that fundamental culture and to provide, one,

18   construction, to provide increased numbers, to

19   provide --

20   JUSTICE GINSBURG: But you can't provide

21   construction when the State doesn't supply the money for

22   it.

23   MR. PHILLIPS: Except that since the

24   August 8, 2008, period of time, you know, literally

25   hundreds of millions of dollars have gone to

7

1   construction specifically and more than $4 billion have

2   been spent on the provision of health care in this

3   particular system.

4   A great deal of that is because of the

5   receiver.

6   JUSTICE GINSBURG: Then if there are -- if

7   there are these great changes in circumstances so that

8   now they -- medical care can be administered in

9   something approaching a decent way, you could go back to

10   the single-judge district court and say I'm moving under

11   60(b); circumstances have changed, it is no longer the

12   case that it's impossible to render decent health care.

13   MR. PHILLIPS: Justice Ginsburg, I don't

14   think we could get that relief from the single-judge

15   district court, unless you are asking me to actually

16   seek to remove the entirety of the claim. I mean, the

17   order that says that we have to get to 137.5 percent of

18   the design, the design capacity within 2 years is a

19   three-judge district court decision.

20   JUSTICE SOTOMAYOR: So you go back to that

21   panel because it invited you to. It said if

22   circumstances change, come back.

23   MR. PHILLIPS: Right, but that will always

24   be the case, Justice Sotomayor. The fundamental

25   question here is: Congress shifted dramatically the

1   approach that you are supposed to take as a court of

2   equity in this context. This is supposed to be a matter

3   of last resort, which would mean that you would give the

4   receiver a full opportunity to do what the receiver --

5   JUSTICE BREYER: The receiver said the best

6   statement that seemed to me to summarize it. It's in

7   his brief on page 9. He has about two paragraphs. And

8   as you read that two paragraphs, it sounds as if

9   overcrowding is a big, big cause of this problem, which

10   is horrendous, which if you think it's accurately

11   described in the mental case in the first page, two

12   paragraphs, if that's a fair description from the

13   record, it's a horrendous problem.

14   MR. PHILLIPS: Well --

15   JUSTICE BREYER: What the receiver says is

16   overcrowding is a big cause of it. And then he says: I

17   think we have discovered you actually can provide care,

18   and certainly our plan and turnaround plan believes we

19   can provide constitutional levels of care no matter what

20   the population is.

21   So then you look to the care and turnaround

22   plan and it says: Spend $8 billion building more

23   buildings, and then the legislature rejected it. Okay?

24   Now, there we are. More time; what's supposed to

25   happen.

9

1   MR. PHILLIPS: No, but, Justice Breyer, the

2   legislature also approved a smaller but nevertheless

3   multibillion-dollar construction program.

4   JUSTICE BREYER: It was 2.31 or something

5   like that. Did they approve the 2.3? Is that in place,

6   2.35? Did they approve that?

7   MR. PHILLIPS: Yes, they did approve that,

8   and that money is being spent.

9   JUSTICE BREYER: Okay. So he said: We need

10   8, we need 8; and they approved 2.35.

11   MR. PHILLIPS: Right, and the receiver --

12   JUSTICE BREYER: Is there any evidence here

13   that suggests that 2.35 is sufficient to cure the

14   constitutional violation?

15   MR. PHILLIPS: Well, I don't know whether it

16   will get you there or not.

17   JUSTICE BREYER: So I take it from your

18   answer the answer is no, there is no evidence?

19   MR. PHILLIPS: Well, there is the evidence

20   that the receiver asked for contempt for not getting the

21   8 billion and withdrew that motion. So obviously there

22   is some sense in which the receiver is reasonably

23   satisfied with 2.35 billion as an opening gambit.

24   But again, all of this goes to what is, at

25   least from my perspective, the fundamental question the

1   court should have evaluated in the first instance, which

2   is: Are we ready yet to give up hope at this point?

3   JUSTICE BREYER: Well, what he says -- what

4   the receiver says about the 2.35, is that it is a

5   significant step farther. It is certainly better than

6   no construction at all. However, that is not equivalent

7   to a conclusion that that current compromise will result

8   in sustainable constitutional health care at current

9   population density levels. That's what he said about

10   it.

11   So -- so we have his views and I'm back to

12   my question: What else is supposed to happen, which was

13   your question initially.

14   MR. PHILLIPS: Justice Breyer, when the

15   receiver says that, now remember, he says at current

16   population levels. He doesn't suggest, and his brief is

17   very clear that it doesn't urge this Court to affirm the

18   particular order in this case.

19   JUSTICE ALITO: Mr. --

20   MR. PHILLIPS: Can I just finish this?

21   JUSTICE ALITO: Yes.

22   MR. PHILLIPS: And the reality is that the

23   population levels have dropped pretty significantly

24   since August, since the trial in this particular case.

25   And given the actions by the legislature in A.B. 18 and

1   the actions of the legislature in A.B. 900, there are

2   both a lot of expenditures on the table and substantial

3   reductions in the population size. And so therefore,

4   even under the receiver's --

5   JUSTICE GINSBURG: Do we have information

6   about that substantial reduction? In this record, it

7   just seems to be that there's -- no matter how many

8   efforts have been made, the population goes up. And now

9   you say that the population has gone down. From what

10   point in time and how much has it gone down?

11   MR. PHILLIPS: Well, it's down to around, as

12   I understand it, about 147,000 from a high of around 165

13   to 170,000, and it has dropped, as we know, because

14   there has been a change in the good time credits. There

15   has been a significant number of transfers. I mean,

16   that was the purpose of the governor's proclamation

17   declaring an emergency.

18   JUSTICE SOTOMAYOR: So it's possible that

19   within the 2-year period, you are going to hit the mark

20   if you -- that's what the --

21   MR. PHILLIPS: I think it unlikely.

22   JUSTICE SOTOMAYOR: That's what the

23   three-judge panel said, which is: If you implement most

24   of the proposals being made, you are likely to hit the

25   mark. So what you are saying is you are going to do it.

 1   And if you don't, they invited you to come back and --

 2   you really don't think that if you hit 140 percentage,

 3   that the court is going to order an immediate release of

 4   the 2.5 percent over the limit it set? It's going to

 5   ask you: What have you put into place to reach that

 6   level over what additional period of time?

 7   MR. PHILLIPS: There is a core sort of

 8   federalism answer and then a basic sort of factual point

 9   to be made here. Let me make the second one first, and

10   then I want to come back to the -- what you may regard

11   as rhetorical, but nevertheless I think important, which

12   is that when we made our initial proposal to the

13   three-judge court suggesting what we thought would be a

14   reasonable reduction within a reasonable period of time,

15   it was met with both a motion for contempt and summary

16   rejection out of hand, notwithstanding that there was

17   improvement in both --

18   JUSTICE SOTOMAYOR: So what are we fighting

19   about?

20   MR. PHILLIPS: So --

21   JUSTICE SOTOMAYOR: Are we fighting about

22   that the plan was wrong, or are we fighting about that

23   you are angry that you were told to do it in 2 years --

24   in 22 years, as opposed to do it in 25 years? Is that

25   -- is that what you're objecting to?

1   MR. PHILLIPS: No. I think this -- this

2   goes to the federalism point.

3   JUSTICE SOTOMAYOR: Can you do it in 5

4   years?

5   MR. PHILLIPS: I don't know. I -- you know,

6   if -- balancing all of the policies that the State has

7   to take into account, can it get there and is that in

8   the best interest of the State of California? If it is,

9   yes, then we can get there.

10   JUSTICE SOTOMAYOR: Well, the best interest

11   of the State of California, isn't it to deliver adequate

12   constitutional care to the people that it incarcerates?

13   That's a constitutional obligation.

14   MR. PHILLIPS: Absolutely. And California

15   recognizes that.

16   JUSTICE SOTOMAYOR: So when are you going to

17   get to that? When are you going to avoid the needless

18   deaths that were reported in this record? When are you

19   going to avoid or get around people sitting in their

20   feces for days in a dazed state? When are you going to

21   get to a point where you are going to deliver care that

22   is going to be adequate?

23   JUSTICE SCALIA: Don't be rhetorical.

24   MR. PHILLIPS: I'll do my best. Thank you,

25   Your Honor.

1   I mean, first of all, if you look at the

2   receiver's 2009 death review which came out in 2010, it

3   specifically says that there has been a significant

4   downward trend over the past 4 years. The suicides --

5   the 25 suicides in '09 were 66 percent of the average

6   for the preceding 3 years, and the 9 homicides were 60

7   percent of the average. There has been significant

8   improvement.

9   And the more important point in response to

10   your specific question, Justice Sotomayor, is that the

11   record in this case was cut off in August of 2008, and

12   so what we have are --

13   JUSTICE KENNEDY: Of course, but the problem

14   I have with that, Mr. Phillips, is that at some point

15   the Court has to say: You have been given enough time;

16   the constitutional violation still persists, as the

17   State itself acknowledges.

18   MR. PHILLIPS: Well, I'm not sure we've --

19   JUSTICE KENNEDY: Overcrowding is the

20   principal -- overcrowding is the principal cause, as

21   experts have testified, and it's now time for a remedy.

22   The Court can't -- has to at some point

23   focus on the remedy, and that's what it did, and that it

24   seems to me was a perfectly reasonable decision.

25   MR. PHILLIPS: Justice Kennedy, I agree with

1   everything you say except -- and I even agree with the

2   last statement, because, you know, you needed a

3   significant remedy. There's no question about it. But

4   you got a significant remedy when the receiver was

5   appointed in 2005 and implemented a program in 2006.

6   JUSTICE KAGAN: How much time do you think

7   the receiver needed? I mean, how much time did --

8   should the court have given the receiver to develop his

9   plan and to try to implement his plan?

10   MR. PHILLIPS: Well, there's no -- Justice

11   Kagan, there is no specific time frame. I mean,

12   obviously we believe that we are entitled to a

13   reasonable opportunity to comply with the receiver's

14   orders and to bring ourselves ultimately into compliance

15   with the Constitution, and --

16   JUSTICE KENNEDY: Well, at some point the

17   State itself said that if it had I think 7 years, it

18   could get down to 137.5, and it didn't seem to object to

19   that.

20   MR. PHILLIPS: No, that's --

21   Justice Kennedy, you know, given all of the other

22   constraints, et cetera -- again, there is a fundamental

23   difference between what you do under the hammer of a

24   district court order, which is what we have under these

25   circumstances, and what the State will do. That said,

1   the State is absolutely committed.

2   Again, to go back to what is the root cause

3   of the constitutional violation, it's not overcrowding.

4   I mean, when California violated the constitutional

5   rights of the mentally ill in the 1990s, the prisons

6   weren't crowded. It was because there was a fundamental

7   lack of attentiveness to medical care under those

8   circumstances. And that is unfortunate, to be sure.

9   More than that.

10   But that was the reason. To go back to your

11   point, Justice Kennedy, that's why the, receiver, which

12   is an extraordinary remedy. To confer upon a private

13   individual the entire authority to run the California

14   Department of Corrections, not just simply a facility or

15   anything like that, but the entire Department of

16   Corrections' medical health provision, is incredible.

17   JUSTICE GINSBURG: And I thought that

18   officer himself said: I can't do this without as a

19   first step reducing the population; nothing else is

20   going to work until we reduce the population to the

21   point where there is room for clinics, room for medical

22   personnel to operate. I mean, that was the view of the

23   district judge, the special master in one case, the

24   receiver in the other case.

25   Everybody, they all agreed reducing the

17

1   population is not going to cure it, not going to make

2   everything perfect, but without doing that as a first

3   step, nothing -- there will be no cure.

4   MR. PHILLIPS: Well, Justice Ginsburg, even

5   if he had said that, and I don't think that's precisely

6   how I would interpret what the receiver said under these

7   circumstances anyway, but even if you accept that, the

8   idea of a 137-1/2 percent design cap that has to be

9   implemented within fewer than 2 years is a remedy that

10   is neither necessary nor sufficient. It is not aimed at

11   the specific class. It doesn't remedy the specific

12   Federal rights as required by the Prisoners Litigation

13   Reform Act.

14   JUSTICE GINSBURG: I don't get the class

15   thing, because what -- you can't have a remedy just

16   limited to the class. The class wants to have clinics.

17   They want to have personnel who function someplace

18   outside of a broom closet. So you can't deal with this

19   problem by just dealing with the mentally ill and the

20   people with medical problems. You have to provide space

21   for facilities.

22   MR. PHILLIPS: I think, Justice Ginsburg,

23   the -- the fundamental point here is that it may

24   eventually be that you have to get to that stage; but if

25   you look at the receiver's reports since August 2008,

1   which consistently analyzed this issue, and they say:

2   And we have been able successfully to bring in very

3   qualified personnel, and we have significantly larger

4   numbers; we know there is construction in place; it may

5   not be as substantial as what I originally proposed; it

6   is nevertheless very significant.

7   And Congress was very explicit that the

8   remedy of a prisoner release order should be the

9   remedy of --

10   JUSTICE BREYER: Where do I look at to find

11 this? It's a big record. What I did was I -- it refers

12 to on-line evidence and I went and looked at the

13 pictures, and the pictures are pretty horrendous to me.

14 And I would say page 10 of the religious group's brief,

15 for example, shows you one of them.

16   And what they are saying is, it's -- it's

17 obvious. Just look at it. You cannot have mental

18 health facilities that will stop people from killing

19 themselves and you cannot have medical facilities that

20 will stop staph and tubercular infection in conditions

21 like this. And then you look at them.

22   Now, you've looked at them. I have looked

23 at them. And what is the answer to that? There is

24 nothing in here that -- the special master said

25 $8 billion is the answer, and they haven't come close.

19

 1   So how can I -- or you if you were in my

 2   position -- what would you say in an opinion that says

 3   that these three judges who have 200 pages of

 4   findings -- what would you say to, to -- as an answer to

 5   what I just said?

 6   MR. PHILLIPS: I would say that the

 7   Prisoners Litigation Reform Act has a series of very

 8   specific requirements that the Federal court has to

 9   comply with, and that in deciding to go to the

10   three-judge district court in the first instance, you

11   have to examine the orders that are in place and whether

12   those orders have had a reasonable time within which to

13   operate.

14   JUSTICE KENNEDY: Yes, but the State -- the

15   State did not claim that either order in either case has

16   succeeded in achieving the remedy. You have never

17   claimed that.

18   MR. PHILLIPS: Well, it depends on what you

19   mean by --

20   JUSTICE KENNEDY: And -- and -- and just if

21   I can have your attention for a moment. I have this

22   problem with the case. Overcrowding is of course always

23   the cause. If I am running a hotel -- if I am looking

24   at a highway system, I need a highway, what's the number

25   of cars? If the problem is bad service in a hotel,

 1 well, it's the number of employees per -- per guest. I

 2 mean, that's fairly simple.

 3   Now, I recognize of course that Congress has

 4 -- had imposed a special duty on us. But I think it

 5 means that overcrowding must not be ordered unless that

 6 is the only efficacious remedy in -- in a permissible

 7 period of time. And it seems to me there is massive

 8 expert testimony to support that proposition on the part

 9 of the prisoners.

10   MR. PHILLIPS: I mean, it seems to me that,

11 first of all, I'm not sure that is consistent with the

12 language, the primary cause of the constitutional

13 violation, not the primary impediment to the

14 implementation of a specific remedy. But I think that

15 is still a difficult and open question as to how to

16 proceed.

17   But it still strikes me that the sequence

18 that Congress envisions and the one that would make the

19 most sense and ultimately the one that hopefully would

20 accommodate both the plaintiffs' interests and the

21 State's interests, and the Department of Corrections'

22 interests, is to allow the receiver to stay on a course

23 that candidly I think will in fact get you there.

24   I mean, again, one of the real flaws in this

25 case, Justice Kennedy, is nobody doubts for a moment

1   that there have been very significant violations of

2   constitutional rights years gone by, and indeed a

3   failure on the mental health side ultimately to get you

4   -- get to the point where we are in fact providing a

5   significant remedy.

6   The reality is that in the course of the

7   last 3 to 4 years under the guidance of the -- of the

8   receiver, who coordinates with the special master on the

9   mental health side, and does it with the cooperation of

10   the State of California, there have been significant --

11   there has been significant movement in the right

12   direction. And if the court had not jumped the gun and

13   said, look, we're not going to -- we're not going to let

14   that part play itself out, we are going to leap ahead

15   and go to a three-judge court and go to the prisons --

16   the prisoner release order, this process would have

17   played itself out and we wouldn't be here --

18   JUSTICE ALITO: All this talk about what the

19   receiver may think can be done seems a little bit

20   perplexing to me, because the receiver did not testify

21   before the three-judge court, isn't that correct?

22   MR. PHILLIPS: That -- that is true, Justice

23   Alito.

24   JUSTICE ALITO: You were not allowed to

25   question him.

1   MR. PHILLIPS: We were not allowed to --

2   JUSTICE ALITO: And now he has submitted

3   what is styled an amicus brief where he doesn't address

4   issues of law. He explains his views about -- he tries

5   to explain prior statements and supplement those prior

6   statements. Is that proper?

7   MR. PHILLIPS: Well, you know, I'm a

8   long-time believer that amicus briefs is pretty much

9   open season in terms of anything you want to present on

10   them. But I mean, obviously I --

11   JUSTICE ALITO: Is that true?

12   MR. PHILLIPS: Clearly a better system is

13   one in which we can --

14   JUSTICE ALITO: Can a witness testify -- can

15   a witness submit an amicus brief that consists of an

16   affidavit?

17   MR. PHILLIPS: No, Your Honor, that's

18   obviously not appropriate. And it's one of the things

19   that we've complained about.

20   JUSTICE GINSBURG: I thought the -- the --

21   that brief was filed because the -- there were, in your

22   presentations there were representations about the

23   special master, and he filed that brief to say: You

24   must understand this in context; I was making a speech

25   at the club. So he wanted to put in context what you

1   had used. You had quoted his statements.

2   MR. PHILLIPS: Well, to be sure, although,

3   candidly, we had -- we had referred to some of those

4   same statements even in the jurisdictional stage in this

5   litigation. This has been part of the case for quite

6   some time.

7   So I -- I don't know what motivated the

8   special master to file an out-of-time brief -- or I

9   mean, the receiver to file an out-of-time brief. But I

10   understand -- but you know, we didn't object to it so

11   long as the court was of a mind to hear from the

12   receiver.

13   But I do think the most important part of

14   that to keep in mind in this context is the receiver

15   didn't ask for this Court to affirm. The receiver

16   simply clarified certain statements that had been made

17   and tried to say, as Justice Alito described, put them

18   into some kind of context. And that's -- and that's

19   fine, and we obviously don't have any quarrel with --

20   with that particular presentation.

21   But I do think to say that the receiver has

22   insisted that he cannot get to a constitutionally

23   permissible result without the order that has been

24   imposed in this particular case is -- is simply not

25   consistent with either the record and it's certainly not

1   consistent with that amicus brief.

2   JUSTICE KENNEDY: Well, but the experts

3   testified to that effect.

4   MR. PHILLIPS: I mean, experts may --

5   certainly reached that specific conclusion. But this

6   Court has recognized --

7   JUSTICE KENNEDY: And the strike force and

8   the governor's -- governor's commission reached the

9   same conclusion.

10   MR. PHILLIPS: Well --

11   JUSTICE KENNEDY: The strike team, I think

12   they called them.

13   MR. PHILLIPS: Right. But again, it seems

14   to me that there is a very, very, very big difference

15   between what do you need to accomplish in order to

16   remedy whatever -- whatever the constitutional violation

17   is, recognizing in the first instance that the biggest

18   element of an Eighth Amendment violation is the

19   deliberate indifference prong, which absolutely seems to

20   me to have been completely eliminated by the conduct of

21   the State over the course of the last 3 to 4 years.

22   JUSTICE BREYER: What specifically will

23   happen? I mean, at the moment, you know, we could go

24   through -- we have all these briefs. I mean there are

25   all these experts, all the reports. Everybody is saying

1   you need to spend the money. And we have -- if you

2   really want to cure the constitutional violation, we

3   have the legislature rejecting 8 billion but 2, which

4   doesn't -- 2.35, and so -- nothing, and a void. And

5   give us more time.

6   I mean, I read the newspaper. It doesn't

7   seem to me California has been voting a lot of money for

8   new programs. The -- the -- what is it -- what is it

9   specifically that would happen that would cure this

10   problem were we to say -- I mean, a big human rights

11   problem -- what would we say -- what would happen if we

12   were to say, no, this panel's wrong? What would happen

13   that would cure the problem?

14   MR. PHILLIPS: Well, it depends I suppose on

15   some ways on how you --

16   JUSTICE BREYER: A constitutional problem

17   which the State itself admits --

18   MR. PHILLIPS: Right.

19   JUSTICE BREYER: -- is constitutional, a

20   State with a governor who has said publicly that there

21   is this tremendous safety and health problem in the

22   prisons. What -- what would happen?

23   MR. PHILLIPS: Well, if the Court were to

24   conclude that the three-judge panel shouldn't have been

25   convened, that would be one outcome. If the Court

26

1   concludes that it was appropriate to convene it, but

2   137-1/2 percent is not narrowly tailored, it would be a

3   different one. Either way, it will go back obviously to

4   a court of equity. The receiver is in place. The

5   receiver has a comprehensive plan in place which he is

6   implementing as we speak.

7   One of the things that --

8   JUSTICE GINSBURG: One piece of it -- you

9   said something about the 2.35 million. They didn't come

10   up with the 8 million, but they did come up with the

11   2.35 billion. And then I'm just looking at this brief

12   for the receiver and there is a footnote, page 11,

13   footnote 3, that says: No, that money isn't there; it

14   is dependent upon several approvals that have not yet

15   been secured and such approvals ultimately may not be

16   forthcoming.

17   MR. PHILLIPS: Well, 400 million of it has

18   already been spent. The rest of it has already been

19   earmarked for this particular purpose, and there is --

20   and the expectation from the State of California is that

21   money is going forward. Construction is, as we speak,

22   under way. And the one thing we do know is that every

23   time the receiver asks for a check he gets one.

24   JUSTICE GINSBURG: But not the 2.35.

25   MR. PHILLIPS: I'm sorry.

1   JUSTICE GINSBURG: I mean, I think you did

2   say earlier that this was a done deal, 2.35 billion.

3   But this is a note telling us it's not so.

4   MR. PHILLIPS: Well, the receiver is saying

5   it's not etched in stone. I understand that. But our

6   assumption and our expectation and our belief is that

7   that money is going to be used for construction. There

8   are projects that are finished, there are projects that

9   are underway, and there are project that are scheduled

10   to begin within the next 6 weeks, all of which will be

11   funded out of that $2.35 billion.

12   JUSTICE GINSBURG: And one project that the

13   joint legislative budget committee said, no, we are not

14   going to give you money for that.

15   MR. PHILLIPS: They asked for additional

16   information, to be sure. But the expectation, again,

17   from the governor, both from this governor and the

18   governor-elect, is that that money will ultimately be

19   approved and that that facility would be built. And we

20   are moving along very rapidly to get that construction

21   under way, because we are talking about enormous

22   facilities under these particular circumstances, Justice

23   Ginsburg.

24   JUSTICE KAGAN: Mr. Phillips, my trouble

25   listening to you is that it seems as though you are

28

1   asking us to re-find facts. You know, you have these

2   judges who have been involved in these cases since the

3   beginning, for 20 years in the Plata case, who thought,

4   we've done everything we can, the receiver has done

5   everything he can; this just isn't going anywhere and it

6   won't go anywhere until we can address this root cause

7   of the problem.

8   And that was the view of the judges who had

9   been closest to the cases from the beginning and the

10 view of the three-judge court generally. So how can we

11 reach a result essentially without, you know, re-finding

12 the facts that they have been dealing with for 20 years?

13   MR. PHILLIPS: The fundamental problem with

14 the fact-finding in this -- well, there are actually two

15 fundamental problems. First of all, remember that the

16 receiver gets appointed and then 3 months later you get

17 a motion for a 3-judge court. The three-judge court

18 convenes itself before the receiver has even finalized

19 the comprehensive plan to bring everybody into

20 compliance in the first instance.

21   So the reality is that is the fundamental

22 legal error I'm asking this Court to correct. But even

23 if you get beyond that and you are looking at the

24 primary cause analysis, it seems to me that's -- that's

25 at most, at best, a mixed question of law and fact, and

1   it's the kind of standard that this Court ought to

2   analyze to determine in the first instance and on an

3   independent review whether or not the overcrowding is,

4   quote, "the primary cause of the violation."

5   And what makes that inquiry particularly

6   appropriate for this Court, as opposed to simply

7   slavishly adhering, deferring to the district court in

8   this circumstance, is that the district court

9   arbitrarily cut off the record in August of '08 and

10   there have been enormous developments since then. And

11   there were enormous developments --

12   JUSTICE GINSBURG: Can you explain me

13   something about that. It was confusing in the brief,

14   Mr. Phillips. I thought that the State had said: We

15   don't want the plaintiffs to tour these facilities any

16   more. We don't want to have discovery go beyond some

17   date in 2008. I thought that it was the State that was

18   urging: We don't need any more discovery, we don't want

19   any more inspection tours.

20   So how could -- how could the plaintiffs

21   submit more than they did when the State said it's

22   enough, 2008 should be the cutoff?

23   MR. PHILLIPS: Well, there is a huge

24   difference between not allowing formal tours and all of

25   the rigamarole that goes with that, which is what the

 1 State specifically objected to. But what the State

 2 wanted to do and what the Intervenors on our side in

 3 even greater vehemence wanted to do was to bring forward

 4 evidence that proved that in the interim period of time

 5 there have been, in fact, significant improvements. As

 6 I sit here today, Justice Kennedy, you said it is

 7 conceded that we are in constitutional violation. It is

 8 conceded that we have been in constitutional violation.

 9 I don't know whether today we are in violation.

10   JUSTICE GINSBURG: But then don't you have

11 the burden? If you concede that you have been in

12 constitutional violation, then it seems to me that you

13 have the burden of showing that is no longer the case.

14 That's generally so in the --

15   JUSTICE SOTOMAYOR: Counsel, did you --

16   CHIEF JUSTICE ROBERTS: I'm sorry. Could

17 you answer Justice Ginsburg's question first?

18   MR. PHILLIPS: Justice Ginsburg, I

19 understand what the ordinary rule would be of a court of

20 equity dealing with a constitutional violation. But we

21 are talking about an order entered under the Prisoners

22 Litigation Reform Act, and it's quite clear, the statute

23 couldn't be any plainer, that it shifts the burden

24 significantly onto the plaintiff when you are going to

25 go for a remedy as extreme as insisting that somewhere

1   between potentially 36,000 and 45,000 inmates be

2   released within a 2-year period of time.

3   Again, if you go back, the receiver has

4   not -- at the time that all of this took place, the

5   receiver had been appointed. The receiver had devised a

6   plan. The receiver is currently spending an enormous

7   amount of money, $4 billion on health care, to get -- to

8   get the system moving in the right direction, with the

9   right attitude, in order to bring ourselves without

10 question into constitutional compliance. The truth is

11 we haven't really had an assessment of where we are in

12 the constitutional compliance spectrum.

13   JUSTICE GINSBURG: Well, maybe -- we are

14 talking about one of the cases, but the other one --

15 -and it's the newer one, instituted in 2001. But what

16 about the one that started out in 1990?

17   MR. PHILLIPS: Coleman is obviously a

18 much -- a much more serious problem, I don't doubt that.

19 But it seems -- and if the Court were to conclude

20 ultimately that Coleman ought to go back for another

21 analysis based on the problems there, I could understand

22 that. And it would be a very different prisoner release

23 order under those circumstances because then you would

24 have to take out all of the evidence with respect to

25 Plata and let that play out.

1   But even that it seems to me would be a

2 mistake under these circumstances where the special

3 master and receiver have been in a sense joined at the

4 hip in a variety of ways. And it only makes sense,

5 because the receiver is controlling the provision of

6 medical care in the CDCR and the special master is

7 taking care of or trying to promote a very small slice

8 of that.

9   So in the scheme of things, as you might

10 expect, the receiver consistently gets the ultimate

11 authority to make the decisions to help provide the kind

12 of resources, both in quality and quantity and staff and

13 construction and access to health care.

14   JUSTICE SOTOMAYOR: Counsel, this issue

15 about evidence. Did you proffer to the judge anywhere

16 in this record what the additional evidence it was that

17 you wanted to show? I know that the decrease in

18 suicides happened post-trial, so you couldn't have

19 proffered that pretrial.

20   MR. PHILLIPS: Right.

21   JUSTICE SOTOMAYOR: But you run the prisons.

22 I presume that you could have yourself without discovery

23 set forth a proffer for the court that says: We had a

24 wait time between diagnosis and treatment that was

25 60 days, 90 days, 120 days in the past and we have

1   reduced that down now to 2 weeks or whatever the reality

2   is.

3   MR. PHILLIPS: Right.

4   JUSTICE SOTOMAYOR: Why didn't you -- you

5   keep saying we were blocked.

6   MR. PHILLIPS: Because the district court --

7   because the district court could not have been plainer.

8   And when the Intervenor's counsel stood up in the

9   opening statement and said, I want to start talking

10   about the beneficial changes and where the status is

11   today as opposed to where it was way back when, the

12   three-judge court, at least one of the member of the

13   three-judge court, said: We have been as clear as we

14   can be that we are not entertaining any evidence on that

15   point.

16   So the notion of coming forward with a

17   proffer, while technically it might have been, was

18   clearly a futile act and we had already annoyed the

19   judges on our side by even making reference to it. So I

20   don't think it's an appropriate response to say that we

21   should have put forward more, because the truth is we

22   would have --

23   JUSTICE SOTOMAYOR: Except that the district

24   court invited you to proffer that evidence that went to

25   the appropriateness of the remedy, so you didn't have to

1   proffer it -- it viewed you as saying, we are no longer

2   violating, constitutionally violating the Eighth

3   Amendment. Instead it said: We will take whatever you

4   have to proffer to show that the remedy is

5   inappropriate.

6   MR. PHILLIPS: All right. But Justice

7   Sotomayor, there is, to my mind at least, a complete

8   disconnect in saying, I'm not going to tell you exactly

9   where the constitutional violation is today, we are not

10   going to get into that, we are just going to assume

11   there is a constitutional violation; now prove to me

12   that the remedy -- you know, what remedy will or will

13   not work under those circumstances. It seems to me the

14   exact opposite is the way to do it. You determine where

15   the constitutional violation is --

16   JUSTICE SOTOMAYOR: When does -- well, we'll

17   get back to Justice Kennedy's --

18   CHIEF JUSTICE ROBERTS: Counsel, I see your

19   time is about to expire.

20   MR. PHILLIPS: Thank you, Mr. Chief Justice.

21   CHIEF JUSTICE ROBERTS: Mr. Specter.

22   ORAL ARGUMENT OF DONALD SPECTER

23   ON BEHALF OF THE APPELLEES

24   MR. SPECTER: Thank you, Mr. Chief Justice,

25   and may it please the Court:

1   For 20 years, the overcrowding crisis has

2   caused prisoners suffering from psychosis and

3   life-threatening illnesses to languish in their cells

4   because treatment facilities have no room for them.

5   Prisoners are committing suicide at a rate twice the

6   national average and more than two-thirds of those

7   suicides are preventable. The absence of --

8   JUSTICE SOTOMAYOR: Are you talking about

9   current figures or past? Tell us the date of the

10   figures?

11   MR. SPECTER: Sure. That's from the trial

12   court's opinion, Your Honor. That's from the record.

13   JUSTICE SOTOMAYOR: That's what I thought.

14   How do you address your adversary's point that the

15   adequacy of a remedy can't be measured unless you

16   measure the State of the situation at the time the

17   remedy is imposed?

18   MR. SPECTER: Well, I think, Your Honor,

19   there was massive amounts of evidence about the

20   constitutional violations that existed at the time that

21   the remedy was imposed. And if we -- I can point to the

22   jurisdictional statement 1 appendix, page 30a, the court

23   said: "Nonetheless, as we describe below, fundamental

24   unconstitutional deficiencies caused primarily by

25   overcrowding continue to exist."

1   JUSTICE SCALIA: They didn't take any

2   evidence on the point, I thought.

3   MR. SPECTER: No, Your Honor. I'm sorry,

4   that's not correct, with all respect. They took massive

5   amounts of evidence up to the day of trial about all the

6   conditions as they relate to the remedy. And those

7   conditions were --

8   JUSTICE SOTOMAYOR: Could you give us the

9   record?

10   JUSTICE SCALIA: Current conditions?

11   MR. SPECTER: -- were current as of the

12   time of the trial.

13   JUSTICE SCALIA: What was -- what was your

14   friend talking about when he said that they rejected any

15   effort to show the current situation?

16   MR. SPECTER: Well, my friend and I have a

17   disagreement, but I think Justice Sotomayor accurately

18   captured it. What the three-judge panel said is: Look,

19   we're not going to -- you can't -- this isn't the place

20   for you to come in and say everything's fine,

21   everything's constitutional.

22   What the three-judge court did say is: We

23   will consider -- and they did, in fact, consider -- all

24   of the evidence from the State. They had experts from

25   the State, two of the prisons, in August 2008. Those

1   experts wrote reports, they testified, and they

2   testified about the conditions current. And one of

3   them from the mental health --

4   JUSTICE SCALIA: That was in 2008.

5   MR. SPECTER: That was the time of the

6   trial, Your Honor. The discovery --

7   JUSTICE KENNEDY: They had a cutoff date of

8   some two months before the trial.

9   MR. SPECTER: In August, and the trial

10 started in November.

11   JUSTICE KENNEDY: And that -- but before

12 that point, the experts that were -- had testified were

13 aware of the conditions that existed.

14   MR. SPECTER: Exactly, Your Honor.

15   JUSTICE SCALIA: And when was the remedy

16 imposed?

17   MR. SPECTER: The remedy -- well, the final

18 order came -- well, the close of evidence was in

19 December of 2008.

20   JUSTICE SCALIA: That was in the -- in the

21 one-judge court, in the district court, wasn't it?

22   MR. SPECTER: No, no. In the three-judge

23 court -- the three-judge court closed evidence in

24 December of 2008. We then argued the case after the

25 post-trial briefing in February of 2009. Then the Court

1 came out with the tentative decision about 20 days

2 later, and then in August of 2009, it issued the

3 183-page opinion and the order.

4   CHIEF JUSTICE ROBERTS: Didn't you -- I'm

5 sorry. Let me just keep track here.

6   The evidence was cut off when in 2008?

7   MR. SPECTER: The trial closed in December

8 of 2008, after all the parties had submitted all their

9 evidence. Then there was post-trial briefing for a

10 month. Then we had argument in February of that year.

11 And then a few weeks later, they issued a brief summary

12 of their conclusions in an attempt to get the State and

13 the parties to settle the case.

14   CHIEF JUSTICE ROBERTS: You don't dispute

15 the statement I have -- it's in the response to the

16 intervenors -- that between October 2006 and October

17 2010 the population of the adult facilities declined by

18 14,832 inmates?

19   MR. SPECTER: I agree with my friend

20 Mr. Phillips that the population has declined by about

21 10,000 prisoners. Most of that decline has been due to

22 transfer to out-of-State prisons, and true, there is --

23 some amount of it has been as a result of the marginal

24 increase in good time credits, which the State elected

25 to pursue on its own.

1   JUSTICE KENNEDY: What about the argument

2   that there was evidence that should have been admitted

3   but that was not with reference to new construction?

4   MR. SPECTER: Well, I don't -- there was no

5   evidence that wasn't -- that was offered that wasn't

6   considered by the three-judge panel, Your Honor. They

7   considered all the evidence. Their 183-page opinion is

8   scrupulous in considering all the evidence, both that

9   supported the order and they distinguished the evidence

10   and, in fact, made credibility determinations based on

11   the evidence that was contrary. But I --

12   JUSTICE SOTOMAYOR: Could --

13   JUSTICE ALITO: I'm sorry.

14   Could you explain what the connection is

15   between the 137.5 percent figure and the constitutional

16   violations relating to the provision of medical care in

17   general and treatment for -- for mental illness?

18   My understanding of the 137.5 percent figure

19   is that that has to do with the total number of

20   prisoners in the -- in the system in relation to design

21   capacity; isn't that right?

22   MR. SPECTER: That's correct, Your Honor.

23   JUSTICE ALITO: Now, what does the ruling --

24   that doesn't speak to the number of personnel who are

25   available in the system to attend to medical needs or

1   mental illness. It doesn't speak to the extent of the

2   facilities that are available for those purposes. It

3   seems to be -- there seems to be a disconnect between

4   those two. Could you explain why that is narrowly

5   tailored?

6   MR. SPECTER: Yes, Your Honor. There was --

7   the Court made findings that 137.5 percent was the

8   maximum number of prisoners that -- of the capacity, of

9   the design capacity of the prison, that the prison could

10   have that would enable the State to -- to have all those

11   things you just mentioned -- staffing, facilities,

12   medication management -- be effective, and reach the

13   actual prisoners who are ill, seriously ill.

14   JUSTICE ALITO: See, that's what I don't

15   understand. You can have a -- could you not have a

16   prison where the cells are somewhat crowded -- and 137.5

17   percent of design capacity is not -- is not

18   unconstitutional in itself, is it?

19   MR. SPECTER: No, it -- you could have --

20   it's a remedy, Your Honor.

21   JUSTICE ALITO: You could have a prison

22   where the -- the cells themselves are crowded, and yet

23   there are other facilities available for medical care

24   and plenty of staff to attend to those things. So

25   what's the connection?

41

1   MR. SPECTER: Well, that's -- that's -- and

2   you're right. If there were -- if the cells were

3   crowded but the prison had all the other facilities

4   available, then there might not be a problem. You have

5   to -- well, I hope you can understand that in this case,

6   the prisons were built to double-cell the prisoners, but

7   they weren't built to provide 200 percent of healthcare

8   needs. So as soon as they started to double-cell these

9   prisoners, they could meet their literal housing needs

10   in the space of the cell, but they couldn't meet the

11   needs of their healthcare.

12   And that's why, Your Honor, the

13   137.5 percent figure is reasonable: Because the Court

14   went almost a third overcrowding above what all the

15   experts recommended.

16   JUSTICE ALITO: But why order the release of

17   around 40,000 prisoners, many of whom, perhaps the great

18   majority of whom, are not going to be within the class

19   in either of these lawsuits? Why order the release of

20   all those people, rather than ordering the provision of

21   the construction of facilities for medical care,

22   facilities to treat mental illness, hiring of staff to

23   treat mental illness? Why not go directly to the

24   problem rather than address what seems to be a different

25   issue altogether?

1   MR. SPECTER: Well, I have two responses to

2   that, and they are both a little separate.

3   The first point: It's important to

4   understand that this is not a release order. It's a

5   population crowding reduction order. The Court is not

6   ordering the State to throw open the gates of its doors

7   and release people. They can reduce crowding through

8   more transfers to out of State. To your construction

9   point, if the State still chooses, it can construct new

10   facilities to increase the capacity, and the three-judge

11   panel said if you increase the capacity, you can

12   increase the population.

13   The point about --

14   JUSTICE ALITO: If all they do is to build

15   more cells, they are not going to address the problem.

16   MR. SPECTER: Exactly. So that goes to the

17   second part of your question, which is: Why don't they

18   try other things, like ordering the prisons to hire more

19   doctors, ordering better medication management, all of

20   those kinds of things? And the answer to that is in the

21   appendix to the Appellee's Coleman brief, which lists 70

22   discrete orders which the Coleman court, single-judge

23   Coleman court, tried over a period of 15 years, which

24   have proven singularly to be ineffective. And that is

25   why the court analyzed all those things; the trial court

1   analyzed all these things, and it made a finding of fact

2   that based on the statements by the special master, by

3   the receiver's reports, and by the general horrendous

4   conditions that we have in these prisons, that those

5   discrete orders would not solve the problem. And given

6   the level of harm --

7   JUSTICE ALITO: I still don't get it.

8   You're saying that they were ordered to do a variety of

9   things that directly address the problem and they didn't

10   comply. So as a --

11   MR. SPECTER: No.

12   JUSTICE ALITO: In order to -- in order to

13   provide some kind of remedy we are going to order

14   something else that doesn't address the problems that

15   these lawsuits aim at addressing.

16   MR. SPECTER: No, that -- no, Your Honor, to

17   the contrary, Justice Alito, we -- I think the court

18   believes based on the facts that it found that this

19   would be an effective remedy. All of the testimony that

20   they heard from experts from Texas, from Pennsylvania,

21   from Washington State -- all of whom had suffered, had

22   dealt with crowding in their prison systems, has said

23   that when you reduce the crowding, that's the critical

24   thing you have to do now; because unless you reduce the

25   crowding, nothing else is going to work, and the Court

1   found that that was exactly true.

2   Nothing else over 20 years in one case, and

3   over 8 years in another case has worked. And all -- as

4   Justice Kennedy says, massive amounts of evidence show

5   that the primary reason it hasn't worked is one singular

6   word, overcrowding; and when you reduce overcrowding the

7   prison will be able to operate and will be able to

8   provide those services that it can't provide now, so the

9   doctors will have room to be able to work, which they

10   don't have now.

11   There will be less prisoners, so officers

12   will be able to take them from one place to another to

13   get treatment. There won't be so many lockdowns, which

14   inhibit care.

15   JUSTICE SOTOMAYOR: Counsel --

16   JUSTICE ALITO: That is a very indirect way

17   of addressing the problem and it has collateral

18   consequences. If -- if I were a citizen of California,

19   I would be concerned about the release of 40,000

20   prisoners. And I don't care what you term it, a prison

21   release order or whatever the --

22   MR. SPECTER: Crowding --

23   JUSTICE ALITO: -- terminology you used was.

24   If 40,000 prisoners are going to be released, you really

25   believe that if you were to come back here 2 years after

1 that, you would be able to say, they haven't -- they

2 haven't contributed to an increase in crime --

3   MR. SPECTER: Well --

4   JUSTICE ALITO: -- in the State of

5 California? In the -- in the amicus brief that was

6 submitted by a number of States, there is an extended

7 discussion of the effect of one prisoner release order

8 with which I am familiar, and that was in Philadelphia;

9 and after a period of time they tallied up what the cost

10 of that was, the number of murders, the number of rapes,

11 the number of armed robberies, the number of assaults --

12 you don't -- that's not going to happen in California?

13   MR. SPECTER: Your Honor, this trial court

14 found based on 50 pages of its opinion, based on expert

15 testimony, not only from our experts but from the

16 State's experts, from the intervenors' experts, they all

17 came to the unanimous conclusion that there are methods

18 that -- by which you can reduce crowding which will not

19 increase crime in our State.

20   The Secretary of the Department of

21 Correction whose was the secretary at the time of trial

22 testified that he was in favor, for example, of

23 increasing prisoner's good time credits. That's one way

24 to reduce crowding.

25   And moreover, there was statistical evidence

46

1   saying, looking at all the other States that had reduced

2   their prison population over a period of about 15 years,

3   and they all came to the same conclusion, all of those

4   studies came to the same conclusion, which is there is

5   no -- there is no increase in the crime rate.

6   CHIEF JUSTICE ROBERTS: But that is not what

7   -- that is not what the three-judge district court

8   determined. The Prisoner Litigation Reform Act requires

9   that court to give substantial weight to adverse impact

10   on public safety.

11   MR. SPECTER: Yes. Yes, Your Honor.

12   CHIEF JUSTICE ROBERTS: And when -- and then

13   it said to the State look, you come up with a plan that

14   gets you to 137.5 in two years.

15   MR. SPECTER: Yes, Your Honor.

16   CHIEF JUSTICE ROBERTS: The State did, and

17   the State did not say -- emphatically did not say this

18   is not going to have an adverse impact on public safety.

19   MR. SPECTER: Right, but the --

20   CHIEF JUSTICE ROBERTS: There is a problem

21   with a double negative there. But -- and what the

22   district court said; it doesn't examine that. It said,

23   well, we're sure the State's not going to do anything

24   that has an adverse impact on public safety. I am

25   looking at page 4a of the jurisdictional statement.

47

1   MR. SPECTER: Right. I know --

2   CHIEF JUSTICE ROBERTS: And said -- and so

3   it did not make those determinations, but the PLRA

4   requires it to determine that what it's ordering -- or

5   at least gives substantial weight to the public safety

6   issue. So isn't that a basis for overturning the remedy

7   that's imposed here?

8   MR. SPECTER: I would respectfully disagree

9   with that and I'll tell you why --

10   CHIEF JUSTICE ROBERTS: I thought you would.

11   (Laughter.)

12   MR. SPECTER: At least it's respectful.

13   (Laughter.)

14   MR. SPECTER: I will tell you why I think

15   that. The court examined all of the methods that are

16   commonly used and that the governor himself has proposed

17   to reduce crowding. The governor himself wanted to

18   reduce the prison population by 37,000. That was in one

19   of his legislative enactments, and the secretary of

20   corrections testified that those proposals were safe.

21   CHIEF JUSTICE ROBERTS: Did he want to do it

22   within the 2-year period the district court ordered?

23   MR. SPECTER: Yes, Your Honor, he did. He

24   submitted legislation to the legislature for that, and

25   the legislature wouldn't -- wouldn't take it. And the

1   governor actually said, reacting to that, after a riot

2   at Chino which was partly -- at one of the -- Chino is a

3   prison in California. A riot, he said, and the quote:

4   "And the politicians in Sacramento have swept the

5   problem under the rug."

6   CHIEF JUSTICE ROBERTS: Right. Right. No,

7   my -- my question is specifically with respect to the --

8   MR. SPECTER: I'll get to that.

9   CHIEF JUSTICE ROBERTS: With respect to the

10   two-year plan --

11   MR. SPECTER: Right.

12   CHIEF JUSTICE ROBERTS: -- and I would like

13   an answer to that.

14   MR. SPECTER: Yes.

15   CHIEF JUSTICE ROBERTS: Because I look at

16   this record; I see that the district court didn't do

17   what with required by the Act with respect to the plan

18   that it's ordering. It just simply said, oh, we're sure

19   -- I'm the State wouldn't do anything to hurt public

20   safety, after telling the State you have got to give me

21   a plan in 2 years that gets to 137.5.

22   MR. SPECTER: Right. Well, I think all of

23   the -- it didn't -- it didn't analyze the plan, because

24   the court was trying -- well, there was no plan.

25   The Court, what they -- what the Court did

49

1   was it said, we want to give the State the maximum

2   flexibility for comity reasons to determine how best to

3   remedy the constitutional violations.

4   Now on cert, then said -- they also said

5   that we're sure the State can do it in a safe way. But

6   it's not our job to -- the method.

7   CHIEF JUSTICE ROBERTS: Well, they said

8   we're sure, because we trust -- I'm just quoting from

9   4a: "We trust that the State will comply with its duty

10 to ensure public safety as it implements the

11 constitutionally required reduction." The State is

12 saying it cannot meet the 137.5 in 2 years without an

13 adverse impact on public safety.

14   MR. SPECTER: Right. And the -- that's the

15 State's position --

16   CHIEF JUSTICE ROBERTS: Right.

17   MR. SPECTER: And had been the State's

18 position all along. The court's findings that a

19 population reduction of this magnitude were clear, and

20 they are not shown to be clearly erroneous here. They

21 -- the court said point blank that we -- we're -- it's

22 our finding that the State can reduce the population to

23 its current levels -- from its current levels to 137.5

24 safely. They made that finding --

25   JUSTICE SOTOMAYOR: Counsel, didn't

1   the court --

2   MR. SPECTER: They haven't been shown to be

3   clearly ear erroneous. So they didn't have to look at

4   particulars. In an effort to give the State the maximum

5   flexibility, they wanted to allow the State to choose

6   the methods that it wanted. If the State -- if the

7   court had ordered --

8   JUSTICE SOTOMAYOR: Counsel --

9   JUSTICE SCALIA: Well, what do you mean they

10   can do it? Of course they could do it safely if they

11   built, you know, umpteen new prisons; but that's --

12   MR. SPECTER: But they can also do it

13   safely --

14   JUSTICE SCALIA: You know, that's pie in the

15   sky, that's not going to happen.

16   MR. SPECTER: No, it isn't, Your Honor,

17   because they can also do it safely by good time credits.

18   They can do it safely --

19   JUSTICE SCALIA: Doesn't good time credits

20   let -- let people out who would not otherwise be out?

21   MR. SPECTER: Just a -- you know, the

22   evidence was at trial, and the court's finding about

23   that evidence was, and the State official so testified,

24   that giving prisoners good time credits is not a threat

25   to public safety.

1   JUSTICE SOTOMAYOR: Counsel. Didn't --

2   JUSTICE KAGAN: Why wouldn't it have been

3 the better course, for the State -- for the Court to

4 say, you know, the State said it can do this in 5 years

5 without any public safety problem?

6   MR. SPECTER: Right.

7   JUSTICE KAGAN: So why don't we let them

8 take those 5 years?

9   MR. SPECTER: Because, Your Honor, as

10 Justice Ginsburg and others have been saying before, the

11 constitutional violations have been ongoing for

12 20 years. We are dealing here with cases of life and

13 death and serious injury. And after all these years,

14 when they -- when they heard the evidence that said that

15 population could be -- and they made the findings which

16 the State doesn't argue are clearly erroneous -- when

17 they made those findings, that it could be reduced

18 safely, they had an obligation to provide a remedy that

19 would provide constitutionally adequate care in the

20 safest manner possible -- in the quickest manner

21 possible.

22   CHIEF JUSTICE ROBERTS: I think --

23   JUSTICE SOTOMAYOR: Counsel --

24   CHIEF JUSTICE ROBERTS: I think Justice

25 Sotomayor has been patient.

1   JUSTICE SOTOMAYOR: I have several questions

2 but I'm not sure why -- you have not been responding to

3 Justice -- to the Chief Justice. Didn't the district

4 court discuss different safe ways of reducing the

5 population?

6   MR. SPECTER: Yes.

7   JUSTICE SOTOMAYOR: And said, we are not

8 imposing them because we want the State to do -- to

9 choose among them?

10   MR. SPECTER: Yes, Your Honor.

11   JUSTICE SOTOMAYOR: As I've looked at the

12 State's final plan, I thought that they had in fact not

13 only accepted all of the recommendations but they added

14 a couple of additional remedies that the Court had not

15 suggested?

16   MR. SPECTER: Yes, Your Honor.

17   JUSTICE SOTOMAYOR: Is it a fair statement

18 that the district, that the three judge panel was

19 saying, if you do these things that's their finding, you

20 can do it without affecting public safety, wasn't that

21 what they were saying?

22   MR. SPECTER: Yes, Your Honor, if I didn't

23 make that clear, I meant to.

24   JUSTICE SOTOMAYOR: The second more

25 important question was going back to something that

1   Justice Scalia asked you, which was, you made the

2   statement that no one was stopped from proffering

3   evidence about prison conditions up till two months

4   before the trial.

5   MR. SPECTER: Yes, Your Honor.

6   JUSTICE SOTOMAYOR: So what evidence was

7   excluded?

8   MR. SPECTER: Nothing.

9   JUSTICE SOTOMAYOR: What point is the other

10   side making that they were excluded from making?

11   MR. SPECTER: Well, as we said in our

12   briefs, Your Honor, there was no evidence that was

13   excluded, and in fact, the State's witnesses testified

14   about conditions. Some of the conditions current as of

15   the day of the testimony. So it was very current.

16   Nothing was excluded. That way, even if the Court made

17   a ruling which was error, which we don't believe it was,

18   there was absolutely no prejudice.

19   JUSTICE BREYER: What was the number? I was

20   puzzled about the same thing that Justice Sotomayor was.

21   I read on page 253 of the appendix a conclusion where

22   the district court said it is our conclusion that they

23   can reduce this by how many people. What is it?

24   30,000 -- it's a lot.

25   MR. SPECTER: 35,000.

1   JUSTICE BREYER: That this could be done

2   safely.

3   MR. SPECTER: Yes.

4   JUSTICE BREYER: Preceding page, whatever

5   that was, 253.

6   MR. SPECTER: Right.

7   JUSTICE BREYER: There are about six pages

8   where they summarize evidence from all kinds of

9   criminologists that say, for example, there are 17,000

10   technical parole violators that are being sent to prison

11   who haven't committed additional crimes and they could

12   perhaps be released from some of the time that they're

13   spending in prison. Then they go on to this good time,

14   which would, I guess, lead to people who are 50 years

15   old or 60 years old who have been in prison for 40 years

16   would be released at age 55 instead of age 75, I guess

17   there is some category there.

18   MR. SPECTER: Yes, Your Honor.

19   JUSTICE BREYER: Then they had several other

20   things. Okay. Now, what are some facts about that?

21   MR. SPECTER: There was also testimony that

22   the Department Of Corrections was using a risk

23   assessment instrument to identify the low risk

24   prisoners.

25   JUSTICE ALITO: Isn't it true that in one of

55

1   the main programs that was cited as providing a

2   safeguard is evidence-based rehabilitation programs?

3   MR. SPECTER: Yes, Your Honor. All the

4   witnesses from the State, the intervenors, the local

5   witnesses, our experts, they all found that those would

6   help reduce crime. And that they would be most

7   effective if they were continued, but they would be

8   effective also if they were --

9   JUSTICE ALITO: What is the general record

10   on the success of rehabilitation efforts?

11   MR. SPECTER: Well, you can't say generally

12   because different programs have different records.

13   JUSTICE ALITO: What did Congress think when

14   it enacted the sentencing format?

15   MR. SPECTER: I don't know.

16   JUSTICE KENNEDY: I have this question and

17   this goes just to remedy. I recognize the district

18   court has to be given considerable discretion.

19   It shows the 137.5 figure, halfway between

20   145 and 130.

21   MR. SPECTER: Yes, Your Honor.

22   JUSTICE KENNEDY: I think that certainly the

23   Prison Litigation Reform Act means that you have to, if

24   there is going to be a release order it must be

25   releasing the minimum amount.

1   MR. SPECTER: Yes.

2   JUSTICE KENNEDY: That will effect the

3   purposes of the remedy order. There was substantial

4   expert opinion that 145 -- 145 percent would be

5   sufficient. Doesn't the evidence indicate to you that

6   at least 145 ought to be the beginning point, not 137.5?

7   MR. SPECTER: Well --

8   JUSTICE KENNEDY: And I understand -- may I

9   make -- there were more -- correct me if I am wrong,

10   there were more experts that testified that 145 would

11   work then there were that 130 was necessary?

12   MR. SPECTER: No. I respectfully disagree

13   with the record, Your Honor. The 145 figure came from a

14   report by the former governor, Duke Majin, and a group

15   that he organized. And they said that they could

16   operate a crowded system at 145 percent of capacity.

17   And that figure was high, the district court found,

18   because it didn't take into account healthcare needs.

19   It didn't take into account healthcare needs, which is

20   the issue at issue here. Our experts testified that

21   because it didn't take into account healthcare needs,

22   130 percent was the better number. It's the number that

23   the strike team had thought of. The administration's

24   own strike team. It's the number that these

25   professional experts believed would be sufficient to

57

1   remedy the population.

2   And back to my answer to Justice Alito's

3   question is, the healthcare facilities themselves were

4   built to provide services to only 100 percent --

5   healthcare services to only 100 percent of prisoners.

6   JUSTICE KENNEDY: But the experts -- the

7   experts who were testifying were quite aware of the fact

8   that overcrowding related to the constitutional

9   violations, that was their whole theory.

10   MR. SPECTER: Yes.

11   JUSTICE KENNEDY: And any number of them

12   suggested that 145.

13   MR. SPECTER: I think there might have been

14   only one, one expert suggested 145. I think most, the

15   majority of the experts suggested 130. The court found

16   and it has not been challenged here as clearly

17   erroneous, that the weight of the evidence went to 130.

18   They wanted to do what you're saying, which was minimize

19   the intrusion and maximize the population. So even

20   though they found, the Court had ample basis to issue an

21   order saying it should be 130, they said in an abundance

22   of caution and to give the State the benefit of the

23   doubt and to make sure, we are going to bump it up an

24   extra 7.5 percent.

25   JUSTICE KENNEDY: I see no evidence in the

1   record that the State -- pardon me, that your clients

2   said that 145 wouldn't work.

3   MR. SPECTER: I think --

4   CHIEF JUSTICE ROBERTS: Maybe you can

5   answer.

6   JUSTICE SOTOMAYOR: Just the experts.

7   CHIEF JUSTICE ROBERTS: Maybe you can

8   answer, counsel, please.

9   MR. SPECTER: Thank you. My recollection of

10 the testimony was that our experts said it had to get

11 down to 130 in order for the other remedies to be

12 effective, Your Honor.

13   JUSTICE SOTOMAYOR: The expert who gave the

14 145?

15   MR. SPECTER: Pardon me?

16   JUSTICE SOTOMAYOR: The expert who gave the

17 145?

18   MR. SPECTER: There was no expert -- well,

19 there was one expert who said maybe in the best of

20 circumstances it could get to 145. All the others

21 talked about 130 percent.

22   JUSTICE SOTOMAYOR: Let's go to the one

23 who's used the 145 figure.

24   MR. SPECTER: He was a psychologist, Your

25 Honor.

1   JUSTICE SOTOMAYOR: He was a what?

2   MR. SPECTER: He was a psychologist who has

3   expertise in prison healthcare.

4   JUSTICE SOTOMAYOR: And did he say that 145

5   you could deliver healthcare?

6   MR. SPECTER: He was equivocal on that

7   point. He thought -- he said that at the outer reaches

8   it might be true. But I want to emphasize that the

9   district court has allowed the State to come back in at

10   any time to modify its order and to modify this

11   percentage point if the circumstances changed. So.

12   JUSTICE GINSBURG: Mr. Specter, there has

13   been at least two significant changes. One is the good

14   time credit. The California legislature did pass the

15   law that upped the good time credits, and also

16   addressing the probationers and the parolees, the

17   technical violators from the system. Do you have any

18   information about what effect that legislation was

19   passed January?

20   MR. SPECTER: It was passed, I think, last

21   year. And I think it went into effect in July of last

22   year, I believe, if that's what you are referring to.

23   JUSTICE GINSBURG: So do we know at all what

24   effect this has had?

25   MR. SPECTER: It has had a marginal effect

1   on reducing the population. There have been no reports

2   that it has led to an increase in crime. But to get

3   back to my earlier point, and your point,

4   Justice Kennedy, about the remedy and that it should be

5   the least intrusive possible. This order is set to take

6   effect over a two-year period and during that two-year

7   period, if Mr. Phillips is correct that the conditions

8   are constitutional and that they can deliver services at

9   145 percent, then the State is free to come in and make

10   a motion to bring those changed circumstances to the

11   court. And, if anything, this Court has been incredibly

12   sensitive to the needs and desires of the State. And it

13   was extremely reluctant to end this order in the first

14   place and it would bend over backwards to give the State

15   discretion.

16   JUSTICE KENNEDY: I don't see a finding by

17   the three judge Court that 145, is it, would not be an

18   he have efficacious remedy. I know that it would for

19   137.

20   MR. SPECTER: Yes, Your Honor. I don't

21   think -- I don't think it's explicitly said 145, but I

22   think it discussed the 145 figure in the context of the

23   fact that it didn't provide for healthcare services. So

24   it discounted that a little bit and went down about

25   7 percent. But it came close to that figure, I believe.

 1   CHIEF JUSTICE ROBERTS: Can I ask you a

 2   hypothetical question that I know is not your case? But

 3   let's say you had the district court entering an order

 4   saying: You have to bring it down to 137.5 in 2 years.

 5   That will, as a practical matter, result in the release

 6   of 40,000 prisoners.

 7   The State comes back and makes a showing

 8   supported by experts saying: Look, if you give us 4

 9   years, we can reach the figure without releasing any

10   prisoners. Do you think it would violate the Prison

11   Litigation Reform Act for the district court to say:

12   No, I want this done in 2 years, not 4 years, and we

13   just have to deal with the fact that there are going to

14   be 40,000 prisoners out on the streets?

15   MR. SPECTER: Well, the Prison Litigation

16   Reform Act requires the court to give substantial weight

17   to the public safety implications of its decision. So

18   under those circumstances, it's -- under those

19   hypothetical circumstances, there is always the

20   possibility that in those cases, the degree of public

21   safety problems might outweigh the harm.

22   That -- as you said, that's not this case.

23   They found that we could do it. And they -- the

24   three-judge panel found that the State could reduce the

25   population safely. And there was no suggestion then in

1 the record that this 2- or 4-year period would make that

2 much of a difference.

3   You have to put the 40,000 or 35,000 figure

4 in context. California releases 120,000 prisoners every

5 year on parole. That's a lot of prisoners. And the

6 findings of the district courts are, even when the

7 California increases the number of parolees in the

8 communities, that doesn't increase the crime rate.

9   JUSTICE ALITO: What is the recidivism rate

10 for those parolees?

11   MR. SPECTER: Well, it depends on the risk

12 of the parolee. The high-risk ones --

13   JUSTICE ALITO: In general, what is the

14 recidivism rate?

15   MR. SPECTER: Well, overall, the risk is

16 around 70 percent, but for low-risk prisoners the risk

17 is 17 percent who reviolate.

18   CHIEF JUSTICE ROBERTS: I'm sorry. I

19 couldn't -- what was the first --

20   MR. SPECTER: The first number when you take

21 all parolees, all together, it's 70 percent.

22   CHIEF JUSTICE ROBERTS: 7-0?

23   MR. SPECTER: 7-0, because -- within three

24 years. That's what -- the situation we have now, and

25 that's the situation that the governor, the secretary,

1   and the court described as a failure. With parole

2   reform you could reduce that number in many ways, and

3   the Court described how you could do that. But the

4   lowest --

5   JUSTICE ALITO: What is the lowest? It's 17

6   percent.

7   MR. SPECTER: 17 percent, and California has

8   a risk assessment instrument which the Court found --

9   which the Court found could be used to make sure that

10   what happened in Philadelphia doesn't happen again. If

11   I understand it --

12   JUSTICE ALITO: Well, I understood that of

13   the low-risk -- if only the low-risk people are

14   released, around 3,000 of them are going to commit

15   another crime.

16   MR. SPECTER: They -- but they don't have to

17   be released, first off. I want to make sure I emphasize

18   the point that this is a crowding reduction measure.

19   You don't have to release 30,000 prisoners.

20   JUSTICE ALITO: They don't have to be

21   released if you can build enough cells --

22   MR. SPECTER: Or you can divert, or you can

23   improve the parole system so that parole violators don't

24   commit so many crimes. If you offer rehabilitation

25   alternatives, if you provide a number of diversion into

1   the community, there are a number of options short of

2   releasing prisoners. And the 70 percent figure

3   concludes --

4   JUSTICE ALITO: The 17 percent figure goes

5   exactly to my concern. This is going to have -- it

6   seems likely this is going to have an effect on public

7   safety. And the experts can testify to whatever they

8   want, but you know what? If this order goes into

9   effect, we will see. We will see, and the people of

10   California will see. Are there more crimes or are there

11   not?

12   MR. SPECTER: Well, if it's based on the

13   experience in other jurisdictions, the court found we

14   wouldn't. And I wanted to say -- to clarify one point,

15   Your Honor: The 70 percent figure includes -- doesn't

16   always include crimes. It includes lots of technical

17   parole violators. People who have missed their

18   appointments, for example. So it's not as grave as some

19   of the figures that are informed by the other side.

20   JUSTICE GINSBURG: Is -- is there any other

21   case where the prison reduction has been done under the

22   PLRA, or is this the first -- the first one?

23   MR. SPECTER: It's the first one to reach

24   this Court, obviously. There have been a few others

25   that have been resolved by consent, as I understand it,

1 or not appealed, but just a few.

2   JUSTICE BREYER: Is there any evidence on --

3 I see their suggestions -- the technical parole

4 violators go elsewhere. The elderly and infirm

5 prisoners, some of them be released. The good time

6 credits for older people were -- would have effect, be

7 increased, and also, halfway houses and other kinds of

8 prison facilities which used to be called less -- less

9 physically restrictive punishments, or taking the money

10 you save and building new prisons. Okay, that seems to

11 be the gamut.

12   Is there any evidence, statistically or

13 otherwise -- because it used to be that States did rely

14 on halfway houses. They relied upon -- they relied upon

15 certain camps -- prison camps, for example -- and some

16 of them were pretty tough. And there were a whole range

17 of what used to be called intermediate punishments.

18   MR. SPECTER: Yes, Your Honor.

19   JUSTICE BREYER: All right. Is there any

20 statistical evidence on the part -- on the point that

21 Justice Alito raised --

22   MR. SPECTER: Yes, Your Honor.

23   JUSTICE BREYER: -- as to whether these did

24 or did not result in higher crime rates?

25   MR. SPECTER: Well, the evidence was, and

1   the Court found -- and again, it's not clear error --

2   that these programs were more effective than prison in

3   reducing recidivism, and they were less expensive.

4   And -- and that's part of the reason why the three-judge

5   panel concluded that a reduction in the prison

6   population wouldn't increase crime.

7   CHIEF JUSTICE ROBERTS: Counsel, one of the

8   thing that concerns me about this type of institutional

9   reform litigation is that the State is responsible for a

10   lot of different things. What happens when you have

11   this case, another district court ordering the State to

12   take action with respect to environmental damage,

13   another court saying you have got to spend this much

14   more on education for disabled, another court saying you

15   have got to spend this much more on something else? How

16   does the State sort out its obligations?

17   Does it say: Well, I'll spend more money to

18   build prisons, but I will violate this other district

19   court order saying I have to spend money to build water

20   treatment plants?

21   MR. SPECTER: Well, Your Honor, in this

22   particular case --

23   CHIEF JUSTICE ROBERTS: I know you like your

24   particular case. You want the State to say: This is

25   where I'm going to put my money. But the point is that

67

1   it's a budget prioritization that the State has to go

2   through every day, and now it's being transferred from

3   the State legislature to Federal district courts

4   throughout the State.

5   MR. SPECTER: Well, I believe the Federal

6   courts have an obligation to enforce the Constitution

7   and the laws.

8   CHIEF JUSTICE ROBERTS: No, no. I believe

9   that as well, Counsel.

10   What I'm saying is that you have conflicting

11   orders from different district courts telling them: You

12   have got to comply with the Constitution by spending

13   8 billion here and another court saying: I have got

14   another constitutional problem of my own, and you have

15   got to spend 8 billion over there. What is the State

16   supposed to do in that situation?

17   MR. SPECTER: Well, my simple answer to your

18   question, Your Honor, and I don't mean to be flippant,

19   but they're -- they have an obligation to follow the

20   Federal law, the constitutional law, and other laws.

21   And if they are not, then the Federal court has an

22   obligation to impose a remedy.

23   In this particular case, the State has a

24   choice. You can either incarcerate 140,000 prisoners in

25   a system built for 80,000, or it can incarcerate a

1   lesser number. If it chooses to incarcerate 148,000

2   prisoners in a space built for 80, it's going to incur

3   certain obligations. And we believe, as I said in the

4   answer to Justice Breyer's question, that the State

5   could choose to use less restrictive punishments,

6   alternative punishments, get a better bang for their

7   buck, have more public safety.

8   But that's -- if we -- if the Court imposed

9   that kind of a rule, then the State would be here saying

10   it's -- it's violating comity provisions and making

11   policy choices for the State which it shouldn't. I

12   believe in this case, the Court gave the State the

13   maximum degree of flexibility to make all the policy

14   choices surrounding -- surrounding the incarceration of

15   these prisoners. You just -- the Constitution prevents

16   the State from incarcerating somebody and then not

17   providing them the basic medical care they need to

18   escape from the prison and not die before their sentence

19   is out. And that's what we have here.

20   Thank you.

21   JUSTICE KENNEDY: If you take the State's

22   concession that it can meet a goal in 5 years and the

23   Federal court order is 2 years, we are talking about 3

24   years. Is there any indication of how fast the State's

25   remedy would click in? Are we talking maybe about a

 1   5 percent differential for the last 3 years, or --

 2   MR. SPECTER: Well, there are a lot of

 3   things the State can do quickly. For instance, it can

 4   reform its parole system; it cannot re-incarcerate

 5   technical parole violators. It can --

 6   JUSTICE KENNEDY: No, no. I'm saying,

 7   assuming -- compare what the State concedes that it will

 8   do with what the Court has ordered it to do.

 9   MR. SPECTER: The State -- well, I just want

10   to remind you that the governor proposed to the

11   legislature that he reduce the prison population. He

12   said it could be done safely by the same amount, roughly

13   37,000 prisoners in 2 years. So what the court found

14   was basically what the governor had believed was safe.

15   The 5-year -- the 5-year period is longer.

16   And the 5-year period is longer because it takes time to

17   construct the facilities that the -- that State wants to

18   construct. I believe that's the major difference

19   between the two remedies. But the other methods, the

20   good time credits, parole reform, diversion, those can

21   be implemented very quickly, and those substantial

22   reductions can be accomplished safely in that amount of

23   time.

24   JUSTICE SOTOMAYOR: So should the court have

25   said 2 years for everything but construction? Wouldn't

1   that have been a more narrowly tailored remedy?

2   MR. SPECTER: Well, the State --

3   JUSTICE SOTOMAYOR: Except that they --

4   MR. SPECTER: I was --

5   JUSTICE SOTOMAYOR: -- that there was going

6   to be no construction adequate, because there was no

7   money.

8   MR. SPECTER: Right. And the State has --

9   has really not put up the money to construct those new

10   prisons. This case has been on going since 2006 and

11   they have hardly constructed anything. Even if it was a

12   more narrow remedy, the court found that construction

13   wouldn't be a viable alternative. My time is up.

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   Mr. Phillips, you have three minutes left.

16   REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

17   ON BEHALF OF THE APPELLANTS

18   MR. PHILLIPS: Thank you Mr. Chief Justice.

19   Just a few points. First of all, with

20   respect to the state of the record and what was

21   proffered and what was not proffered, if you look at the

22   joint appendix at 2085, there is a specific proffer that

23   is made by the intervenors in that context -- or I mean,

24   I'm sorry, there is a specific proffer made by the State

25   of the --

71

1   JUSTICE SOTOMAYOR: I'm sorry, what page was

2   that?

3   MR. PHILLIPS: 2085, that is volume 6. And

4   it's at that point where the plaintiffs, the intervening

5   plaintiffs say we would like to put on evidence of

6   institutional violations, and Judge Karlton says twice

7   this court has said, we will not receive that evidence.

8   You have made a clear -- as clear a record as you can;

9   please don't waste our time. And then later at 2338,

10   which is again in volume 6, where we enter -- Mr. --

11   Desseimer -- who is the assistant secretary of CDCR in

12   charge of healthcare, he specifically said -- I've read

13   the -- declaration and it will not be received, to the

14   extent it says the State is in compliance. So we have

15   made our efforts and we were rebuffed.

16   JUSTICE SOTOMAYOR: I'm sorry; I don't know

17   what the declaration said. Is the actual declaration in

18   the record somewhere?

19   MR. PHILLIPS: Yes, I believe the actual

20   declaration is in the record.

21   JUSTICE SOTOMAYOR: All right.

22   JUSTICE KAGAN: Mr. Phillips, sorry, but I'm

23   on a different subject. Does the State stand by its

24   representation that it can do this without any public

25   safety impact in 5 years?

1   MR. PHILLIPS: Yes. I mean, we made that

2   submission to the court and we -- we believe that we

3   could comply with it. That said --

4   JUSTICE KAGAN: That means it's true.

5   MR. PHILLIPS: We --

6   JUSTICE KAGAN: Not -- notwithstanding

7   budget -- economic differences, budget differences?

8   MR. PHILLIPS: Well -- well, I mean the

9   plaintiff's counsel talks about all of the things that

10   you had can do, and if you -- if you look at 70a of the

11   -- the jurisdictional statement appendix, it

12   specifically says, there is a line, above the line we

13   can implement, and that will get you about 16,000

14   inmates and below the line you need legislation in order

15   to implement these things. But the reality is that

16   anytime you say you are going to release 30,000 inmates

17   in a never compressed period of time, I guarantee you

18   that there is going to be more crime and people are

19   going to die on the streets of California. I mean

20   that -- there is not way out of that particular box.

21   JUSTICE KAGAN: But if they were 5 years you

22   think you could do it without any public safety impact

23   in the way that you told the Court you could?

24   MR. PHILLIPS: I think so, but I'm still

25   concerned, because the district court in this specific

73

1   says: We have not evaluated the -- the safety impact of

2   each of the State's -- of the elements the elements of

3   the State's proposed plan, and it seems to me they had

4   an obligation to do that.

5   The other point I want to make with respect

6   to Justice Kennedy's question is that there is not a

7   shred of evidence that 137.5 makes any sense whatsoever.

8   That is a pulled out of the air number. Theirs was

9   aspirational. None of that is based on what is the

10   constitutional violation that exists at the time you

11   adopt that particular percentage.

12   And it seems to me this is the entire

13   problem with this -- this exercise, which is to say we

14   are going to fix this across the board, rather than what

15   would make much more sense, which is to evaluate these

16   matters facility by facility, to evaluate these matters

17   on various elements discrete elements of how you can

18   reduce the prison population, and to do it in -- in

19   conjunction with a receiver who is in place who can help

20   to implement this in a very systemic way and that will

21   get us to where we want to get to.

22   JUSTICE SOTOMAYOR: So why didn't you give

23   the court that as your plan? The court gave you

24   absolute discretion to implement the plan that you

25   wanted; it said we don't want to do facility by

74

1   facility, because we want you to figure out where you

2   need to implement.

3   So, your plan didn't do that; why? Either

4   in your 5-year plan or in your 2-year plan.

5   MR. PHILLIPS: Because the district court's

6   order said you are going to have to reach 137.5 percent

7   in two years, period. That's the categorical rule, and

8   the first time we went in to suggest something above 137

9   and a half, Judge Henderson said, "I'm not hearing

10   that."

11   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12   Mr. Phillips, Mr. Specter.

13   The case is submitted.

14   (Whereupon, at 12:31 p.m., the case in the

15   above-entitled matter was submitted.)

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A

able 19:2 45:7,7
45:9,12 46:1
above-entitled
1:12 75:15
absence 36:7
absolute 74:24
absolutely 4:8
14:14 17:1
25:19 54:18
abundance 58:21
accept 18:7
accepted 53:13
access 33:13
accommodate
21:20
accomplish
25:15
accomplished
70:22
accorded 4:25
account 14:7
57:18,19,21
accurately 9:10
37:17
achieving 20:16
acknowledges
15:17
act 18:13 20:7
31:22 34:18
47:8 49:17
56:23 62:11,16
action 67:12
actions 11:25
12:1
actual 41:13
72:17,19
add 5:15
added 53:13
additional 13:6
28:15 33:16
53:14 55:11
address 23:3
29:6 36:14

42:24 43:15
44:9,14
addressing 44:15
45:17 60:16
adequacy 36:15
adequate 14:11
14:22 52:19
71:6
adhering 30:7
administered 8:8
administration's
57:23
admits 26:17
admitted 40:2
adopt 74:11
adult 39:17
adversary's
36:14
adverse 47:9,18
47:24 50:13
affidavit 23:16
affirm 11:17
24:15
age 55:16,16
ago 6:8
agree 15:25 16:1
39:19
agreed 17:25
ahead 3:24 5:22
22:14
aim 44:15
aimed 18:10
air 74:8
AL 1:4,7
Alito 11:19,21
22:18,23,24
23:2,11,14
24:17 40:13,23
41:14,21 42:16
43:14 44:7,12
44:17 45:16,23
46:4 55:25 56:9
56:13 63:9,13
64:5,12,20 65:4

66:21
Alito's 58:2
allow 5:2 21:22
51:5
allowed 22:24
23:1 60:9
allowing 30:24
alternative 5:8
69:6 71:13
alternatives
64:25
altogether 42:25
Amendment
25:18 35:3
amicus 23:3,8,15
25:1 46:5
amount 32:7
39:23 56:25
70:12,22
amounts 36:19
37:5 45:4
ample 58:20
analysis 29:24
32:21
analyze 30:2
49:23
analyzed 19:1
43:25 44:1
angry 13:23
annoyed 34:18
answer 10:18,18
13:8 19:23,25
20:4 31:17
43:20 49:13
58:2 59:5,8
68:17 69:4
anytime 73:16
anyway 18:7
appealed 66:1
APPEARANC...
1:15
Appellants 1:17
2:4,10 3:8
71:17

Appellees 1:19
2:7 35:23
Appellee's 43:21
appendix 36:22
43:21 54:21
71:22 73:11
appointed 4:19
7:15 16:5 29:16
32:5
appointment
6:17
appointments
65:18
approach 9:1
approaching 8:9
appropriate 3:21
23:18 27:1 30:6
34:20
appropriateness
34:25
approvals 27:14
27:15
approve 10:5,6,7
approved 10:2
10:10 28:19
arbitrarily 30:9
argue 52:16
argued 38:24
argument 1:13
2:2,5,8 3:4,7
6:13 35:22
39:10 40:1
71:16
armed 46:11
ARNOLD 1:3
asked 10:20
28:15 54:1
asking 8:15 29:1
29:22
asks 27:23
aspirational 74:9
assaults 46:11
assessment
32:11 55:23

64:8
assistant 72:11
assume 35:10
assuming 70:7
assumption 28:6
attempt 39:12
attend 40:25
41:24
attention 20:21
attentiveness
17:7
attitude 32:9
August 7:24
11:24 15:11
18:25 30:9
37:25 38:9 39:2
authority 17:13
33:11
available 40:25
41:2,23 42:4
average 15:5,7
36:6
avoid 14:17,19
aware 38:13 58:7
A.B 6:18 11:25
12:1
a.m 1:14 3:2

B

back 5:25 8:9,20
8:22 11:11 13:1
13:10 17:2,10
27:3 32:3,20
34:11 35:17
45:25 53:25
58:2 60:9 61:3
62:7
backwards 61:14
bad 20:25
balancing 14:6
bang 69:6
based 32:21
40:10 44:2,18
46:14,14 65:12
74:9

basic 13:8 69:17
basically 5:19
  70:14
basis 48:6 58:20
beginning 29:3,9
  57:6
behalf 1:16,18
  2:4,7,10 3:8
  35:23 71:17
belief 28:6
believe 16:12
  45:25 54:17
  60:22 61:25
  68:5,8 69:3,12
  70:18 72:19
  73:2
believed 57:25
  70:14
believer 23:8
believes 9:18
  44:18
bend 61:14
beneficial 34:10
benefit 58:22
Berkeley 1:18
best 9:5 14:8,10
  14:24 29:25
  50:2 59:19
better 11:5 23:12
  43:19 52:3
  57:22 69:6
beyond 29:23
  30:16
big 9:9,9,16
  19:11 25:14
  26:10
biggest 25:17
billion 8:1 9:22
  10:21,23 19:25
  26:3 27:11 28:2
  28:11 32:7
  68:13,15
bit 22:19 61:24
blank 50:21

blocked 34:5
board 74:14
box 73:20
Breyer 9:5,15
  10:1,4,9,12,17
  11:3,14 19:10
  25:22 26:16,19
  54:19 55:1,4,7
  55:19 66:2,19
  66:23
Breyer's 69:4
brief 9:7 11:16
  19:14 23:3,15
  23:21,23 24:8,9
  25:1 27:11
  30:13 39:11
  43:21 46:5
briefing 38:25
  39:9
briefs 5:7 23:8
  25:24 54:12
bring 16:14 19:2
  29:19 31:3 32:9
  61:10 62:4
broken 6:20
broom 18:18
buck 69:7
budget 28:13
  68:1 73:7,7
build 43:14 64:21
  67:18,19
building 9:22
  66:10
buildings 9:23
built 28:19 42:6,7
  51:11 58:4
  68:25 69:2
bump 58:23
burden 31:11,13
  31:23

C

C 2:1 3:1
California 1:4,18
  3:15 14:8,11,14

17:4,13 22:10
26:7 27:20
45:18 46:5,12
49:3 60:14 63:4
63:7 64:7 65:10
73:19
called 25:12 66:8
  66:17
camps 66:15,15
candidly 21:23
  24:3
cap 18:8
capacity 8:18
  40:21 41:8,9,17
  43:10,11 57:16
captured 37:18
care 8:2,8,12
  9:17,19,21 11:8
  14:12,21 17:7
  32:7 33:6,7,13
  40:16 41:23
  42:21 45:14,20
  52:19 69:17
cars 20:25
CARTER 1:16
  2:3,9 3:7 71:16
case 3:4,16 4:1,7
  4:15,15 7:1,10
  8:12,24 9:11
  11:18,24 15:11
  17:23,24 20:15
  20:22 21:25
  24:5,24 29:3
  31:13 38:24
  39:13 42:5 45:2
  45:3 62:2,22
  65:21 67:11,22
  67:24 68:23
  69:12 71:10
  75:13,14
cases 3:5 29:2,9
  32:14 52:12
  62:20
categorical 75:7

category 55:17
cause 7:11,12
  9:9,16 15:20
  17:2 20:23
  21:12 29:6,24
  30:4
caused 36:2,24
caution 58:22
CDCR 33:6
  72:11
cell 42:10
cells 36:3 41:16
  41:22 42:2
  43:15 64:21
cert 50:4
certain 24:16
  66:15 69:3
certainly 9:18
  11:5 24:25 25:5
  56:22
cetera 16:22
challenged 58:16
change 4:10 7:17
  8:22·12:14
changed 8:11
  60:11 61:10
changes 8:7
  34:10 60:13
characterization
  6:4
charge 72:12
check 27:23
Chief 3:3,9 31:16
  35:18,20,21,24
  39:4,14 47:6,12
  47:16,20 48:2
  48:10,21 49:6,9
  49:12,15 50:7
  50:16 52:22,24
  53:3 59:4,7
  62:1 63:18,22
  67:7,23 68:8
  71:14,18 75:11
Chino 49:2,2

choice 68:24
choices 69:11,14
choose 51:5 53:9
  69:5
chooses 43:9
  69:1
circumstance
  30:8
circumstances
  4:23 8:7,11,22
  16:25 17:8 18:7
  28:22 32:23
  33:2 35:13
  59:20 60:11
  61:10 62:18,19
cited 56:1
citizen 45:18
claim 8:16 20:15
claimed 20:17
clarified 24:16
clarify 65:14
class 4:19,21
  18:11,14,16,16
  42:18
clear 11:17 31:22
  34:13 50:19
  53:23 67:1 72:8
  72:8
clearly 23:12
  34:18 50:20
  51:3 52:16
  58:16
click 69:25
clients 59:1
clinics 7:4 17:21
  18:16
close 6:23 19:25
  38:18 61:25
closed 38:23
  39:7
closest 29:9
closet 18:18
club 23:25
Coleman 4:21

32:17,20 43:21
43:22,23
collateral 45:17
come 3:19 8:22
13:1,10 19:25
27:9,10 37:20
45:25 47:13
60:9 61:9
comes 62:7
coming 34:16
comity 50:2
69:10
commission 25:8
commit 64:14,24
committed 17:1
55:11
committee 28:13
committing 36:5
commonly 48:16
communities
63:8
community 65:1
compare 70:7
complained
23:19
complete 35:7
completely 25:20
compliance
16:14 29:20
32:10,12 72:14
comply 16:13
20:9 44:10 50:9
68:12 73:3
comprehensive
27:5 29:19
compressed
73:17
compromise 11:7
concede 31:11
conceded 31:7,8
concedes 70:7
concern 65:5
concerned 45:19
73:25

concerns 67:8
concession 69:22
conclude 26:24
32:19
concluded 67:5
concludes 27:1
65:3
conclusion 5:14
11:7 25:5,9
46:17 47:3,4
54:21,22
conclusions
39:12
concrete 5:23
6:13
conditions 19:20
37:6,7,10 38:2
38:13 44:4 54:3
54:14,14 61:7
conduct 25:20
confer 17:12
conferred 5:3
conflicting 68:10
confusing 30:13
Congress 8:25
19:7 21:3,18
56:13
conjunction
74:19
connection 40:14
41:25
connections 4:20
consent 7:16
65:25
consequences
45:18
consider 37:23
37:23
considerable
56:18
considered 40:6
40:7
considering 40:8
consistent 21:11

24:25 25:1
consistently 19:1
33:10
consists 23:15
Constitution
16:15 68:6,12
69:15
constitutional
5:16 7:11,12
9:19 10:14 11:8
14:12,13 15:16
17:3,4 21:12
22:2 25:16 26:2
26:16,19 31:7,8
31:12,20 32:10
32:12 35:9,11
35:15 36:20
37:21 40:15
50:3 52:11 58:8
61:8 68:14,20
74:10
constitutionally
24:22 35:2
50:11 52:19
constraints
16:22
construct 43:9
70:17,18 71:9
constructed
71:11
construction 5:9
5:11 6:20 7:18
7:21 8:1 10:3
11:6 19:4 27:21
28:7,20 33:13
40:3 42:21 43:8
70:25 71:6,12
contempt 10:20
13:15
context 9:2 23:24
23:25 24:14,18
61:22 63:4
71:23
continue 36:25

continued 56:7
contrary 40:11
44:17
contributed 46:2
controlling 33:5
convene 27:1
convened 4:22
26:25
convenes 29:18
cooperation 22:9
coordinates 22:8
core 13:7
correct 4:3 22:21
29:22 37:4
40:22 57:9 61:7
Correction 46:21
corrections
17:14,16 21:21
48:20 55:22
cost 46:9
counsel 6:7
31:15 33:14
34:8 35:18
45:15 50:25
51:8 52:1,23
59:8 67:7 68:9
71:14 73:9
75:11
couple 53:14
course 4:25 6:16
15:13 20:22
21:3,22 22:6
25:21 51:10
52:3
court 1:1,13 3:10
3:11,13,23 4:7
4:7 5:8 8:10,15
8:19 9:1 11:1
11:17 13:3,13
15:15,22 16:8
16:24 20:8,10
22:12,15,21
24:11,15 25:6
26:23,25 27:4

29:10,17,17,22
30:1,6,7,8
31:19 32:19
33:23 34:6,7,12
34:13,24 35:25
36:22 37:22
38:21,21,23,23
38:25 41:7
42:13 43:5,22
43:23,25,25
44:17,25 46:13
47:7,9,22 48:15
48:22 49:16,24
49:25,25 50:21
51:1,7 52:3
53:4,14 54:16
54:22 56:18
57:17 58:15,20
60:9 61:11,11
61:17 62:3,11
62:16 64:1,3,8
64:9 65:13,24
67:1,11,13,14
67:19 68:13,21
69:8,12,23 70:8
70:13,24 71:12
72:7 73:2,23,25
74:23,23
courts 63:6 68:3
68:6,11
court's 36:12
50:18 51:22
75:5
credibility 40:10
credit 60:14
credits 12:14
39:24 46:23
51:17,19,24
60:15 66:6
70:20
crime 46:2,19
47:5 56:6 61:2
63:8 64:15
66:24 67:6

73:18
crimes 55:11
  64:24 65:10,16
criminologists
  55:9
crisis 5:11 36:1
critical 44:23
crowded 17:6
  41:16,22 42:3
  57:16
crowding 43:5,7
  44:22,23,25
  45:22 46:18,24
  48:17 64:18
culture 7:13,17
cure 5:16 10:13
  18:1,3 26:2,9
  26:13
current 11:7,8,15
  36:9 37:10,11
  37:15 38:2
  50:23,23 54:14
  54:15
currently 3:14
  32:6
cut 15:11 30:9
  39:6
cutoff 30:22 38:7

D

D 3:1
damage 67:12
date 30:17 36:9
  38:7
day 37:5 54:15
  68:2
days 14:20 33:25
  33:25,25 39:1
dazed 14:20
deal 8:4 18:18
  28:2 62:13
dealing 7:6 18:19
  29:12 31:20
  52:12
dealt 44:22

death 15:2 52:13
deaths 14:18
December 38:19
  38:24 39:7
decent 8:9,12
deciding 20:9
decision 8:19
  15:24 39:1
  62:17
decisions 33:11
declaration
  72:13,17,17,20
declaring 12:17
decline 39:21
declined 39:17
  39:20
decrease 33:17
deferring 30:7
deficiencies
  36:24
degree 62:20
  69:13
deliberate 25:19
deliver 14:11,21
  60:5 61:8
density 11:9
Department
  17:14,15 21:21
  46:20 55:22
dependent 27:14
depends 4:14
  20:18 26:14
  63:11
describe 36:23
described 9:11
  24:17 64:1,3
description 9:12
design 8:18,18
  18:8 40:20 41:9
  41:17
desires 61:12
Desseimer 72:11
details 5:23
determinations

40:10 48:3
determine 30:2
  35:14 48:4 50:2
determined 47:8
develop 16:8
developments
  30:10,11
devised 32:5
diagnosis 33:24
die 69:18 73:19
difference 16:23
  25:14 30:24
  63:2 70:18
differences 73:7
  73:7
different 27:3
  32:22 42:24
  53:4 56:12,12
  67:10 68:11
  72:23
differential 70:1
difficult 21:15
direction 22:12
  32:8
directly 42:23
  44:9
disabled 67:14
disagree 48:8
  57:12
disagreement
  37:17
disconnect 35:8
  41:3
discounted 61:24
discovered 9:17
discovery 30:16
  30:18 33:22
  38:6
discrete 43:22
  44:5 74:17
discretion 56:18
  61:15 74:24
discuss 53:4
discussed 61:22

discussion 46:7
dispute 39:14
disregard 7:13
distinguished
  40:9
district 3:13,22
  4:6,7 8:10,15
  8:19 16:24
  17:23 20:10
  30:7,8 34:6,7
  34:23 38:21
  47:7,22 48:22
  49:16 53:3,18
  54:22 56:17
  57:17 60:9 62:3
  62:11 63:6
  67:11,18 68:3
  68:11 73:25
  75:5
diversion 64:25
  70:20
divert 64:22
doctors 43:19
  45:9·
doing 18:2
dollars 7:25
DONALD 1:18
  2:6 35:22
doors 43:6
double 47:21
double-cell 42:6
  42:8
doubt 32:18
  58:23
doubts 21:25
downward 15:4
dramatically
  8:25
dropped 11:23
  12:13
due 39:21
Duke 57:14
duty 21:4 50:9
D.C 1:9,16

E

E 2:1 3:1,1
ear 51:3
earlier 28:2 61:3
early 4:18
earmarked
  27:19
economic 73:7
education 67:14
effect 25:3 46:7
  57:2 60:18,21
  60:24,25 61:6
  65:6,9 66:6
effective 41:12
  44:19 56:7,8
  59:12 67:2
efficacious 21:6
  61:18
effort 37:15 51:4
efforts 12:8
  56:10 72:15
Eighth 25:18
  35:2
either 20:15,15
  24:25 27:3
  42:19 68:24
  75:3
elderly 66:4
elected 39:24
element 25:18
elements 74:2,2
  74:17,17
eliminated 25:20
emergency
  12:17
emphasize 60:8
  64:17
emphatically
  47:17
employees 21:1
enable 41:10
enacted 6:19
  56:14
enactments

79

48:19
enforce 68:6
enormous 28:21
  30:10,11 32:6
ensure 50:10
enter 72:10
entered 31:21
entering 62:3
entertaining
  34:14
entire 17:13,15
  74:12
entirety 8:16
entitled 16:12
environmental
  67:12
envisions 21:18
equity 9:2 27:4
  31:20
equivalent 11:6
equivocal 60:6
erroneous 50:20
  51:3 52:16
  58:17
error 29:22
  54:17 67:1
escape 69:18
ESQ 1:16,18 2:3
  2:6,9
essentially 29:11
et 1:4,7 16:22
etched 28:5
evaluate 74:15
  74:16
evaluated 11:1
  74:1
eventually 18:24
everybody 17:25
  25:25 29:19
everything's
  37:20,21
evidence 10:12
  10:18,19 19:12
  31:4 32:24

33:15,16 34:14
34:24 36:19
37:2,5,24 38:18
38:23 39:6,9
40:2,5,7,8,9,11
45:4 46:25
51:22,23 52:14
54:3,6,12 55:8
57:5 58:17,25
66:2,12,20,25
72:5,7 74:7
evidence-based
  56:2
exact 35:14
exactly 35:8
  38:14 43:16
  45:1 65:5
examine 20:11
  47:22
examined 48:15
example 19:15
  46:22 55:9
  65:18 66:15
excluded 54:7,10
  54:13,16
Excuse 5:6
exercise 74:13
exist 5:13 36:25
existed 4:17
  36:20 38:13
exists 74:10
expect 33:10
expectation
  27:20 28:6,16
expenditures
  12:2
expensive 67:3
experience
  65:13
expert 21:8
  46:14 57:4
  58:14 59:13,16
  59:18,19
expertise 60:3

experts 15:21
  25:2,4,25 37:24
  38:1,12 42:15
  44:20 46:15,16
  46:16 56:5
  57:10,20,25
  58:6,7,15 59:6
  59:10 62:8 65:7
expire 35:19
explain 23:5
  30:12 40:14
  41:4
explains 23:4
explicit 19:7
explicitly 61:21
extended 46:6
extent 41:1
  72:14
extra 58:24
extraordinarily
  3:18
extraordinary
  3:12 4:24 5:3
  6:22 17:12
extreme 31:25
extremely 61:13

F

facilities 5:15
  6:21 7:8 18:21
  19:18,19 28:22
  30:15 36:4
  39:17 41:2,11
  41:23 42:3,21
  42:22 43:10
  58:3 66:8 70:17
facility 17:14
  28:19 74:16,16
  74:25 75:1
fact 6:5,25 21:23
  22:4 29:25 31:5
  37:23 40:10
  44:1 53:12
  54:13 58:7
  61:23 62:13

facts 29:1,12
  44:18 55:20
factual 13:8
fact-finding
  29:14
failure 22:3 64:1
fair 6:3 9:12
  53:17
fairly 21:2
familiar 46:8
farther 11:5
fast 69:24
favor 46:22
February 38:25
  39:10
feces 14:20
Federal 18:12
  20:8 68:3,5,20
  68:21 69:23
federalism 13:8
  14:2
fewer 7:4,7 18:9
fighting 13:18,21
  13:22
figure 40:15,18
  42:13 56:19
  57:13,17 59:23
  61:22,25 62:9
  63:3 65:2,4,15
  75:1
figures 36:9,10
  65:19
file 24:8,9
filed 23:21,23
final 38:17 53:12
finalized 29:18
find 19:10
finding 44:1
  50:22,24 51:22
  53:19 61:16
findings 20:4
  41:7 50:18
  52:15,17 63:6
fine 24:19 37:20

finish 11:20
finished 28:8
first 6:18 7:5,6
  9:11 11:1 13:9
  15:1 17:19 18:2
  20:10 21:11
  25:17 29:15,20
  30:2 31:17 43:3
  61:13 63:19,20
  64:17 65:22,22
  65:23 71:19
  75:8
fiscal 5:10
fix 74:14
flaws 21:24
flexibility 50:2
  51:5 69:13
flippant 68:18
focus 15:23
follow 68:19
footnote 27:12
  27:13
force 25:7
formal 30:24
format 56:14
former 57:14
forth 33:23
forthcoming
  27:16
forward 27:21
  31:3 34:16,21
found 44:18 45:1
  46:14 56:5
  57:17 58:15,20
  62:23,24 64:8,9
  65:13 67:1
  70:13 71:12
frame 16:11
frankly 4:16
free 61:9
friend 37:14,16
  39:19
full 9:4
function 18:17

fundamental
7:10,17 8:24
10:25 16:22
17:6 18:23
29:13,15,21
36:23
funded 28:11
futile 34:18

G

G 1:16 2:3,9 3:1
3:7 71:16
gambit 10:23
gamut 66:11
gates 43:6
general 40:17
44:3 56:9 63:13
generally 29:10
31:14 56:11
getting 10:20
Ginsburg 4:1,4,5
4:9,10,12 6:25
7:9,20 8:6,13
12:5 17:17 18:4
18:14,22 23:20
27:8,24 28:1,12
28:23 30:12
31:10,18 32:13
52:10 60:12,23
65:20
Ginsburg's 31:17
give 5:23 6:13
9:3 11:2 26:5
28:14 37:8 47:9
49:20 50:1 51:4
58:22 61:14
62:8,16 74:22
given 4:23 5:18
7:5 11:25 15:15
16:8,21 44:5
56:18
gives 48:5
giving 51:24
go 8:9,20 17:2,10
20:9 22:15,15

25:23 27:3 29:6
30:16 31:25
32:3,20 42:23
55:13 59:22
66:4 68:1
goal 69:22
goes 10:24 12:8
14:2 30:25
43:16 56:17
65:4,8
going 3:24 12:19
12:25 13:3,4
14:16,17,19,20
14:21,22 17:20
18:1,1 22:13,13
22:14 27:21
28:7,14 29:5
31:24 35:8,10
35:10 37:19
42:18 43:15
44:13,25 45:24
46:12 47:18,23
51:15 53:25
56:24 58:23
62:13 64:14
65:5,6 67:25
69:2 71:5,10
73:16,18,19
74:14 75:6
good 12:14 39:24
46:23 51:17,19
51:24 55:13
60:13,15 66:5
70:20
gotten 5:11
governor 1:3
26:20 28:17,17
48:16,17 49:1
57:14 63:25
70:10,14
governor's 12:16
25:8,8
governor-elect
28:18

grave 65:18
great 8:4,7 42:17
greater 31:3
ground 6:20
group 57:14
group's 19:14
growing 5:21
guarantee 73:17
guess 55:14,16
guest 21:1
guidance 22:7
gun 22:12

H

half 75:9
halfway 56:19
66:7,14
hammer 16:23
hand 13:16
happen 9:25
11:12 25:23
26:9,11,12,22
46:12 51:15
64:10
happened 33:18
64:10
happens 67:10
harm 44:6 62:21
health 7:8 8:2,12
11:8 17:16
19:18 22:3,9
26:21 32:7
33:13 38:3
healthcare 42:7
42:11 57:18,19
57:21 58:3,5
60:3,5 61:23
72:12
hear 3:3 24:11
heard 44:20
52:14
hearing 75:9
help 33:11 56:6
74:19
Henderson 75:9

high 12:12 57:17
higher 66:24
highway 20:24
20:24
high-risk 63:12
hip 33:4
hire 43:18
hiring 5:13 6:23
42:22
hit 12:19,24 13:2
homicides 15:6
Honor 14:25
23:17 36:12,18
37:3 38:6,14
40:6,22 41:6,20
42:12 44:16
46:13 47:11,15
48:23 51:16
52:9 53:10,16
53:22 54:5,12
55:18 56:3,21
57:13 59:12,25
61:20 65:15
66:18,22 67:21
68:18
hope 11:2 42:5
hopefully 21:19
horrendous 9:10
9:13 19:13 44:3
hotel 20:23,25
houses 66:7,14
housing 42:9
huge 30:23
human 26:10
hundreds 7:25
hurt 49:19
hypothetical
62:2,19

I

idea 18:8
identify 55:23
ill 17:5 18:19
41:13,13
illness 40:17

41:1 42:22,23
illnesses 36:3
immediate 13:3
impact 47:9,18
47:24 50:13
72:25 73:22
74:1
impediment
21:13
implement 5:2
12:23 16:9
73:13,15 74:20
74:24 75:2
implementation
21:14
implemented
5:19 16:5 18:9
70:21
implementing
27:6
implements
50:10
implications
62:17
important 13:11
15:9 24:13 43:3
53:25
impose 68:22
imposed 21:4
24:24 36:17,21
38:16 48:7 69:8
imposing 53:8
impossible 8:12
improve 64:23
improvement
13:17 15:8
improvements
31:5
inappropriate
35:5
incarcerate
68:24,25 69:1
incarcerated
3:14

incarcerates 14:12

incarcerating 69:16

incarceration 69:14

include 65:16

includes 65:15 65:16

increase 39:24 43:10,11,12 46:2,19 47:5 61:2 63:8 67:6

increased 7:18 66:7

increases 63:7

increasing 46:23

incredible 17:16

incredibly 61:11

incur 69:2

independent 30:3

indicate 57:5

indication 69:24

indifference 25:19

indirect 45:16

individual 17:13

ineffective 43:24

infection 19:20

infirm 66:4

information 12:5 28:16 60:18

informed 65:19

inherent 4:17

inhibit 45:14

initial 13:12

initially 11:13

injury 52:13

inmate 7:13

inmates 3:14 32:1 39:18 73:14,16

inquiry 30:5

insisted 24:22

insisting 31:25

inspection 30:19

instance 11:1 20:10 25:17 29:20 30:2 70:3

instituted 32:15

institutional 67:8 72:6

instrument 55:23 64:8

interest 14:8,10

interests 21:20 21:21,22

interim 31:4

intermediate 66:17

interpret 18:6

intervening 72:4

intervenors 31:2 39:16 46:16 56:4 71:23

Intervenor's 34:8

intrusion 58:19

intrusive 61:5

invited 8:21 13:1 34:24

involved 29:2

issue 7:10 19:1 33:14 42:25 48:6 57:20,20 58:20

issued 3:12 39:2 39:11

issues 23:4

___

J

January 60:19

job 50:6

joined 33:3

joint 28:13 71:22

judge 3:13 17:23 33:15 53:18 61:17 72:6 75:9

judges 20:3 29:2 29:8 34:19

July 60:21

jumped 22:12

jurisdictional 24:4 36:22 47:25 73:11

jurisdictions 65:13

Justice 3:3,9 4:1 4:3,5,9,10,12 5:6 6:7,12,25 7:9,20 8:6,13 8:20,24 9:5,15 10:1,4,9,12,17 11:3,14,19,21 12:5,18,22 13:18,21 14:3 14:10,16,23 15:10,13,19,25 16:6,10,16,21 17:11,17 18:4 18:14,22 19:10 20:14,20 21:25 22:18,22,24 23:2,11,14,20 24:17 25:2,7,11 25:22 26:16,19 27:8,24 28:1,12 28:22,24 30:12 31:6,10,15,16 31:17,18 32:13 33:14,21 34:4 34:23 35:6,16 35:17,18,20,21 35:24 36:8,13 37:1,8,10,13 37:17 38:4,7,11 38:15,20 39:4 39:14 40:1,12 40:13,23 41:14 41:21 42:16 43:14 44:7,12 44:17 45:4,15

45:16,23 46:4 47:6,12,16,20 48:2,10,21 49:6 49:9,12,15 50:7 50:16,25 51:8,9 51:14,19 52:1,2 52:7,10,22,23 52:24,24 53:1,3 53:3,7,11,17 53:24 54:1,6,9 54:19,20 55:1,4 55:7,19,25 56:9 56:13,16,22 57:2,8 58:2,6 58:11,25 59:4,6 59:7,13,16,22 60:1,4,12,23 61:4,16 62:1 63:9,13,18,22 64:5,12,20 65:4 65:20 66:2,19 66:21,23 67:7 67:23 68:8 69:4 69:21 70:6,24 71:3,5,14,18 72:1,16,21,22 73:4,6,21 74:6 74:22 75:11

___

K

Kagan 16:6,11 28:24 52:2,7 72:22 73:4,6,21

Karlton 72:6

keep 24:14 34:5 39:5

keeps 5:21

Kennedy 15:13 15:19,25 16:16 16:21 17:11 20:14,20 21:25 25:2,7,11 31:6 38:7,11 40:1 45:4 56:16,22 57:2,8 58:6,11

58:25 61:4,16 69:21 70:6

Kennedy's 35:17 74:6

killing 19:18

kind 24:18 30:1 33:11 44:13 69:9

kinds 43:20 55:8 66:7

know 7:24 10:15 12:13 14:5,5 16:2,21 19:4 23:7 24:7,10 25:23 27:22 29:1,11 31:9 33:17 35:12 48:1 51:11,14 51:21 52:4 56:15 60:23 61:18 62:2 65:8 67:23 72:16

___

L

lack 17:7

language 21:12

languish 36:3

larger 19:3

Laughter 48:11 48:13

law 23:4 29:25 60:15 68:20,20

laws 68:7,20

lawsuits 42:19 44:15

lead 55:14

leap 22:14

leapfrogged 3:23

led 61:2

left 71:15

legal 29:22

legislation 48:24 60:18 73:14

legislative 28:13 48:19

legislature 5:10
9:23 10:2 11:25
12:1 26:3 48:24
48:25 60:14
68:3 70:11
length 4:13
lesser 69:1
let's 59:22 62:3
level 13:6 44:6
levels 9:19 11:9
11:16,23 50:23
50:23
life 52:12
life-threatening
36:3
limit 13:4
limited 18:16
line 73:12,12,14
listening 28:25
lists 43:21
literal 42:9
literally 7:24
litigation 18:12
20:7 24:5 31:22
47:8 56:23
62:11,15 67:9
little 22:19 43:2
61:24
local 56:4
lockdowns 45:13
logical 4:25
long 24:11
longer 4:11 8:11
31:13 35:1
70:15,16
long-time 23:8
look 6:15 9:21
15:1 18:25
19:10,17,21
22:13 37:18
47:13 49:15
51:3 62:8 71:21
73:10
looked 19:12,22

19:22 53:11
looking 20:23
27:11 29:23
47:1,25
lot 12:2 26:7
54:24 63:5
67:10 70:2
lots 65:16
low 55:23
lowest 64:4,5
low-risk 63:16
64:13,13

M

magnitude 50:19
main 56:1
Majin 57:14
major 70:18
majority 42:18
58:15
making 5:5 23:24
34:19 54:10,10
69:10
management
41:12 43:19
manner 52:20,20
MARCIANO
1:7
marginal 39:23
60:25
mark 12:19,25
massive 21:7
36:19 37:4 45:4
master 4:21 6:1
7:2 17:23 19:24
22:8 23:23 24:8
33:3,6 44:2
matter 1:12 9:2
9:19 12:7 62:5
75:15
matters 74:16,16
maximize 5:14
58:19
maximum 41:8
50:1 51:4 69:13

mean 8:16 9:3
12:15 15:1 16:7
16:11 17:4,22
20:19 21:2,10
21:24 23:10
24:9 25:4,23,24
26:6,10 28:1
51:9 68:18
71:23 73:1,8,19
means 5:24 21:5
56:23 73:4
meant 53:23
measure 36:16
64:18
measured 36:15
medical 8:8 17:7
17:16,21 18:20
19:19 33:6
40:16,25 41:23
42:21 69:17
medication 41:12
43:19
meet 42:9,10
50:12 69:22
member 34:12
mental 9:11
19:17 22:3,9
38:3 40:17 41:1
42:22,23
mentally 17:5
18:19
mentioned 41:11
met 13:15
method 50:6
methods 46:17
48:15 51:6
70:19
million 27:9,10
27:17
millions 7:25
mind 24:11,14
35:7
minimize 58:18
minimum 3:18

56:25
minutes 71:15
missed 65:17
mistake 33:2
mixed 29:25
modify 60:10,10
moment 20:21
21:25 25:23
money 7:21 10:8
26:1,7 27:13,21
28:7,14,18 32:7
66:9 67:17,19
67:25 71:7,9
month 39:10
months 29:16
38:8 54:3
motion 10:21
13:15 29:17
61:10
motivated 24:7
movement 22:11
moving 8:10
28:20 32:8
multibillion-dol...
10:3
murders 46:10

N

N 2:1,1 3:1
narrow 71:12
narrowly 27:2
41:4 71:1
national 36:6
necessary 18:10
57:11
need 5:16 10:9
10:10 20:24
25:15 26:1
30:18 69:17
73:14 75:2
needed 16:2,7
needless 14:17
needs 40:25 42:8
42:9,11 57:18
57:19,21 61:12

negative 47:21
neither 18:10
never 5:22 20:16
73:17
nevertheless
10:2 13:11 19:6
new 26:8 40:3
43:9 51:11
66:10 71:9
newer 32:15
newspaper 26:6
note 28:3
notion 34:16
notwithstanding
13:16 73:6
November 1:10
38:10
number 12:15
20:24 21:1
40:19,24 41:8
46:6,10,10,11
46:11 54:19
57:22,22,24
58:11 63:7,20
64:2,25 65:1
69:1 74:8
numbers 7:18
19:4

O

O 2:1 3:1
object 16:18
24:10
objected 31:1
objecting 13:25
objection 7:16
obligation 14:13
52:18 68:6,19
68:22 74:4
obligations 67:16
69:3
obvious 19:17
obviously 4:13
10:21 16:12
23:10,18 24:19

27:3 32:17
65:24
October 39:16
39:16
offer 64:24
offered 40:5
officer 17:18
officers 45:11
official 51:23
oh 6:7 49:18
Okay 9:23 10:9
55:20 66:10
old 55:15,15
older 66:6
ones 63:12
one-judge 38:21
ongoing 52:11
on-line 19:12
open 21:15 23:9
43:6
opening 10:23
34:9
operate 7:8
17:22 20:13
45:7 57:16
opinion 20:2
36:12 39:3 40:7
46:14 57:4
opportunity 5:2
9:4 16:13
opposed 13:24
30:6 34:11
opposite 35:14
option 5:12,12
options 65:1
oral 1:12 2:2,5
3:7 35:22
order 3:12,16,19
3:22 5:18 8:17
11:18 13:3
16:24 19:8
20:15 22:16
24:23 25:15
31:21 32:9,23

38:18 39:3 40:9
42:16,19 43:4,5
44:12,12,13
45:21 46:7
56:24 57:3
58:21 59:11
60:10 61:5,13
62:3 65:8 67:19
69:23 73:14
75:6
ordered 21:5
44:8 48:22 51:7
70:8
ordering 42:20
43:6,18,19 48:4
49:18 67:11
orders 4:6 16:14
20:11,12 43:22
44:5 68:11
ordinary 31:19
organized 57:15
originally 19:5
ought 30:1 32:20
57:6
outcome 26:25
outer 60:7
outside 5:17 6:1
18:18
outweigh 62:21
out-of-State
39:22
out-of-time 24:8
24:9
overall 63:15
overcrowding
6:2 7:1 9:9,16
15:19,20 17:3
20:22 21:5 30:3
36:1,25 42:14
45:6,6 58:8
overturning 48:6

P

P 3:1
page 2:2 9:7,11

19:14 27:12
36:22 47:25
54:21 55:4 72:1
pages 20:3 46:14
55:7
panel 4:22 8:21
12:23 26:24
37:18 40:6
43:11 53:18
62:24 67:5
panel's 26:12
paragraphs 9:7,8
9:12
pardon 59:1,15
parole 55:10
63:5 64:1,23,23
65:17 66:3 70:4
70:5,20
parolee 63:12
parolees 60:16
63:7,10,21
part 21:8 22:14
24:5,13 43:17
66:20 67:4
particular 3:16
3:25 4:15 8:3
11:18,24 24:20
24:24 27:19
28:22 67:22,24
68:23 73:20
74:11
particularly 3:17
6:17 30:5
particulars 51:4
parties 39:8,13
partly 49:2
pass 60:14
passed 60:19,20
patient 52:25
penal 3:15 4:17
pending 4:2
Pennsylvania
44:20
people 7:4,7

14:12,19 18:20
19:18 42:20
43:7 51:20
54:23 55:14
64:13 65:9,17
66:6 73:18
percent 6:24
8:17 13:4 15:5
15:7 18:8 27:2
40:15,18 41:7
41:17 42:7,13
57:4,16,22 58:4
58:5,24 59:21
61:9,25 63:16
63:17,21 64:6,7
65:2,4,15 70:1
75:6
percentage 13:2
60:11 74:11
perfect 18:2
perfectly 15:24
period 3:15 6:16
7:24 12:19 13:6
13:14 21:7 31:4
32:2 43:23 46:9
47:2 48:22 61:6
61:7 63:1 70:15
70:16 73:17
75:7
permissible 21:6
24:23
perplexing 22:20
persists 15:16
personnel 17:22
18:17 19:3
40:24
perspective
10:25
Petitioners 1:5
phase 4:15
Philadelphia
46:8 64:10
Phillips 1:16 2:3
2:9 3:6,7,9 4:1

4:3,8,12 6:3,10
6:15 7:9,23
8:13,23 9:14
10:1,7,11,15
10:19 11:14,20
11:22 12:11,21
13:7,20 14:1,5
14:14,24 15:14
15:18,25 16:10
16:20 18:4,22
20:6,18 21:10
22:22 23:1,7,12
23:17 24:2 25:4
25:10,13 26:14
26:18,23 27:17
27:25 28:4,15
28:24 29:13
30:14,23 31:18
32:17 33:20
34:3,6 35:6,20
39:20 61:7
71:15,16,18
72:3,19,22 73:1
73:5,8,24 75:5
75:12
physically 66:9
pictures 19:13
19:13
pie 51:14
piece 27:8
place 6:18,21 7:4
7:14 10:5 13:5
19:4 20:11 27:4
27:5 32:4 37:19
45:12 61:14
74:19
plainer 31:23
34:7
plaintiff 31:24
plaintiffs 21:20
30:15,20 72:4,5
plaintiff's 73:9
plan 9:18,18,22
13:22 16:9,9

27:5 29:19 32:6
47:13 49:10,17
49:21,23,24
53:12 74:3,23
74:24 75:3,4,4
plants 67:20
Plata 1:7 3:4 4:19
29:3 32:25
play 22:14 32:25
played 22:17
please 3:10
35:25 59:8 72:9
plenty 41:24
PLRA 48:3
65:22
point 3:19 11:2
12:10 13:8 14:2
14:21 15:9,14
15:22 16:16
17:11,21 18:23
22:4 34:15
36:14,21 37:2
38:12 43:3,9,13
50:21 54:9 57:6
60:7,11 61:3,3
64:18 65:14
66:20 67:25
72:4 74:5
points 71:19
policies 14:6
policy 69:11,13
politicians 49:4
population 5:21
6:5 9:20 11:9
11:16,23 12:3,8
12:9 17:19,20
18:1 39:17,20
43:5,12 47:2
48:18 50:19,22
52:15 53:5 58:1
58:19 61:1
62:25 67:6
70:11 74:18
position 20:2

50:15,18
possibility 62:20
possible 12:18
52:20,21 61:5
post-trial 33:18
38:25 39:9
potential 7:6
potentially 32:1
powers 4:24 5:3
practical 62:5
preceding 15:6
55:4
precisely 18:5
prejudice 54:18
premature 3:18
present 23:9
presentation
24:20
presentations
23:22
presume 33:22
pretrial 33:19
pretty 11:23
19:13 23:8
66:16
preventable 36:7
prevents 69:15
primarily 36:24
primary 21:12,13
29:24 30:4 45:5
principal 15:20
15:20
prior 23:5,5
prioritization
68:1
prison 41:9,9,16
41:21 42:3
44:22 45:7,20
47:2 48:18 49:3
54:3 55:10,13
55:15 56:23
60:3 62:10,15
65:21 66:8,15
67:2,5 69:18

70:11 74:18
prisoner 19:8
22:16 32:22
46:7 47:8
prisoners 18:12
20:7 21:9 31:21
36:2,5 39:21
40:20 41:8,13
42:6,9,17 45:11
45:20,24 51:24
55:24 58:5 62:6
62:10,14 63:4,5
63:16 64:19
65:2 66:5 68:24
69:2,15 70:13
prisoner's 46:23
prisons 17:5
22:15 26:22
33:21 37:25
39:22 42:6
43:18 44:4
51:11 66:10
67:18 71:10
private 17:12
probably 3:20
probationers
60:16
problem 5:22 9:9
9:13 15:13
18:19 20:22,25
26:10,11,13,16
26:21 29:7,13
32:18 42:4,24
43:15 44:5,9
45:17 47:20
49:5 52:5 68:14
74:13
problems 4:16
18:20 29:15
32:21 44:14
62:21
proceed 21:16
process 3:19
6:23 22:16

proclamation
12:16
professional
57:25
proffer 33:15,23
34:17,24 35:1,4
71:22,24
proffered 33:19
71:21,21
proffering 54:2
program 10:3
16:5
programs 26:8
56:1,2,12 67:2
progress 5:5,20
7:3
project 28:9,12
projects 28:8,8
promote 33:7
prong 25:19
proper 23:6
properly 7:15
proposal 13:12
proposals 5:9
12:24 48:20
proposed 19:5
48:16 70:10
74:3
proposition 21:8
prove 35:11
proved 31:4
proven 43:24
provide 7:17,18
7:19,20 9:17,19
18:20 33:11
42:7 44:13 45:8
45:8 52:18,19
58:4 61:23
64:25
providing 22:4
56:1 69:17
provision 8:2
17:16 33:5
40:16 42:20

provisions 69:10
psychologist
59:24 60:2
psychosis 36:2
public 47:10,18
47:24 48:5
49:19 50:10,13
51:25 52:5
53:20 62:17,20
65:6 69:7 72:24
73:22
publicly 26:20
pulled 74:8
punishments
66:9,17 69:5,6
purpose 12:16
27:19
purposes 41:2
57:3
pursue 39:25
put 6:18 7:4,14
13:5 23:25
24:17 34:21
63:3 67:25 71:9
72:5
puzzled 54:20
p.m 75:14

Q

qualified 19:3
quality 33:12
quantity 33:12
quarrel 24:19
question 8:25
10:25 11:12,13
15:10 16:3
21:15 22:25
29:25 31:17
32:10 43:17
49:7 53:25
56:16 58:3 62:2
68:18 69:4 74:6
questions 53:1
quickest 52:20
quickly 70:3,21

quite 24:5 31:22
  58:7
quote 30:4 49:3
quoted 24:1
quoting 50:8

R

R 3:1
raised 66:21
range 66:16
rapes 46:10
rapidly 28:20
rate 36:5 47:5
  63:8,9,14
rates 66:24
reach 13:5 29:11
  41:12 62:9
  65:23 75:6
reached 25:5,8
reaches 60:7
reacting 49:1
read 9:8 26:6
  54:21 72:12
ready 11:2
real 7:11,12
  21:24
reality 11:22
  22:6 29:21 34:1
  73:15
really 5:11 13:2
  26:2 32:11
  45:24 71:9
reason 7:14
  17:10 45:5 67:4
reasonable
  13:14,14 15:24
  16:13 20:12
  42:13
reasonably
  10:22
reasons 50:2
rebuffed 72:15
REBUTTAL 2:8
  71:16
receive 72:7

received 72:13
receiver 4:19,20
  4:24 5:2,19,25
  6:4,5,16,18,22
  7:2,14 8:5 9:4,4
  9:5,15 10:11,20
  10:22 11:4,15
  16:4,7,8 17:11
  17:24 18:6
  21:22 22:8,19
  22:20 24:9,12
  24:14,15,21
  27:4,5,12,23
  28:4 29:4,16,18
  32:3,5,5,6 33:3
  33:5,10 74:19
receiver's 12:4
  15:2 16:13
  18:25 44:3
recidivism 63:9
  63:14 67:3
recognition 4:16
recognize 21:3
  56:17
recognized 25:6
recognizes 14:15
recognizing
  25:17
recollection 59:9
recommendati...
  53:13
recommended
  42:15
record 9:13 12:6
  14:18 15:11
  19:11 24:25
  30:9 33:16
  36:12 37:9
  49:16 56:9
  57:13 59:1 63:1
  71:20 72:8,18
  72:20
records 56:12
reduce 17:20

43:7 44:23,24
  45:6 46:18,24
  48:17,18 50:22
  54:23 56:6
  62:24 64:2
  70:11 74:18
reduced 34:1
  47:1 52:17
reducing 6:2
  17:19,25 53:4
  61:1 67:3
reduction 12:6
  13:14 43:5
  50:11,19 64:18
  65:21 67:5
reductions 12:3
  70:22
reference 34:19
  40:3
referred 24:3
referring 60:22
refers 19:11
reform 18:13
  20:7 31:22 47:8
  56:23 62:11,16
  64:2 67:9 70:4
  70:20
regard 13:10
rehabilitation
  56:2,10 64:24
rejected 9:23
  37:14
rejecting 26:3
rejection 13:16
relate 37:6
related 3:5 58:8
relating 40:16
relation 40:20
release 3:13 13:3
  19:8 22:16
  32:22 42:16,19
  43:4,7 45:19,21
  46:7 56:24 62:5
  64:19 73:16

released 32:2
  45:24 55:12,16
  64:14,17,21
  66:5
releases 63:4
releasing 56:25
  62:9 65:2
relied 66:14,14
relief 8:14
religious 19:14
reluctant 61:13
rely 66:13
relying 6:8,11
remarkable 3:17
remedial 4:14
remedies 53:14
  59:11 70:19
remedy 3:22 5:1
  15:21,23 16:3,4
  17:12 18:9,11
  18:15 19:8,9
  20:16 21:6,14
  22:5 25:16
  31:25 34:25
  35:4,12,12
  36:15,17,21
  37:6 38:15,17
  41:20 44:13,19
  48:6 50:3 52:18
  56:17 57:3 58:1
  61:4,18 68:22
  69:25 71:1,12
remember 11:15
  29:15
remind 70:10
remove 8:16
render 8:12
report 57:14
reported 14:18
reports 18:25
  25:25 38:1 44:3
  61:1
representation
  72:24

representations
  23:22
required 18:12
  49:17 50:11
requirements
  20:8
requires 47:8
  48:4 62:16
requiring 3:13
resolved 65:25
resort 3:22 5:1
  9:3
resources 33:12
respect 32:24
  37:4 49:7,9,17
  67:12 71:20
  74:5
respectful 48:12
respectfully 48:8
  57:12
responding 53:2
response 15:9
  34:20 39:15
responses 43:1
responsible 67:9
rest 27:18
restrictive 5:24
  6:14 66:9 69:5
result 11:7 24:23
  29:11 39:23
  62:5 66:24
reversed 5:21
review 3:11 15:2
  30:3
reviolate 63:17
re-find 29:1
re-finding 29:11
re-incarcerate
  70:4
rhetoric 5:23
rhetorical 13:11
  14:23
rigamarole 30:25
right 8:23 10:11

22:11 25:13
26:18 32:8,9
33:20 34:3 35:6
40:21 42:2
47:19 48:1 49:6
49:6,11,22
50:14,16 52:6
55:6 66:19 71:8
72:21
rights 17:5 18:12
22:2 26:10
riot 49:1,3
risk 55:22,23
63:11,15,16
64:8
robberies 46:11
ROBERTS 3:3
31:16 35:18,21
39:4,14 47:6,12
47:16,20 48:2
48:10,21 49:6,9
49:12,15 50:7
50:16 52:22,24
59:4,7 62:1
63:18,22 67:7
67:23 68:8
71:14 75:11
room 7:7,8 17:21
17:21 36:4 45:9
root 17:2 29:6
roughly 70:12
route 3:25
rug 49:5
rule 31:19 69:9
75:7
ruling 40:23
54:17
run 17:13 33:21
running 20:23

_____ S _____

S 2:1 3:1
Sacramento 49:4
safe 48:20 50:5
53:4 70:14

safeguard 56:2
safely 50:24
51:10,13,17,18
52:18 55:2
62:25 70:12,22
safest 52:20
safety 26:21
47:10,18,24
48:5 49:20
50:10,13 51:25
52:5 53:20
62:17,21 65:7
69:7 72:25
73:22 74:1
satisfied 10:23
save 66:10
saying 6:1 12:25
19:16 25:25
28:4 34:5 35:1
35:8 44:8 47:1
50:12 52:10
53:19,21 58:18
58:21 62:4,8
67:13,14,19
68:10,13 69:9
70:6
says 8:17 9:15
9:16,22 11:3,4
11:15,15 15:3
20:2 27:13
33:23 45:4 72:6
72:14 73:12
74:1
Scalia 14:23 37:1
37:10,13 38:4
38:15,20 51:9
51:14,19 54:1
scheduled 28:9
scheme 33:9
Schwarzenegger
1:3 3:4
scope 3:20
scrupulous 40:8
season 23:9

second 6:18,22
13:9 43:17
53:24
secretary 46:20
46:21 48:19
63:25 72:11
secured 27:15
see 5:4,12 35:18
41:14 49:16
58:25 61:16
65:9,9,10 66:3
seek 8:16
sense 10:22
21:19 33:3,4
74:7,15
sensitive 61:12
sent 55:10
sentence 69:18
sentencing 56:14
separate 43:2
sequence 21:17
series 3:23 20:7
serious 32:18
52:13
seriously 41:13
service 20:25
services 45:8
58:4,5 61:8,23
set 13:4 33:23
61:5
settle 39:13
shifted 8:25
shifts 31:23
short 65:1
show 33:17 35:4
37:15 45:4
showing 31:13
62:7
shown 50:20 51:2
shows 19:15
56:19
shred 74:7
side 22:3,9 31:2
34:19 54:10

65:19
significant 6:19
11:5 12:15 15:3
15:7 16:3,4
19:6 22:1,5,10
22:11 31:5
60:13
significantly
11:23 19:3
31:24
simple 21:2
68:17
simply 17:14
24:16,24 30:6
49:18
single-judge 4:7
8:10,14 43:22
singular 45:5
singularly 43:24
sit 31:6
sitting 14:19
situation 36:16
37:15 63:24,25
68:16
six 55:7
size 12:3
sky 51:15
slavishly 30:7
slice 33:7
slow 5:22
small 5:20 33:7
smaller 3:20 10:2
solution 6:1
solve 44:5
somebody 69:16
someplace 18:17
somewhat 41:16
soon 42:8
sorry 27:25
31:16 37:3 39:5
40:13 63:18
71:24 72:1,16
72:22
sort 13:7,8 67:16

Sotomayor 5:6
6:7,12 8:20,24
12:18,22 13:18
13:21 14:3,10
14:16 15:10
31:15 33:14,21
34:4,23 35:7,16
36:8,13 37:8,17
40:12 45:15
50:25 51:8 52:1
52:23,25 53:1,7
53:11,17,24
54:6,9,20 59:6
59:13,16,22
60:1,4 70:24
71:3,5 72:1,16
72:21 74:22
sounds 9:8
space 18:20
42:10 69:2
speak 27:6,21
40:24 41:1
special 4:21 5:25
7:2 17:23 19:24
21:4 22:8 23:23
24:8 33:2,6
44:2
specific 5:17
15:10 16:11
18:11,11 20:8
21:14 25:5
71:22,24 73:25
specifically 4:19
8:1 15:3 25:22
26:9 31:1 49:7
72:12 73:12
Specter 1:18 2:6
35:21,22,24
36:11,18 37:3
37:11,16 38:5,9
38:14,17,22
39:7,19 40:4,22
41:6,19 42:1
43:1,16 44:11

44:16 45:22
46:3,13 47:11
47:15,19 48:1,8
48:12,14,23
49:8,11,14,22
50:14,17 51:2
51:12,16,21
52:6,9 53:6,10
53:16,22 54:5,8
54:11,25 55:3,6
55:18,21 56:3
56:11,15,21
57:1,7,12 58:10
58:13 59:3,9,15
59:18,24 60:2,6
60:12,20,25
61:20 62:15
63:11,15,20,23
64:7,16,22
65:12,23 66:18
66:22,25 67:21
68:5,17 70:2,9
71:2,4,8 75:12
spectrum 32:12
speech 23:24
spend 9:22 26:1
67:13,15,17,19
68:15
spending 32:6
55:13 68:12
spent 8:2 10:8
27:18
staff 5:13,14,15
7:8 33:12 41:24
42:22
staffing 41:11
stage 18:24 24:4
stand 72:23
standard 30:1
staph 19:20
start 34:9
started 32:16
38:10 42:8
state 4:14 7:21

14:6,8,11,20
15:17 16:17,25
17:1 20:14,15
22:10 25:21
26:17,20 27:20
30:14,17,21
31:1,1 36:16
37:24,25 39:12
39:24 41:10
43:6,8,9 44:21
46:4,19 47:13
47:16,17 49:19
49:20 50:1,5,9
50:11,22 51:4,5
51:6,23 52:3,4
52:16 53:8 56:4
58:22 59:1 60:9
61:9,12,14 62:7
62:24 67:9,11
67:16,24 68:1,3
68:4,15,23 69:4
69:9,11,12,16
70:3,7,9,17
71:2,8,20,24
72:14,23
statement 6:8
9:6 16:2 34:9
36:22 39:15
47:25 53:17
54:2 73:11
statements 23:5
23:6 24:1,4,16
44:2
States 1:1,13
46:6 47:1 66:13
State's 7:16
21:21 46:16
47:23 50:15,17
53:12 54:13
69:21,24 74:2,3
statistical 46:25
66:20
statistically
66:12

status 34:10
statute 31:22
stay 21:22
step 7:5,5,6 11:5
17:19 18:3
steps 3:23 5:8,17
6:13
stone 28:5
stood 34:8
stop 19:18,20
stopped 54:2
streets 62:14
73:19
strike 25:7,11
57:23,24
strikes 3:17
21:17
struck 5:10
studies 47:4
styled 23:3
subject 72:23
submission 73:2
submit 23:15
30:21
submitted 23:2
39:8 46:6 48:24
75:13,15
substantial 4:16
6:21 12:2,6
19:5 47:9 48:5
57:3 62:16
70:21
substantially
3:20
succeeded 20:16
success 6:23
56:10
successfully 19:2
suffered 44:21
suffering 36:2
sufficient 10:13
18:10 57:5,25
suggest 11:16
75:8

suggested 53:15
58:12,14,15
suggesting 6:11
13:13
suggestion 62:25
suggestions 66:3
suggests 10:13
suicide 36:5
suicides 15:4,5
33:18 36:7
summarize 9:6
55:8
summary 13:15
39:11
supplement 23:5
supply 7:21
support 21:8
supported 40:9
62:8
suppose 26:14
supposed 3:21
5:1 9:1,2,24
11:12 68:16
Supreme 1:1,13
sure 15:18 17:8
21:11 24:2
28:16 36:11
47:23 49:18
50:5,8 53:2
58:23 64:9,17
surrounding
69:14,14
sustainable 11:8
swept 49:4
system 3:15 4:17
8:3 20:24 23:12
32:8 40:20,25
57:16 60:17
64:23 68:25
70:4
systemic 74:20
systems 44:22

———— **T** ————

T 2:1,1

table 12:2
tailored 27:2
41:5 71:1
take 9:1 10:17
14:7 32:24 35:3
37:1 45:12
48:25 52:8
57:18,19,21
61:5 63:20
67:12 69:21
taken 3:24
takes 70:16
talk 22:18
talked 5:8,13
59:21
talking 28:21
31:21 32:14
34:9 36:8 37:14
69:23,25
talks 73:9
tallied 46:9
team 25:11 57:23
57:24
technical 55:10
60:17 65:16
66:3 70:5
technically 34:17
tell 5:7,17 6:13
35:8 36:9 48:9
48:14
telling 28:3 49:20
68:11
tentative 39:1
term 45:20
terminology
45:23
terms 23:9
testified 15:21
25:3 38:1,2,12
46:22 48:20
51:23 54:13
57:10,20
testify 22:20
23:14 65:7

testifying 58:7
testimony 21:8
  44:19 46:15
  54:15 55:21
  59:10
Texas 44:20
Thank 3:9 14:24
  35:20,24 59:9
  69:20 71:14,18
  75:11
Theirs 74:8
theory 58:9
thing 18:15 27:22
  44:24 54:20
  67:8
things 23:18 27:7
  33:9 41:11,24
  43:18,20,25
  44:1,9 53:19
  55:20 67:10
  70:3 73:9,15
think 4:13 6:3
  8:14 9:10,17
  12:21 13:2,11
  14:1 16:6,17
  18:5,22 21:4,14
  21:23 22:19
  24:13,21 25:11
  28:1 34:20
  36:18 37:17
  44:17 48:14
  49:22 52:22,24
  56:13,22 58:13
  58:14 59:3
  60:20,21 61:21
  61:21,22 62:10
  73:22,24
third 42:14
thought 7:1
  13:13 17:17
  23:20 29:3
  30:14,17 36:13
  37:2 48:10
  53:12 57:23

60:7
threat 51:24
three 20:3 53:18
  61:17 63:23
  71:15
three-judge 4:22
  8:19 12:23
  13:13 20:10
  22:15,21 26:24
  29:10,17 34:12
  34:13 37:18,22
  38:22,23 40:6
  43:10 47:7
  62:24 67:4
throw 5:25 43:6
till 54:3
time 4:13 5:18
  6:17 7:24 9:24
  12:10,14 13:6
  13:14 15:15,21
  16:6,7,11 20:12
  21:7 24:6 26:5
  27:23 31:4 32:2
  32:4 33:24
  35:19 36:16,20
  37:12 38:5
  39:24 46:9,21
  46:23 51:17,19
  51:24 55:12,13
  60:10,14,15
  66:5 70:16,20
  70:23 71:13
  72:9 73:17
  74:10 75:8
today 3:11 31:6,9
  34:11 35:9
told 13:23 73:23
total 40:19
tough 66:16
tour 30:15
tours 30:19,24
track 39:5
transfer 39:22
transferred 68:2

transfers 12:15
  43:8
treat 42:22,23
treatment 33:24
  36:4 40:17
  45:13 67:20
tremendous
  26:21
trend 15:4
trial 11:24 36:11
  37:5,12 38:6,8
  38:9 39:7 43:25
  46:13,21 51:22
  54:4
tried 5:20 24:17
  43:23
tries 23:4
trouble 28:24
true 4:8 22:22
  23:11 39:22
  45:1 55:25 60:8
  73:4
trust 50:8,9
truth 32:10 34:21
try 16:9 43:18
trying 33:7 49:24
tubercular 19:20
Tuesday 1:10
turnaround 9:18
  9:21
turns 5:4
twice 36:5 72:6
two 9:7,8,11
  29:14 37:25
  38:8 41:4 43:1
  47:14 54:3
  60:13 70:19
  75:7
two-thirds 36:6
two-year 49:10
  61:6,6
type 67:8

U

ultimate 33:10

ultimately 16:14
  21:19 22:3
  27:15 28:18
  32:20
umpteen 51:11
unanimous 46:17
unconstitutional
  36:24 41:18
understand
  12:12 23:24
  24:10 28:5
  31:19 32:21
  41:15 42:5 43:4
  57:8 64:11
  65:25
understanding
  40:18
understood 5:7
  64:12
underway 28:9
unfortunate 17:8
United 1:1,13
unprecedented
  3:12·
upped 60:15
urge 11:17
urging 30:18
use 69:5

V

v 1:6 3:4
variety 33:4 44:8
various 74:17
vehemence 31:3
viable 71:13
view 17:22 29:8
  29:10
viewed 35:1
views 11:11 23:4
violate 62:10
  67:18
violated 17:4
violating 35:2,2
  69:10
violation 5:16

7:11,12 10:14
  15:16 17:3
  21:13 25:16,18
  26:2 30:4 31:7
  31:8,9,12,20
  35:9,11,15
  74:10
violations 22:1
  36:20 40:16
  50:3 52:11 58:9
  72:6
violators 55:10
  60:17 64:23
  65:17 66:4 70:5
void 26:4
volume 72:3,10
voting 26:7

W

wait 4:11,13 5:12
  33:24
want 13:10 18:17
  23:9 26:2 30:15
  30:16,18 34:9
  48:21 50:1 53:8
  60:8 62:12
  64:17 65:8
  67:24 70:9 74:5
  74:21,25 75:1
wanted 23:25
  31:2,3 33:17
  48:17 51:5,6
  58:18 65:14
  74:25
wants 18:16
  70:17
Washington 1:9
  1:16 44:21
wasn't 38:21
  40:5,5 53:20
waste 72:9
water 67:19
way 8:9 27:3,22
  28:21 34:11
  35:14 45:16

46:23 50:5
54:16 73:20,23
74:20
ways 4:14 26:15
33:4 53:4 64:2
weakest 6:12
weeks 28:10
34:1 39:11
weight 47:9 48:5
58:17 62:16
went 19:12 34:24
42:14 58:17
60:21 61:24
75:8
weren't 17:6 42:7
we'll 35:16
we're 22:13,13
37:19 47:23
49:18 50:5,8,21
we've 15:18
23:19 29:4
whatsoever 74:7
withdrew 10:21
witness 23:14,15
witnesses 54:13
56:4,5
word 45:6
work 17:20 35:13
44:25 45:9
57:11 59:2
worked 45:3,5
worse 5:11
wouldn't 22:17
48:25,25 49:19
52:2 59:2 65:14
67:6 70:25
71:13
wrong 13:22
26:12 57:9
wrote 38:1

X

x 1:2,8

Y

---

year 39:10 60:21
60:22 63:5
years 4:2,11 6:8
8:18 13:23,24
13:24 14:4 15:4
15:6 16:17 18:9
22:2,7 25:21
29:3,12 36:1
43:23 45:2,3,25
47:2,14 49:21
50:12 52:4,8,12
52:13 55:14,15
55:15 62:4,9,12
62:12 63:24
69:22,23,24
70:1,13,25
72:25 73:21
75:7

$

$2.35 28:11
$4 8:1 32:7
$8 9:22 19:25

0

08 30:9
09 15:5
09-1233 1:5 3:4

1

1 36:22
10 19:14
10,000 39:21
100 58:4,5
11 27:12
11:10 1:14 3:2
12:31 75:14
120 33:25
120,000 63:4
130 56:20 57:11
57:22 58:15,17
58:21 59:11,21
137 61:19 75:8
137-1/2 18:8 27:2
137.5 8:17 16:18

40:15,18 41:7
41:16 42:13
47:14 49:21
50:12,23 56:19
57:6 62:4 74:7
75:6
14,832 39:18
140 13:2
140,000 68:24
145 56:20 57:4,4
57:6,10,13,16
58:12,14 59:2
59:14,17,20,23
60:4 61:9,17,21
61:22
147,000 12:12
148,000 69:1
15 43:23 47:2
16,000 73:13
165 12:12
17 63:17 64:5,7
65:4
17,000 55:9
170,000 12:13
18 11:25
183-page 39:3
40:7
1990 32:16
1990s 4:18 17:5

2

2 8:18 13:23 18:9
26:3 34:1 45:25
49:21 50:12
62:4,12 63:1
69:23 70:13,25
2-year 3:15
12:19 32:2
48:22 75:4
2.3 10:5
2.31 10:4
2.35 10:6,10,13
10:23 11:4 26:4
27:9,11,24 28:2
2.5 13:4

---

20 4:2,11 29:3,12
36:1 39:1 45:2
52:12
200 20:3 42:7
2000s 4:18
2001 32:15
2005 16:5
2006 16:5 39:16
71:10
2008 7:24 15:11
18:25 30:17,22
37:25 38:4,19
38:24 39:6,8
2009 15:2 38:25
39:2
2010 1:10 15:2
39:17
2085 71:22 72:3
22 13:24
2338 72:9
25 13:24 15:5
253 54:21 55:5

3

3 2:4 3:12 15:6
22:7 25:21
27:13 29:16
69:23 70:1
3,000 64:14
3-judge 29:17
30 1:10
30a 36:22
30,000 54:24
64:19 73:16
35 2:7
35,000 54:25
63:3
36,000 3:14 32:1
37,000 48:18
70:13

4

4 15:4 22:7 25:21
62:8,12
4a 47:25 50:9

4-year 63:1
40 55:15
40,000 42:17
45:19,24 62:6
62:14 63:3
400 27:17
45,000 3:14 32:1

5

5 14:3 52:4,8
69:22 70:1
72:25 73:21
5-year 70:15,15
70:16 75:4
50 46:14 55:14
55 55:16

6

6 28:10 72:3,10
60 15:6 33:25
55:15
60(b) 8:11
66 15:5

7

7 16:17 61:25
7-0 63:22,23
7.5 58:24
70 4:6 43:21
63:16,21 65:2
65:15
70a 73:10
71 2:10
75 55:16

8

8 7:24 10:10,10
10:21 26:3
27:10 45:3
68:13,15
80 69:2
80,000 68:25

9

9 9:7 15:6
90 6:24 33:25

---

900 6:19 12:1

`