

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, GOVERNOR
OF THE STATE OF CALIFORNIA, ET AL.,
Appellants,

v.

MARCIANO PLATA, ET AL.,
Appellees.

**On Appeal from the
United States District Courts for the
Eastern and Northern Districts of California**

**BRIEF OF CENTER ON THE ADMINISTRATION
OF CRIMINAL LAW AND 30 CRIMINOLOGISTS
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are the Center on the Administration of Criminal Law (“the Center”) and 30 leading criminologists² who have substantial knowledge of and interest in criminal justice issues. *Amicus curiae* the Center is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. The Center’s litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases in state and federal courts throughout the United States. Criminologist *amici curiae* are leading criminologists and other prominent scholars and researchers in the criminology field whose work focuses on the interrelationship between crime and punishment, including the consequences of mass incarceration. The objective of *amici curiae* in this case is to provide this Court with an empirically and experientially grounded understanding of the public-safety implications of the three-judge district court’s decision.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief, and a letter reflecting their blanket consent to the filing of *amicus* briefs has been filed with the Clerk.

² A full list of *amici curiae* criminologists, who join this brief as individuals and not as representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

The three-judge district court correctly concluded that California could comply with the court's prison population reduction order without an adverse impact on public safety. The court began by noting that the current overcrowded state of California's prisons itself has a substantial negative impact on public safety. The court considered extensive evidence on methods by which California could reduce its prison population without an adverse impact on public safety, including measures that have been used successfully in other jurisdictions. Of particular interest are the expanded use of good-time credits and the diversion of low-risk prisoners with short sentences (less than six months) to community-based sanctions or drug treatment programs rather than incarceration in the state prison system. Under these programs, prisoners would be released just a few months sooner, on average, than otherwise. The district court painstakingly examined the evidence showing that applying these techniques would likely enhance, rather than impair, public safety.

Empirical evidence from other jurisdictions in which similar techniques have been used shows that they can be implemented without an increase in the crime rate. Many states, including New York, New Jersey, Illinois, Ohio, Michigan, and Massachusetts, as well as local jurisdictions in California, have carried out prison-release programs and experienced either no change or a decrease in crime rates. As these examples show, fewer prisoners does not equal more crime. The evidence also shows that incarceration's effectiveness at deterring crime depends on punishment being certain and swift, rather than on the length of incarceration. A growing body of

evidence, including studies of early-release programs in Washington and Michigan, suggests that changing the length of incarceration is not associated with changes in either recidivism or crime rates. Hence, shorter prison terms does not equal more crime.

Just as *decreasing* the prison population does not predictably result in *more* crime, *increasing* the prison population does not predictably result in *less* crime. Extensive empirical evidence shows that states with higher incarceration rates tend to have higher (not lower) crime rates. Again, evidence from such places as New York, West Virginia, Alabama, Florida, and California's own counties, as well as national crime statistics, document the lack of a linear relationship between growth in prison populations and crime rates. Simply put, jurisdictions that incarcerate increasingly large percentages of their population are not consistently any more crime-free than other jurisdictions. Taken as a whole, the data suggest strongly that there comes a point after which the marginal benefit of increased incarceration diminishes and can lead to increased crime rates.

There are at least two ways in which high incarceration rates can lead to increased crime. First, prisons in general, and overcrowded prisons in particular, tend to be "criminogenic," that is, they tend to cultivate violence and criminality in offenders who otherwise might not have recidivated once released. Second, incarceration can lead to more crime in the communities from which the prisoners came. Even a short period of incarceration can lead to drastically reduced employment opportunities and hence to increased risk of criminal activity by ex-prisoners and those dependent upon them. In addition, parental incarceration disrupts child development and

increases the odds that the children themselves will engage in criminal activity. By diverting selected low-risk prisoners to community-based sanctions and reducing prison terms by a few months on average, the California plan can contribute to reducing future criminal behavior by the prisoners themselves and by others in their communities. The parties and *amici* challenging the three-judge district court's order completely ignore the potential for this kind of positive impact on public safety.

The California plan for reducing prison population contains several elements that other jurisdictions have implemented (and, in some instances, that California itself previously had implemented) to reduce overcrowding without compromising public safety. The plan calls for the use of validated risk-assessment tools, which have been used with success in such places as Michigan, Mississippi, and Kansas. It calls for an expansion of the good-time credit system, which has worked well in, for example, New York, Illinois, Nevada, and Washington. And it calls for carefully targeted diversion of low-risk prisoners serving only a few months in prison to community-based sanctions. Similar programs have succeeded in New York, Kansas, Michigan, and Texas.

The available empirical evidence, as reflected in the experience of many states, thus strongly supports the three-judge district court's conclusion that its prison population reduction order can be implemented without compromising public safety.

ARGUMENT

I. THE THREE-JUDGE DISTRICT COURT PROPERLY FOUND THAT CALIFORNIA CAN SAFELY IMPLEMENT THE ORDERED REDUCTION IN PRISON POPULATION.

The three-judge district court ordered California to reduce its prison population to 137.5% of design capacity by the end of 2011. *See* JS1-App.³ 169a. Furthermore, it determined that California could do so “without a meaningful adverse impact on public safety or the operation of the criminal justice system.” *Id.* at 248a. Consistent with the mandate of the Prison Litigation Reform Act of 1995 (“PLRA”), 18 U.S.C. § 3626(a)(1)(A), the court thoroughly considered the potential for adverse effects on public safety. The court devoted nearly ten days of trial and more than 50 pages of its opinion to the public-safety issue. After carefully weighing an extensive body of evidence that included, among other things, testimony from “former and current heads of corrections of five states, top academic researchers in the field of incarceration and crime; CDCR officials; and county officials, district attorneys, probations officers and sheriffs from across California,” JS1-App. 185a, the court concluded that California could comply with its prison population reduction order without an adverse impact on public safety.

The district court began by noting the strong evidence in the record that the current combination of overcrowding and inadequate rehabilitation programming in California’s prison system itself has a

³ References to “JS1-App.” are to the appendix accompanying the jurisdictional statement in No. 09-416; references to “09-1233 JS App.” are to the appendix accompanying the jurisdictional statement in this case, No. 09-1233.

“substantial adverse impact on public safety.” *Id.* at 188a. Petitioners/defendants did not “dispute the overwhelming evidence that overcrowding in prisons itself threatens public safety, nor could they.” *Id.* at 191a. Even California’s Governor Schwarzenegger recognized that “overcrowding causes harm to people and property, leads to inmate unrest and misconduct, reduces or eliminates programs, and increases recidivism as shown within this state and in others.” *Id.* at 191a-192a (internal quotation marks omitted).

The district court also noted the “overwhelming agreement among experts for plaintiffs, defendants, and defendant-intervenors that it is ‘absolutely’ possible to reduce the prison population in California safely and effectively.” *Id.* at 192a-193a. The court considered and described a wide variety of methods that California could use to achieve that goal, ranging from sentencing reform and modification of criminal statutes, to transfers of inmates to federal custody, to evidence-based rehabilitative programming. *Amici curiae* wish to highlight as especially promising two of the methods identified by the court: (1) expansion of good-time credits, and (2) diversion of low-risk offenders and technical parole violators.

California’s good-time credit program allows inmates to “earn credits off their prison sentences through ‘participation in work, educational, vocational, therapeutic or other prison activities’ and for good behavior.” *Id.* at 196a (quoting Cal. Penal Code §§ 2931, 2933). All of the experts who testified before the district court supported the expansion of this good-time credit system. *Id.* at 196a-197a. The evidence before the court indicated that such an expansion “would reduce the prison population by allowing inmates to shorten their lengths of stay in prison by

a few months” and that “such moderate reductions in prison sentences do not adversely affect either recidivism rates or the deterrence value of imprisonment.” *Id.* at 197a-198a. The court noted that California implemented early-release programs in 21 counties between 1996 and 2006, with approximately 1.7 million inmates released by court order without resulting in a higher crime rate. *Id.* at 202a-203a. Based on extensive record evidence, the court found that shortening an inmate’s length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism and that, overall, expanding the use of good-time credits “would not adversely affect but rather would benefit the public safety.” *Id.* at 204a.

The district court also found that prison populations can be reduced safely and effectively by diverting members of two groups out of the state prison system: technical parole violators and low-risk offenders with short sentences. California returns an unusually high fraction of parolees to state prison, as compared with other states. Approximately 70,000 parolees are returned to prison in California each year, of which approximately 17,000 are “pure technical violators” who have not been arrested for a new crime but have only violated a term or condition of their parole. *Id.* They are sent to state prison for an average of only four months; while there, they are kept in crowded reception centers. *Id.* at 205a-206a. The court found, based on a careful review of the evidence, that “public safety would improve if technical parole violators who are not returned to prison were diverted to alternative sanctions in the community, including drug treatment, day reporting centers, electronic monitoring, and, if necessary, county jail.” *Id.* at 208a.

In addition to technical parole violators, low-risk offenders with short sentences are promising candidates for diversion to community sanctions. Many prisoners enter the California prison system with sentences of less than 24 months, “the largest group of which are those with a sixteen-month sentence, many of whom have already served up to seven months of their sentence in a county jail.” *Id.* at 210a. “Under current policies, these inmates can halve the remaining periods of their sentences by earning work credits, with the result that these inmates serve only a few months in state institutions – an amount comparable to that served by technical parole violators.” *Id.* Instead of locking up *all* of these offenders, the state could “use risk assessment instruments to identify low-risk offenders and divert these offenders to community correctional programs to serve their sentences.” *Id.* The evidence before the district court was that sanctions short of imprisonment can have deterrent value so long as they are “meaningful, immediate, and certain.” *Id.* at 211a (internal quotation marks omitted). The court noted that programs that divert offenders from prisons to community-based sanctions or substance abuse programs had been used with success in Pennsylvania, Ohio, and Michigan. *Id.* at 213a. In light of all the evidence, the court found that “diversion of offenders to community correctional programs has significant beneficial effects on public safety and the operation of the criminal justice system as compared to the current system, including preventing the exposure of offenders to criminogenic conditions, providing effective rehabilitation, and avoiding disruption in the offender’s life that creates re-entry problems upon release.” *Id.* at 214a.

The district court took pains to point out that “many witnesses wrongly assumed that this court would require a sudden mass release of one-third of California’s prisoners or a ban on accepting new or returned prisoners.” *Id.* at 222a. The court emphasized that such an indiscriminate approach “was not proposed by any party, nor would it be approved by the court.” *Id.* Accordingly, the court found that its prison crowding reduction order could be implemented without an adverse effect on public safety. As discussed further below, the court was correct.

II. PRISON POPULATION REDUCTION PROGRAMS CAN BE EXECUTED WITHOUT ADVERSELY AFFECTING PUBLIC SAFETY.

All available empirical evidence indicates that prison populations can be reduced without causing an increase in crime rates.⁴ While incarceration can serve to incapacitate, deter, and rehabilitate some portion of the prisoner population, its overall effect on crime rates is small compared to other legal and social factors.⁵ As a result, states that have similar incarceration rates often have dissimilar crime rates. Since 1994, crime rates have dropped significantly, to about the same rates as in 1970, when the nation had fewer than 200,000 prison inmates and the incarceration rate was only 96 per 100,000. Today, more than 1.6 million total prisoners are incarcerated, a rate of 504 prisoners per 100,000 persons.⁶

⁴ See *infra* notes 23-28.

⁵ See *generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2006).

⁶ See HEATHER C. WEST, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER INMATES AT MIDYEAR 2009 – STATISTICAL TABLES 2 (June 2010).

This evidence suggests that low crime rates can be achieved without high incarceration rates.

A number of states have reduced their prison populations by increasing parole grant rates, increasing good-time credits, and diverting low-risk offenders from prison. The research on those reductions shows either no increase or a decline in crime rates following reductions in prison population. Thus, according to the available empirical data, prison populations can be – and have been – reduced without an adverse effect on public safety.

A. Empirical Evidence Shows That Prison Populations Can Be Reduced Without Increasing Crime.

1. Declines in crime rates have accompanied reductions in incarceration rates.

Empirical evidence shows that incarceration’s effectiveness at deterring crime depends on punishment being certain and swift, not on the length of incarceration.⁷ Thus, incarceration rates can be reduced without an adverse effect on public safety. “Most scientific evidence suggests that there is little

⁷ See Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 12-15 (1998) (summarizing studies suggesting that certainty of sanction, not severity of punishment, has greater deterrent effect). “The hope that the presence of brutal prisons will deter law violators is as old as the invention of the prison itself. Contemporary supporters of longer sentences argue that longer and harsher punishments are necessary to deter crime by making criminals think twice before committing another crime. This notion simplifies and distorts the dynamics of criminal behavior. When most people commit a crime, they correctly believe that they will not be caught.” THE JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION 14 (2007) (“UNLOCKING AMERICA”).

if any relationship between fluctuations in crime rates and incarceration rates.”⁸

In a salient example for this case, the number of prisoners in state or federal custody in the state of California declined from 171,340 in 2006 to 168,286 in 2009.⁹ During the same time period, the crime rate in California declined by 15% (from 3,640 per 100,000 to 3,094).¹⁰ Furthermore, from 1994 to 2000, California reduced the number of prison sentences handed out by judges by 14%, and violent crime in California dropped by 34% during the same period.¹¹ This statewide trend of fewer incarcerations and less crime also was seen on a local level. For example, in the four years following the 2005 release of 56,000 Los Angeles County jail inmates to comply with a mandatory population cap, the crime rate in the county declined by nearly 15%.¹² Similarly, in San

⁸ UNLOCKING AMERICA at 8; *see also, e.g.*, RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 4 (2005) (“INCARCERATION AND CRIME”) (surveying states trends to find that, “[s]ince 1998, 12 states experienced stable or declining incarceration rates, yet the 12% average decrease in crime rates in these states was the same” for those states as states with increasing incarceration rates).

⁹ *See* CALIFORNIA DEP’T OF CORR. & REHAB., AVERAGE DAILY PRISON POPULATION: CALENDAR YEAR 2006 (2007); CALIFORNIA DEP’T OF CORR. & REHAB., AVERAGE DAILY PRISON POPULATION: CALENDAR YEAR 2009 (2010).

¹⁰ *See* CALIFORNIA DEP’T OF JUSTICE, CRIME IN CALIFORNIA 2009: ADVANCE RELEASE (2009).

¹¹ *See* MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 126 (2005).

¹² *See* Los Angeles County Sheriff’s Dep’t Crime Summary, http://file.lacounty.gov/lasd/cms1_148405.pdf (showing overall crime rate per 10,000 population decreasing from 219.24 in 2005 to 186.39 in 2009). “In 2005 the county was forced to release early 56,000 sentenced inmates, 46,000 male and 10,000

Diego from 1994 to 2000, the number of prison sentences decreased by 25% while violent crime dropped 43%.¹³

Evidence from around the United States is consistent with the experience in California: all across the country, states and localities have experienced decreases in crime rates at the same time they have reduced their prison populations. New York City experienced one of the largest declines in crime in the country at the same time as it substantially reduced its jail and prison populations.¹⁴ Between 1993 and 2001, violent crime in New York City decreased by 64%, and homicides by 69% while its jail population dropped by 25% and the number of people sentenced to prison fell by 42%.¹⁵ Between 2000 and 2009, the number of index crimes reported in New York City

female, in order to comply with their jail population caps.” California State Sheriffs’ Ass’n, *Jail Overcrowding: A State and Local Crisis* (2006), <http://www.calsheriffs.org/index.php/resource-center/cssa-library/jail-overcrowding-whitepaper>.

¹³ See JACOBSON, *supra* note 11, at 126. Although some analysts have attributed the dramatic reductions in serious crime and felony arrests in New York City to the introduction of new methods of policing, particularly the use of the computerized statistics program CompStat, *see id.* at 114-15, San Diego had the same experience without using New York’s methods. See also Judith Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171 (1999) (describing San Diego’s Neighborhood Policing Philosophy, which emphasizes both community policing and community participation, in contrast to New York City’s “zero-tolerance” policy).

¹⁴ See ZIMRING, *supra* note 5, ch. 6; JACOBSON, *supra* note 11, at 126.

¹⁵ See JACOBSON, *supra* note 11, at 113; UNLOCKING AMERICA at 8 & n.19.

dropped 34.6%,¹⁶ and at the same time the New York City Department of Correction inmate population decreased by 11.6%.¹⁷ Statewide in New York between 2000 and 2009, the index crime rate dropped 25.4%¹⁸ while the New York State Department of Correction Services inmate population fell by 18.5%.¹⁹

New Jersey likewise experienced declining crime rates contemporaneously with declining prison populations: the crime rate there fell 17% from 2000 to 2008, while the number of offenders sentenced to prison declined by 7%.²⁰ In fact, from 1992 to 2002, several states that had the lowest increases in prisoner population – including Illinois, Ohio, Michigan, and Massachusetts – also saw a substantial decrease in violent crime.²¹ And nationwide from 1994 to 2000, 6% fewer people were sentenced to prison in state courts, yet violent crime dropped 23%.²² As

¹⁶ See DIV. OF CRIMINAL JUSTICE SERVS., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, CRIME IN NEW YORK STATE: 2009 FINAL DATA 5, app. 2 (2010).

¹⁷ Between March 31, 2000, and December 31, 2009, the New York City Department of Correction inmate population decreased by 11.6%. See NEW YORK STATE COMM’N OF CORR., INMATE POPULATION STATISTICS (Oct. 2010) (“NY STATE 2010 INMATE POPULATION STATISTICS”).

¹⁸ See CRIME IN NEW YORK STATE: 2009 FINAL DATA at 5, app. 1.

¹⁹ Between March 31, 2000, and December 31, 2009, the New York State Department of Correction inmate population decreased by 18.5%. See NY STATE 2010 INMATE POPULATION STATISTICS.

²⁰ See Chris Megerian, *N.J.’s Inmate Population Declines; Officials Credit Less Crime, Prisoner Re-Entry Programs*, NJ.COM, July 18, 2010.

²¹ See JACOBSON, *supra* note 11, at 127-28 & fig. 4.6.

²² See *id.* at 126.

these examples show, fewer prisoners does not equal more crime.

2. Moderate reductions in the length of imprisonment for selected prisoners can be implemented without compromising public safety.

In addition to studying the general relationship between crime and incarceration, criminologists have studied the effects of both shorter and longer periods of imprisonment on recidivism rates and crime rates. A growing body of evidence suggests that changing the average or median length of stay in a particular state is not associated with changes in either recidivism or crime rates.²³ Accordingly, efforts to lower prison population by reducing length of stay are not expected to affect public safety adversely.

In many states, good-time credits that prisoners receive for completing vocational and other rehabilitative services moderately reduce the period of certain inmates' confinement by a few weeks or months.²⁴

²³ See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 187 (2003) (reviewing research and finding “no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence”); CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING, DENYING PAROLE AT FIRST ELIGIBILITY: HOW MUCH PUBLIC SAFETY DOES IT ACTUALLY BUY? 58 (2009) (“DENYING PAROLE”) (“The data examined in this report show that people whose parole was delayed did not return to prison for new crimes at a much different rate than people released when first eligible.”).

²⁴ See CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 10 (2009) (citing new initiatives in Colorado and Oregon and tentative plans in Illinois and Ohio); John Cloud,

Jurisdictions that have used such programs have found that they reduce prison populations, lower recidivism rates, and reduce prison costs without increasing crime rates.²⁵ For example, Washington State expanded its earned-release program to increase opportunities for offenders who demonstrated good behavior in prison. An independent analysis of the program found that offenders were released on average 63 days early; measured against matched comparison groups, these offenders had a lower total recidivism rate, lower felony recidivism rate, and equivalent violent felony recidivism rate.²⁶

These are not isolated results. Study after study has shown that prisoners released on an accelerated schedule do not recidivate more quickly or at higher rates compared to those who remain behind bars for the duration of their sentences. In one review of the relevant literature, drawing on data from 1981 to 2004, the authors concluded that there was “no significant difference in rates of recidivism among accelerated release and full-term prisoners” and that in some cases “early release prisoners had lower rates of recidivism.”²⁷ An extensive study of prisoner

Do Early-Release Programs Raise the Crime Rate?, TIME.COM, Sept. 14, 2009.

²⁵ See *infra* Part II.B.

²⁶ See WASHINGTON STATE INST. FOR PUB. POL’Y, INCREASED EARNED RELEASE FROM PRISON: IMPACTS OF A 2003 LAW ON RECIDIVISM AND CRIME COSTS, REVISED 6-7 (2009) (“INCREASED EARNED RELEASE FROM PRISON”).

²⁷ CAROLINA GUZMAN, BARRY KRISBERG & CHRIS TSUKIDA, NATIONAL COUNCIL ON CRIME & DELINQUENCY, ACCELERATED RELEASE: A LITERATURE REVIEW 2 (2008). These findings are informing the decisions of corrections professionals. Michigan Department of Corrections spokesman Russ Marlan was recently quoted saying, “If you look at all the research and data out

release in Michigan determined that “[s]erving more time does not decrease the chances of reoffending and may actually increase it.”²⁸

B. Empirical Evidence Shows That Increasing Incarceration Does Not Necessarily Enhance Public Safety.

1. Marginal increases in incarceration rates do not inevitably lead to marginal decreases in crime rates.

Empirical evidence also shows that linear or proportional reductions in crime rates are not achieved by increasing the size of the prison population. Intervenor attempt (at 22-23) to argue to the contrary by cherry-picking a handful of (mostly outdated) studies. But careful analysis of the empirical data reveals that, notwithstanding intervenors’ protestations, there is no simple, direct relationship between incarceration rates and crime rates.

For example, in California in the 1980s, the state’s incarcerated population increased more than three-fold, and in the same period the crime rate dropped by about 15%. But an empirical study of these data found that decreased burglary and larceny offenses accounted for nearly all of the reduction in crime and that the reduction for all other offenses was “weak to negligible.”²⁹ Moreover, the study’s authors concluded that prison expansion’s role in even the

there, it shows there really is no connection between the amount of time served in prison and recidivism.” John Agar, *Is Proposal To Allow More Michigan Prisoners Early Release Worth the Savings?*, MLIVE.COM, Mar. 2, 2010.

²⁸ DENYING PAROLE at 43.

²⁹ FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 100-01 (1997).

15% decrease was dubious: arrest statistics showed that the drop related mainly to juveniles, who were less likely than adults to be locked up in the first instance.³⁰

On the national level, one study concluded that the dramatic increases in incarceration rates from 1970 to 1990 accounted for only about 25% of the decrease in the nation's crime rate today.³¹ Put differently, 75% of the decline in the crime rate was caused by something other than increased use of incarceration. Indeed, both the author of this study – as well as James Q. Wilson, whose work intervenors cite in support of their assertion of a linear relationship between crime and imprisonment – concede that incarceration has reached a point of diminishing returns.³² Consistent with this view, the nationwide incarceration rate has risen steadily and dramatically since 1975, but the crime rate during that period has oscillated, rising to peaks in 1980 and 1991, declining

³⁰ *See id.*

³¹ *See* William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97, 125 (Alfred Blumstein & Joel Wallman eds., 2006 rev.) (“Most of the responsibility for the crime drop rests with improvements in the economy, changes in the age structure, or other social factors. Whether the key to further reductions lies in further prison expansions, or (more likely) in further improvements in these other factors remains an open question.”).

³² *See id.*; James Q. Wilson, *Crime and Public Policy*, in *CRIME* 489, 502 (James Q. Wilson & Joan Petersilia eds., 1995) (“But lengthening the time served beyond some point will, like increasing the proportion of convicted criminals sent to prison, encounter diminishing marginal returns.”).

throughout the 1990s, and remaining relatively stable during the last decade.³³

Also telling is that those states with higher rates of growth in incarceration do not experience greater declines in crime.³⁴ In fact, the actual trend is that states with higher incarceration rates tend to have higher (not lower) crime rates. From 1991 to 1998, states that increased incarceration at *lower* rates experienced *greater* declines in crime rates than states that increased incarceration rates more.³⁵ The same phenomenon continued from 1998 to 2003, a period when states that decreased incarceration rates or held rates stable experienced the same reduction in crime as states that increased incarceration.³⁶ In New York State from 1991 to 2001, the incarceration rate increased by a modest 10.9%, while Texas's more than doubled, increasing 139.4%. Yet, during the same time, as crime rates were generally falling across the country, crime in Texas declined by only 34% while New York State's crime rate was cut in half.³⁷ In West Virginia, the incarceration rate rose by 5.1% from 2008 to 2009 – and during that period

³³ See JAMES AUSTIN & TONY FABELO, THE JFA INST., THE DIMINISHING RETURNS OF INCREASED INCARCERATION – A BLUE-PRINT TO IMPROVE PUBLIC SAFETY AND REDUCE COSTS 10 (2004); INCARCERATION AND CRIME at 7, fig. 5.

³⁴ See JENNI GAINSBOROUGH & MARC MAUER, THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S 4 (2000).

³⁵ “The ‘above average’ states increased their rate of incarceration by an average of 72% and experienced a 13% decline in crime, while the rate of incarceration in ‘below average’ states rose by 30% and crime rates declined by 17%.” *Id.*

³⁶ See INCARCERATION AND CRIME at 4.

³⁷ See AUSTIN & FABELO, *supra* note 33, at 12, tbl. 4.

the state's violent crime nonetheless rose by 8.3%.³⁸ In Alabama between 2000 and 2009, despite relatively significant increases in prison population, the crime rate held nearly steady.³⁹ Within California, when San Francisco and Alameda counties lowered the number of state prison inmates in the 1980s, their crimes rates dropped at rates similar to those seen in California counties in which prison populations increased.⁴⁰

The disconnect between incarceration and crime rates can be seen in temporal comparisons as well as geographical ones. In New York City from 1993 to 2001, the city jail population dropped by 22% and the local trial courts imposed 47% fewer prison sentences, but violent crime decreased by 52%.⁴¹ By contrast, 1985 to 1992 was a period of significantly increased incarceration – the number of prison sentences in New York City increased by 75% – but reported violent crime increased by 18%.⁴²

³⁸ See HEATHER C. WEST, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS AT YEAREND 2009 – ADVANCE COUNTS app. tbl. 1 (June 2010); FED. BUREAU OF INVESTIGATION, 2009 CRIME IN THE UNITED STATES tbl. 5 (Sept. 2010); FED. BUREAU OF INVESTIGATION, 2008 CRIME IN THE UNITED STATES tbl. 5 (Sept. 2009).

³⁹ Alabama's prison population increased 28.4% during this time period. See ALABAMA DEP'T OF CORR., FISCAL YEAR 2009 ANNUAL REPORT 54. Meanwhile, the crime rate rose or fell by small amounts each year, resulting in a 6% decrease overall from 2000 to 2009. See ALABAMA CRIMINAL JUSTICE INFO. CTR., CRIME IN ALABAMA 2009, at 8; ALABAMA CRIMINAL JUSTICE INFO. CTR., 2000 CRIME IN ALABAMA 14.

⁴⁰ See UNLOCKING AMERICA at 8 & n.21.

⁴¹ See JACOBSON, *supra* note 11, at 106, 122-23.

⁴² See *id.* at 123.

All of these data are consistent with the observations of the American Bar Association’s Justice Kennedy Commission. This Commission, charged with reexamining fundamental criminal justice issues, concluded that “[i]t is not even clear that the increased use of incarceration has enhanced public safety, although lawmakers for twenty years have acted in reliance on the claimed crime-preventive effect of harsh and certain punishments.”⁴³ The crime-preventative effects of punishment are indeed unclear, and intervenors’ claims to the contrary do not comport with the majority view held among criminologists.⁴⁴

Intervenors’ selective citation of studies claiming a linear relationship between incarceration rates and crime rates is thus of limited value to understanding the true public-safety impact of the three-judge district court’s overcrowding reduction order. The studies cited by intervenors discuss data from an era – 1971 until 1993 – that began with low prison populations and rising crime rates. Specifically, the

⁴³ JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS TO THE ABA HOUSE OF DELEGATES 20 (2004) (“KENNEDY COMM’N REPORT”) (“Researchers are just beginning to explore the implications of the dramatic growth in incarceration rates for crime rates, for families and communities, for prison management, and for politics.”).

⁴⁴ See generally Steven N. Durlauf & Daniel S. Nagin, *The Deterrent Effect of Imprisonment*, in CONTROLLING CRIME: STRATEGIES AND TRADEOFFS (Philip J. Cook et al. eds., forthcoming 2010); see also Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 178 (2009) (“[A] key finding of our review is that the great majority of studies point to a null or criminogenic effect of the prison experience on subsequent offending.”).

nation's prison population in 1971 was 198,061.⁴⁵ By 1994, the population had risen to more than 1 million.⁴⁶ In California, the prison population was 20,294 in 1971⁴⁷ and had increased to 125,179 by 1994.⁴⁸ Many violent and property offenders were imprisoned during this period. It is not surprising that there was a crime-reducing effect, as prosecutors were targeting society's worst offenders. Since 1994, incarceration rates have continued to rise – but via the increased incarceration of drug offenders, technical parole violators, and persons who previously would have been sentenced to probation.

Several studies more recent than those relied upon by Intervenor document the diminishing-return phenomenon. For example, an analysis of county-level data in Florida from 1980 to 2000 shows no statistically significant relationship between growth in prison populations and violent crime and property crime.⁴⁹ Another recent analysis of data from 1972

⁴⁵ See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 556, tbl. 6.21 (Oct. 1996).

⁴⁶ See *id.*

⁴⁷ See CALIFORNIA DEPT OF CORR., CALIFORNIA PRISONERS: 1970 AND 1971, at 1 (1972).

⁴⁸ See CALIFORNIA DEPT OF CORR., CALIFORNIA PRISONERS & PAROLEES: 1993 & 1994, at 1 (1996).

⁴⁹ See Tomislav V. Kovandzic & Lynne M. Vieraitis, *The Effect of County-Level Prison Population Growth on Crime Rates*, 5 CRIMINOLOGY & PUB. POL'Y 213, 234-36 (2006) ("This study finds no support for the 'more prisoners, less crime' thesis.").

to 2000 finds that, in certain circumstances, imprisoning more people can increase crime.⁵⁰

Taken as a whole, these data make it clear that there comes a point after which the marginal benefit of increased incarceration diminishes. Indeed, in some circumstances, increased incarceration imposes marginal costs – that is, increased crime – rather than benefits.⁵¹ In sum, as noted by the Kennedy Commission, the data “indicate that jurisdictions that incarcerate increasingly large percentages of their population are not necessarily any more crime-free than other jurisdictions.”⁵²

State *amici*’s reliance on wholly anecdotal evidence deserves even less credence than intervenors’ flawed invocation of statistical studies. To the extent that there is anecdotal evidence of a temporary increase in arrests in the initial months of an early release, that temporary increase represents only a concentration in the total number of arrests that would have happened anyway. As the three-judge district court explained, “the weight of the evidence showed that, because length of stay is unrelated to recidivism, all else being equal the likelihood that a person who is released a few months before his original release date will reoffend is the same as if he were released on his original release date.” JS1-App. 200a-201a. The court concluded that, although the timing and circumstances of a crime, if any, committed by a re-

⁵⁰ See Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL’Y 245, 269-70 (2006).

⁵¹ See Joanna Shepherd, *The Imprisonment Puzzle: Understanding How Prison Growth Affects Crime*, 5 CRIMINOLOGY & PUB. POL’Y 285, 285 (2006).

⁵² KENNEDY COMM’N REPORT at 20.

leased inmate might be affected, the evidence indicated that the total number of such crimes would not change: “[w]hile the victims of crimes may be different, and we do not underestimate the significance of early release to those victims, our concern under the PLRA is to consider the overall impact on public safety, which we find would be no different.” *Id.* at 201a.

2. Increased incarceration can increase crime.

The evidence cited above indicates that various methods of reducing the prison population can be implemented without putting the public at risk of higher crime rates. In addition, and as the district court recognized, there is evidence that high incarceration rates and long sentences, particularly combined with overcrowded prisons, actually can increase crime rather than avert it. There are two key ways in which this happens: First, the “criminogenic” nature of prisons can cultivate violence and criminality in offenders who might otherwise not have recidivated. The more people are subjected to this environment, the more widespread these effects will be. And the effects themselves become more severe as prisons become more crowded. Second, the disproportionate impact of high incarceration rates on particular communities can produce the kind of social consequences that lead to more crime. The parties and *amici* challenging the three-judge district court’s order fail to address this kind of “adverse impact on public safety.”

Being in prison increases an individual’s proclivity toward future criminal behavior – the “criminogenic”

effect of America's prison system.⁵³ Studies show that placing low-risk offenders in the same prison population as high-risk offenders increases the chances that the low-risk inmates will recidivate, suggesting that the low-risk individuals may be learning more serious criminal behavior from their fellow inmates.⁵⁴ As the three-judge district court noted, overcrowding in California's prisons has limited the state's ability to classify inmates according to their risk level and to segregate them effectively. *See* JS1-App. 189a. And a study of California's prisons found that "among those with a relatively limited criminal past – with little experience in the criminal justice system and few past offenses – placement in a higher-security prison appears to have a criminogenic effect on both cognitions and personality."⁵⁵ Furthermore, prison population density is correlated with increased violence as well as more frustration with a system that cannot provide sufficient resources for each inmate.⁵⁶ By reducing overcrowding in compliance with the court's order, and by diverting low-level offenders to alternative custody, California will

⁵³ *See* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1056-57 & nn.30-38.

⁵⁴ *See id.* at 1055 & n.23.

⁵⁵ Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, in *DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM* 151, 164 (Steven Raphael & Michael A. Stoll eds., 2009). The criminal personality factors assessed included impulsivity, absence of guilt, narcissism, dominant tendencies, risk-taking, violence, and aggression. The "criminal cognitions" measured included moral justification, refusal to accept responsibility, blaming the victim, and rationalizations. *Id.* at 162-64.

⁵⁶ *See* Pritikin, *supra* note 53, at 1058.

be able to ameliorate these negative effects of incarceration.

Beyond the effects on prisoners themselves, incarceration can lead to more crime in the communities from which those prisoners came.⁵⁷ By reducing incarceration rates and diverting low-risk prisoners to community-based sanctions, California can likewise reduce these social consequences and should see less crime as a result. Multiple studies confirm the obvious: increased unemployment is associated with more crime, particularly with property crimes.⁵⁸ People who have been in prison have drastically reduced employment opportunities.⁵⁹ Legal barriers

⁵⁷ See generally Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551 (2003). The authors closely examined the effects of incarceration across New York neighborhoods from 1985 to 1997. See also Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *CRIMINOLOGY* 441, 467 (1998) (“High incarceration rates may contribute to rates of criminal violence by the way they contribute to such social problems as inequality, family life deterioration, economic and political alienation, and social disorganization.”).

⁵⁸ See DON STEMEN, VERA INST. OF JUSTICE, *RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME* 11, tbl. 2 (2007) (collecting data from four studies showing a 10% increase in unemployment leads to a 10-16.6% increase in property offenses); Pritikin, *supra* note 53, at 1061 (“Research has consistently shown that inability to obtain steady, quality employment is one of the biggest risk factors for offender recidivism.”); Harry J. Holzer, *Collateral Costs: Effects of Incarceration on Employment and Earnings Among Young Workers*, in Raphael & Stoll, *supra* note 55, at 239, 256 (“Our review of the empirical evidence suggests that, despite the mixed nature of the findings reviewed, the net effects of incarceration on employment and earnings are likely negative.”).

⁵⁹ This effect is even more pronounced for racial minorities. See, e.g., Devah Pager, *Double Jeopardy: Race, Crime, and Get-*

may prevent former prisoners from holding certain jobs; employers may be reluctant to hire them; they may acquire behaviors in prison that are incompatible with adjusting to employment; and they may lose social connections that facilitate legitimate job opportunities.⁶⁰ “When age, education, school enrollment, region of residence and urban residence are statistically accounted for, past incarceration reduced subsequent wages by 11 percent, cut annual employment by 9 weeks and reduced yearly earnings by 40 percent.”⁶¹ This effect persists even when total work experience is statistically accounted for – meaning that it is incarceration itself and the stigma that follows from it, rather than time and experience lost while in prison, that drives unemployment of released inmates.⁶² And, even if individuals can secure post-release employment, the financial effects of their previous incarceration may put them at an increased risk of recidivism, as available data suggest that a prison sentence carries with it an “earnings penalty”

ting a Job, 2005 WIS. L. REV. 617, 641-44 (finding that white job applicants with a criminal record are half as likely to be called back after a job interview as identical applicants without records, and that black applicants are one-third as likely). *See generally* DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

⁶⁰ *See* STEMEN, *supra* note 58, at 10; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues Of Race And Dignity*, 85 N.Y.U. L. REV. 457, 492-94 (2010) (detailing legal barriers to employment of former prisoners); Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410, 412-13 (2001).

⁶¹ BRUCE WESTERN & BECKY PETTIT, *THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY* 11 (2010).

⁶² *See id.*

of anywhere from 10% to 30%.⁶³ By diverting low-risk prisoners and technical parole violators out of the state prison system in a targeted manner and keeping these people closer to home with intermediate sanctions short of imprisonment, California's plan can be expected to reduce this prison-related unemployment and its after-effects.

Incarceration also has a long-term criminogenic effect by disrupting parent-child relationships. Parental incarceration disrupts child development and can lead to a host of negative effects on inmates' families. Obviously, children suffer from the economic consequences of their parents' imprisonment.⁶⁴ But they also tend to have more behavioral problems and poorer emotional well-being, meaning that incarceration can instigate or exacerbate a cycle of criminal behavior in subsequent generations.⁶⁵ Children with parents in prison may encounter stigma from their peers, and their performance in school tends to suffer. At the same time, their home environments are often destabilized by events such as geographic relocation or a new relationship on the part of the non-

⁶³ Western et al., *supra* note 60, at 424.

⁶⁴ See Pritikin, *supra* note 53, at 1065.

⁶⁵ See, e.g., Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in Raphael & Stoll, *supra* note 55, at 177, 194-202. Johnson's analysis isolates parental incarceration from other compounding factors that might contribute to children's behavioral and emotional difficulties. See also UNLOCKING AMERICA at 9-10 (citing evidence that parental incarceration is associated with higher rates of delinquency, mental illness, and drug abuse in children, as well as reduced academic success and employment prospects).

incarcerated parent.⁶⁶ All of this increases the odds that the children themselves will engage in criminal activity.⁶⁷ Again, diverting low-risk individuals to community-based sanctions rather than state prison can be expected to reduce these sorts of negative effects on children and their ultimate impact on public safety.

Thus, a properly designed and implemented prison population reduction program, like the one California has proposed, actually can contribute to a reduction in future criminal behavior by the prisoners themselves and by others in their communities. The parties and *amici* challenging the three-judge district court's order completely ignore the potential for this kind of positive impact on public safety.

III. CALIFORNIA'S PLAN FOR REDUCING PRISON POPULATION RELIES ON METHODS THAT HAVE BEEN SUCCESSFULLY AND SAFELY IMPLEMENTED ELSEWHERE.

The California plan for reducing prison population contains several elements that other jurisdictions have implemented (and, in some instances, that California itself had previously implemented) successfully to reduce overcrowding without compromising public safety. In particular, three features of California's proposal – using evidence-based risk assessment tools, enhancing opportunities for good-time credits, and diverting low-level offenders to places other than prison – have been proven successful in other states. This experience strongly supports the

⁶⁶ See WESTERN & PETTIT, *supra* note 61, at 21; Pritikin, *supra* note 53, at 1066.

⁶⁷ See Pritikin, *supra* note 53, at 1066-67.

three-judge district court’s conclusion that California’s plan can be implemented without a significant adverse impact on public safety.

A. California’s Proposal Relies on Validated Risk-Assessment Tools for Decisionmaking.

In several ways, California’s proposal incorporates empirically validated risk-assessment tools into the decisionmaking processes for offender placement, treatment, and release. For example, California proposes to use “summary parole” for offenders who meet a number of risk-evaluation criteria, including approval under the California Static Risk Assessment tool, which was validated by the University of California. 09-1233 JS App. 40a & n.7. The state would also base parole violation sanctions on the risk level of the individual, “placing parolees in the right programs and returning the high risk parole violators to prisons.” *Id.* at 41a. A proposed alternative custody program would allow certain eligible inmates to serve part of their sentences in facilities outside of prison; the criteria implement a risk-assessment tool to identify those inmates with the highest likelihood of success in such circumstances. *See id.* at 63a-64a.

Many states have recognized the valuable role risk-assessment tools can play in reducing recidivism.⁶⁸

⁶⁸ Additionally, a comprehensive policy framework report recently advocated expanded use of such tools: “Supervision and programs are most effective at reducing future crime when they (i) accurately assess offender risk and need, and (ii) use assessment results to assign supervision levels . . . and target programs to criminogenic needs.” PEW CENTER ON THE STATES, POLICY FRAMEWORK TO STRENGTHEN COMMUNITY CORRECTIONS 7 (2008); *see also* MEGHAN GUEVARA & ENVER SOLOMON, U.S. DEPT’ OF JUSTICE, CRIME & JUSTICE INST., NAT’L INST. OF CORR., IMPLEMENTING EVIDENCE-BASED POLICY AND PRACTICE IN COM-

In Michigan, for example, a key part of the state's recent Michigan Prisoner ReEntry Initiative ("MPRI") involves improving decisionmaking processes, and especially parole decisions, based on quality risk-assessment metrics.⁶⁹ The approach is paying off; where the MPRI model has been implemented, recidivism rates have been reduced by one-third.⁷⁰ Mississippi's experience has been similar. The state parole board last year adopted "a parole 'risk instrument' based on a generation of peer-reviewed research about which inmates are likely to recidivate and which aren't."⁷¹ As a result, parole grant rates have nearly doubled, without a corresponding increase in crime.⁷² Kansas, too, has seen the benefit of increasing the efficacy of correctional

MUNITY CORRECTIONS 12 (2d ed. 2009) (recommending the corrections authorities "[d]evelop and maintain a complete system of ongoing offender risk screening/triage and needs assessments" as part of recidivism reduction strategy).

⁶⁹ "The MPRI Model involves improved decision making at seven critical decision points in the three phases of the custody, release, and community supervision/discharge process." MICHIGAN DEPT OF CORR., 2009 STATISTICAL REPORT G-1 (2010) ("MICHIGAN 2009 STATISTICAL REPORT"). Michigan is using a dynamic risk-assessment tool known as COMPAS. *Id.* at G-2. "At the state level, MPRI provides better training and more sophisticated assessment instruments for parole board members to raise their confidence in parole plans and expected outcomes, thus enabling higher parole approval rates." JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 35 (2010).

⁷⁰ See MICHIGAN 2009 STATISTICAL REPORT at G-3 (citing a "33% relative rate reduction in total returns to prison" through May 2010, compared against 1998 baseline).

⁷¹ John Buntin, *Mississippi's Corrections Reform: How America's Reddest State – and Most Notorious Prison – Became a Model of Corrections Reform*, GOVERNING (Aug. 2010).

⁷² See *id.*

decisionmaking. As part of a 2007 statewide Risk Reduction Initiative, county-level probation supervision agencies received new risk-assessment training to help focus their efforts on the probationers most at risk for violation.⁷³ By doing so, the agencies were able to increase probation success rates from 46% in 2006 to 61% in 2008.⁷⁴

Like each of these states, California can safely reduce its prison population in part through its proposal to base more decisions on validated risk-assessment instruments.

B. California’s Enhanced Credit System Proposal Has Worked in Other States.

California’s plan also is tailored to avoid undermining the deterrence effects that can be achieved through incarceration. As noted, empirical evidence shows that incarceration’s effectiveness at deterring crime depends on the certainty and speed of imprisonment, not its length.⁷⁵ Thus the California proposal includes an accelerated-release initiative based on expanding the credit-earning system already in use. *See* 09-1233 JS App. 38a-39a. State after state has done the same thing with positive results.

New York’s experience is particularly instructive because the state’s “merit time” program has been in place since 1997. Merit time allows non-violent pris-

⁷³ GREENE & MAUER, *supra* note 69, at 54-55. Prior to the 2007 initiative, an increasing number of parole revocations were for offenders classified as “low risk,” suggesting that the previous assessment tool (or its implementation) was flawed. *See* JASON BRYL & TONY FABELLO, THE JFA INST., KANSAS REVOCATION STUDY – FINAL REPORT: ANALYSIS OF PAROLE DATA FROM 2003-2005, at iii (June 2006).

⁷⁴ *See* GREENE & MAUER, *supra* note 69, at 55.

⁷⁵ *See supra* Part II.A.1.

oners to qualify for earlier parole consideration by successfully completing education courses, substance abuse treatment, or extensive community service.⁷⁶ Prisoners who benefitted from the merit-time program between 1997 and 2006 returned to prison at a lower rate than prisoners who did not.⁷⁷ These long-term results parallel those observed in earlier but less extensive reviews of Illinois's enhanced good-time credit program.⁷⁸

Other states recently have replicated the positive results achieved in New York and Illinois. In 2007, Nevada increased the amount of good-time credits available to prisoners who complete education or treatment programs or demonstrate good conduct. The state also made parolees and probationers eligible for credit.⁷⁹ Nevada's prison population now is declining without compromising public safety. Indeed, from 2006 to 2009, violent crime in Nevada dropped 5% and property crime dropped 25%.⁸⁰ Similarly, Washington State's 2003 earned early release law allows eligible non-violent offenders to advance their release date by exhibiting good conduct and participating in work, education, or treatment

⁷⁶ See GREENE & MAUER, *supra* note 69, at 16.

⁷⁷ See *id.*

⁷⁸ See GUZMAN ET AL., *supra* note 27, at 7 (citing comparison of inmates awarded 90 versus 180 days of good-time credit that found "very little difference in the return-to-prison rates" between the two groups); MALCOLM C. YOUNG, SETTING THE RECORD STRAIGHT: THE TRUTH ABOUT 'EARLY RELEASE' FROM ILLINOIS PRISONS 19 (2010).

⁷⁹ See Report of James Austin, PhD, ¶ 33, Case No. 2:90-cv-00520-LKK-JFM, DN 3231-4 (Aug. 2008).

⁸⁰ Compare 2009 CRIME IN THE UNITED STATES, *supra* note 38, at tbl. 5, with FED. BUREAU OF INVESTIGATION, 2006 CRIME IN THE UNITED STATES tbl. 5 (Sept. 2007).

programs.⁸¹ As in New York, prisoners released under Washington's expanded earned-credit program have lower recidivism rates than other prisoners.⁸²

Like these other states that have successfully implemented accelerated release while reporting either no change or else actual reductions in recidivism and crime rates, California's plan uses modest sentence reductions and is targeted toward inmates who pose a low recidivism risk and who have demonstrated positive behavior while in prison.

C. California's Diversion Initiatives Have Worked Elsewhere.

In addition to accelerating release, California plans to reduce prison overcrowding through various diversion initiatives that will help keep low-risk offenders out of prison in the first place. The proposal calls for reentry courts aimed at assisting drug offender parolees through treatment, *see* 09-1233 JS App. 42a-43a, helping them avoid further incarceration for technical or substantive violations. It provides for alternative custody, using penalties such as house arrest and GPS monitoring for offenders who are eligible based on a risk-assessment metric. *See id.* at 63a-64a. Furthermore, the proposal would divert specific low-level offenders who are serving only a few months in state correctional facilities to county jails. *See id.* at 68a-69a. Beyond general crowding reduction, each of these reforms will preserve scarce prison resources for those who commit violent and property crimes. And they will limit low-risk offenders' exposure to the criminogenic conditions that can make them more dangerous upon their eventual release.

⁸¹ *See* INCREASED EARNED RELEASE FROM PRISON at 2.

⁸² *See id.* at 7.

Similar reforms have been safely implemented elsewhere in the country. New York State has successfully used drug treatment as an alternative to incarceration since the 1990s.⁸³ Kansas adopted a comparable drug diversion program in late 2003;⁸⁴ a preliminary analysis of the outcomes showed that diverted offenders tended to have higher rates of successful termination and lower rates of technical revocation than other offenders.⁸⁵

Both Michigan and Texas have diverted low-level offenders to alternative incarceration facilities, as California proposes, without putting the public at risk. Part of Michigan's MPRI model is the Community ReEntry Initiative, under which eligible parole or supervision violators are sent to county detention facilities rather than back to prison.⁸⁶ Similarly, in Texas, the 2007 Justice Reinvestment Initiative included a plan to house technical parole and probation violators in secure intermediate sanction facilities instead of revoking their supervision and sending them to prison.⁸⁷ There is no evidence that doing so has posed any public-safety risk.

Again, based on the documented experience of other states, California's proposal to implement

⁸³ See GREENE & MAUER, *supra* note 69, at 10-11 (surveying history of New York's "DTAP" programs).

⁸⁴ See *id.* at 51.

⁸⁵ See DON STEMEN & ANDRES RENGIFO, VERA INST. OF JUSTICE, KANSAS SENATE BILL 123: A PROCESS AND IMPLEMENTATION EVALUATION 61 (2006).

⁸⁶ See MICHIGAN 2009 STATISTICAL REPORT at H-1.

⁸⁷ See JUSTICE CTR., COUNCIL OF STATE GOV'TS, JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE 4 (2009).

diversion programs for low-level offenders should not adversely affect public safety.

CONCLUSION

For the foregoing reasons, the Court should affirm the order of the three-judge district court.

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* DISCLOSURE: Drs. Austin, Haney, and Krisberg served as expert witnesses in the district court and were compensated for that work by counsel for plaintiffs.