

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,

Plaintiffs, No. CIV S-90-0520 LKK JFM P

vs.

ARNOLD SCHWARZENEGGER,
et al.,

O R D E R

Defendants.

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On July 23, 2007 this court granted plaintiffs' motion to request the convening of a three-judge court pursuant to 18 U.S.C. § 3626(a)(3) and 28 U.S.C. § 2284. A similar motion was granted on the same day in Plata v. Schwarzenegger, Case No. CIV 01-1351 TEH (N.D. Cal.). By order filed on July 26, 2007, the Chief Judge of the Ninth Circuit appointed a single three-judge district court pursuant to 28 U.S.C. § 2284 to consider entering a prisoner release order in both the above-captioned case and in Plata.

On July 27, 2007, defendants filed a notice of appeal of this court's July 23 order requesting the appointment of the

1 three-judge court. Defendants also filed a motion to stay the
 2 court's July 23 order pending appeal. For the reasons discussed
 3 herein, the motion to stay is denied.

4 First, this court's July 23, 2007 order is not an appealable
 5 order.¹ The order is not a final judgment,² nor is it an
 6 interlocutory decision from which an appeal lies under 28 U.S.C.
 7 § 1292.³ Nor is the order granting plaintiff's motion to request
 8 the convening of a three-judge court appealable under the
 9 collateral order doctrine. See Coopers & Lybrand v. Livesay, 437
 10 U.S. 463, 468(1978)(orders that do not dispose of the entire
 11 litigation are appealable as collateral orders if they "[1]
 12 conclusively determine the disputed question, [2] resolve an
 13 important issue completely separate from the merits of the
 14 action, and [3] [are] effectively unreviewable on appeal from a
 15 final judgment").

16 Second, defendants' motion to stay is moot. The order

17 ¹ It is well-settled that a defective notice of appeal does
 18 not divest the district court of jurisdiction to act. See Ruby
v. Secretary of U.S. Navy, 365 F.3d 385, 389 (9th Cir. 1966).
 19 Indeed, where, as here, defendants have filed a notice of appeal
 20 from a non-appealable order jurisdiction remains with this court.
See id. at 388.

21 ² "Generally, a final decision under § 1291 'ends the
 22 litigation on the merits and leaves nothing for the court to do
 23 but execute the judgment.'" S.E.C. v. Capital Consultants LLC,
 453 F.3d 1166, 1170 (9th Cir. 2006) (quoting Catlin v. United
States, 324 U.S. 229, 233 (1945)).

24 ³ In relevant part, 28 U.S.C. § 1292(a) vests the Courts of
 25 Appeals with jurisdiction over interlocutory orders of the
 26 district courts "granting, continuing, modifying, refusing or
 dissolving injunctions, or refusing to dissolve or modify
 injunctions, . . ." 28 U.S.C. § 1292(a).

1 issued by this court on July 23, 2007 requested the convening of
2 a three-judge court pursuant to 18 U.S.C. § 3626(a)(3) and 28
3 U.S.C. § 2284. By order filed July 26, 2007, the Chief Judge of
4 the Ninth Circuit granted the request and appointed a three-judge
5 court. Given that the action requested in the court's order
6 already transpired, namely the appointment of a three-judge
7 court, there remains nothing left to stay.

8 Third, even assuming arguendo that some part of the July 23,
9 2007 order were appealable, defendants have not met the standard
10 for a stay of that order. In evaluating a motion for stay
11 pending appeal, the court considers, "(1) whether the stay
12 applicant has made a strong showing that he is likely to succeed
13 on the merits; (2) whether the applicant will be irreparably
14 injured absent a stay; (3) whether issuance of the stay will
15 substantially injure the other parties interested in proceeding;
16 and (4) where the public interest lies." Hilton v. Braunschweil,
17 481 U.S. 770, 776(1987).

18 Defendants have failed to make any colorable showing that
19 they are likely to succeed on the merits of their appeal, nor
20 have they shown that they will suffer any cognizable injury in
21 the absence of a stay.⁴ The third factor in particular favors
22 denial of defendants' motion. As discussed at length in the
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24 ⁴ Defendants contend that "[t]he irreparable harm is the
25 risk to public safety from an improper prisoner release order." Defendants' Motion for Stay Pending Appeal, filed July 27, 2007,
26 at 5. This contention is without merit. Simply put, no such harm is created by the request to convene a three-judge court.

1 court's July 23 order, the overcrowding crisis in the California
2 Department of Corrections and Rehabilitation is preventing the
3 delivery of constitutionally adequate mental health care to the
4 plaintiff class. See July 23, 2007 Order at 6:6-8:2; 8:18-13:17.
5 Given the nature of the crisis, further unwarranted delay could
6 result in significant harm to the plaintiff class.

7 For all of the foregoing reasons, defendants' motion for
8 stay pending appeal is DENIED.

9 IT IS SO ORDERED.

10 DATED: July 31, 2007.

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13 LAWRENCE K. KARLTON
14 SENIOR JUDGE
15 UNITED STATES DISTRICT COURT
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