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Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that prisoners often have trouble getting legal information and we cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this information, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your institution's law library. If you want legal advice backed by a guarantee, try to hire a lawyer to address your specific problem.

Information Concerning Transfers to Out-of-State Prisons Updated July 2010

We are sending you this letter because you requested information or advice about transfers to out-of-state prisons. This letter provides information on (1) the legal developments that have resulted in the transfers of California prisoners to out-of-state prisons since 2006, (2) the number of prisoners housed out of state and the current rules regarding which prisoners can be transferred, (3) the pros and cons of out-of-state transfer and how to challenge a transfer, and (4) other laws under which prisoners can request out-of-state transfer.

Please note that the following information only addresses transfers for prisoners who are serving California state prison sentences. This letter does not address transfers of California prisoners who have concurrent terms from other states or the federal system. It also does not discuss transfers of California prisoners to other countries.¹

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¹ Information about transfers for prisoners who are serving non-California concurrent terms and transfers to other countries can be found in Chapter 3 of the The California State Prisoners Handbook, (4th Ed. 2008 and periodic supplements), published by the Prison Law Office. The Handbook should be available in most prison law libraries.

I. Developments Regarding Out of State Transfers Since October 2006

(a) The Governor’s Proclamation

The California Department of Corrections and Rehabilitation (CDCR) is facing an overcrowding crisis. On October 4, 2006, Governor Schwarzenegger declared a state of emergency and issued a Proclamation on overcrowding. The Proclamation recognized that overcrowding threatens the health and safety of prisoners and prison staff.²

To address the overcrowding crisis, the Governor ordered CDCR officials to enter into contracts to house adult California prisoners in out-of-state prisons operated by private companies or by other state or county agencies.³ The Governor ordered the CDCR to start by transferring prisoners who volunteer for out-of-state placement. The Proclamation also authorized the CDCR to transfer prisoners involuntarily if the CDCR decided such transfers were necessary. The Proclamation over-rode the then-effective version of Penal Code § 11191, which stated that no prisoner could be transferred to serve a California sentence in another state without the prisoner’s written consent.

(b) Court Decisions

After the Governor’s Proclamation was issued, the state prison guards’ union filed a lawsuit claiming that the Proclamation went beyond the Governor’s authority and violated laws that restrict the state from entering contracts with private parties for services that could be performed by public employees. The Court of Appeal ruled that the Proclamation was properly enacted.⁴ The California Supreme Court declined to review the case.

(c) Amendment of Penal Code 11191

Effective May 3, 2007, the California Legislature amended Penal Code § 11191. The new version of § 11191 authorizes the CDCR to transfer prisoners to other states, both voluntarily and involuntarily. However, under the statute, the transfer of any prisoner with a serious medical or mental health condition is prohibited unless the prisoner has given written consent to the transfer.⁵

² The Governor’s Proclamation is available on the Governor’s website at www.gov.ca.gov/index.php?/archive/proclamations/2006/10/.

³ The Governor’s Proclamation does not permit transfer of juvenile offenders who are committed to the CDCR’s Division of Juvenile Justice.

⁴ California Correctional Peace Officers’ Association v. Schwarzenegger (2008) 163 Cal.App.4th 802 [77 Cal.Rptr.3d 844].

⁵ Penal Code § 11191(b).

Before a prisoner can be transferred out of state, the prisoner has the right to consult with an attorney concerning his or her transfer rights; a free state-appointed attorney will be provided if the prisoner cannot afford to hire an attorney. The prisoner must be informed of the right to consult with an attorney prior to signing any transfer consent form.⁶

In addition, the law says that at any time more than five years after the transfer, a prisoner is entitled to revoke consent and demand to be returned to a California prison. The return to California shall occur within 30 days after the consent to out-of-state placement is revoked.⁷ These provisions presumably do not apply to prisoners who are transferred involuntarily.

The amended version of Penal Code § 11191 is to be in effect until July 1, 2011 or until the CDCR has constructed a certain number of additional permanent bed spaces. The new provisions will automatically be repealed as of January 1, 2012 unless the Legislature acts to extend the provisions.⁸

II. Current Rules Regarding Out-of State Transfers

As of November 2009, the CDCR's goal is to house about 10,500 male prisoners in other states.⁹ There are currently five active out-of-state facilities, run by a private company called the Corrections Corporation of America (CCA); the facilities are located in Arizona, Mississippi and Oklahoma. The out-of-state housing program is administered by a Chief Deputy Administrator for the "California Out of State Correctional Facility" or "COCF."¹⁰

There are no out-of-state facilities for female California prisoners.

The CDCR has adopted regulations regarding out-of-state transfer procedures, eligibility and priorities. The regulations are found in 15 CCR §§ 3379(a)(9) and its subdivisions.

All male prisoners will be reviewed for transfer eligibility upon arrival in the reception center and at periodic classification reviews.¹¹ Transfer eligibility depends upon the prisoner's

⁶ Penal Code § 11191(a).

⁷ Penal Code § 11191(a).

⁸ Penal Code § 11191(c).

⁹ Up-to-date information about the number of prisoners housed out of state can be found at the CDCR website at www.cdcr.ca.gov/News/HousingInmates.html.

¹⁰ The locations of out-of-state facilities and contact information for the individual facilities and the COCF administrator can be found on the CDCR website at www.cdcr.ca.gov/Visitors/CA_Out_Of_State_Facilities.html.

¹¹ 15 CCR § 3379(a)(9).

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security and custody level and the length of time left to serve.¹² CDCR also has set priorities regarding which eligible prisoners will be transferred out-of-state first. Highest priority for transfer is assigned to prisoners who are not U.S. citizens and who are likely to be deported at the end of their prison terms. Prisoners who are paroling outside of California also are deemed high priority for transfer. For other prisoners, lack of a job assignment and lack of regular visits from family members will increase the likelihood of involuntary out-of-state transfer.¹³

Under the regulations, some types of prisoners cannot be transferred involuntarily. These are (1) prisoners with serious medical or dental conditions; (2) prisoners who are receiving mental health care at any level of care; (3) developmentally disabled prisoners (DD1, DD2 or DD3), and (4) physically disabled prisoners who cannot travel safely or require active medical intervention, who cannot perform daily living tasks without assistance, or who are on dialysis.¹⁴

Some prisoners with serious medial or dental conditions can volunteer for out-of-state placement and be considered for transfer on a case-by-case basis if the transfer will not have a detrimental impact on the prisoner's health and appropriate health care is available at an out-of-state facility. Some prisoners who are receiving mental health care may also volunteer for transfer, but they cannot be moved out-of-state unless the transfer is permitted by a court order.¹⁵ However, under a polict adopted by the Prison Health Care Receiver appointed by the federal court to run the California prison medical system, some prisoners are absolutely ineligible for out-of-state transfer. This policy applies to any prisoner who has a medical condition that is not likely to resolve in six months, dental problems, specific serious conditions (including cancer, HIV/AIDS, active seizure disorder, blood pressure at or above 160/100, certain types of diabetes, kidney problems requiring dialysis, etc.) or a history of mental health treatment at the EOP level or in a Psychiatric Services Unit (PSU), Mental Health Crisis Bed (MHCB) or the Department of Mental Health (DMH). Also, a prisoner is temporarily ineligible for out-of-state transfer if he has a pending mental health, dental, or medical diagnostic/treatment appointment, has a current acute injury, has been hospitalized in the past year, has attempted suicide in the past year, is in the Correctional Clinical Case Management System (CCCMS) or has been in the CCMS in the past year.¹⁶

Prisoners who are in the Disability Placement Program (DPP) and require special placement (categories DPW, DPM, DPO, DPH and DPV) shall be considered for out-of-state

¹² 15 CCR § 3379(a)(9)(A) and (B).

¹³ 15 CCR § 3379(a)(9)(H).

¹⁴ 15 CCR § 3379(a)(9)(G).

¹⁵ 15 CCR § 3379(a)(9)(F)(2).

¹⁶ Division of Correctional Health Services, Inmate Medical Services, Vol. IV, Chapter #30, California Out-of-State Facility Transfer Procedure, Attachment I, eff. Nov. 2008.

transfer on a case-by-case basis;¹⁷ a prisoner should not be transferred unless appropriate accommodations are available at the out-of-state facility. There are no particular restrictions on out-of-state transfer for prisoners who are in the DPP but who are not in one of the special placement categories.

It appears to be the CDCR's informal policy that prisoners in the Developmental Disability Program (DDP) are generally not subject to out-of-state transfers. Any DDP prisoner who is transferred out-of-state would have to be provided with appropriate assistance and accommodations.

The new regulations also re-state the statutory rule that a prisoner shall be provided with an opportunity to consult with an attorney prior to transfer. A prisoner may waive the right to an attorney consultation.¹⁸ The consultations are carried out by attorneys who contract with the state to provide services to prisoners and parolees. The attorneys meet with prisoners who are facing out-of-state transfer, sometimes in groups, to advise them about the laws and regulations and to answer questions. The attorneys also explain the process for filing administrative appeals to protest a transfer, but it appears that they will not actually represent prisoners in legal challenges.

Notification of eligibility for transfer, the right to an attorney consultation, the fact of the attorney consultation itself, and any agreement to a voluntary transfer are to be documented on particular CDCR forms.¹⁹

III. Pros and Cons of Transferring Out-of-State and Methods for Challenging an Out-of-State Transfer

Prisoners who are asked to transfer to another state should consider the potential costs or benefits of transfer.

A prisoner's sentence will remain the same no matter where he is housed. The sentencing terms for prisoners housed out-of-state are still governed by California laws, and California's direct appeal and habeas corpus procedures for challenging convictions apply. Out-of-state prisoners remain officially in custody of the CDCR and subject to the same rules, rights and privileges as other CDCR prisoners.²⁰ Prisoners housed out-of-state also will presumably remain eligible to earn sentence credits pursuant to California law.²¹

¹⁷ Division of Correctional Health Services, Inmate Medical Services, Vol. IV, Chapter #30, California Out-of-State Facility Transfer Procedure and attachments I-V, eff. Nov. 2008.

¹⁸ 15 CCR § 3379(a)(9)(C).

¹⁹ 15 CCR § 3379(a)(9)(D) through (F).

²⁰ 15 CCR § 3379(a)(9)(I).

²¹ Eligibility to earn prison credits is governed by Penal Code §§ 2932-2933.6 and 15 CCR § 3043-3044.

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Transfers may be detrimental to some prisoners. For example, transfer could make it difficult for family and friends to visit or make a prisoner unable to participate in a Prison Industries Authority (PIA) program. It also may be difficult for prisoners housed out-of-state to get access to the forms and information needed to file pleadings in the California courts.²² Conditions in the out-of-state prisons are still somewhat unknown and may be less likely to be monitored by the outside community.

On the other hand, the overcrowding in many California prisons has resulted in abysmal living conditions, poor medical and mental health care, and high levels of stress and violence. In some cases, prisoners who have been transferred have reported that they prefer being housed in an out-of-state prison.

For most prisoners, there is no legal right to avoid transfer to an out-of-state facility and the decision is entirely within the discretion of the CDCR. Prisoners who have family in California may be able to persuade CDCR staff not to transfer them out-of-state, particularly since California law directs the CDCR consider family ties in deciding where to house prisoners.²³ A prisoner facing a possible out-of-state transfer might want to gather letters from family members stating that they wish to visit regularly and explaining how out-of-state travel would be burdensome or difficult.

Otherwise, a prisoner's only hope of avoiding an involuntary out-of-state transfer (or returning to a California facility after being transferred out of state) is to show that the placement is likely to harm his health or safety. Prisoners who have serious medical, dental or mental health conditions can assert that the statute and regulations prohibit housing them out-of-state or placing them in an out-of-state facility that cannot meet their health care needs.²⁴ Transfer to a prison unequipped to treat a prisoner's medical or mental health care needs might also violate the U.S. Constitution's Eighth Amendment prohibition on cruel and unusual punishment.²⁵ Likewise, transferring a disabled prisoner to a facility that is unable to accommodate that disability might violate state regulations, the Eighth Amendment or the federal Americans with Disabilities Act (the ADA), 42 U.S.C. § 12101 et seq.²⁶ Other prisoners might be able to argue

²² Courts have held that sending state authorities maintain responsibility for providing state legal materials to their prisoners incarcerated in out-of-state facilities. Boyd v. Wood (9th Cir. 1995) 52 F.3d 820; Clayton v. Tansy (10th Cir.1993) 26 F.3d 980, 982; Rich v. Zitnay (1st Cir. 1981) 644 F.2d 41, 43.

²³ Penal Code § 5068, but see In re Rhodes (1998) 61 Cal.App.4th 101, 106-107 [70 Cal.Rptr.2d 912] (overcrowding and administrative needs were valid reasons to transfer prisoner away from family).

²⁴ Penal Code § 1191 and 15 CCR § 3379(a)(9)(F)(2) and (G).

²⁵ See Estelle v. Gamble (1976) 429 U.S. 97 (deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment); Coleman v. Wilson (E.D. Cal. 1995) 912 F.Supp. 1282 (same re: mental health care).

²⁶ See Pennsylvania Dept. of Corrections v. Yeskey (1998) 524 U.S. 206 (ADA protects disabled prisoners from discrimination); Frost v. Agnos (9th Cir. 1998) 152 F.3d 1124 (failure to provide accessible facilities can amount to cruel and unusual punishment); 15 CCR § 3085 (no CDCR inmate shall be denied the benefits of services, programs or activities or be subjected to discrimination due to disability).

that a transfer would subject them to cruel and unusual punishment in violation of the Eighth Amendment if the transfers would place them with known enemies or others who would cause serious harm.²⁷ Prison officials also cannot transfer a prisoner solely in retaliation for the prisoner's exercise of constitutionally protected rights.²⁸

As with most prison condition issues, a prisoner's first step for challenging an out-of-state transfer is to file an administrative appeal using CDCR form 602 (general issues), 602-HC (health care issues) or 1824 (disability issues). If a transfer is imminent and could cause serious and irreparable harm, a prisoner can ask that the appeal be processed as an emergency matter.²⁹ If the administrative appeal is unsuccessful, a prisoner can then seek a court order forbidding the CDCR from transferring the prisoner out of state or requiring the CDCR to return the prisoner to California. A petition for writ of habeas corpus filed in state court is the quickest and easiest means to seek such relief and can be based on either state or federal legal principles. Alternatively, a prisoner whose federal rights would be violated by an out-of-state transfer can file a federal civil rights suit (a "section 1983" case).

Additional free materials regarding administrative appeals, state habeas corpus procedures and federal civil rights suits are available from the Prison Law Office upon request.

IV. Other Laws Authorizing Out-of-State Transfers

Prisoners sometimes want to request transfer to a particular state for safety reasons or to be near family. The Interstate Corrections Compact provides another way for California prisoners to request transfer to prisons run by other states or the federal government.³⁰

Under these provisions almost all transfers are the result of "inmate-for-inmate" swaps between California and another state or the federal prison system. Such transfers are relatively uncommon. In general, a prisoner has no right to compel transfer to a prison in another jurisdiction to serve a California term, and even when California officials would like to transfer a prisoner, there must be an interstate agreement allowing such a move. The provisions that apply to voluntary transfers and that are described above, such as the right to consult with an attorney and requirement of the prisoner's written consent, continue to apply to transfers requested by prisoners under the Interstate Corrections Compact.³¹

²⁷ See Farmer v. Brennan (1994) 511 U.S. 825, 832-834 [114 S.Ct. 1970; 128 L.Ed.2d 811] (prison officials have duty to protect prisoners from violence by other prisoners; a constitutional violation occurs when danger of harm is "sufficiently serious" and prison official acts with "deliberate indifference" to inmate's health or safety).

²⁸ Pratt v. Rowland (9th Cir. 1995) 65 F.3d 802, 806-807; Rizzo v. Dawson (9th Cir. 1985) 778 F.2d 527, 532; Lucero v. Hensley (C.D. Cal. 1996) 920 F.Supp.1067, 1076; Scott v. Reno (C.D. Cal. 1995) 902 F.Supp. 1190, 1195.

²⁹ 15 CCR § 3084.7(a).

³⁰ Penal Code §§ 2911(c) and 11189 et seq.

³¹ Penal Code §§ 2911 and 11191.

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A prisoner who wants to transfer to another state or to the federal prison system should first determine if California has an exchange contract with the jurisdiction to which he or she wishes to transfer. As of September 2006, California had contracts with the following jurisdictions: Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Washington, Wyoming and the Federal Bureau of Prisons.³²

This type of transfer is generally used only for cases in which the prisoner has special safety needs and in which the prisoner's permanent residence, resources, and future parole plans are outside California. Even these prisoners, however, will not be considered for transfer if they are considered to be a management problem. According to CDCR staff, a prisoner who wishes to transfer to another state must have at least two years left to serve; life prisoners are not necessarily prohibited from transfer. If the prisoner is transferring for family reunification, the family must reside in the state to which the prisoner wishes to transfer. Generally, if a prisoner's needs can be met in California's prisons as well as they can be met in another jurisdiction, then an out-of-state transfer will not be approved.

This type of transfer to another state normally is initiated by a prisoner's request. Institution staff should then obtain the written consent of the prisoner and, if the prisoner appears eligible for transfer, prepare a report for the Departmental Review Board (DRB). At the request of a court, district attorney or law enforcement officials, the CDCR's Interstate Compact Unit may also submit a transfer request to the DRB.

The DRB must approve the out-of-state transfer request.³³ If the DRB approves a transfer, the CDCR's Interstate Compact Unit will contact the other jurisdiction and attempt to obtain an agreement to accept the prisoner. Transfer will occur only if the other state agrees to it. Some states, for various reasons, will make few or no exchanges with California.

A prisoner who is transferred to another state or federal prison to serve a California sentence remains under the sentencing laws and legal jurisdiction of California, and California can have the prisoner returned at any time.³⁴ Remaining under California's jurisdiction also means that the prisoner is entitled to any rights or benefits he or she would have received in California.³⁵ Thus, a California prisoner transferred out-of-state is eligible to earn worktime credits under the same rules as would be applied in California.³⁶ California is also responsible

³² Memo from CDC Classification Services Unit dated September 20, 2004 and list of Western Interstate Correctional Compact participants dated August 31, 2004; phone confirmation with CDCR staff September 2006.

³³ DOM § 62010.10.4.

³⁴ Penal Code § 11189, Art. IV(c).

³⁵ Penal Code § 11189, Art. IV(e).

³⁶ 15 CCR § 3043(g).

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for providing a prisoner who is housed out-of-state with California legal materials to ensure access to the California courts.³⁷

At any time more than five years after an out-of-state transfer, a prisoner can revoke consent to out-of-state placement and ask to return to a California prison. Transfer shall occur within 30 days after the prisoner's consent to out-of-state placement is revoked.³⁸

Finally, an out-of-state transfer does not require the prisoner to be paroled out-of-state; in fact, unless the prisoner and the involved jurisdictions agree otherwise, the prisoner will be returned to California for parole.³⁹ Parole outside of California must be separately arranged.⁴⁰

Prisoners should note that the Interstate Corrections Compact is not a federal law, and violation of the Compact cannot be raised in a federal civil rights lawsuit unless the violation also affects some right protected by the federal constitution or statutes.⁴¹

³⁷ See Boyd v. Wood (9th Cir. 1995) 52 F.3d 820; Clayton v. Tansy (10th Cir.1993) 26 F.3d 980, 982; Rich v. Zitnay (1st Cir. 1981) 644 F.2d 41, 43.

³⁸ Penal Code § 11191.

³⁹ Penal Code § 11189, Art. IV(g).

⁴⁰ Out-of-state parole is governed by the Interstate Compact for Adult Offender Supervision. Penal Code § 11180-11181; see also Penal Code §§ 11175-11179. Additional information on out-of-state parole is available in Chapter 10 of the The California State Prisoners Handbook, Fourth Edition (2008).

⁴¹ Ghana v. Pearce (9th Cir. 1998) 159 F.3d 1206.