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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 2013

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 number of prisoners housed out of state and the rules regarding which prisoners can be transferred, (2) the pros and cons of out-of-state transfer and how to challenge a transfer, and (3) other laws under which prisoners can request out-of-state transfer.

This letter only addresses transfers for prisoners serving California state prison sentences. This letter does not address transfers of prisoners who have concurrent terms from other states or the federal system. It also does not discuss transfers of prisoners to other countries. 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). The *Handbook* should be available in most prison law libraries.

Transfers to out-of-state prisons are one part of California's plan to reduce prison overcrowding as required by federal court orders. There are currently disputes about how much further California must reduce overcrowding and what means should be used. Because of these disputes, there may be policy changes in the future that affect how many prisoners are housed out-of-state. For broader information on the State's population-reduction plans, please write to the Prison Law Office and request the free information letter on *California's Prison Population Reduction Plans*; that letter is also available on the Resources page of the Prison Law Office website (www.prisonlaw.com).

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I. Rules Regarding Out-of State Transfers

In October 2006, the Governor declared a state of emergency and issued a Proclamation on prison overcrowding. To address the overcrowding crisis, the Governor ordered the California Department of Corrections and Rehabilitation (CDCR) to enter into contracts to house adult California prisoners in out-of-state prisons operated by private companies or public agencies. The Proclamation authorized the CDCR to transfer prisoners involuntarily if the CDCR decided such transfers were necessary. The Proclamation over-rode the version of Penal Code § 11191 that was in effect at that time and which stated that no prisoner could be transferred to serve a California sentence in another state without the prisoner's consent. The Governor's Proclamation was upheld against a court challenge.¹ In May 2007, the California Legislature temporarily amended Penal Code § 11191 to authorize the CDCR to transfer prisoners to other states, both voluntarily and involuntarily. Although the temporary amendment authorizing involuntary out-of-state transfers has expired, the CDCR continues to transfer inmates out of state involuntarily pursuant to the Governor's Proclamation.

The CDCR reports that as of July 2013, there are just under 9,000 male prisoners housed in 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. Some additional prisoners are housed in a CCA facility located in Kern County, California. There are no out-of-state facilities for female California prisoners. The out-of-state housing program is administered by a Chief Deputy Administrator for the "California Out of State Correctional Facility" or "COCF."²

Before a prisoner can be transferred out of state, the prisoner has the right to consult with an attorney. A free state-appointed attorney will be provided if the prisoner cannot afford to hire an attorney. A prisoner may waive the right to an attorney consultation.³ 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 CDCR forms.⁴ 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 the advising attorneys will not actually represent prisoners in legal challenges.

¹ California Correctional Peace Officers' Association v. Schwarzenegger (2008) 163 Cal.App.4th 802 [77 Cal.Rptr.3d 844].

² Contact information for the out-of-state facilities and the COCF administrator can be found on the CDCR website at www.cdcr.ca.gov/Visitors/CA_Out_Of_State_Facilities.html.

³ 15 CCR § 3379(a)(9)(C); see also Penal Code § 11191(a).

⁴ 15 CCR § 3379(a)(9)(D) through (F).

THE PRISON LAW OFFICE

Information Concerning Transfers to Out-of-State Prisons – July 2013

page 3

The law appears to state that a prisoner can revoke consent and demand to be returned to a California institution any time more than five years after the transfer.⁵ However, a prisoner who revokes consent could very likely still end up housed out-of-state on an involuntary basis.

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 are reviewed for transfer eligibility upon arrival in the reception center and at periodic classification reviews. Transfer eligibility depends upon the prisoner's security and custody level and the length of time left to serve. CDCR also has set priorities for which eligible prisoners will be transferred out-of-state. Highest priority for transfer are prisoners who are not U.S. citizens and who are likely to be deported at the end of their prison terms. Prisoners who will be paroling outside of California also are 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.⁶

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 classified as DD1, DD2 or DD3; and (4) physically disabled prisoners who cannot travel safely, require active medical intervention (such as being on dialysis), or cannot perform basic daily living tasks without assistance.⁷

Some prisoners with serious medical or dental conditions can volunteer for out-of-state placement and be considered on a case-by-case basis if the transfer will not be bad for the prisoner's health and appropriate health care is available at an out-of-state facility.⁸ The Prison Health Care Receiver (who was appointed by the federal court to run the California prison medical system) has a policy that governs such transfers. To be eligible for placement in an out-of-state facility, a prisoner must be classified by medical staff as having a functional capacity of Limited Duty or better, an out-patient (OP) level of care, and a medical risk level of Medium Risk or less. Also, a prisoner must be classified as needing Frequent Basic Consultation or less and Low Intensity Nursing or less, and be able to be transported from and to California by routine transportation methods.⁹ To house prisoners with serious medical conditions, an out-of-state facility must provide nursing and primary care service on a continuous basis, be able to provide urgent care, and have short and long term care in an Outpatient Housing Unit (OHU) or Correctional Treatment Center (CTC) available on-site.

⁵ See both current and former Penal Code § 11191.

⁶ 15 CCR § 3379(a)(9).

⁷ 15 CCR § 3379(a)(9)(G).

⁸ 15 CCR § 3379(a)(9)(F)(2).

⁹ California Correctional Health Services, Medical Services, Vol. IV, Chapter 29.1, Appendix II (July 2013).

Prisoners who are receiving mental health care may volunteer and be considered for transfer, but the transfer must be approved by a court order.¹⁰

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

II. Pros and Cons of Transferring Out-of-State and How to Challenge 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 sentences 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.¹¹ Prisoners housed out-of-state should also to earn sentence credits pursuant to California law.

Transfers may not be in the best interests of some prisoners. For example, transfer could make it difficult for family and friends to visit or keep a prisoner from participating in a Prison Industries Authority (PIA) program. It also may be difficult for out-of-state prisoners to get access to forms and information needed to file legal cases in the California courts.¹² Conditions in the out-of-state prisons may be less likely to be monitored by the outside community.

On the other hand, the overcrowding in many California prisons has resulted in terrible 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 up to the CDCR. Prisoners who have family in California may be able to persuade CDCR staff not to transfer them out-of-state, especially since California law directs the CDCR to consider family ties in deciding where to house a prisoner.¹³ A prisoner who wants to

¹⁰ 15 CCR § 3379(a)(9)(F)(2).

¹¹ 15 CCR § 3379(a)(9)(I).

¹² 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.

¹³ 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).

THE PRISON LAW OFFICE

Information Concerning Transfers to Out-of-State Prisons – July 2013

page 5

avoid an out-of-state transfer should try 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 is to show that the placement is likely to harm his health or safety. Prisoners who have serious medical, dental or mental health conditions or disabilities can argue that the CDCR regulations and policies prohibit housing them in an out-of-state facility. 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.¹⁴ 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.¹⁵ Other prisoners might be able to argue they would suffer cruel and unusual punishment in violation of the Eighth Amendment if the transfer would place them with known enemies or others who would cause serious harm.¹⁶ Prison officials also cannot transfer a prisoner solely in retaliation for the prisoner's exercise of constitutionally protected rights.¹⁷

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 scheduled to occur soon and could cause the prisoner serious harm, the prisoner can ask that the appeal be processed as an emergency matter.¹⁸ If the administrative appeal is unsuccessful, a prisoner can then ask a court to issue an 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 way 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 or on the Resources page of the Prison Law Office website (www.prisonlaw.com).

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ 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.

¹⁸ 15 CCR § 3084.7(a).

III. Other Laws Authorizing Out-of-State Transfers

Prisoners sometimes want to transfer to a particular state for safety reasons or to be near family. The Interstate Corrections Compact provides a way for California prisoners to request transfer to prisons run by other states or the federal government.¹⁹ California currently has exchange contracts with all of the other U.S. states, the federal prison system, and Puerto Rico.²⁰ The right to consult with an attorney and requirement that the prisoner give written consent apply to transfers requested under the Interstate Corrections Compact.²¹

Almost all Interstate Compact 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.

This type of transfer is used mostly in 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 in such situations, a prisoner who is considered to be a management problem will not be considered for transfer. 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.

An Interstate Compact transfer normally is initiated by a prisoner’s request. Institution staff should get the written consent of the prisoner and, if the prisoner appears eligible for transfer, prepare a report for the Departmental Review Board (DRB). A court, district attorney or law enforcement officers also may request that CDCR staff consider an interstate transfer.

If the DRB approves a transfer, the CDCR’s Interstate Compact Unit will contact the other jurisdiction and attempt to get 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. The prisoner is entitled to any rights or benefits he or she would have received in California, including eligibility to earn conduct credits under the

¹⁹ Penal Code §§ 11189-11190; see also Penal Code §§ 2911 (contracts for transfers to the federal prison system).

²⁰ Per phone call with CDCR Interstate Compact Office staff, March 2012.

²¹ Penal Code §§ 2911(c) and 11191(a).

THE PRISON LAW OFFICE

Information Concerning Transfers to Out-of-State Prisons – July 2013

page 7

same rules as in California prisons.²² California is also responsible for providing a prisoner who is housed out-of-state with California legal materials to ensure access to the California courts.²³

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.²⁴

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 states agree otherwise, the prisoner will be returned to California for parole.²⁵ Parole outside of California must be separately arranged.²⁶

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.²⁷

²² Penal Code § 11189, Art. IV(c) and (e); 15 CCR § 3043(d).

²³ 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.

²⁴ Penal Code § 11191(a).

²⁵ Penal Code § 11189, Art. IV(g).

²⁶ See Penal Code § 11180-11181; additional information on out-of-state parole is available in Chapter 10 of the The California State Prisoners Handbook, Fourth Edition (2008 and periodic supplements).

²⁷ Ghana v. Pearce (9th Cir. 1998) 159 F.3d 1206.