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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WADE THORNTON,

Plaintiff,

v.

ARNOLD SCHWARZENEGGER,
Governor; GLENN TILTON,
Director of the California
Department of Corrections and
Rehabilitation; MATTHEW
KRAMER, Warden of Folsom
State Prison,

Defendants.

NO. CIV. 08-1260 WBS CMK

ORDER

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Plaintiff Wade Thornton, a prisoner proceeding pro se, brought this action pursuant to 42 U.S.C. § 1983 to prevent his pending transfer to an out-of-state prison. In his Complaint, plaintiff bases his § 1983 claim on four alleged constitutional violations: 1) that plaintiff's pending transfer and defendants' alleged criteria for selecting transferable inmates violates his rights to Due Process and Equal Protection; 2) that defendant

1 Governor Schwarzenegger's mandate to involuntarily transfer
2 inmates to out-of-state prisons violates plaintiff's Eighth
3 Amendment and Fourteenth Amendment rights; 3) that plaintiff's
4 pending transfer violates his right of access to the courts; and
5 4) that the involuntary transfer of prisoners to out-of-state
6 prisons violates the Thirteenth Amendment. Plaintiff also
7 requests the court to enjoin his transfer to an out-of-state
8 prison.

9 Pursuant to 28 U.S.C. § 1915A(a), Magistrate Judge
10 Craig M. Kellison screened plaintiff's Complaint and recommended
11 that it be dismissed with prejudice for failure to state a claim
12 upon which relief can be granted. (Dec. 29, 2008 Findings and
13 Recommendations ("F&Rs") 9.) On January 12, 2009, plaintiff
14 filed timely objections to the Magistrate Judge's Findings and
15 Recommendations. The sole ground underlying plaintiff's
16 objection to the dismissal of his Complaint is that a prior
17 version of California Penal Code section 11191 precludes
18 defendants from involuntarily transferring him to an out-of-state
19 prison. (Pl.'s Objections 1-2.) Pursuant to 28 U.S.C. §
20 636(b)(1)(C), this court has conducted a de novo review of the
21 relevant findings and recommendations and will accept the
22 Magistrate Judge's recommendation to dismiss plaintiff's
23 Complaint with prejudice.

24 "A liberty interest may arise from either of two
25 sources: the due process clause itself or state law.'" Carver v.
26 Lehman, 550 F.3d 883, 886 (9th Cir. 2008) (quoting Toussaint v.
27 McCarthy, 801 F.2d 1080, 1089 (9th Cir. 1986)). The federal
28 Constitution does not give rise to the liberty interest plaintiff

1 alleges because "an interstate prison transfer . . . does not
2 deprive an inmate of any liberty interest protected by the Due
3 Process Clause in and of itself." Olim v. Wakinekona, 461 U.S.
4 238, 248 (1983); accord White v. Lambert, 370 F.3d 1002, 1013
5 (9th Cir. 2004). Plaintiff must therefore establish that the
6 state has created a liberty interest and that the deprivation of
7 that interest constitutes an "atypical and significant hardship .
8 . . in relation to the ordinary incidents of prison life."
9 Sandin v. Conner, 515 U.S. 472, 484 (1995).¹

10 Relying on the version of California Penal Code section
11 11191 that applied at the time of his sentencing, plaintiff
12 argues that the written consent requirement in the statute vested
13 him with an irrevocable liberty interest in choosing to remain in
14 an in-state prison for the duration of his confinement. (Pl.'s
15 Objections 1-2; Compl. ¶¶ 4-7.) At the time of plaintiff's
16 sentencing, section 11191 provided: "Any court or other agency .
17 . . may commit or transfer [an] inmate to any institution within
18 or without this state . . . , but no inmate sentenced under

19
20 ¹ In his Findings and Recommendations, the Magistrate
21 Judge stated that a state-created liberty interest could exist
22 only if "the deprivation in question (1) restrains the inmate's
23 freedom in a manner not expected from the sentence; and (2)
24 'imposes atypical and significant hardship on the inmate in
25 relation to the ordinary incidents of prison life.'" (F&Rs 3:22-
26 26 (quoting Sandin, 515 U.S. at 484) (emphasis added).) In
27 Sandin, however, the Supreme Court identified those two standards
28 as separate and distinct avenues to establish a protected liberty
interest. See Sandin, 515 U.S. at 484 ("[Instances when states
create liberty] interests will be generally limited to freedom
from restraint which, while not exceeding the sentence in such an
unexpected manner as to give rise to protection by the Due
Process Clause of its own force, nonetheless imposes atypical and
significant hardship on the inmate in relation to the ordinary
incidents of prison life.") (emphasis added) (citations omitted).

1 California law may be committed or transferred to an institution
2 outside of this state, unless he has executed a written consent
3 to the transfer." Cal. Penal Code § 11191 (amended by A.B. 900
4 (2007)).

5 This written consent requirement was first displaced,
6 however, on October 4, 2006, when Governor Schwarzenegger issued
7 the "Prison Overcrowding State of Emergency Proclamation"
8 ("proclamation") pursuant to his powers under the California
9 Emergency Services Act, Cal. Gov't Code §§ 8550-8668. Prison
10 Overcrowding State of Emergency Proclamation (Oct. 4, 2006),
11 available at <http://gov.ca.gov/index.php?/proclamation/4278/>. As
12 relevant to plaintiff's Complaint, the proclamation ordered the
13 California Department of Corrections and Rehabilitation (CDCR) to
14 exhaust all possibilities for voluntary transfers and then
15 "effectuate involuntary transfers of California prison inmates."
16 Id. The proclamation further provided that, "because strict
17 compliance with California Penal Code sections 11191 and 2911
18 would prevent, hinder, or delay the mitigation of the severe
19 overcrowding in [California] prisons, applicable provisions of
20 these statutes are suspended to the extent necessary to enable
21 the CDCR to transfer adult inmates . . . to institutions in other
22 states . . . without consent." Id.²

24 ² No court has specifically addressed the validity of the
25 proclamation with respect to its abatement of section 11191's
26 consent requirement. But see Cal. Corr. Peace Officers' Ass'n v.
27 Schwarzenegger, 163 Cal. App. 4th 802, 820, 825 (2008) (holding
28 that Governor Schwarzenegger "did not exceed his authority in
issuing the proclamation" and that the proclamation did not
violate Article VII of the California Constitution, as
implemented by the Civil Service Act). As the Legislature
withdrew section 11191's consent requirement before the transfer

1 About seven months after Governor Schwarzenegger issued
2 the proclamation, the California Legislature deleted section
3 11191's written consent requirement.³ When doing so, the
4 Legislature also provided that the written consent requirement
5 would be reinstated by the earlier of July 1, 2011, or the date
6 when in-state prison facilities achieved the requisite inmate
7 capacity. Cal. Penal Code § 11191(c). The CDCR has also amended
8 its regulations in response to the proclamation and the
9 Legislature's amendment of section 11191. See Cal. Code Regs.
10 tit. 15, § 3379(a)(9).

11 Consequently, even assuming section 11191 vested
12 plaintiff with a liberty interest in preventing his involuntary
13 transfer to an out-of-state prison at the time he was sentenced,
14 that interest no longer existed when the CDCR initiated his
15 transfer on May 30, 2008. As the Ninth Circuit has recognized,
16 "[a] state-created liberty interest exists only as long as the

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18 at issue in this case, the court need not address plaintiff's
19 argument that Governor Schwarzenegger exceeded his authority when
he mandated the involuntary transfer of prisoners.

20 ³ While the Legislature deleted "but no inmate sentenced
21 under California law may be committed or transferred to an
22 institution outside of this state, unless he has executed a
23 written consent to the transfer," it left language which could
24 arguably suggest that the CDCR is still required to obtain
25 written consent to effectuate an out-of-state transfer. See Cal.
26 Penal Code § 11191(a) ("The inmate . . . shall be informed of
27 those rights prior to executing the written consent. At any time
28 more than five years after the transfer, the inmate shall be
entitled to revoke his consent and to transfer to an institution
in this state.") (emphasis added). The Legislature's deletion of
the only language expressly requiring written consent and the
unequivocal statements in the legislative history memorializing
its intent to remove the written consent requirement, see, e.g.,
A.B. 900, Legislative Counsel's Digest 4 (May 3, 2007) ("This
bill would, until a specified date, eliminate the consent
requirement, except in certain circumstances."), dispel any
ambiguity that could result from the unaltered language.

1 statute or regulation creating it remains effective. If the
2 state repeals the statute or eliminates the regulation, the
3 liberty interest ceases to exist." Toussaint, 801 F.2d at 1092;
4 cf. Atkins v. Parker, 472 U.S. 115, 129-30 (1985) ("The
5 procedural component of the Due Process Clause does not 'impose a
6 constitutional limitation on the power of Congress to make
7 substantive changes in the law of entitlement to public
8 benefits.' . . . '[T]he legislative determination provides all
9 the process that is due.'" (citations omitted) (alteration in
10 original).

11 At a minimum, therefore, the Legislature's amendment of
12 section 11191 on May 3, 2007, terminated any statutorily created
13 liberty interest plaintiff may have had in choosing to remain in
14 an in-state prison. Accordingly, because plaintiff does not have
15 a cognizable liberty interest under the Due Process Clause, the
16 Magistrate Judge properly dismissed that component of his § 1983
17 claim. With respect to the remaining allegations giving rise to
18 plaintiff's § 1983 claim and plaintiff's request for injunctive
19 relief, the court will dismiss plaintiff's Complaint for the
20 reasons stated in the Magistrate Judge's Findings and
21 Recommendations.

22 IT IS THEREFORE ORDERED that

23 (1) the Magistrate Judge's Findings and Recommendations
24 of December 20, 2008, be, and the same hereby are, adopted to the
25 extent they are consistent with this Order;

26 (2) plaintiff's Complaint be, and the same hereby is,
27 dismissed with prejudice for failure to state a claim upon which
28 relief can be granted;

1 (3) plaintiff's request for injunctive relief be, and
2 the same hereby is, denied with prejudice; and

3 (4) the Clerk of the Court is directed to enter
4 judgment and close this case.

5 DATED: February 4, 2009

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7 WILLIAM B. SHUBB
8 UNITED STATES DISTRICT JUDGE
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