



PRISON LAW OFFICE

General Delivery, San Quentin CA 94964
Telephone (510) 280-2621 • Fax (510) 280-2704
www.prisonlaw.com

Director:
Donald Specter

Managing Attorney:
Sara Norman

Staff Attorneys:
Rana Anabtawi
Susan Christian
Rebekah Evenson
Steven Fama
Penny Godbold
Megan Hagler
Alison Hardy
Kelly Knapp
Millard Murphy
Lynn Wu

Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information and 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 pamphlet, 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.

INFORMATION REGARDING PROPOSITION 9

(revised June 2011)

The following information is a summary of some of the changes in California law resulting from Proposition 9 (also known as "Marsy's Law"), which was passed by the voters on November 4, 2008. Proposition 9 modified the California Constitution and altered the California Penal Code by amending two statutes and adding two additional statutes. The main changes that affect people who have been convicted and sentenced are (1) changes in the procedures for determining whether life prisoners are suitable for parole; (2) changes in the procedures for revoking parole; (3) new rules on the payment of restitution; (4) restriction of the early release of prisoners; and (5) limitations on the rights of prisoners.

I. CHANGES IN LIFE PAROLE CONSIDERATION PROCEDURES

A. Scheduling Parole Consideration Hearings for Life Prisoners (Pen. Code § 3041.5)

Before the passage of Proposition 9, when a prisoner with an indeterminate life sentence was found unsuitable for parole, he or she was entitled to an annual parole consideration hearing unless the Board of Parole Hearings (the Board) found that it was not reasonable to expect that parole would be granted the following year and stated the reasons for the finding. The next hearing could be delayed up to two years in non-murder cases and up to five years in murder cases.

After Proposition 9, the maximum period between parole hearings following a denial has changed. Under the new provision (Pen. Code § 3041.5, subd. (b)(3)), the Board, after considering the views and interests of the victim, shall schedule the next hearing, as follows:

Board of Directors

Penelope Cooper, President • Michele WalkinHawk, Vice President • Marshall Krause, Treasurer
Honorable John Burton • Felecia Gaston • Christiane Hipps • Margaret Johns
Cesar Lagleva • Laura Magnani • Michael Marcum • Ruth Morgan • Dennis Roberts

- (A) In 15 years, unless the Board finds by clear and convincing evidence that consideration of the public and victim's safety does not require a more lengthy period of incarceration than 10 additional years.
- (B) In 10 years, unless the Board finds by clear and convincing evidence that consideration of the public and victim's safety does not require a more lengthy period of incarceration than seven additional years.
- (C) In three years, five years or seven years, where consideration of the public and victim's safety does not require a more lengthy period of incarceration than seven additional years.

Thus, under Proposition 9, the soonest a prisoner would have his or her next parole consideration hearing is three years, and the presumption is that parole will be denied for 15 years unless the Board finds a reason to schedule it earlier. Because of these changes, a prisoner may want to consider waiving his or her hearing for a period of one to five years if the prisoner knows it is unlikely that he or she will be found suitable at the next hearing.

The Board has discretion to "advance" the next hearing date and hold the hearing sooner if there is a change in circumstances or new information establishing a reasonable likelihood that public safety does not require the additional years of incarceration. A prisoner may send one written request to the Board every three years asking to advance the hearing date and describing the changed circumstances or new information. (Pen. Code § 3041.5, subds. (b)(4) and (d).) BPH Form 1045(A) is used to make this request. A court can overturn a Board's decision regarding such a request only if the Board has committed a "manifest abuse of discretion." (Pen. Code § 3041.5, subd. (d)(2).)

Before Proposition 9, when the Board rescinded a previously set parole date, the Board was required to schedule the next hearing within 12 months. Now, the Board will follow the same scheduling guidelines described above after rescinding a previously set parole date. (Pen. Code § 3041.5, subd. (a).)

The Board began implementing this portion of Proposition 9 effective December 15, 2008. However, the Board agreed not to apply Proposition 9 at the next hearing for any prisoner who was supposed to have his or her hearing before December 15, 2008, but had the hearing postponed by the Board for some reason beyond the prisoner's control, such as needing a new psychological report.

Proposition 9 has been subject to challenges. In May 2011, a state court of appeal held that the provisions raising the minimum parole deferral period, increasing the default maximum deferral period and limiting the Board's discretion to reduce the maximum deferral period violate the "ex post facto" clauses of the federal and state constitutions when applied to prisoners whose crimes were committed prior to the enactment of Proposition 9. The court found that under Proposition 9 the risk of increased incarceration is real and significant. (*In re Vicks* (2011) __ Cal.App.4th __; 11 Cal. Daily Op. Serv. 5670.) As of early June 2011, the *Vicks* case is not yet final and may be subject to rehearing or review.

On the other hand, in December 2010, the federal Ninth Circuit Court of Appeals reached a conclusion opposite to that in the *Vicks* case. The Ninth Circuit found that because the Board can grant a request to advance a hearing date, Proposition 9 does not create a significant risk of prolonging an individual's incarceration. The Ninth Circuit held that, even assuming that Proposition 9 created some risk of prolonged incarceration, prisoners' ability to apply for expedited hearings remedied any possible ex post facto violation. (*Gilman v. Schwarzenegger* (9th Cir. 2010) __ F.3d __.; 11 Cal. Daily Op. Serv. 994.

B. Expansion of the Rights of Victims at Life Parole Consideration Hearings (Pen. Code §§ 3041.5(a)(2) and 3043)

Proposition 9 expanded the rights of victims to attend and to be heard at various criminal proceedings, including parole consideration hearings for life prisoners. The victim, next of kin, members of the victim's family, and two representatives may now attend and are entitled to testify at parole consideration hearings. Their testimony may include their views on the parolee's previous convictions, the effect of the crimes on the victim and their families, and the suitability of the prisoner for parole. The Board is required to consider the entire and uninterrupted statements of all of these persons in deciding whether to release the prisoner on parole, and the prisoner or parolee's attorney are not entitled to ask questions of them. In addition, victims and their representatives can require that transcripts of their statements be provided to every hearing panel that considers the prisoner's parole in the future.

II CHANGES IN PAROLE REVOCATION PROCEEDINGS

Proposition 9 attempted to modify Penal Code § 3044 and reduce parolees' due process rights in parole revocation proceedings. However, those parts of Proposition 9 conflict with a permanent injunction entered by a federal district court in a class action lawsuit called *Valdivia v. Davis*. In 2009, the federal court told the state that it had to keep complying with the injunction in the *Valdivia* case, instead of making the changes set forth in Proposition 9. (*Valdivia v. Schwarzenegger* (E.D. Cal. 2009) 603 F.Supp.2d 1275.) In March 2010, the Ninth Circuit Court of Appeals vacated the district court order and instructed the court to amend the *Valdivia* injunction to accord with Proposition 9 unless it found that specific Proposition 9 provisions violate the federal constitution or other federal law. *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 994-995.

As of June 2011, the provisions of the *Validiva* injunction generally remain in effect. Further litigation is on hold due to the passage of Assembly Bill (AB) 109 in April 2011. AB 109, if put into effect, would take responsibility for most parole supervision and revocations away from the CDCR and the Board and transfer it to the counties. However, AB 109 is NOT currently in effect and will not take effect unless and until laws are passed to provide funding for it. It is currently not known if or when AB 109 will ever take effect.

The provisions of Proposition 9 that have been in dispute are as are follows:

Appointment of an Attorney – As of June 2011, all parolees continue to receive appointed attorneys for parole revocation hearings. If Proposition 9 goes into effect, parolees would no longer automatically be appointed an attorney for revocation proceedings. Instead, parolees would have to request an attorney. The Board would grant the request only if the parolee is indigent and appears to be incapable of speaking effectively in his or her own defense due to the complexity of the charges, the defense, or the parolee’s mental or educational incapacity.

Probable Cause Hearing – Under Proposition 9, parolees would be entitled to a probable cause hearing no later than 15 calendar days following arrest for a parole violation. This actually would provide sooner probable cause hearings for most parolees than required by *Valdivia*, under which the Board was usually required to conduct a probable cause hearing no later than 13 business days after placement of the parole hold. However, unlike Proposition 9, *Valdivia* requires the Board to hold an expedited hearing where a parolee has a complete defense to the parole violation charge; the expedited hearing must be held within 6 to 8 business days after placement of the parole hold (or as soon as possible thereafter, if the parolee needs more time to produce defense evidence).

Revocation Hearing – Under *Valdivia*, the Board is required to conduct a final revocation hearing no later than 35 calendar days after placement of a parole hold. If the relevant parts of Proposition 9 were to take effect, a parolee would be entitled to a revocation hearing no later than 45 calendar days following his or her arrest for a parole violation.

Hearsay Evidence – Under Proposition 9, hearsay evidence offered by parole agents, peace officers, or a victim would generally be admissible at parole revocation hearings. However, this portion of Proposition 9 is not likely to take effect, as the Ninth Circuit Court of Appeals has re-affirmed that hearsay is not admissible at parole revocation hearings (even if the evidence falls within one of the hearsay exceptions applicable in criminal cases) unless the state’s reason for not producing the witness outweighs the parolee’s interest in confronting the witness. (*Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 989-991.)

Elimination of Various Due Process Rights – Under *Valdivia*, the Board is required to provide a number of other due process rights to parolees such as written notice of charges, the right of the parolee to appear and speak on his or her own behalf at the probable cause hearing, a neutral hearing officer, the right to subpoena witnesses and evidence, the consideration of alternatives to incarceration, a written statement by the fact-finder of the evidence relied on and reasons for revoking parole, and access to an audiotape of the parole revocation hearing. Full implementation of Proposition 9 would eliminate many of these rights.

III. PAYMENT OF RESTITUTION BY CRIMINAL OFFENDERS

Proposition 9 added subdivision (b)(13) to Article I, Section 28, of the California Constitution to require courts to order restitution for every case in which a crime victim suffers a loss. Any funds collected by a court or law enforcement agencies will first be applied to restitution. Thus, payment of restitution takes priority over other fines and obligations a prisoner may legally owe. This law has little actual impact, as the law has long required sentencing courts to impose restitution and the CDCR to collect restitution from money deposited in prisoners' trust accounts.

IV. RESTRICTION OF THE EARLY RELEASE OF PRISONERS

Proposition 9 amended Article I, section 28(f) of the California Constitution to state that sentences must be carried out in compliance with the court's sentencing orders and prisoners' sentences shall not be "substantially diminished" by early release policies intended to alleviate overcrowding. It also requires the legislature to provide enough funds to house prisoners for the full terms of their sentences, although statutorily authorized credits will still be permitted to reduce prisoners' sentences.

Despite this provision, a federal court issued an order in January 2010 that would require the state of California to implement a plan to significantly reduce its prison overcrowding. (*Coleman v. Schwarzenegger* (E.D. Cal) No. CIV S-90-0520 LKK GGH/*Plata v. Schwarzenegger* (N.D. Cal.) C01-1351 TEH, January 12, 2010 Order to Reduce Prison Population.) On May 23, 2011, the United States Supreme Court upheld the federal court's decision, finding that over-crowding is resulting in cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. *Brown v. Plata*, Case No. 09-1233. The Court's ruling means that the state must reduce its prison population by approximately 32,000 prisoners within the next two years.

The court gave the state the right to choose the crowding reduction methods it will use. The plan developed by the state does not include "early releases" of any current prisoners, but proposes other means of reducing the prison population and expanding the prison capacity. The reductions in overcrowding would be accomplished through other means including: (1) building more California state-operated prison beds on the grounds of existing CDCR prisons or recently-closed juvenile facilities, (2) opening new re-entry and community-based facilities, (3) transferring more prisoners to out-of-state facilities, and (4) housing some prisoners in privately-operated prisons within California. The plan also proposes reducing the prison population by (5) redefining some property crimes so that they are misdemeanors rather than felonies, (6) housing some incoming low-risk felons in jails for their entire terms, (7) placing some prisoners on monitored home detention, (8) implementing reforms to reduce the number of people sent to prison on probation or parole revocations, (9) increasing the good conduct and work credits that can be earned by some prisoners, and (10) commuting sentences for certain non-citizens who will be deported or transferred to federal custody. At this time, we do not know exactly when or how all the parts of the state's plan will be put into effect.

V. LIMITATIONS ON THE RIGHTS OF PRISONERS

Proposition 9 added subdivision (a)(5) to Article I, Section 28, of the California Constitution to limit the rights and privileges of prisoners to those required by the United States Constitution and the laws of California. This provision could potentially affect various rights and privileges such as visitation, higher education, and recreational programming. If the CDCR uses this provision to interfere with court-ordered consent decrees that require the CDCR to provide prisoners with various rights beyond those mandated by state and federal law, there will likely be litigation over those matters.