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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 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 want legal advice backed by a guarantee, try to hire a lawyer to address your specific problem. 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

(11/01/09)

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 impacting prisoners are (1) changes in the procedures for granting parole to life prisoners (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.

The following is a discussion of changes that impact individuals after they have been convicted and sentenced - please note this discussion is not meant to be comprehensive and there are portions of the Proposition that are not discussed.

### **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.

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With the passage of Proposition 9, the maximum period between parole hearings following a denial has changed. The Board is now interpreting the law so that lifer's hearings are not held annually and maybe put off for up to 15 years after a denial of parole. 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:

- (A) In fifteen 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 for the prisoner than 10 additional years.
- (B) In ten 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 for the prisoner 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 for the prisoner than seven additional years.

Thus, under Proposition 9, the soonest a prisoner would be able to 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. In light of these changes, a prisoner may want to consider waiving his or her hearings 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.

Once the next hearing is scheduled, the Board has discretion to "advance the 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 (including a copy for the victim) asking to advance the hearing date and describing the changed circumstances or new information. (Pen. Code § 3041.5, subd. (b)(4) and (d).)

Before the passage of 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 must follow the same scheduling guidelines as described in § 3041.5(b)(3) above after rescinding a previously set parole date. (See Pen. Code § 3041.5, subd. (a).)

**B. Proposition 9 Should Not Be Applied to Life Prisoners Whose Hearings Were Due Prior to December 15, 2008 but Were Delayed by the Board**

The changes made by Proposition 9 should not apply to the next hearing for prisoners who were supposed to have their hearing before December 15, 2008, but had it postponed by the Board for some reason such as needing a new psychological report. As of March 31, 2009, the Board had identified nearly 700 lifers who fell into that category. Cases that fell into this exception to Proposition 9 and

were heard before March 2009, should have been reviewed by the BPH and any denial of parole converted to a period of one to five years. Cases that fell into this exception and in which prisoners stipulated to unsuitability before March 2009 should have been reviewed by the Board and the period of the stipulation should have been changed.

Any prisoner who thinks he or she falls into this category but who has not heard from the Board or gotten a letter from the firm UnCommon Law, which represents lifers on this matter, should write to:

**UnCommon Law,  
220 4<sup>th</sup> Street, Ste 201  
Oakland, CA 94607**

A case does not fall under the exception if the prisoner had control over the reason for the postponement (e.g. obtaining more support letters etc.) and voluntarily postponed the hearing until a date *after* December 15, 2008.

The above exceptions only apply to the hearings that were overdue as of December 15, 2008. Subsequent hearings will be conducted under the rules set forth in Proposition 9.

### **C. Challenges to Proposition 9 in Life Prisoner Cases**

Some of Proposition 9's provisions are being challenged in the courts. For example, there is a legal argument that the law should not be applied to persons who committed their crimes before the passage of the law. This is because the "ex post facto" clauses of the federal and state constitutions prohibit the government from increasing punishment for a crime after the crime was committed.<sup>1</sup> In one case, *Gilman v. Schwarzenegger*, prisoners are challenging Proposition 9 under the ex post facto clause by arguing that it makes life prisoner's prison terms longer.<sup>2</sup> There are also several individual challenges to the Proposition pending before courts of appeal at this time. However, so far there have been no definitive court rulings.

### **D. 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

<sup>1</sup> U.S. Const., art. I, §10; Cal. Const., art 1, § 9; see *Miller v. Florida* (1987) 482 U.S. 423; *Lynce v. Mathis* (1997) 519 U.S. 433.

<sup>2</sup> *Gilman v. Schwarzenegger* (E.D. Cal. 2009) CIV S-5-830 LKK/GGH Corrected Fourth Amended/Supplemental Complaint for Declaratory and Injunctive Relief – Class Action, Docket No. 175.

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. This means that any false or misleading statements will remain in the file.

## 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, these parts of Proposition 9 directly conflict with a permanent injunction entered by a federal court in 2004 in a class action lawsuit called *Valdivia v. Davis*. On March 26, 2009, the federal district court issued an order upholding the *Valdivia* Injunction and stopping the state from implementing portions of Proposition 9.<sup>3</sup> The CDCR has appealed the district court's order, and the matter is currently pending before the Ninth Circuit Court of Appeals. The provisions of Proposition 9 that are in dispute are as follows:

- **Appointment of an Attorney** – Under Proposition 9, parolees would no longer automatically be appointed an attorney in parole revocation proceedings. Instead, parolees would have to request appointment of an attorney. The Board would only grant the request 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 are entitled to a probable cause hearing no later than 15 calendar days following arrest for a parole violation. This actually provides 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 evidence of the defense).
- **Revocation Hearing** – The Board is currently 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 violation of parole.
- **Hearsay Evidence** – Under Proposition 9, hearsay evidence offered by parole agents, peace officers, or a victim would be admissible at parole revocation hearings.

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<sup>3</sup> *Valdivia v. Schwarzenegger* (E.D. Cal. 2009) 603 F.Supp.2d 1275.

- **Elimination of Various Due Process Rights** – Currently, the Board is required to provide a number of additional 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. Proposition 9 would eliminate 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.

Courts have yet to consider how this provision will be interpreted in light of a 2009 federal court order requiring the CDCR to significantly reduce its prison population.<sup>4</sup> The specifics of how the population reduction will be achieved is still being litigated. In addition, the state has filed an appeal of the order in the United States Supreme Court.

### **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.

<sup>4</sup> *Coleman v. Schwarzenegger* (E.D. Cal) No. CIV S-90-0520 LKK/GGH/*Plata v. Schwarzenegger* (N.D. Cal.) C-01-1351 THE, August 4, 2009 Opinion and Order.