

AMENDED IN SENATE JULY 9, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 1166

Introduced by Assembly Member Nielsen

February 27, 2009

An act to amend Sections 3041 and 3041.5 of the Penal Code, relating to parole.

LEGISLATIVE COUNSEL'S DIGEST

AB 1166, as amended, Nielsen. Parole: hearings: review.

Existing law provides that, one year prior to the minimum eligible parole release date of an inmate serving an indeterminate sentence, a panel of 2 or more commissioners or deputy commissioners of the Board of Parole Hearings shall meet with the inmate and set a parole release date, as specified. Existing law provides that in the event of a tie vote, the matter shall be referred to the board for an en banc hearing, as specified.

This bill would, instead, provide that in the event of a tie vote, the matter shall be referred to the board for an en banc review ~~of limited to~~ the record, *as specified*, that was before the panel that rendered the tie vote. The bill would require the board to vote, upon the en banc review of the record, to either grant or deny parole and render a statement of decision. *The bill would require the board to separately state reasons for its decision to grant or deny parole. The bill would require that the commissioner involved in the tie vote be recused from consideration of the matter in the en banc review.*

Existing law, as amended by Proposition 9, the Victim's Bill of Rights Act of 2008: Marsy's Law, of the November 4, 2008, statewide general election, establishes procedures at all hearings for the purpose of

reviewing a prisoner's parole suitability, or the setting, postponing, or rescinding of parol dates, and provides prisoners and victims specified rights at these hearings.

This bill would exempt en banc reviews of tie votes from these provisions.

Proposition 9 permits the Legislature, by a statute enacted by a vote of $\frac{3}{4}$ of the membership of each house and in accordance with specified procedures, to amend the provisions of the act. Because this bill would eliminate *these* en banc hearings and exempt en banc reviews from the application of this act's statutory provisions, it would require a $\frac{3}{4}$ vote.

Vote: $\frac{3}{4}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 3041 of the Penal Code is amended to
2 read:
3 3041. (a) In the case of any inmate sentenced pursuant to any
4 provision of law, other than Chapter 4.5 (commencing with Section
5 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet
6 with each inmate during the third year of incarceration for the
7 purposes of reviewing the inmate's file, making recommendations,
8 and documenting activities and conduct pertinent to granting or
9 withholding postconviction credit. One year prior to the inmate's
10 minimum eligible parole release date a panel of two or more
11 commissioners or deputy commissioners shall again meet with the
12 inmate and shall normally set a parole release date as provided in
13 Section 3041.5. No more than one member of the panel shall be a
14 deputy commissioner. In the event of a tie vote, the matter shall
15 be referred for an en banc review of the record that was before the
16 panel that rendered the tie vote. Upon en banc review, the board
17 shall vote to either grant or deny parole and render a statement of
18 decision. *The en banc review shall be conducted pursuant to*
19 *subdivision (e).* The release date shall be set in a manner that will
20 provide uniform terms for offenses of similar gravity and
21 magnitude ~~in~~ *with* respect to their threat to the public, and that will
22 comply with the sentencing rules that the Judicial Council may
23 issue and any sentencing information relevant to the setting of
24 parole release dates. The board shall establish criteria for the setting
25 of parole release dates and in doing so shall consider the number

1 of victims of the crime for which the inmate was sentenced and
2 other factors in mitigation or aggravation of the crime. At least
3 one commissioner of the panel shall have been present at the last
4 preceding meeting, unless it is not feasible to do so or where the
5 last preceding meeting was the initial meeting. Any person on the
6 hearing panel may request review of any decision regarding parole
7 for an en banc hearing by the board. In case of a review, a majority
8 vote in favor of parole by the board members participating in an
9 en banc review is required to grant parole to any inmate.

10 (b) The panel or the board, sitting en banc, shall set a release
11 date unless it determines that the gravity of the current convicted
12 offense or offenses, or the timing and gravity of current or past
13 convicted offense or offenses, is such that consideration of the
14 public safety requires a more lengthy period of incarceration for
15 this individual, and that a parole date, therefore, cannot be fixed
16 at this meeting. After the effective date of this subdivision, any
17 decision of the parole panel finding an inmate suitable for parole
18 shall become final within 120 days of the date of the hearing.
19 During that period, the board may review the panel's decision.
20 The panel's decision shall become final pursuant to this subdivision
21 unless the board finds that the panel made an error of law, or that
22 the panel's decision was based on an error of fact, or that new
23 information should be presented to the board, any of which when
24 corrected or considered by the board has a substantial likelihood
25 of resulting in a substantially different decision upon a rehearing.
26 In making this determination, the board shall consult with the
27 commissioners who conducted the parole consideration hearing.
28 No decision of the parole panel shall be disapproved and referred
29 for rehearing except by a majority vote of the board, sitting en
30 banc, following a public meeting.

31 (c) For the purpose of reviewing the suitability for parole of
32 those inmates eligible for parole under prior law at a date earlier
33 than that calculated under Section 1170.2, the board shall appoint
34 panels of at least two persons to meet annually with each inmate
35 until the time the person is released pursuant to proceedings or
36 reaches the expiration of his or her term as calculated under Section
37 1170.2.

38 (d) It is the intent of the Legislature that, during times when
39 there is no backlog of inmates awaiting parole hearings, life parole
40 consideration hearings, or life rescission hearings, hearings will

1 be conducted by a panel of three or more members, the majority
2 of whom shall be commissioners. The board shall report monthly
3 on the number of cases where an inmate has not received a
4 completed initial or subsequent parole consideration hearing within
5 30 days of the hearing date required by subdivision (a) of Section
6 3041.5 or paragraph (2) of subdivision (b) of Section 3041.5, unless
7 the inmate has waived the right to those timeframes. That report
8 shall be considered the backlog of cases for purposes of this
9 section, and shall include information on the progress toward
10 eliminating the backlog, and on the number of inmates who have
11 waived their right to the above timeframes. The report shall be
12 made public at a regularly scheduled meeting of the board and a
13 written report shall be made available to the public and transmitted
14 to the Legislature quarterly.

15 (e) For purposes of this section, an en banc review by the board
16 means a review conducted by a majority of commissioners holding
17 office on the date the matter is heard by the board. *An en banc*
18 *review shall be conducted in compliance with the following:*

19 (1) *The commissioners conducting the review shall consider*
20 *the entire record of the hearing that resulted in the tie vote.*

21 (2) *The review shall be limited to the record of the hearing. The*
22 *record shall consist of the transcript or audiotape of the hearing,*
23 *written or electronically recorded statements actually considered*
24 *by the panel that produced the tie vote, and any other material*
25 *actually considered by the panel. New evidence or comments shall*
26 *not be considered in the en banc proceeding.*

27 (3) *The board shall separately state reasons for its decision to*
28 *grant or deny parole.*

29 (4) *A commissioner who was involved in the tie vote shall be*
30 *recused from consideration of the matter in the en banc review.*

31 SEC. 2. Section 3041.5 of the Penal Code is amended to read:

32 3041.5. (a) At all hearings for the purpose of reviewing a
33 prisoner's parole suitability, or the setting, postponing, or
34 rescinding of parole dates, with the exception of en banc review
35 of tie votes, the following shall apply:

36 (1) At least 10 days prior to any hearing by the Board of Parole
37 Hearings, the prisoner shall be permitted to review his or her file
38 which will be examined by the board and shall have the opportunity
39 to enter a written response to any material contained in the file.

1 (2) The prisoner shall be permitted to be present, to ask and
2 answer questions, and to speak on his or her own behalf. Neither
3 the prisoner nor the attorney for the prisoner shall be entitled to
4 ask questions of any person appearing at the hearing pursuant to
5 subdivision (b) of Section 3043.

6 (3) Unless legal counsel is required by some other provision of
7 law, a person designated by the Department of Corrections and
8 Rehabilitation shall be present to ~~insure~~ ensure that all facts
9 relevant to the decision be presented, including, if necessary,
10 contradictory assertions as to matters of fact that have not been
11 resolved by departmental or other procedures.

12 (4) The prisoner and any person described in subdivision (b) of
13 Section 3043 shall be permitted to request and receive a
14 stenographic record of all proceedings.

15 (5) If the hearing is for the purpose of postponing or rescinding
16 of parole dates, the prisoner shall have rights set forth in paragraphs
17 (3) and (4) of subdivision (c) of Section 2932.

18 (6) The board shall set a date to reconsider whether an inmate
19 should be released on parole that ensures a meaningful
20 consideration of whether the inmate is suitable for release on
21 parole.

22 (b) (1) Within 10 days following any meeting where a parole
23 date has been set, the board shall send the prisoner a written
24 statement setting forth his or her parole date, the conditions he or
25 she must meet in order to be released on the date set, and the
26 consequences of failure to meet those conditions.

27 (2) Within 20 days following any meeting where a parole date
28 has not been set, the board shall send the prisoner a written
29 statement setting forth the reason or reasons for refusal to set a
30 parole date, and suggest activities in which he or she might
31 participate that will benefit him or her while he or she is
32 incarcerated.

33 (3) The board shall schedule the next hearing, after considering
34 the views and interests of the victim, as follows:

35 (A) Fifteen years after any hearing at which parole is denied,
36 unless the board finds by clear and convincing evidence that the
37 criteria relevant to the setting of parole release dates enumerated
38 in subdivision (a) of Section 3041 are such that consideration of
39 the public and victim's safety does not require a more lengthy
40 period of incarceration for the prisoner than 10 additional years.

1 (B) Ten years after any hearing at which parole is denied, unless
2 the board finds by clear and convincing evidence that the criteria
3 relevant to the setting of parole release dates enumerated in
4 subdivision (a) of Section 3041 are such that consideration of the
5 public and victim's safety does not require a more lengthy period
6 of incarceration for the prisoner than seven additional years.

7 (C) Three years, five years, or seven years after any hearing at
8 which parole is denied, because the criteria relevant to the setting
9 of parole release dates enumerated in subdivision (a) of Section
10 3041 are such that consideration of the public and victim's safety
11 requires a more lengthy period of incarceration for the prisoner,
12 but does not require a more lengthy period of incarceration for the
13 prisoner than seven additional years.

14 (4) The board may in its discretion, after considering the views
15 and interests of the victim, advance a hearing set pursuant to
16 paragraph (3) to an earlier date, when a change in circumstances
17 or new information establishes a reasonable likelihood that
18 consideration of the public and victim's safety does not require
19 the additional period of incarceration of the prisoner provided in
20 paragraph (3).

21 (5) Within 10 days of any board action resulting in the
22 postponement of a previously set parole date, the board shall send
23 the prisoner a written statement setting forth a new date and the
24 reason or reasons for that action and shall offer the prisoner an
25 opportunity for review of that action.

26 (6) Within 10 days of any board action resulting in the
27 rescinding of a previously set parole date, the board shall send the
28 prisoner a written statement setting forth the reason or reasons for
29 that action, and shall schedule the prisoner's next hearing in
30 accordance with paragraph (3).

31 (c) The board shall conduct a parole hearing pursuant to this
32 section as a de novo hearing. Findings made and conclusions
33 reached in a prior parole hearing shall be considered in but shall
34 not be deemed to be binding upon subsequent parole hearings for
35 an inmate, but shall be subject to reconsideration based upon
36 changed facts and circumstances. When conducting a hearing, the
37 board shall admit the prior recorded or memorialized testimony
38 or statement of a victim or witness, upon request of the victim or
39 if the victim or witness has died or become unavailable. At each
40 hearing the board shall determine the appropriate action to be taken

1 based on the criteria set forth in paragraph (3) of subdivision (a)
2 of Section 3041.

3 (d) (1) An inmate may request that the board exercise its
4 discretion to advance a hearing set pursuant to paragraph (3) of
5 subdivision (b) to an earlier date, by submitting a written request
6 to the board, with notice, upon request, and a copy to the victim
7 which shall set forth the change in circumstances or new
8 information that establishes a reasonable likelihood that
9 consideration of the public safety does not require the additional
10 period of incarceration of the inmate.

11 (2) The board shall have sole jurisdiction, after considering the
12 views and interests of the victim to determine whether to grant or
13 deny a written request made pursuant to paragraph (1), and its
14 decision shall be subject to review by a court or magistrate only
15 for a manifest abuse of discretion by the board. The board shall
16 have the power to summarily deny a request that does not comply
17 with the provisions of this subdivision or that does not set forth a
18 change in circumstances or new information as required in
19 paragraph (1) that in the judgment of the board is sufficient to
20 justify the action described in paragraph (4) of subdivision (b).

21 (3) An inmate may make only one written request as provided
22 in paragraph (1) during each three-year period. Following either
23 a summary denial of a request made pursuant to paragraph (1), or
24 the decision of the board after a hearing described in subdivision
25 (a) to not set a parole date, the inmate shall not be entitled to submit
26 another request for a hearing pursuant to subdivision (a) until a
27 three-year period of time has elapsed from the summary denial or
28 decision of the board.