

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 4

MENTALLY DISORDERED OFFENDERS (MDO's)



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Table of Contents

<u>A.Introduction.....</u>	<u>1</u>
a)Who can be declared a Mentally Disordered Offender (MDO)?.....	1
b)Does the MDO law violate equal protection?.....	1
c)Does the MDO law violate the ban on ex post facto laws?.....	2
d)Are MDO proceedings civil or criminal in nature?.....	2
<u>B.Criteria for MDO Designation.....</u>	<u>2</u>
1.What criteria must someone meet to be designated as an MDO?...2	
e)What is a “severe mental disorder?”	3
a)Does a finding of “substantial danger of physical harm” require proof of a recent overt act?.....	4
b)What type of treatment satisfies the 90-day requirement?.....	4
c)What constitutes a crime committed with “force or violence?”	6
<i>i.What are the definitions of “force” and “violence?”.....</i>	<i>6</i>
<i>ii.Does force against property meet the MDO requirements?....</i>	<i>6</i>
<i>iii.Does force used against an animal meet the MDO requirements?.....</i>	<i>7</i>
<i>iv.Does the force or violence have to result in injury?.....</i>	<i>7</i>
<u>C.Procedures for MDO Designation.....</u>	<u>8</u>
1.How are MDO proceedings initiated?	8
3.What rights does a parolee have if a certification hearing is requested?.....	10
a)What happens if a parolee challenges a BPT decision by requesting a certification review trial?.....	10
<i>i.When is the Certification Review Trial Held?.....</i>	<i>10</i>

ii. What types of evidence can the Court consider at a certification review trial?..... 10

iii. What are the burden and standard of proof at a certification review trial?..... 11

iv. Is a parolee in an MDO trial “innocent until proven guilty?”.. 11

v. What other constitutional rights are implicated by the civil nature of MDO proceedings?..... 11

vi. Can the court instruct a jury as to the consequences of a finding that a parolee is a MDO?..... 12

vii. During the trial, may the parolee be restrained?..... 13

D. Review of an MDO Commitment..... 13

1. When is an MDO commitment reviewed?..... 13

4. What rights does an MDO have when her commitment is reviewed?
13

E. Duration and Placement..... 13

1. How long does an MDO Commitment last?..... 13

a) Where will an individual be placed after commitment as an MDO?
14

F. Extension of an MDO Commitment..... 15

1. How can MDO Status be extended?..... 15

b) May an MDO contest her mental state at the time of the offense when she is being considered for an extension?..... 16

c) How many times can an MDO status be extended?..... 16

G. Revocation and Termination of an MDO Commitment..... 16

1. What happens if a MDO Outpatient Commitment is revoked?..... 16

d) What happens if the Severe Mental Disorder goes into remission?
16

A. Introduction

a) *Who can be declared a Mentally Disordered Offender (MDO)?*

Prisoners who have a mental disability at the time of, or upon termination of, their parole may be subject to involuntary commitment as a Mentally Disordered Offender (MDO).

In 1986, the California Legislature enacted a mandatory mental health evaluation and treatment program for prisoners who have severe mental disorders that are not in remission at the time of their parole. The Mentally Disordered Offender Act applies to persons who committed crimes on or after January 1, 1986. Penal Code §§ 2960 - 2981. It provides for mandatory mental health commitment as a condition of parole for all prisoners “who have a treatable, severe mental disorder that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated” who are “not in remission or cannot be kept in remission at the time of their parole or upon termination of parole,” creating a danger to society. Penal Code § 2960. Mental health treatment is provided “until the severe mental disorder which was one of the causes of, or was an aggravating factor in the person’s prior criminal behavior is in remission and can be kept in remission.” Penal Code § 2960.

MDO commitments should not be confused with provisions under which the Director of The California Department of Corrections and Rehabilitation (CDCR) may commit a dangerous or gravely disabled prisoner, or an inmate at a county jail or juvenile detention facility, to a state hospital prior to actual release or termination of parole. Penal Code §§ 2974, 4011.6; Welf. and Inst. Code § 5150 *et seq.*

b) *Does the MDO law violate equal protection?*

The original version of the law was held to have violated the equal protection clauses of the federal and state constitutions because it treated potential MDOs differently from similarly situated individuals subject to involuntary commitment by not requiring proof of present dangerousness. *People v. Gibson* (1988) 204 Cal.App.3d 1425. In response, the Legislature amended the law to require proof that a parolee represents a substantial danger of physical harm to others prior to commitment or recommitment as an MDO. Penal Code § 2966(c).

c) Does the MDO law violate the ban on ex post facto laws?

The *Gibson* court had held that, because the MDO scheme was essentially penal in nature, it violated the ban on ex post facto laws (laws that retroactively change the legal consequences of acts committed, or the legal status of facts and relationships that existed, before the law was enacted) when applied to parolees whose underlying offenses were committed prior to the effective date of the MDO law. *People v. Gibson* (1988) 204 Cal.App.3d 1425. However, this holding was overturned by *People v. Robinson*, which held that the MDO law is a nonpunitive civil law, despite the scheme's placement in the Penal Code. *People v. Robinson* (1998) 63 Cal.App.4th 348.

d) Are MDO proceedings civil or criminal in nature?

Rulings since the *Robinson* case, above, have “uniformly have held that [MDO] proceedings are civil in nature and, therefore, do not implicate the constitutional rights afforded to criminal defendants.” *People v. Beeson* (2002) 99 Cal.App.4th 1393 at 1407, fn. omitted.

The civil nature of the MDO scheme means that a plea bargain may not be conditioned on a judicial finding that the offense falls outside the MDO law. *People v. Renfro* (2004) 125 Cal.App.4th 223. The *Renfro* court stated that “[t]o permit such a plea agreement would, in effect, nullify a mandatory statutory parole scheme, and would preclude a civil proceeding unrelated to punishment for the criminal offense, and largely unrelated to the commission of the underlying offense.” *Id.* at 230.

B. Criteria for MDO Designation

1. What criteria must someone meet to be designated as an MDO?

Under Penal Code section 2962, prisoners meeting the following criteria must continue to be involuntarily detained and treated by the Department of Mental Health (DMH) as a condition of parole:

- (a) The prisoner has a *severe mental disorder* that is *not* in remission, or *cannot* be kept in remission without treatment;
- (b) The severe mental disorder was a *cause of*, or an *aggravating*

factor in the commission of the crime for which the individual was sent to prison;

- (c) The prisoner has been in treatment for a severe mental disorder for *90 days* or more *within the last year* before the parole or release date;
- (d) Before the prisoner's parole or release, the treating physician and other specified medical authorities have certified that each of the noted conditions exists, and that by reason of the disorder, the prisoner represents a *substantial danger of physical harm to others*; and
- (e) The crime for which the prisoner was sentenced to prison, and which the prisoner's severe mental disorder caused or aggravated, must satisfy the following *two* conditions:
 - (1) it was punished by a *determinate sentence* under Penal Code section 1170; and
 - (2) it constituted one of the following *crimes*: voluntary manslaughter; mayhem; kidnapping by force or fear; robbery or carjacking with personal use of a dangerous weapon; nonconsensual rape, sodomy, oral copulation, or penetration by foreign object by force, violence, duress, menace, or fear of immediate bodily injury; lewd acts on a child under age 14; continuous sexual abuse; arson; any felony involving firearm use; exploding or attempting to explode destructive device with intent to commit murder; attempted murder; a crime in which the prisoner expressly or impliedly threatened another with force, or "[a] crime not enumerated [above], in which the prisoner used force or violence, or caused serious bodily injury."

e) *What is a "severe mental disorder?"*

The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. However, it does not include personality or adjustment disorders, drug addiction, epilepsy,

mental retardation, or other developmental disabilities. Penal Code § 2962(a).

2. When is a severe mental disorder “in remission?”

The term “remission” means that psychotropic medication or psychosocial support keeps the symptoms of the severe mental disorder under control. The phrase “cannot be kept in remission without treatment” means that, within the last year, the prisoner was in remission, but: (1) was physically violent, except in self-defense, (2) made serious threats of substantial physical harm to others, (3) intentionally caused property damage, or (4) did not voluntarily follow the treatment plan. Penal Code § 2962(a).

If an MDO has been physically violent (except in self-defense) during the year before a recommitment determination is made, the trial court is automatically required to find that she¹ is not in remission within the meaning of Penal Code section 2962, even if the person has no symptoms. Other acts that preclude a finding of remission are making serious threats, failing to follow a treatment plan and intentionally damaging property. *People v. Burroughs* (2005) 131 Cal.App.4th 1401; Penal Code § 2962(a).

a) Does a finding of “substantial danger of physical harm” require proof of a recent overt act?

No. An inmate may be determined to represent a “substantial danger of physical harm” without proof of a recent overt dangerous act. Penal Code § 2962(f).

b) What type of treatment satisfies the 90-day requirement?

The 90 days of treatment that the parolee received must have been for the mental disorder for which her continued commitment is being proposed. Where a parolee had not been treated for pedophilia, she could not be held as a pedophile, despite the fact that the treatment she had received for depression had included medication that can be used as treatment for pedophilia. *People v. Sheek* (2004) 122 Cal.App.4th 1606.

At least one court has held that the requirement for 90 days of treatment

¹ For the sake of readability, this publication uses the masculine and feminine personal pronouns in alternate chapters.

does not mean that the parolee need actually have undergone treatment. *People v. Kirkland* (1994) 24 Cal.App.4th 891. The *Kirkland* court held that “neither continuous nor involuntary treatment of a mentally disordered offender reimprisoned for parole violations is a jurisdictional prerequisite of continued treatment proceedings under [Penal Code sections] 2970 and 2972.” *Id.* at 909. By describing treatment as “continued,” section 2970 refers to “continuation of the treatment to which the offender was required to submit as a condition of parole, even if the offender never actually underwent such treatment or received it sporadically.” *Id.* at 905-06. Further, section 2970 refers to the subsequent treatment as ‘involuntary,’ not necessarily because the treatment itself was involuntary, but simply “because the defendant is involuntarily committed for such treatment.” *Id.* at 906.

People v. Del Valle held that treatment may not take place in an outpatient facility or through an agency outside the CDC or DMH. *People v. Del Valle* (2002) 100 Cal.App.4th 88. The court held that a parolee’s 85 days of treatment in CDC custody plus treatment of at least five more days in an outpatient facility was not sufficient to meet the statutory requirement:

Under the statutes, a parolee's mental health treatment is planned, approved and implemented through the CDC by the DMH. There is no suggestion that a parolee may participate in treatment that is outside the auspices of the DMH. If a parolee is required to undergo inpatient treatment, the same standard should apply to an individual who is in custody and is being evaluated for MDO status. It is consistent with the statutory scheme that a prisoner must receive 90 days of inpatient treatment before he can qualify as an MDO.

Id. at 93.

However, *People v. Martin* affirmed an MDO commitment when part of the treatment was received at a county jail, due to Penal Code section 2981, which allows records from a state penitentiary, county jail, federal penitentiary or state hospital to be used to prove the 90 days of treatment. *People v. Martin* (2005) 127 Cal.App.4th 970. Therefore, the rule appears to be that the 90 days of treatment must be received while the parolee is in custody.

c) *What constitutes a crime committed with “force or violence?”*

i. What are the definitions of “force” and “violence?”

The words "force" and "violence," as used under the MDO criteria are not synonymous. Therefore, it is error for the trial court to use a definition found in CALJIC 16.141 for battery, as the slight touching required for battery is not sufficient to meet the force or violence requirement. *People v. Collins* (1992) 10 Cal.App.4th 690.

Sexual battery that involved restraint of a child for several minutes has been held to rise to the level required by the MDO act. *People v. Valdez* (2001) 89 Cal.App.4th 1013.

The "force or violence" requirement has been satisfied when the parolee used a plastic razor, pretending it was a gun, in committing false imprisonment. *People v. Pretzer* (1992) 9 Cal.App.4th 1078. In *Pretzker*, the court held that “force and violence” were not synonymous and that although Mr. Pretzker “may not have directly applied physical power... his behavior in pretending to be armed posed a danger.” *Id.* at 1083.

ii. Does force against property meet the MDO requirements?

Unaccompanied by threats or other factors, force against property does not meet the MDO requirements. An order committing a parolee to Atascadero State Hospital as an MDO based on an offense of felony vandalism was reversed based on a finding that Penal Code section 2962(e)(2)(P) did not apply to the use of force against property. *People v. Green* (2006) 142 Cal.App.4th 907.

On the other hand, an offense against an inanimate object, although not qualifying as a crime in which the prisoner used force or violence or caused serious bodily injury, might qualify as a crime involving an implied threat to use force or violence likely to produce substantial physical harm, pursuant to section 2962(e)(2)(Q). *People v. Kortesmaki* (2007) 156 Cal.App.4th 922. See *also* the discussion of threats, below.

iii. Does force used against an animal meet the MDO requirements?

A parolee may be committed as an MDO after a crime of cruelty to an animal. *People v. Dyer* (2002) 95 Cal.App.4th 448. The court in *Dyer* affirmed the commitment, stating that “he committed a violent crime against a living creature,” which was sufficient. *Id.* at 456.

iv. Does the force or violence have to result in injury?

In *People v. Lopez*, the parolee had argued that his threats concerned only future violence, and therefore were not covered under the MDO provision. The court held that terrorist threats can involve immediate force or violence likely to produce substantial harm as required by Penal Code section 2962(e)(2)(Q). *People v. Lopez* (1999) 74 Cal.App.4th 675.

Pursuant to a 2000 amendment, crimes involving “force or violence” under section 2962 includes crimes in which “the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used.” Penal Code § 2962(e)(2)(Q).

The 2000 amendment to section 2962 was the result of a case involving a mere threat or implied force in the commission of a crime. *People v. Anzalone* (1999) 19 Cal.4th 1074. The California Supreme Court ruled that the crime of unarmed second degree robbery (by use of a non-threatening note and demand for money), unaccompanied by any actual display of force or violence on her part, and resulting in no bodily injury to anyone, did not constitute a crime of “force or violence” supporting an MDO commitment. The court reasoned that in enacting section 2962(e) (2), the legislative intent was to require treatment of parolees as MDO’s only in the limited situations in which a prisoner inflicted serious bodily injury or committed forcible or violent crimes, or robbery with a dangerous weapon because of mental disorder. Given the aggravated nature of the other crimes specified in the statute, as well as the specific inclusion of robberies involving the personal use of a deadly or dangerous weapon, it was unlikely that the legislature intended to make every robbery a “forcible” one.

People who were already in prison at the time of the post-Anzalone

amendments are subject to commitment under those amendments. Upon parole, a person who had been convicted of setting fire to his wife's car was diagnosed as having a paranoid delusional disorder, and the Board of Prison Terms (BPT) determined that he was an MDO. *People v. Macauley* (1999) 73 Cal.App.4th 704. He argued that his conviction for arson of property did not qualify as an MDO offense at the time of his commitment, and that the amendment to the MDO law, which enlarged the list of qualifying offenses to include arson of property "where the act posed a substantial danger of physical harm to others," was an ex post facto law if applied to his case. Penal Code § 2962(e)(2)(L). The court held that the retroactive application of the amendment did not violate the constitutional prohibition against ex post facto laws, and the parolee's conviction for setting fire to his wife's automobile fell within provisions of the amended MDO statute.

The retroactive applicability of the post-Anzalone revisions was also confirmed by *People v. Butler* (1999) 74 Cal.App.4th 557. The court held that the parolee's conviction for stalking qualified as an MDO offense under Penal Code section 2962(e)(2)(Q), a 1999 amendment that extended as qualifying offenses crimes that involve the threat of force rather than actual force. The court also held that the 1999 amendment could be applied retroactively, since the MDO law is a civil scheme and does not violate the prohibition of ex post facto laws. The court further held that Penal Code section 646.9(m), which establishes a procedure to facilitate mental health treatment during a parolee's prison term for stalking, neither supersedes nor conflicts with the MDO law.

Crimes for which an individual has not been charged cannot be used to meet the "force or violence" criterion. *People v. Green* (2006) 142 Cal.App.4th 907.

C. Procedures for MDO Designation

1. How are MDO proceedings initiated?

Prisoners confined either in prison or the state hospital will be evaluated for MDO status prior to their parole date by two mental health evaluators - one from California Department of Corrections (CDC) and the other from the Department of Mental Health (DMH) - and then certified as an MDO by the chief psychiatrist from the CDC. If these evaluators disagree on whether the prisoner meets the criteria, two independent evaluators will be

appointed. Cal. Code Regs. tit. 15, § 2573. When the two evaluators concur, the BPT will order that the prisoner be confined as an MDO. Penal Code §§ 2962(d)(1) - (3); Cal. Code Regs. tit. 15, §§ 2572 and 2573.

The diagnosis that a person has a severe mental disorder must be made by the DMH. If the DMH does not decide that the person meets MDO criteria, a district attorney may not retain independent experts to evaluate whether the person should have such a diagnosis. *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347.

Upon notification by the BPT that she has been designated as an MDO, the parolee may either: (1) agree with the MDO certification and sign the special condition of parole; (2) refuse to sign the special parole condition and have a parole revocation hearing with appointed counsel; or (3) sign the special parole condition and request a certification hearing before the BPT. Cal. Code Regs. tit 15, § 2575.

If a parolee requests a certification hearing before the BPT, she can challenge the BPT's decision by appealing the decision to the BPT Appeals Unit, or by requesting a certification review trial in Superior Court. Penal Code §§ 2966(a) and (b); Cal. Code Regs. tit. 2, § 2576.

MDO commitment is technically a special condition of parole. If a parolee refuses to sign the parole agreement, the parole authority may revoke parole and return the prisoner to custody in a correctional institution. Penal Code §§ 3057 and 3060.5; Cal. Code Regs. tit. 15, § 2575(b).

District attorneys are not independently empowered to initiate civil commitment proceedings under section 2970. They may do so only when the director of the facility providing the prisoner's treatment states in a written evaluation that the prisoner's severe mental disorder is not in remission, or cannot be kept in remission without treatment. The district attorney does not have the authority to initiate such a proceeding and cannot file a petition for continued involuntary treatment of a person when the staff at a mental hospital no longer believes she poses a threat to the public. *People v. Marchman* (2006) 145 Cal.App.4th 79; *People v. Jauregui Garcia* (2005) 127 Cal.App.4th 558.

If an individual has been placed on outpatient status under Penal Code section 2972.1 before receiving a full year of inpatient status, a petition need not be filed in order to extend an MDO's commitment, because the

period spent on outpatient status does not count toward the term of commitment. However, the court is required to calendar a hearing no later than 30 days after the end of the one-year period of outpatient placement to consider whether the person will continue on outpatient status, be confined on inpatient status or be discharged from MDO status. *People v. Morris* (2005) 126 Cal.App.4th 527.

3. What rights does a parolee have if a certification hearing is requested?

At a certification hearing before the BPT, the burden of proof is on the BPT to show that the parolee meets the MDO criteria by a *preponderance of the evidence*. The prisoner has a right to an appointed attorney and the appointment of two independent evaluators. Penal Code § 2966(a); Cal. Code Regs. tit. 15, § 2576.

Because the burden of proof is on the BPT to prove that the parolee meets each of the MDO criteria, an argument that medication keeps a mental disorder in remission is not an affirmative defense required to be proven by the parolee. Instead, it is incumbent upon the BPT to prove that the parolee would not take his prescribed medication and, therefore, would become dangerous if he were released. *People v. Noble* (2002) 100 Cal.App.4th 184.

a) What happens if a parolee challenges a BPT decision by requesting a certification review trial?

i. When is the Certification Review Trial Held?

A certification review trial must be held within 60 days of a request, unless the parolee waives time or good cause is shown. The parolee in a certification review trial has a right to a jury trial and to be represented by an attorney. However, if the parolee wishes to have a court trial, the District Attorney must first agree to waive the jury.

ii. What types of evidence can the Court consider at a certification review trial?

The trier of fact can only consider whether the prisoner met all of the MDO criteria as of the date of the BPT certification hearing, even if the parolee's mental illness is currently in remission. Penal Code § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678. The *Tate* court noted that under Penal

Code section 2968 a parolee may file a writ of mandamus for his release if his mental illness is in remission after the BPT certification hearing.

In a superior court certification review trial, a qualified mental health expert may consider a probation report in expressing an opinion that a prisoner meets the MDO criteria. *People v. Miller* (1994) 25 Cal.App.4th 913.

Evidence of prior violent crimes can be admitted in an MDO trial, even when the crimes were not the controlling offenses in the MDO certification petition. *People v. Pace* (1994) 27 Cal.App.4th 795.

Until the certification review trial is completed, the order of the BPT is in effect and the person is treated as an MDO. Penal Code § 2966(b).

iii. What are the burden and standard of proof at a certification review trial?

Like a BPT hearing, the burden of proof at a certification review trial is on the BPT. However, unlike the hearing, the standard of proof at the trial is *beyond a reasonable doubt*. If trial is by jury, it must be a unanimous verdict. The hearing is labeled as civil, but both civil and criminal discovery rules apply. If a court or jury reverses a BPT finding, the court shall suspend the decision for five working days to allow for the orderly release of the prisoner. Penal Code § 2966(b).

iv. Is a parolee in an MDO trial “innocent until proven guilty?”

Because MDO proceedings are considered civil in nature, the criminal safeguard of innocent until proven guilty does not apply. Therefore, a parolee in a certification review trial has no right to a jury instruction directing the jury to presume that he is not an MDO. The court stated that in the context of a civil commitment, the idea that to avoid error we must run the risk of some who are innocent going free does not apply. *People v. Beeson* (2002) 99 Cal.App.4th 1393.

v. What other constitutional rights are implicated by the civil nature of MDO proceedings?

The Fifth Amendment protection against double jeopardy does not apply to MDO proceedings. *People v. Francis* (2002) 98 Cal.App.4th 873. However, when a court bases its determination on one of the MDO criteria that are

not capable of change [(1) whether the underlying offense involved force or violence, (2) whether the severe mental disorder was one of the causes or an aggravating factor in the commission of the underlying offense, or (3) whether the person has been treated for 90 days in the past year], the prosecutor is barred by *res judicata* from trying the parolee as an MDO again for the same offense. *People v. Francis* (2002) 98 Cal.App.4th 873; *People v. Parham* (2003) 111 Cal.App.8th 1178.

There is no right to self-representation in MDO proceedings. *People v. Williams* (2003) 110 Cal.App.4th 1577.

There is no requirement that a jury trial be waived personally in MDO proceedings. *People v. Montoya* (2001) 86 Cal.App.4th 825. Therefore, a jury trial can be waived by counsel over the parolee's objection. *People v. Otis* (1999) 70 Cal.App.4th 1174; *People v. Fischer* (2006) 134 Cal.App.4th 76.

The District Attorney may not ask questions that are beyond the parolee's mental state, including questions about the underlying offense, and other arrests and offenses, as this would violate the Fifth Amendment right against self-incrimination. *People v. Pretzer* (1992) 9 Cal.App.4th 1078. However, questioning a parolee about whether force or violence was used in an offense is proper, since it is solicited merely to determine whether or not continued commitment is called for, not to punish the parolee. *People v. Clark* (2002) 82 Cal.App.4th 1072.

A court may admit a parolee's testimony from a recommitment proceeding without violating her rights to equal protection. *People v. Lopez* (2006) 137 Cal.App.4th 1099. Despite case law extending the privilege against self-incrimination to some civil committees, the court held that conditions for all civil committees need not be identical.

vi. Can the court instruct a jury as to the consequences of a finding that a parolee is a MDO?

At an MDO trial, the court cannot instruct a jury about the consequences of the verdict (i.e., that a parolee might be hospitalized for the balance of parole if the statutory criteria were met). *People v. Collins* (1992) 10 Cal.App.4th 690.

vii. During the trial, may the parolee be restrained?

A prospective MDO committee may be forced to wear leg restraints in court. *People v. Fisher* (2006) 136 Cal.App.4th 76.

D. Review of an MDO Commitment

1. *When is an MDO commitment reviewed?*

After one year, a parolee is entitled to a BPT Annual Review Hearing to determine (1) if she still meets the MDO criteria and (2) whether she can be treated on an outpatient basis. Penal Code § 2966(c); Cal. Code Regs. tit.15, § 2580.

4. *What rights does an MDO have when her commitment is reviewed?*

At the hearing, the burden of proof is on the BPT to show that the parolee still meets the MDO criteria by a preponderance of the evidence. The MDO parolee has a right to an appointed attorney and the appointment of two independent evaluators. The parolee may appeal the decision. Penal Code § 2966(c); Cal. Code Regs. tit.15, § 2580.

A parolee who disagrees with the MDO determination at the Annual Review Hearing also has a right to another superior court trial on whether she met the MDO criteria. At trial, the parolee has a right to a jury and to be represented by an attorney. If the inmate wishes to proceed by court trial, the District Attorney must first agree to waive the jury. The burden of proof is on the BPT and the standard of proof is beyond a reasonable doubt. If trial is by jury, it must be an unanimous verdict. The hearing is considered civil, but both civil and criminal discovery rules apply. Penal Code §§ 2966(b) and (c).

E. Duration and Placement

1. *How long does an MDO Commitment last?*

The length of a parole period is determined by statute, and depends on the type of sentence imposed. Parole terms can extend beyond the maximum parole period because of parole revocations, or because the parolee escapes from custody. The BPT can also waive a parole period. Most prisoners have a maximum parole period of three years, with a four-year

maximum if parole is suspended due to revocation. Some prisoners may have longer periods of parole when their convictions are for more serious offenses. Penal Code §§ 3000 - 3001.1.

a) *Where will an individual be placed after commitment as an MDO?*

Once certified as an MDO, a parolee is committed for inpatient treatment at a state psychiatric hospital, unless designated officials from the DMH certify that outpatient treatment is appropriate. Sixty days after the initial certification, or after parole is continued at a Annual Review Hearing, an MDO parolee may also request a placement hearing before the BPT to determine if she can be treated on an outpatient basis. At the hearing, the DMH has the burden of establishing by a *preponderance of the evidence* that the MDO parolee requires inpatient treatment – *i.e.* the MDO cannot be safely and effectively treated on an outpatient basis. The parolee has a right to an appointed attorney and the appointment of two independent evaluators. The parolee may appeal the decision. Penal Code §§ 2964(a) and (b); Cal. Code Regs. tit. 15, §§ 2576 and 2578.

If outpatient placement is deemed to be appropriate, MDO parolees are usually placed into CONREP. However, the procedural provisions of Penal Code section 1600 *et seq.* (governing CONREP) apply only when an MDO parolee is committed under the extension provisions found in Penal Code section 2972. Penal Code §§ 2964(a), (b), and 2972(d).

A parolee who is committed as an MDO may be placed on outpatient CONREP. Penal Code § 1600 *et seq.* MDOs extended under this section are entitled to the same patients' rights afforded to civil committees under the LPS Act. Penal Code § 2972(g); Welf. and Inst. Code § 5325.

A patient may be released on outpatient status if the court believes that she can be safely and effectively treated on an outpatient basis. Likewise, their outpatient status can be revoked if the court believes that she can no longer be safely and effectively treated in that manner. Penal Code § 2972(d). Time spent on outpatient status does not count as actual custody and is not credited toward the patient's maximum term of commitment or term of extended commitment, unless she is placed in a locked facility by an outpatient supervisor. Penal Code § 2972(c).

Outpatient status may not exceed one year, after which time the court must

either discharge the person, order her confined to a facility, or renew her outpatient status. Penal Code § 2972.1(a).

F. Extension of an MDO Commitment

1. How can MDO Status be extended?

MDO commitment may be extended at yearly intervals if a parolee's severe mental disorder is not in remission, or cannot be kept in remission without treatment, before termination of parole or upon "release from prison if the prisoner refused to agree to treatment as a condition of parole as required by [Penal Code] Section 2962."² Penal Code §§ 2970 and 2972(c).

To extend an MDO commitment under these provisions, the District Attorney must first file a petition with the Superior Court. The petition must be accompanied by affidavits specifying that treatment has been continuously provided in a state hospital or outpatient program while the prisoner was released from prison on parole. Penal Code § 2970. The inmate has a right to a jury trial and to representation by an attorney at the extension hearing. The District Attorney must agree to waive the jury if the inmate wishes to proceed by court trial. The burden of proof is on the District Attorney and the standard of proof is beyond a reasonable doubt. If trial is by jury, only a unanimous verdict can extend the MDO commitment. The hearing is labeled civil, but both civil and criminal discovery rules apply. Penal Code § 2972(a).

A petition seeking an extension of a mentally disordered offender commitment must be filed prior to the termination of a prior commitment. If a petition is not filed until after the commitment has expired, the court will lack jurisdiction to hear the petition and must dismiss it. However, the court may still be able to hold the individual under a regular psychiatric commitment if appropriate procedures are followed. *People v. Allen* (2007) 42 Cal.4th 91.

² This latter phrase is a *non sequitur*. Penal Code section 2962 has no such requirement that the prisoner agree to treatment as a condition of parole.

- b) *May an MDO contest her mental state at the time of the offense when she is being considered for an extension?***

Once the time has past for the parolee to request a hearing following the initial commitment determination, and proceedings have been instituted to extend the commitment, the parolee may not contest her mental state at the time of the underlying offense. At that point, she may only challenge the BPT's determination of her current mental status. *People v. Merfield* (2007) 147 Cal.App.4th 1071.

- c) *How many times can an MDO status be extended?***

There is *no limit* on the number of extensions the court may order. Penal Code § 2972(e). Therefore, a person falling under these provisions may spend her *entire life* incarcerated as an MDO.

G. Revocation and Termination of an MDO Commitment

- 1. *What happens if a MDO Outpatient Commitment is revoked?***

The CONREP director may revoke outpatient status when the MDO parolee cannot remain safely or receive effective treatment in the community. The MDO parolee has the right to a revocation hearing conducted by the DMH within 15 days of being placed into a secure mental health facility, or within 21 days if good cause exists. In lieu of revocation, the CONREP director or the DMH may also hospitalize an MDO parolee pursuant to the LPS civil commitment scheme. Penal Code § 2964(a).

- d) *What happens if the Severe Mental Disorder goes into remission?***

If the paroled prisoner's mental disorder is put into, and can be kept in, remission during the parole period, the DMH must notify the BPT and discontinue treating the parolee. Penal Code § 2968. However, if by the conclusion of her parole period the parolee's severe mental disorder is not in remission or cannot be kept in remission without treatment, the extension provisions come into play. Penal Code § 2970.

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