

**FORENSIC MENTAL HEALTH
LEGAL ISSUES**

Chapter 5

Conditional Release Program (CONREP)



California's protection and advocacy system

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A. Introduction

1. What is CONREP?

The Forensic Conditional Release Program (CONREP) is an outpatient treatment and supervision program for individuals who are under forensic commitments with the Department of Mental Health (DMH) and who the court has determined can be treated safely and effectively in the community. See *e.g.*, Penal Code §§ 1602, 1603. California courts have emphasized that outpatient status under CONREP is, “a discretionary form of treatment to be ordered by the committing court only if the medical experts who plan and provide treatment conclude that outpatient treatment would benefit the offender and cause no undue hazard to the community”. *People v. Sword* (1994) 29 Cal.App.4th 614, 620; *People v. Harner* (1989) 213 Cal.App.3d 1400, 1407; *People v. Wymer* (1987) 192 Cal.App.3d 508, 513. An individual placed on CONREP remains under the supervision of DMH. Penal Code §§ 1605, 1615.

2. How is CONREP administered?

CONREP is a network of programs administered by counties and funded by the state. DMH contracts with county mental health programs, private agencies, or non-profit contractors to provide CONREP services. DMH CONREP Policy and Procedure Manual (“CONREP Manual”) § 1110.6. The state budget provides 100% of the funding for CONREP assessment, treatment, and supervision services. DMH designates a community program director to be responsible for administering CONREP for each county or region. Penal Code § 1605(a).

3. Who is eligible for CONREP?

Individuals committed under all of the following categories: not guilty by reason of insanity (NGI), incompetent to stand trial (IST), mentally disordered offenders (MDO), mentally disordered sex offenders (MDSO), sexually violent predators (SVP), as well as other patients for whom DMH has direct responsibility (Welf. & Inst. Code § 4360(a)) may all be eligible for placement in the CONREP program. CONREP Manual § 1110.2. NGI,

IST, MDSO, and SVP defendants are placed in CONREP under the procedures described in Penal Code section 1600, *et seq.*¹ Penal Code section 2964 provides a separate procedure for the initial placement of MDOs (without spending any time as an inpatient). For a discussion of this procedure, see *People v. May* (2007) 155 Cal.App.4th 350, 2007 WL 2713740. The procedure for placing MDOs initially on CONREP outpatient status is somewhat different in that the Board of Prison Terms is the deciding body, not the court. Penal Code § 2964(b). When MDO parolees are committed under the extension provisions found in Penal Code section 2972, however, the procedures in Penal Code section 1600, *et seq.*, do apply. Penal Code § 2971(d); Cal. Code Regs tit. 15 § 2578. In addition, Welfare and Institutions Code section 6600 *et seq.* contains additional provisions for the conditional release of individuals committed as SVPs. See generally PAI's *Forensic Mental Health Issues in Criminal Law: Statute & Case Summaries* for detailed discussion of the procedural requirements for NGI, IST, MDO, SVP, and other forensic commitments.

B. Procedures and Standards for Determining Eligibility for Outpatient Release under CONREP

1. *What is the earliest date CONREP becomes available?*

The earliest date on which CONREP is available to a particular individual may depend on the nature of the underlying charges. On the one hand, “any person charged with and found incompetent on a charge of, convicted of, or found not guilty by reason of insanity of” certain enumerated felonies, including “any felony involving death, great bodily injury” or “an act which

¹ NGI acquittees can be released to CONREP either under Penal Code sections 1600-04 or as the first step in the two-part restoration of sanity process under Penal Code section 1026.2. In some circumstances, release under section 1026.2 may be easier since it does not require recommendations from both the hospital director and the community program director. Penal Code § 1026.2(a), (l); *People v. Tilbury* (1991) 54 Cal.3d 56, 72. For more on release under section 1026.2, see the NGI section of this manual.

poses a serious threat of bodily harm to another person” may not be released to CONREP unless he² has already spent at least 180 days confined to a state hospital or other facility. Penal Code § 1601(a). On the other hand, “any person charged with, and found incompetent on a charge of, or convicted of, any misdemeanor or any felony other than those described [above], or found not guilty of any misdemeanor by reason of insanity,” may be committed to CONREP at the onset of the forensic commitment without having spent any time at all in a state hospital or other facility. Penal Code § 1601(b). For MDOs, individuals may request a hearing before the Board of Prison Terms to seek outpatient treatment after 60 days of inpatient treatment. Penal Code § 2964(b). (Since most people become eligible for CONREP after a period of inpatient treatment, the emphasis in this chapter will be on release to CONREP from an inpatient facility.)

2. What are the legal standards for commitment under CONREP?

Generally, an individual may be placed on CONREP only when both the facility director and the CONREP community program director (“CONREP director”) recommend to the court that the individual can be treated safely and effectively in the community. See e.g., Penal Code §§ 1602-1603, 2964(a), 2972. California courts have emphasized that “[o]utpatient status is not a privilege given to [the offender] to finish out his sentence in the less restrictive setting. It is a discretionary form of treatment to be ordered by the committing court only if the medical experts who plan and provide treatment conclude that outpatient treatment would benefit the offender and cause no undue hazard to the community.” *People v. Sword* (1994) 29 Cal.App.4th 614, 620; *People v. Harner* (1989) 213 Cal.App.3d 1400, 1407; *People v. Wymer* (1987) 192 Cal.App.3d 508, 513. The court must approve or disapprove the medical experts’ recommendations rather than serving as a mere rubber stamp. *People v. Sword* (1994) 29 Cal.App.4th 614, 628.

² For the sake of readability, this publication uses the masculine and feminine personal pronouns in alternate chapters.

In an important case involving a NGI defendant, the court held it was permissible to look to the language of Penal Code section 1026.2(e) and ask if the defendant “would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community.” *People v. Cross* (2005) 127 Cal.App.4th 63, 73. However, even if a court uses the section 1026.2 standard, it still must consider the defendant’s criminal history as required by section 1604(c). *People v. Cross* (2005) 127 Cal.App.4th 63, 73. It is important to note that the presence of a mental illness alone is not sufficient to support a denial of CONREP status. *People v. Cross* (2005) 127 Cal.App.4th 63, 74.

In assessing a defendant’s level of dangerousness, courts have looked to many factors, including:

- The fact that the defendant had been found NGI of multiple burglaries, and was unable to show that he was not dangerous to the property of others. *People v. Allesch* (1984) 152 Cal.App.3d 365 (upholding denial of CONREP status);
- The religious beliefs of a defendant whose excessive religiosity took the form of command hallucinations, one of which resulted in a murder. *People v. Sword* (1994) 29 Cal.App.4th 614, 631 (upholding denial of CONREP status);
- The effectiveness of medication in controlling the defendant’s behavior and his willingness to continue a medication regimen. *People v. Cross* (2005) 127 Cal.App.4th 63, 74 (reversing denial of CONREP status) *People v. Williams* (1988), 198 Cal. App. 3d 1476;
- The defendant’s awareness of his condition and realization that his delusions need not be acted upon. *People v. Cross* (2005) 127 Cal.App.4th 63, 74;
- The fact that an SVP was on anti-androgen treatment and his treating doctors believed he was not likely to engage in sexually violent criminal. *People v. Collins* (2003) 110 Cal.App.4th 340.

See also *People v. Rasmuson* (2006) 145 Cal.App.4th 1487 (denial of petition for conditional release under section 6608 was reversed where there was no evidence supporting the trial court’s implicit finding that the

individual had failed to meet his burden of demonstrating that he was not likely to reoffend).

3. *What is the procedure for evaluating individuals' eligibility for placement?*

Generally, assessment for CONREP placement begins when the facility where an individual is being confined sends a referral packet recommending CONREP for that individual to the court; the court then must immediately forward this information and criminal history information to the CONREP program in the county having jurisdiction over the offense for which that individual has been charged or convicted. CONREP Manual § 1410.5; Penal Code § 1604(a). Upon receiving the CONREP referral, the CONREP program has 30 calendar days to conduct an evaluation and submit a report to the court. CONREP Manual § 1410.5, Penal Code § 1604(b).

To begin its evaluation process, CONREP liaisons are required to visit (in some cases, by videoconference) individuals in state hospitals regularly to evaluate progress toward outpatient treatment. The frequency of visits depends on the commitment category. See CONREP Manual § 1310.5. The purpose of the visits is to review treatment progress, identify barriers to outpatient treatment, and provide feedback to hospital staff.

Before interviewing an individual, CONREP will generally do a thorough chart review and consult with an individual's treatment team. Although CONREP's evaluation guidelines may vary according to an individual's commitment category (See generally CONREP Manual § 1410, *et seq.*), the evaluation tends to focus on the individual's conduct and treatment history and status. In reviewing records and interviewing treatment staff and the individual, CONREP will look at such factors as: recent behavior (e.g. Special Incident Reports, physical altercations/assaults, the use of restraint seclusion); level of dangerousness; treatment adherence (treatment participation, compliance, and understanding); medications (compliance, response, side effects); awareness of mental illness, symptoms, and risk factors; sexual and substance abuse issues, if any; treatment progress (COT readiness assessments, treatment goals, relapse prevention, privilege level in hospital, etc.); social network in hospital; participation in unit activities; family issues; reasons for prior CONREP placements and hospital readmissions; and motivation and willingness to participate in (and benefit from) outpatient treatment. The interview with

the individual will generally also explore the individual's insight into and feelings about the underlying offense (including thoughts/feelings about the victim and the presence of warning signs); realistic short and long term life goals; level of cooperation with the interviewer; hygiene/grooming; understanding of the CONREP program; motivation to leave the hospital; agreement to CONREP Terms and Conditions; and development of a Wellness and Recovery Action Plan for community living. CONREP Manual § 1310.7-9.

Finally, CONREP will contact collateral sources as part of its evaluation process. It will consult with line staff and clinical staff (including possible attendance at an outpatient staffing conference), and the individual's family/friends. CONREP may also contact the victim and/or victim's family members to explore any current relationship with the individual and any concerns about their personal safety. Other individuals or agencies, including the judge, prosecutors, DMH, and in some cases, the Department of Corrections and Rehabilitation, may also have an interest in an individual's possible CONREP status. For example, at one time, Santa Clara courts were simply not allowing any person involved in a homicide to be on CONREP in that county.

4. *What are some specific questions that may be asked of the individual, his treatment team, or collateral contacts during the CONREP evaluation process?*

CONREP may ask questions such as:

- Does the individual show remorse or empathy for his victims?
- Does the individual accept responsibility?
- Does the individual acknowledge having a mental illness?
- Is the individual aware of needing help?
- What does the individual plan to do if relapse symptoms occur?
- Did the mental illness play a role in the underlying offense/charge?
- Does the individual understand the need for CONREP?

- Is the individual willing to comply with CONREP program requirements?
- If the individual has been previously revoked from CONREP, does he understand revocation?
- How satisfied is the individual with his medications?
- How does the individual feel about taking medications?

5. *What factors does the CONREP director look to in determining whether to approve or deny an application for CONREP placement?*

As a practical matter, recommendations from the CONREP director are often hard to obtain. Some appellate courts have emphasized that deference to mental health professionals is appropriate in this context because the premature release of a dangerous person may expose the public to harm. See, e.g., *People v. Harner* (1989) 213 Cal.App.3d 1400, 1407; *People v. Wymer* (1987) 192 Cal.App.3d 508, 513. Therefore, CONREP staff generally will be given wide discretion to accept or reject candidates for outpatient treatment. Even if the hospital director reports that a defendant is ready for release to outpatient status, the CONREP director may refuse to accept the transfer if, for example, the defendant has been on his current medication regimen for less than three months, or if it appears that the defendant refuses to accept responsibility for his actions or fails to empathize with his victims. Also, the geographical area of a particular defendant's release to CONREP may be limited by the location of a victim or a victim's family. Part of the CONREP evaluation process involves interviewing victims and their families to find out if they have any safety concerns. In some cases, victims have obtained injunctions against the presence of the individual within such a large geographic area that the injunction effectively precluded participation in CONREP. But it is important to note that a lack of treatment resources in the CONREP county of responsibility does not, in itself, justify a denial of CONREP. In such cases, programs must consider all other alternatives, including possible transfer to a different CONREP program. CONREP Manual § 1410.14.

6. *What happens if CONREP approves an individual for outpatient status?*

If CONREP approves a referral for outpatient treatment, it must immediately notify the individual's treatment team by letter. The CONREP program director, and the facility director, if the individual is an inpatient, must submit to the court the recommendation regarding the individual's eligibility for CONREP. Evaluations and recommendations submitted to the court by the facility and/or program directors must also include review and consideration of complete, available information regarding the individual's criminal offense and criminal history. Penal Code § 1602(a)(c); 1603(c); 1604(c). The CONREP director also must submit its recommended plan for outpatient treatment and supervision, which must include a description of the specific conditions and terms to be following during outpatient status. Penal Code §§ 1602(a);1603(a); 1604(b). The court must calendar the matter for hearing within 15 judicial days of receiving the information from the community program director. Penal Code § 1604(c). In cases where the underlying offense of the individual being recommended for CONREP is a violent felony (one listed in Penal Code section 1601(a)), the prosecutor must provide notice of the pended hearing date and CONREP recommendation to the victim or victim's next of kin where a request for notice has been filed by the victim or their next of kin. Penal Code § 1603(a)(3).

7. *What are the legal standards and procedures for the CONREP placement hearing?*

The court has no authority to hear a request for CONREP status unless that the CONREP director and, in the case of a person who is an inpatient, the hospital director, advise the court that CONREP status will not endanger the health and safety of others and will benefit from CONREP. *People v. Wymer* (1987) 192 Cal.App.3d 508, 512. If the conditions described above are met, the court must then notice and hold a hearing within 15 judicial days of receiving the community program director's recommendation and plan. Penal Code §§ 1602(a)(3), 1603(a)(3), 1604(c). At this hearing, the court will determine whether or not to approve the recommendation and plan for CONREP status Penal Code §§ 1602(a)(3),1603(a)(3). The defendant seeking release onto CONREP bears the burden of proof at the outpatient placement hearing and must show by a preponderance of the evidence his lack of dangerousness due

to a mental defect, disease, or disorder while under supervision and treatment in the community. *People v. Cross* (2005) 127 Cal.App.4th 63, 72; *People v. Sword* (1994) 29 Cal.App.4th 614, 621-24.

In determining whether or not to approve recommendations for CONREP, the court must consider the circumstances and nature for the criminal offense leading to the commitment, as well as the individual's prior criminal history. Penal Code § 1604(c).

Approval from the court is not automatic. In considering the many interests involved, judges have overridden the joint recommendation of CONREP and state hospital staff for outpatient status.

8. Can a court order denying CONREP status be appealed?

Yes. An order denying outpatient status under Penal Code section 1600, *et seq.*, can be appealed. *People v. Henderson* (1986) 187 Cal.App.3d 1263, 1267-68. Trial court decisions are reviewed under the abuse of discretion standard. *People v. Sword* (1994) 29 Cal.App.4th 614, 619; *People v. Henderson* (1986) 187 Cal.App.3d 1263, 1267-68. A court commits error only if it “exceeds the bounds of reason, all of the circumstances being considered.” *People v. Cross* (2005) 127 Cal.App.4th 63, 73.

C. CONREP Status

1. What happens once a court orders release onto CONREP?

Once the court orders release onto CONREP, the defendant will be “placed on outpatient status subject to the terms and conditions specified in the supervision and treatment plan” submitted by the CONREP director.³ Penal Code § 1604(d). A CONREP commitment lasts for no more than

³ For NGIs, the Community Program Director must place an individual in the recommended CONREP program within 21 days of receiving notice from the Court.

one year, but it may be extended indefinitely as described below. Penal Code § 1606. During the period of outpatient commitment, CONREP must follow the review procedures described in Penal Code sections 1605 and 1606, also described below.

2. *What kinds of terms and conditions can be imposed under CONREP?*

CONREP must provide individualized services, in accordance with a Treatment Plan, that should be updated at least annually. Once outpatient status is granted, CONREP will draft a standardized treatment contract that requires the individual to meet and maintain certain minimum conditions. Because a primary goal of CONREP is the protection of the public from re-offense, individuals are often required to accept treatment terms and conditions that are highly restrictive and invasive of personal liberty.⁴ Generally, CONREP services are provided at one of various core service levels, known as levels (Community Outpatient Treatment Levels, ranging from Intensive Level to Aftercare Level.⁵ CONREP treatment typically consists of individual therapy, group therapy, weekly drug screening, home visits (both scheduled and unscheduled), mandatory medications, and specified collateral contacts in the community. The amounts and frequencies of these services and conditions can be reduced only by the CONREP program.⁶ Furthermore, CONREP can impose conditions such

⁴ Note that DMH CONREP policies do address patients' rights issues, including: confidentiality of patient information; access to records; protection of research and evaluation subjects; and access to voter registration information. Grievance procedures are discussed below.

⁵ Some state hospital residents may be admitted to a Statewide Transitional Residential Program — a temporary placement in a non-medical Community Care Facility — before transitioning to a community placement.

⁶ The CONREP Manual specifies that MDOs on CONREP require special clinical attention and monitoring regarding substance abuse and

as restrictions on residence, roommates, travel and weapons, driving, and personal associations; and requirements such as, early curfews, submission to searches, substance abuse testing, and medication compliance (when ordered). The contract may also include special terms/conditions, depending on individual factors. Although the outpatient treatment contract may be modified at the discretion of the CONREP staff, any new condition(s) should be given to the individual to sign and forwarded to the committing court, the public defender, and/or the individual's parole agent. CONREP Manual § 1110.2.⁷ The following are Examples of special conditions: One CONREP client whose crime was the attack of eight people with a garden rake was prohibited by CONREP from owning a shovel after one was discovered leaning against his house. Another CONREP client, whose crime was molestation, was prohibited from having Disney wallpaper.⁸

3. Can a CONREP patient challenge conditions of CONREP?

While there is no case law that directly addresses a challenge to conditions of CONREP, it may be possible for individuals in CONREP to challenge conditions by using the principles of parole cases by analogy. Parolees have successfully challenged conditions of parole on the ground that they are overbroad. See, e.g., *People v. Garcia* (1993) 19 Cal.App.4th 97; *People v. Bauer* (1989) 211 Cal.App.3d 937. Generally, parole conditions must either relate to the crime for which the parolee was imprisoned or address future criminality, but, as long as they do one of these things, they may prohibit even non-criminal activity. *People v. Lent* (1975) 15 Cal.3d 481, 486 (superseded on another ground by Proposition 8); *People*

medication. CONREP Manual § 1240.10. Similarly, SVPs may require special clinical attention and monitoring regarding travel restrictions, lie detector testing, and plethysmography. CONREP Manual § 1250.17.

⁷ Portions of this discussion were also excerpted from a CONREP training tape for Atascadero State Hospital employees

⁸ Excerpted from a CONREP training tape for Atascadero State Hospital employees.

v. Garcia (1993) 19 Cal.App.4th 97, 101. Conditions that infringe on a parolee's constitutional rights are especially disfavored. *People v. Garcia* (1993) 19 Cal.App.4th 97, 101-102; *People v. Bauer* (1989) 211 Cal.App.3d 937, 944-45. Where a condition of probation requires a waiver of constitutional rights (e.g. freedom of association), the condition must be narrowly drawn. *People v. Garcia* (1993) 19 Cal.App.4th 97; *People v. Bauer* (1989) 211 Cal.App.3d 937. In the *Bauer* case, for example, the Court of Appeal struck down a probation condition requiring the defendant to obtain his probation officer's approval of residence as an infringement of the defendant's constitutional rights. *People v. Bauer* (1989) 211 Cal.App.3d 937.

Keep in mind, however, that many courts are likely to find that parolees and forensically committed persons may be treated differently. See, e.g., *People v. Mord* (1988) 197 Cal.App.3d 1090, 1105 (noting that "there is ample justification for legislative distinctions between those committed for treatment and those committed for punishment"); see also *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167 (finding that IST commitments are non-punitive); *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 506-07 (finding that NGI commitments are non-punitive and that insanity acquittees are not similarly situated to parolees); *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 840-41 (finding that MDO statutes are non-punitive).

4. What is the process for review of outpatient status?

Outpatient status under CONREP "shall be for a period not to exceed one year." Penal Code § 1606.⁹ Every 90 days, the outpatient treatment supervisor (the community program director or designee) must submit a report on an individual's progress to the court, the prosecutor, and defense counsel. Penal Code § 1605(d). In addition, the court must hold a review hearing at the end of the one-year term of commitment. Penal Code

⁹ An insanity acquittee may always seek release from outpatient commitment by applying for restoration to sanity under Penal Code section 1026.2 or by writ of habeas corpus.

§ 1606. The hearing must be held no later than 30 days after the end of the one-year term of commitment, unless good cause exists. Penal Code § 1606. However, at least one court has held that the 30-day timeframe is directory rather than mandatory, meaning that the failure to hold the required review hearing within the 30 day timeframe does not require that individual be released from commitment. *People v. Harner* (1989) 213 Cal.App.3d 1400, 1406-07 (considering a period of several years in which no review hearing occurred). Therefore, failure to comply with the deadlines of Penal Code sections 1600-1606 will most likely not result in the termination of the state's authority to keep a person committed under CONREP.

Before the annual review hearing, the CONREP director must provide a report on the individual's progress and a recommendation regarding whether CONREP status should be renewed, whether the individual should be confined for inpatient treatment, or whether the individual should be discharged from the commitment. Penal Code § 1606. The court must then order one of these three things: the renewal of CONREP, confinement to a treatment facility, or discharge from commitment. Penal Code § 1606. Because the review hearing is less formal than a criminal proceeding, reliable hearsay evidence, including hospital records not falling under one of the hearsay exceptions, is admissible. *People v. Sword* (1994) 29 Cal.App.4th 614, 635-36.

The court's decision at the annual review hearing will depend in part on the individual's commitment category. For example, for ISTs, the decision to renew or terminate outpatient status or order inpatient treatment will depend on whether or not the individual has been (or is not likely to be) restored competency. CONREP Manual § 1420.12. But note that for ISTs, the court may also order initiation of "Murphy Conservatorship" proceedings under Welfare and Institutions Code section 5008(h)(B). For NGIs, the court's decision will be based on a determination of whether sanity has been restored. CONREP Manual § 1420.14. MDO annual review recommendations will be based on a determination of whether an individual continues to meet applicable MDO criteria. CONREP Manual § 1420.16.

5. Does time on CONREP count toward the original term?

For NGIs, time spent on CONREP does not count toward the maximum term of commitment or toward the term of extended commitment. Penal

Code §§ 1026.5(a)(1); 1600.5. *See also People v. Grassini* (2003) 113 Cal.App.4th 765; *People v. Crosswhite* (2002) 101 Cal.App.4th 494 (holding that Penal Code section 1026.5(b)(8), which excludes time on outpatient status from the calculation of actual custody and maximum term of commitment, is not a violation of due process or equal protection).

For MDSOs, time spent on outpatient status does not count toward the maximum term of commitment or toward a term of extended commitment. Penal Code § 1600.5. *See also People v. Henry* (1993) 12 Cal.App.4th 1308.

For Penal Code section 2972 MDOs, time spent on outpatient status does not count toward the maximum term of commitment or toward a term of extended commitment. Penal Code § 1600.5.

For IST defendants, time spent as an outpatient in CONREP is credited toward any term of imprisonment to be served in the underlying criminal case. Penal Code § 1375.5.

For SVPs, time spent as an outpatient on CONREP does not count toward the two-year term of commitment under Welfare and Institutions Code section 6604.

6. *Under what circumstance may a CONREP patient transfer to another CONREP program?*

At the initial CONREP hearing, the court will generally order CONREP placement in the individual's county of commitment, although CONREP may occur in a different county. Penal Code § 1604(d). There is also a process by which an individual can seek transfer from the county of original commitment to a CONREP program in a different county. According to CONREP Manual section 1430.17 *et seq.*, an individual may be transferred to another county's CONREP program when clinically indicated. Reasons for transfer may include: that an individual has family or social supports in another county; the location of the victim; insufficient resources in the current county; or the individual's safety and welfare is jeopardized in the current community. The transfer may occur either by direct referral of an individual's CONREP program, by involvement of State DMH (when a new CONREP program cannot be located), or by referral to a Specialty Treatment Program. Sometimes the court of commitment will remain the same and sometimes responsibility will be transferred to the court of the

new county CONREP program. For judicially committed individuals and PC 2970 MDOs, the prospective CONREP program must accept the individual and the court must approve the transfer following a hearing. For MDO parolees, the transfer also involves the individual's parole agent and transfer of responsibility to the parole office in the new county. When deciding where outpatient treatment is most appropriate, CONREP staff may consider such factors as the potential for contact with a victim or victim's family or the presence of individuals with whom the defendant had previously engaged in criminal activity.

7. How can an individual to file a grievance against his CONREP program?

Individuals on CONREP have the right to access a grievance process (see CONREP Manual § 1470.9 *et seq.*). A grievance can be made about any action taken by a CONREP program, employee, or subcontractor that an individual believes adversely affects his welfare or status. Although the CONREP program is required to seek resolution of the grievance at the lowest level possible, an individual has the right to initiate a formal grievance process. CONREP programs must inform individuals of the grievance process, conspicuously post information about the process at the CONREP site in a language-accessible manner, and make available a CONREP Patient Grievance Form to all patients. Patients must also be advised that they are not required to use the grievance process, and that they can seek help from an outside agency. At the level of informal discussion, the patient (and/or patient representative) has the right to discuss the matter with the Community Program Director or a lower level administrator, if appropriate. If the patient is not satisfied with the result of informal discussion, the patient or patient representative may submit a formal, written grievance by using the CONREP Patient Grievance Form. The formal process contains four levels of review. Note, however, that a review level may be skipped if all involved parties consent. Time limits for response at any step may be extended if all parties consent.

At Level I review, the CONREP Patient Grievance Form is submitted to the CONREP Director or designee, who must respond on the written form within 15 working days of receipt. If the patient chooses to take the grievance to an external agency, the CONREP Director must cooperate and address the grievance. Note that an applicable county mental health grievance process may take the place of the Level I review.

At Level II review, the CONREP Director must give the patient, in writing, the contact information for the CONREP Operations Manager. The Operations Manager must review the grievance and Level I response and respond to the patient in writing within 15 working days after receiving the appeal.

At Level III review, the patient must be given, in writing, the contact information for the Chief of Forensic Services. The Chief of Forensic Services must review the grievance and prior responses and respond to the patient in writing within 15 days of receipt.

Finally, at Level IV review, the patient may appeal to the Director of State DMH or his designee.

D. Termination of CONREP Status

CONREP commitment ends when (1) it terminates without being renewed by the court, (2) the community director notifies the court that the outpatient no longer meets the criteria for continued commitment, or (3) outpatient status is revoked and the outpatient is confined in a treatment facility. See Penal Code § 1606. Note, again, that the specific procedures for renewal, discharge, and revocation may vary according to the statutes governing each type of commitment.

1. *Under what circumstances can an individual be discharged from CONREP?*

As discussed above, outpatient status technically lasts no more than one year. Penal Code § 1606. At the end of one year, the court must hold a review hearing at which it either discharges the individual from CONREP, renews CONREP status, or orders the individual to be confined for inpatient treatment. Penal Code § 1606. The court can only order discharge “under appropriate provisions of law,” which means that it must look to the statutes governing each type of commitment to see if release is appropriate. See below for examples of CONREP discharge based on the criteria of different commitment categories.

An individual can be discharged from CONREP before the end of the one year period, if the outpatient supervisor believes that an outpatient no longer meets the criteria for commitment and notifies the court of this. The court will then will initiate further proceedings under the different

commitment statutes. Penal Code § 1607. For example: if an individual committed as an IST appears to have regained competence, the court can recommence criminal proceedings under Penal Code section 1372; if an NGI acquittee appears to have regained sanity, a sanity restoration trial must be held in accordance with section 1026.2. But remember that a court may consider or institute civil conservatorship proceedings even if an individual no longer meets the criteria for a forensic commitment. For more information on these procedures, see the sections on IST, NGI, MDO, and SVP commitments in this manual.

2. When can CONREP status be revoked?

The CONREP community program director can petition the court to revoke outpatient status if an individual requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision. Penal Code § 1608. The prosecutor may also petition for revocation if there is reason to believe the individual is a danger to the health and safety of self or others while in the community. Penal Code § 1609. Note, that whenever possible the individual should be notified and given an opportunity to discuss the matter before revocation is recommended to the court. CONREP Manual § 1430.5. CONREP status may be revoked for such reasons as: Absence Without Leave (AWOL); commission of an unlawful act or reoffending; illegal or prohibited substance use; mental decompensation; noncompliance with the terms and conditions of the treatment contract; refusal of the patient to consider alternatives to rehospitalization; and clinical errors by CONREP staff. A study of the San Diego CONREP Program from its inception until 1992 found that in outpatient revocation hearings, noncompliance with program conditions was cited in 16 decisions, deterioration of mental condition was cited in 12 decisions, and criminal activity was cited in only nine decisions. Morris, G.H., *Placed in Purgatory: Conditional Release of Insanity Acquittees*, 39 Arizona Law Review 1093 (1997).

It is important for individuals and defense counsel to realize that judges tend to give CONREP directors a great deal of discretion as to what constitutes a valid safety concern. For example, if leaving town is given as a reason for revocation, the fact that the patient had a good reason for leaving town will not necessarily convince a judge that revocation is not appropriate. In cases where the reason for revocation is treatment contract non-compliance, defense counsel should determine whether the violated

term was reasonable and/or had any relationship to the underlying offense. It is important to note that, under *Foucha v. Louisiana* (1992) 504 U.S. 71, 118 L. Ed.2d 437, 112 S. Ct. 1780, it is unconstitutional to commit a non-mentally ill person to a state hospital, even when that person considered dangerous. Therefore, when CONREP status is revoked for failure to accept treatment and supervision or because the patient is considered a danger to others, without having any relationship to his mental condition, counsel should raise applicable *Foucha* issues.

An appellate court has drawn a similarity between the decision to recommit a mentally disturbed offender and the decision to revoke parole. “The revocation of his status and recommitment to a state mental hospital – an institution which often is little more than a sanitary dungeon – certainly works a loss of liberty as grievous as that inflicted upon its parolee and narcotic addict counterparts.” In both contexts, Due Process requires prompt written notice of charges and evidence justifying recommitment and notice of right to challenge allegations at the revocation hearing which must be held by a neutral hearing body. *In re Anderson* (1977) 733 Cal.App.3d 38 at 44.

Under a federal conditional release statute, revocation of conditional release based on noncompliance with a flawed mental health treatment regimen violates due process. Although this did not involve a patient on CONREP status, the relevant legal principles may apply by analogy. *U.S. v. Woods* (1993) 995 F.2d. 894 (9th Cir.).

In *In re McPherson*, the First District Court of Appeal reversed the revocation of outpatient status when the trial court relied on hearsay testimony by a member of the corrections health unit. This case contains a discussion of the standards of evidence used in revocation hearings brought under Penal Code section 1608. *In re McPherson* (1985) 176 Cal.App.3d 332.

3. What are the procedures for a revocation hearing?

When the court receives a revocation request it must hold a hearing within 15 judicial days. Penal Code §§ 1608, 1609. The due process standards used in revocation hearings brought under Penal Code sections 1608 and 1609 are the same as those for probation revocation hearings enumerated under Penal Code section 1203.2 (also known as *Morrissey* rights). A CONREP patient facing revocation has a right to written notice of the

charges, to confront and cross-examine witnesses, and a fact-finding hearing by a neutral body applying a preponderance of the evidence standard of proof. See *In re Anderson* (1977) 73 Cal.App.3d 38; *In re McPherson* (1985) 176 Cal.App.3d 332; *People v. DeGuzman* (1995) 33 Cal.App.4th 414. Furthermore, a patient has the right to appeal a CONREP revocation, similar to the revocation of probation. The standard on appeal is a clear record showing of abuse of discretion. Penal Code § 1237; *People v. Henderson* (1986) 187 Cal.App.3d 1263.

The revocation procedures for MDO parolees are set forth under Penal Code section 2964(a). Under that section, an individual has the right to a revocation hearing conducted by DMH within 15 days of being placed into a secure mental health facility, or within 21 days if good cause exists. Note that in lieu of revocation, the CONREP director or DMH may also hospitalize an MDO parolee under the LPS commitment scheme.

4. What happens if the court revokes my CONREP status?

If the court revokes CONREP status, the patient is returned to a state hospital or any other mental health treatment facility approved by the CONREP director. Penal Code § 1609. The individual may not be released to outpatient status again without judicial approval under Penal Code section 1602 or 1603. Penal Code § 1610(d). However, as mentioned above, under *Foucha v. Louisiana* (1992) 504 U.S. 71, it is unconstitutional to commit a person to a state hospital if that person lacks a mental disease or defect, even when considered dangerous. Therefore, when a patient on CONREP status is revoked for failure to accept treatment and supervision or is considered a danger to others, without having any relationship to his mental condition or a psychiatric diagnosis, *Foucha* should be raised.

E. Confinement Pending a Revocation Hearing (TANGI Status)

The CONREP community program director may confine an individual in a mental health facility pending a revocation hearing if he determines that the individual is dangerous and poses an imminent risk of harm to self or others. Penal Code § 1610(a). The CONREP director must designate a facility (near the courthouse) that will continue to provide treatment and adequate security, and to the greatest extent possible, minimize

interference with the individual's treatment program. This is known as TANGI status.

CONREP may confine an individual in the county jail only if the jail will continue to provide treatment and adequate security, minimize interference with the treatment program, and be able to provide accommodations that ensure the safety of both the patient and the general population of the jail. Penal Code § 1610(b). In addition, the patient must be separated from the general population of the jail. Penal Code § 1610(b).

The CONREP director must submit a written application to the court within one judicial day of confinement in jail specifying the behavior or other reason justifying jail confinement. Penal Code § 1610(a). The court must consider the written application and rule upon it. Penal Code § 1610(a). The CONREP director must also report to the court regarding the type of treatment the person is receiving in jail within three judicial days after placement. Penal Code § 1610(b). If there is evidence that the treatment program is not being followed or the accommodations are inappropriate, the court must order transfer to an appropriate facility, including an appropriate state hospital. Penal Code § 1610(b).

Within three days of the patient's jail confinement, the community director must report to the court regarding the treatment the patient is receiving in the facility. Penal Code § 1610(b). "If there is evidence that the treatment program is not being complied with, or accommodations have not been provided which ensure both the safety of the committed person and the safety of the general population of the jail, the court shall order the person transferred to an appropriate facility, including an appropriate state hospital." Penal Code § 1610(b).

A person on TANGI status has the right to challenge his confinement by writ of habeas corpus under Welfare and Institutions Code section 5275, and also has a right to be advised of his rights under Welfare and Institutions Code Section 5325. Penal Code § 1610(c).

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