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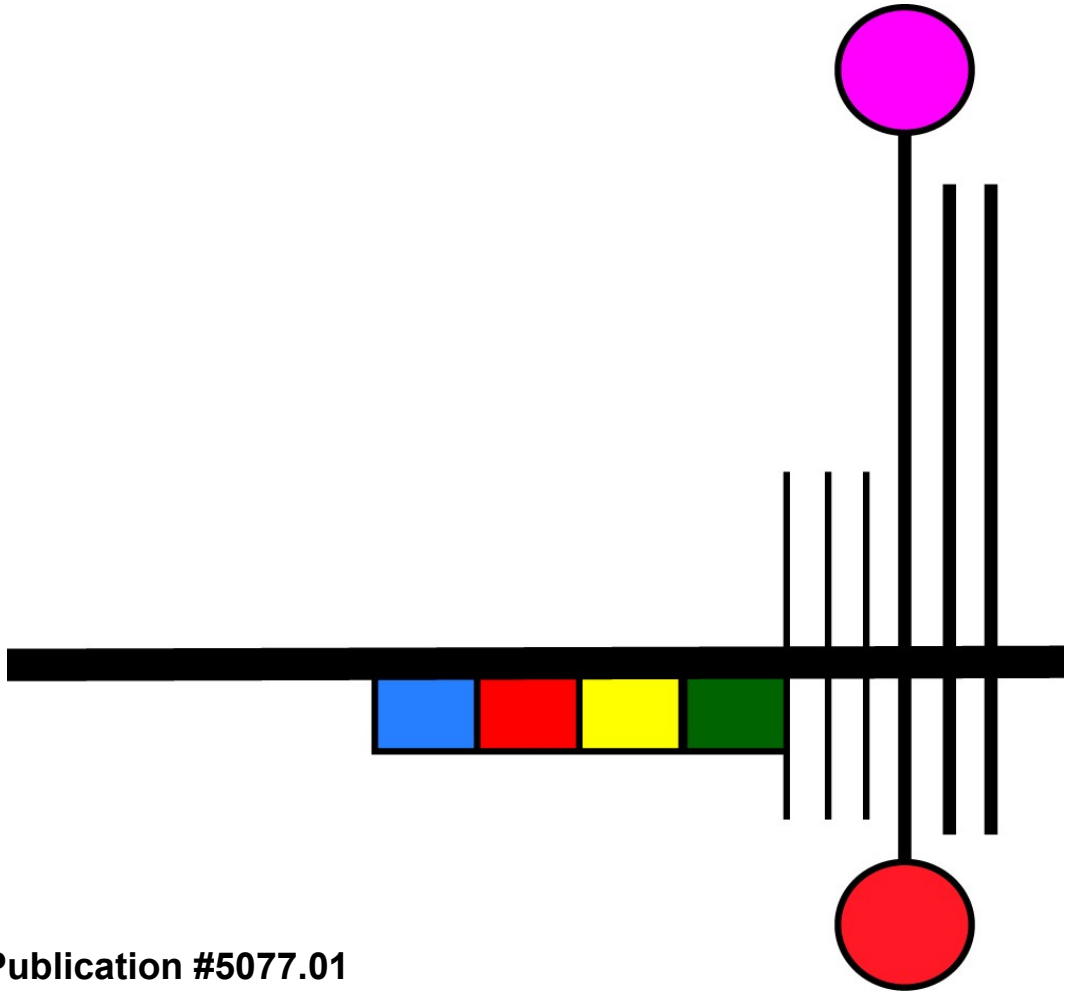
FORENSIC MENTAL HEALTH LEGAL ISSUES



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Disability Rights California is the agency appointed under federal law to protect the civil, legal and service rights of Californians with disabilities. Disability Rights California provides information and technical assistance and direct representation of persons with developmental and mental disabilities.

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You can also download an electronic version of this publication at the following web address: www.disabilityrightsca.org/pubs/507701.pdf

INTRODUCTION

When a defendant with a mental disability enters the criminal justice system, many of the safeguards afforded to criminal defendants under due process, equal protection, and constitutional criminal procedure change. The merging of law and psychiatry has created a hybrid class of defendants who are sometimes treated like civilly committed mental health patients, while at other times like criminal defendants.

The rights and constitutional protections afforded to these "forensic patients" can and do vary according to where they are in the criminal justice process and how they are classified. For instance, the law holds insanity acquittees unaccountable for their actions and imposes mandatory treatment in lieu of punishment. However, they are frequently confined with fewer rights, and for longer periods, than their criminal defendant counterparts.[1] Moreover, once confined, many find themselves facing a Kafka-like situation where they have to prove a negative (i.e., that they are no longer dangerous or no longer mentally ill), in order to be released from the system, and where the legal burden is quite difficult, if not impossible to meet.

People with mental disabilities who enter the criminal justice system are particularly vulnerable to abuse and neglect. They are often ignored, victimized, and warehoused with few treatment options other than medication. Unlike other criminal defendants, they bear a double burden: the stigma associated with mental illness, and the stigma associated with being accused of committing a crime – what many call the "mad and bad" clients.

All too often, the rights of forensic patients are ignored and neglected - even by well-intentioned defense attorneys. Such attorneys may show a laxness toward upholding these clients' civil and constitutional rights either because they do not understand the nature of mental disability, or because they believe that treatment is in their clients' "best interest." Defense attorneys should recognize that getting their clients committed into the mental health system might not be best for them in the long run, especially when they are facing minor criminal charges.

The forensic mental health population in California generally consists of patients confined under five types of commitments: (1) Incompetent to Stand Trial (IST); (2) Not Guilty by Reason of Insanity (NGRI); (3) Mentally Disordered Offenders (MDO); (4) Mentally Disordered Offenders (MDO); and (5) Sexually

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1 A 1995 study found that in California, the median length of confinement for insanity acquittees was 1,359 days, and the same figure for those unsuccessful in their NGRI pleas (and thus found guilty) was 610 days. Silver, E., Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants, 19 *Law and Human Behavior* 381 (1995).

Violent Predators (SVP). A previous statutory classification, Mentally Disordered Sex Offenders (MDSO), was repealed in 1982. Prisoners with mental disabilities may also be transferred from the Department of Corrections and Rehabilitation (CDCR) to the Department of Mental Health (DMH) under Penal Code section 2684. However, these individuals are not addressed in this manual because they retain their legal status as prisoners rather than DMH patients.

In California, the state hospital system provides inpatient commitment under the jurisdiction of the DMH, with most patients residing at Atascadero, Patton, Metropolitan, Napa, or Coalinga State Hospitals. The DMH also provides outpatient commitment through the Conditional Release Program (CONREP), a statewide program managed by the Office of Forensic Services. In addition, the DMH provides and maintains treatment programs for patients at the California Medical Facility at Vacaville, while the CDCR provides varying levels of mental health treatment at the state prisons.[2]

This publication summarizes the procedures and rights afforded to the forensic mental health population in California.[3] It is designed to be an introduction to the field as well as a reference guide for forensic mental health patients, advocates, and attorneys. It is not meant to be an exclusive or exhaustive legal resource and, of course, is not a substitute for research in each individual case. Disability Rights California welcomes your questions and comments about this publication at 800-776-5746.

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2 The following websites provide information about agency structure and facilities. For the Department of Mental Health: www.dmh.cahwnet.gov. For the Department of Corrections and Rehabilitiation: www.**cdcr**.**ca**.gov.

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

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 1

Incompetent to Stand Trial (IST) Commitment

Disability Rights California

California's protection and advocacy system

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A. Introduction

Trial and conviction of a person while legally incompetent violates the due process clause of the U.S. Constitution because an incompetent person is incapable of adequately defending against criminal charges. *Pate v. Robinson* (1966) 383 U.S. 375; *People v. Samuel* (1981) 29 Cal.3d 489.

A defendant is found Incompetent to Stand Trial (IST) and committed for psychiatric treatment when, as a result of a mental disorder or developmental disability, he[1] cannot: (1) understand the nature of the criminal proceedings against him, or (2) assist counsel in the conduct of a defense in a rational manner. Penal Code § 1367(a). An IST finding has no direct application to a defendant's criminal responsibility for the underlying crime, but focuses solely on his mental status at the time that he enters the criminal justice system. *People v. Lawson* (1918) 78 Cal. 722.

Incompetent to Stand Trial commitment to a state hospital or conditional release program (CONREP) may result in a far greater curtailment of an individual's liberty than if he had remained in the criminal justice system. (See Chapter 4 for a discussion of CONREP.) As discussed below, certain felony IST defendants can face perpetual extension of their commitment through application of a "Murphy" conservatorship. Although these defendants were never found guilty of a crime, and are not "gravely disabled" from a civil commitment standpoint, they may spend the rest of their lives confined in a state hospital. Therefore, defense attorneys should initiate all available motions and pre-competency procedures, including the preliminary hearing, to prevent inappropriate IST commitments.

B. Substantive Standards for Incompetency to Stand Trial

1. What is the legal definition of IST?

Under California law, a defendant is mentally incompetent to stand trial if, as a result of a mental disorder or developmental disability, he cannot: (1) understand the nature of the criminal proceedings; or (2) assist counsel in the conduct of a defense in a rational manner. Penal Code § 1367(a).

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

The United States Supreme Court has defined mental competence to stand trial as a defendant's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States* (1960) 362 U.S. 402.

An assertion of incompetency to stand trial cannot be maintained solely because a defendant is being uncooperative, displays poor behavior in the courtroom, or appears odd or bizarre. *People v. Smith* (2003) 110 Cal.App.4th 492; *People v. Medina* (1965) 11 Cal.4th 694; *People v. Superior Court (Campbell)* (1975) 51 Cal.App.3d.459.

2. What is the difference between competency to stand trial and competency to waive counsel?

A criminal defendant has a Sixth Amendment right to represent himself at trial if he: (1) is mentally competent; (2) makes his request knowingly and intelligently, having been apprised of the dangers of self-representation; and (3) makes an unequivocal request to waive counsel within a reasonable time before trial. *Faretta v. California* (1975) 422 U.S. 806; *People v. Welch* (1999) 20 Cal.4th 701; *People v. Marshall* (1997) 15 Cal.4th 1.

The legal standard for determining competency to waive counsel is the same as the standard for determining competency to stand trial. However, in addition to determining that a defendant who seeks to waive counsel is competent, the trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. The focus of a competency inquiry is the defendant's mental capacity; i.e., whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is not coerced. *Godinez v. Moran* (1993) 509 U.S. 389, 401, fn.12; *Van Lynn v. Farmon* (9th Cir. 2003) 347 F.3d 735.

A finding that a defendant is not competent to knowingly and voluntarily waive counsel does not necessarily raise a doubt as to his competency to stand trial. *People v. Welch* (1999) 20 Cal.4th 70.

Despite the above standards, a trial court may deny or terminate self-representation by a defendant who deliberately engages in serious and

obstructionist misconduct. *Faretta v. California* (1975) 22 U.S. 806; *People v. Welch* (1999) 20 Cal.4th 701.

3. When is a defendant incompetent to make the decision to waive a jury trial?

A defendant cannot effectively waive his right to a jury trial, or any other fundamental right, while incompetent. However, a jury waiver taken a few days before the defendant was found IST was valid because there was no evidence of incompetency at the time of the waiver. *People v. Smith* (2003) 110 Cal.App.4th 492.

C. Initiating Incompetency to Stand Trial Proceedings

1. Are IST proceedings initiated differently for people charged with misdemeanors as opposed to felonies?

Penal Code section 1367.1 specifies that before a decision is made whether to hold a formal competency hearing for a defendant charged with only misdemeanors, the court must first refer him to a county-designated mental health facility for evaluation and treatment pursuant to Penal Code section 4011.6 (involuntary commitment to a county-designated facility for mental health evaluation under the LPS Act). Penal Code § 1367.1. Note, however, that the Second District Court of Appeal has held that this provision violates the constitution's Equal Protection clause because felony defendants are not required to undergo the same evaluation and treatment before IST proceedings can begin. *Pederson v. Superior Court* (2003) 105 Cal.App.4th 931.

2. Under what circumstances will a court initiate IST proceedings?

A trial court must initiate IST proceedings when there is substantial evidence raising a doubt as to the defendant's competency to stand trial. Either the court or counsel may raise this issue at any time before judgment, including during probation violation hearings. When the doubt arises in the mind of the trial judge, the judge shall state the doubt on the record and ask for defense counsel's opinion regarding the defendant's competency. The court must then recess the proceedings for as long as reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to his mental competency at that point in time. Penal

Code §§ 1368, 1369; *People v. Laudermilk* (1976) 67 Cal.2d 272; *People v. Kaplan* (2007) 149 Cal.App.4th 372; *People v. Ary* (2004) 118 Cal.App.4th 1016; *People v. Humphrey* (1975) 45 Cal.App.3d 32.

When a doubt regarding competency to stand trial is raised regarding a defendant with a developmental disability, the court will follow the procedures enumerated under Penal Code sections 1370.1 and 1370.4, including referring the defendant to a regional center for evaluation. These sections apply to all defendants with a developmental disability charged with either a felony or misdemeanor.

Even though Penal Code section 1368 is phrased in terms of whether a doubt arises in the mind of the trial judge and is then confirmed by defense counsel, once the accused has come forward with substantial evidence of incompetency to stand trial, due process requires that a full competency hearing be held as a matter of right. *People v. Young* (2005) 34 Cal.4th 1149; *People v. Sundberg* (1981) 124 Cal.App.3d 944.

The right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. *People v. Johnwell* (2004) 121 Cal.App.4th 1267. However, because competency can fluctuate, it may be difficult to prove incompetency at the time of trial long after that time has passed. *Pate v. Robinson* (1966) 383 U.S. 375, 386-87; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1025.

Once a defendant has been found competent to stand trial, a second competency hearing may be required when there is a substantial change in circumstances or new evidence is presented which casts serious doubt on the validity of the prior finding. *Drope v. Missouri* (1975) 420 U.S. 162; *People v. Kaplan* (2007) 149 Cal.App.4th 372; *People v. Jones* (1997) 15 Cal.4th 119 (modified on denial of rehearing); *People v. Duncan* (2000) 78 Cal.App.4th 765.

A court cannot require counsel to state his views as to a defendant's competency. *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465. Even when defense counsel believes and informs the court that the defendant is competent, the court may nevertheless order a competency hearing. Penal Code § 1368(b). *See People v. Skeirik* (1991) 229 Cal.App.3d 444.

Absent substantial evidence of a defendant's incompetence to stand trial, the decision to order a competency hearing is left to the court's discretion. *People v. Ogelsby* (2008) 158 Cal.App.4th 818; *People v. Panah* (2005) 34 Cal.4th 395; *People v. Gallegos* (1990) 52 Cal.3d 115; *People v. Hale* (1989) 44 Cal.3d 531.

It is not appropriate to initiate IST commitment proceedings solely as a means of obtaining mental health treatment. When it appears that a mental health evaluation or treatment is needed, the LPS Act provides civil law mechanisms for obtaining voluntary and, if necessary, involuntary mental health services. Welf. & Inst. Code § 5000, *et seq*.; Penal Code §§ 4011.6, 4011.8.

3. What constitutes "substantial evidence" requiring a court to initiate IST proceedings?

A competency hearing is mandatory when "substantial evidence" of incompetency exists. *Price v. Superior Court* (2001) 25 Cal.4th 1046; *People v. Danielson* (1992) 3 Cal.4th 691 (overruled on other grounds); *People v. Howard* (1992) 1 Cal.4th 1132; *People v. Stankewitz* (1982) 32 Cal.3d 80; *People v. Sundberg* (1981) 124 Cal.App.3d 944.

"Substantial evidence" has been defined as evidence that raises a reasonable doubt concerning the defendant's competency to stand trial. *People v. Frye* (1998) 18 Cal.4th 894, 951-952; *People v. Davis* (1995)10 Cal.4th 463, 527. It has also been defined as evidence that is "reasonable, credible and of solid value." *People v. Marshall* (1997) 15 Cal.4th 1, 31.

> "If a psychiatrist or qualified psychologist, who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied." *People v. Pennington* (1967) 66 Cal.2d 508, 519.

Substantial evidence of incompetency is sufficient to require a full competency hearing even if that conclusion is contradicted by other reports

or evidence. *People v. Young* (2005) 34 Cal.4th 1149; *People v. Murrell* (1987) 196 Cal.App.3d 822.

Evidence of defendant's irrational behavior, his demeanor at trial, and prior medical opinion, taken together, are all relevant in determining whether further inquiry is required as to his competency to stand trial. Under certain circumstances, even one of these factors standing alone may be sufficient to establish IST. *Drope v. Missouri* (1975) 420 U.S. 162. But *see also People v. Marks* (2004) 31 Cal.4th 197, 220 (Once a defendant is found competent to stand trial, "even bizarre statements and actions are not enough to require a further inquiry.")

A defendant's preference for the death penalty, propensity for violence, hoarding of medication for an alleged suicide attempt, and history of psychiatric treatment did not constitute substantial evidence requiring the court to initiate IST proceedings because they had little bearing on the question of whether the defendant could assist his attorney in his defense. *People v. Ramos* (2004) 43 Cal.4th 494.

Evidence regarding past events that does no more than form the basis for speculation regarding possible current incompetency is not sufficient for a finding of IST. *People v. Panah* (2005) 34 Cal.4th 395; *People v. Hayes* (1999) 21 Cal.4th 1211.

A defendant's chronic pain and associated symptoms did not render him IST. Therefore, the trial court was not obligated to suspend criminal proceedings, but only to reasonably accommodate his special needs to the extent practicable in light of courtroom security considerations and other legitimate constraints. *People v. Avila* (2004) 117 Cal. App. 4th 771.

4. What is the effect of a court's failure to conduct a competency hearing in the face of substantial evidence of incompetency?

Failure to hold a competency hearing pursuant to Penal Code section 1368, when there is substantial evidence that the defendant has a mental disorder that prevents him from assisting counsel in his defense, is reversible error. *People v. Standewitz* (1982) 32 Cal.3d 80.

The failure of a trial court to employ procedures to order a competency hearing despite substantial evidence of incompetency requires reversal of

the conviction and remand to the trial court. On remand, the state has the burden of establishing that a retrospective competency hearing can be held to cure the error. *People v. Ary* (2004) 118 Cal.App.4th 1016.

It was reversible error for a trial court to refuse to appoint the regional center director to evaluate the defendant's competency after defense counsel had submitted substantial evidence that that defendant was developmentally disabled and IST. The error deprived the court of jurisdiction to proceed, and required reversal of the sentence and adjudication of guilt unconditionally, since a retrospective determination of competency would not have sufficed. *People v. Castro* (2000) 78 Cal.App.4th 1402.

D. Competency hearings: Procedural Issues

1. What procedural rules apply to IST hearings?

If IST proceedings are initiated at the beginning of trial, some pre-trial procedures are available to test the sufficiency of the criminal charges. These include a preliminary hearing for defendants charged with felonies, and various motions including demurrers, motions to dismiss, and motions to suppress evidence. Penal Code § 1368.1. The outcome of these proceedings may obviate the need for a determination of competency to stand trial.

IST proceedings begin with the court appointing one or two psychiatrists and/or licensed psychologists to examine the defendant and make a recommendation to the court. Penal Code § 1369. *See, "What role do expert evaluations play in competency hearings?"* below.

Although arising in the context of a criminal trial, a competency hearing is governed generally by the rules applicable to civil proceedings. *People v. Johnwell* (2004) 121 Cal.App.4th 1267; *Bagleh v. Superior Court* (2002) 100 Cal.App.4th 478.

All criminal proceedings are suspended pending a resolution of competency to stand trial. If a jury has been impaneled and sworn, the jurors may be discharged if necessary to avoid undue hardship. Penal Code § 1368 (c).

It is unclear whether a defendant has a personal right to be present at a section 1368 hearing, or whether his attorney can waive his presence on his behalf. However, defense counsel cannot waive the defendant's right to testify at the hearing over his objection, unless the court separately determines that the defendant is incompetent to testify. *People v. Harris* (1993) 14 Cal.4th 984.

If the competency trial is by jury, a unanimous verdict is required to certify the defendant as incompetent to stand trial. Penal Code § 1369(f). However, despite the jury's finding, the provisions of Code of Civil Procedure section 629 (judgment notwithstanding the jury verdict) may apply. *People v. Conrad* (1982) 132 Cal.App.3d 361.

If the hearing is conducted in front of a jury, the defendant is only entitled to the number of peremptory challenges available in a civil trial. *People v. Stanley*, (1995) 10 Cal.4th 764, 42 Cal.2d 543

2. What is the burden of proof in a competency hearing?

A defendant is presumed to be competent to stand trial unless incompetency is established by a preponderance of the evidence, regardless of whether the defense or the prosecution raises the issue. Penal Code § 1369(f). *See* also, *Medina v. California* (1992) 505 U.S. 437; *People v. Rells* (2000) 22 Cal.4th 860; *People v. Skeirik* (1995) 10 Cal.4th 764, 808.

Placing the burden of proving incompetency by a preponderance of the evidence on the defendant is not a violation of due process. *People v. Skeirik* (1991) 229 Cal.App.3d 444.

When neither party seeks an incompetency finding, and instead the trial court assumes the burden of producing evidence of incompetence, the court instructs the jury on the applicable legal standard without giving the burden of proof to either party. *People v. Skeirik* (1991) 229 Cal.App.3d 444.

The standard of proof for a second competency hearing is the same substantial evidence standard as for an original hearing. *People v. Kaplan* (2007) 149 Cal.App.4th 372.

It was erroneous for a trial court, at a defendant's competency hearing, to issue a modified instruction that not only placed on the defendant the burden of producing evidence that his incompetence was more convincing than not, but also added the burden of disproving every rational conclusion and reasonable interpretation of the evidence except that which pointed to incompetency. *People v. Johnwell* (2004) 121 Cal.App.4th 1267.

3. What role do expert evaluations play in competency hearings?

Evidence Code section 730 authorizes a court to appoint a mental health expert to examine a defendant and issue a report as to whether a formal competency hearing is necessary. Evidence Code § 730.

If the defendant is seeking a finding of incompetency, IST proceedings begin with the court appointing a psychiatrist or licensed psychologists, and any other expert the court deems appropriate, to examine the defendant. If the defendant is not seeking an incompetency finding, the court will appoint two such experts. If the defendant appears to have a developmental disability, the court will appoint the director of the regional center as an expert. The appointed expert(s) will evaluate the defendant to determine if he is competent to stand trial, whether treatment with anti-psychotic medication is medically appropriate and likely to restore the defendant to competency, whether the defendant has the capacity to refuse anti-psychotic medication, and whether the defendant is a danger to himself or others. Penal Code § 1369.

It was reversible error for a trial court to refuse to appoint the regional center director to evaluate the defendant's competency after defense counsel had submitted substantial evidence that that defendant was developmentally disabled and IST. The error deprived the court of jurisdiction to proceed, and required reversal of the sentence and adjudication of guilt unconditionally, since a retrospective determination of competency would not have sufficed. *People v. Castro* (2000) 78 Cal.App.4th 1402.

When a defendant claims that he has mental retardation, he must submit to pretrial examinations in order to determine the claim's validity. Defendant has limited immunity during these examinations, which are limited to tests

reasonably related to the determination of his mental retardation. *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30.

The admission of written reports from two examining psychologists did not constitute a denial of due process for failure to allow a third expert to determine whether the defendant was competent to stand trial. *People v. Lawley* (2002) 27 Cal.App.4th 102.

Examinations to determine competency are governed by the Civil Discovery Act. Therefore, the 5th and 6th Amendment privileges against self-incrimination and right to counsel do not apply. *Baqleh v. Superior Court* (2002) 100 Cal.App.4th 478.

4. What happens if a defendant and his attorney disagree on issues that arise during incompetency proceedings?

The defendant's right to a jury trial is statutory, not constitutional, and counsel may waive the right to a jury trial even over a defendant's objection. *People v. Masterson* (1994) 8 Cal.4th 965; *People v. Harris* (1993) 14 Cal.4th 984.

Defense counsel did not violate a defendant's due process rights by seeking to prove incompetence over the defendant's objections. However, when defense counsel seeks to prove the defendant's incompetence over his objection, and the defendant wants to testify that he is competent, counsel should let the defendant testify unless the court separately determines that the defendant is incompetent to do so. *People v. Bolden* (1979) 99 Cal.App.3d 375.

A defendant cannot veto his attorney's decisions to seek a competency hearing. He implicitly waives his right to attend the competency hearing by his absence. *People v. Jernigan* (2003) 110 Cal.App.4th 131.

It is unclear whether defense counsel has the right to waive a defendant's presence at an IST hearing over the client's objections. *People v. Harris* (1993) 14 Cal.App.4th 984.

While IST proceedings are pending, a court's refusal to hear the defendant's *Marsden* motion for substitution of counsel may require the reviewing court to reverse the judgment and grant a new trial. Even though Penal Code section 1368 mandates the suspension of all proceedings in

the criminal prosecution once the court has ordered a hearing into the mental competence of the defendant, the Sixth Amendment right to effective representation compels a hearing and an order granting a motion for substitution of counsel when there is a sufficient showing that the defendant's right to the assistance of counsel will be substantially impaired if his request is denied. Hearing a *Marsden* motion during a competency hearing does not reinstate criminal proceedings against the defendant. *People v. Solorzano* (2005) 126 Cal. App. 4th 1063. (*See* also *Marsden Motions*, Chapter 1.)

5. What happens to the criminal charges during and after IST proceedings?

Following an IST filing, a court may dismiss any misdemeanor charge pending against the defendant on 10 days notice to the district attorney. Penal Code § 1370.02.

All criminal proceedings are suspended pending a resolution of competency to stand trial. Penal Code § 1368 (c).

The trial court should not have appointed a "next friend" for an IST defendant rather than granting a stay of the federal habeas corpus proceedings until competency was restored. *Rohan v. Woodford* (9th Cir. 2003) 334 F.3d 803.

When a defendant returns to court because he or is unlikely to regain competency, or remains incompetent after the maximum term of confinement, the court may dismiss the criminal charges in the interests of justice. Penal Code §§ 1370(d),1385.

6. Can statements made by a defendant during an IST evaluation be used against him during the criminal trial?

The Fifth Amendment privilege against self-incrimination prohibits the prosecution's use of statements made by a defendant during a competency evaluation to prove its case-in-chief at the guilt or penalty phase of the criminal trial. *People v. Arcega* (1982) 32 Cal.3d 504; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465.

The Fifth Amendment privilege against self-incrimination prohibits the prosecution's use of statements made by a defendant during a competency

evaluation to impeach his testimony at the criminal trial. *People v. Pokovich* (2006) 39 Cal.4th 1240.

E. Duration of Incompetency to Stand Trial Commitment

An IST commitment ends when either: (1) the maximum time for confinement runs out; or (2) the defendant obtains certification that he has regained competency pursuant to Penal Code section 1372 (discussed under *Restoration of Competency*, below). However, other types of psychiatric commitment can be used to extend the term of hospitalization for certain IST defendants.

1. What is the maximum length of an IST commitment?

Under the due process clause of the U.S. constitution, a defendant found incompetent to stand trial has a right not to be confined for longer than is reasonably necessary to restore him to competency or determine that his competency cannot be restored. *Jackson v. Indiana* (1972) 406 U.S. 715.

California law limits IST commitment to a maximum of three years, or up to the maximum term of imprisonment provided by law, whichever is shorter. Penal Code § 1370(c)(1).

The statutory three-year limit for commitments to regain trial competency applies to the aggregate of all commitments ordered on the same set of criminal charges, not separately each time a commitment was ordered. *In re Polk* (1999) 71 Cal.App.4th 1230.

The maximum commitment for a misdemeanor incompetent to stand trial defendant is one year or the longest permitted prison sentence for the crime charged, whichever is shorter. Penal Code § 1370.01(c)(1). At the end of this time, civil conservatorship proceedings may be initiated under the LPS Act. Penal Code § 1370.01(c)(2).

2. Does time spent on an IST commitment count toward a prison sentence if the defendant is tried and convicted?

An IST defendant receives credit for actual time spent in a hospital, treatment facility, or outpatient program toward any prison time he must serve for the underlying offense. Penal Code § 1375.5. However, the IST defendant does not receive good conduct or work credits for pre-sentence

commitment to a hospital, treatment facility, or outpatient program. *People v. Waterman* (1986) 42 Cal.3d 565.

3. How can the commitment of an IST defendant with a mental illness be extended?

a) Murphy Conservatorships

An IST defendant may have his commitment extended beyond three years or the maximum term of incarceration under a unique type of LPS commitment known as a "Murphy" or "Hofferber" conservatorship. This type of conservatorship technically lasts for one year but can be extended indefinitely.

Under Penal Code section 1370(c)(2) and Welfare and Institutions Code section 5008(h)(1)(B), an extension beyond the maximum period of commitment is permitted when a court makes written findings that an IST defendant: (1) remains incompetent to stand trial; (2) is charged by an undismissed indictment or information with a violent felony; and (3) represents a substantial danger of physical harm to others. *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177.

The court may order the county public guardian's office to initiate Murphy conservatorship proceedings at any time after the defendant has served the maximum term of confinement, or when the treatment facility indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. Penal Code §§ 1370(c)(2), 1370(b)(1).

The standard of proof used to determine dangerousness in a Murphy conservatorship is beyond a reasonable doubt. However, unlike an LPS confinement for grave disability, which must be established beyond a reasonable doubt, the standard of proof to find that the defendant is still incompetent for purposes of a *Murphy* conservatorship is merely preponderance of the evidence. *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 178-179.

Murphy conservatees have the right to a yearly judicial review, a jury trial with a unanimous verdict, and the same procedural protections as other LPS conservatees. *Conservatorship of Hofferber* (1980) 28 Cal.3d 161,172.

4. LPS Conservatorship

When an IST defendant does not qualify under the narrow Murphy conservatorship provisions, he may still be committed under LPS conservatorship provisions for persons who, because of chronic alcoholism or mental disorder, are "gravely disabled" (unable to provide for food, clothing or shelter). Welf. & Inst. Code §§ 5008(h)(1)(A), (h)(2).

5. How can the commitment of an IST defendant with a developmental disability be extended?

IST defendants diagnosed with mental retardation or another developmental disability may be committed to the State Department of Developmental Services (DDS) under the LPS Act or section 6500 of the Welfare and Institutions Code if they are a danger to themselves or others. Welf. & Inst. Code §§ 5000 *et seq.,* 6500 *et seq*.; Penal Code § 1370.1(c)(2). *See* also *In re Hop* (1981) 29 Cal.3d 82. The definition of dangerousness to self or others in section 6500 includes being found incompetent to stand trial on charges of enumerated violent felonies. If the individual is confined in a facility, there is no requirement of a recent overt act to make a finding of dangerousness. Welf. & Inst. Code § 6500.

DDS may place the individual in a state hospital, a developmental center, a licensed community care facility or a health facility for "suitable treatment", which is defined as the least restrictive residential placement necessary to achieve the purposes of treatment. Welf. & Inst. Code § 6509. The commitment lasts for a year and can be renewed. Welf. & Inst. Code § 6500.

F. Placement of IST Defendants

After a defendant is found incompetent to stand trial, the next step is a placement hearing to determine where the defendant is to be treated. The community program director or the regional center (when the IST defendant has a developmental disability) must submit a written recommendation to the court at least 15 court days before the placement hearing. Penal Code §§ 1370(a)(2); 1370.01 (a)(2); 1370.1 (a)(2).

1. Where will misdemeanor defendants found IST on the basis of mental illness be placed for treatment?

Misdemeanor IST defendants are usually placed in local mental health treatment facilities. They cannot be committed to state hospitals unless there are no less restrictive placements available, and a contract for state hospital treatment exists between the county and the Department of Mental Health. Penal Code § 1370.01 (a)(2)(A).

Misdemeanor IST defendants may also be placed directly in the Conditional Release Program (CONREP) for outpatient treatment. Penal Code § 1601(b). (*See* Chapter 4 for a discussion of CONREP.)

2. Where will felony defendants found IST on the basis of mental illness be placed for treatment?

Felony incompetent to stand trial defendants usually receive evaluation and treatment at state hospitals.

When an IST defendant is charged with a "violent felony," inpatient treatment is mandatory for at least a period of 180 days. Penal Code § 1601(a); *People v. Superior Court (Lopez)* (2005) 125 Cal. App. 4th 1558. These defendants cannot be placed in a state hospital, developmental center, or treatment facility unless it is secure and the court determines that the public safety will be protected. Penal Code §§ 1370 (a)(1)(D), 1370.1 (a)(1)(E).

After 180 days at a state hospital, a defendant charged with a violent felony may be placed in the CONREP outpatient treatment program if the court finds that such placement would not pose a danger to the health or safety of others. Penal Code §§ 1370(a)(1)(F), 1370.1 (a)(1)(G), 1601(a).

IST defendants charged with a felony requiring registration as a sex offender under Penal Code section 290 may be required to stay in a state hospital or secure treatment facility unless the court determines that alternative placement would provide more appropriate treatment and the defendant would not pose a danger to others. Penal Code §§ 1370 (B)(ii)-(iii), 1370.1 (B)(ii)-(iii).

IST defendants charged with nonviolent felonies may be placed directly in outpatient treatment through CONREP, without spending any time as an inpatient. Penal Code §§ 1601(a) & (b), 1603.

3. Where will defendants found IST on the basis of a developmental disability be placed for treatment?

IST defendants with a developmental disability charged with misdemeanors or nonviolent felonies are eligible for immediate outpatient care. Penal Code §§ 1601(b), 1370.4.

If a person with a developmental disability is committed as IST, the regional center will make a recommendation to the court as to where the individual should be placed. Penal Code § 1370.1(a)(2). In the meantime, the defendant is in the care of the sheriff, who is to deliver him to a state hospital, developmental center, or other specified residential or outpatient setting that has been approved by the regional center for treatment. Penal Code §§ 1370.1(a)(1)(B)(i), 1370(a)(2). If the defendant is charged with certain offenses requiring registration as a sex offender or offenses considered a violent felony, options for placement may be restricted. Penal Code § 1370.1(a)(1)(B)(ii-iii).

IST defendants with a developmental disability charged with a felony that causes serious bodily injury must be committed to a locked residential facility for a minimum of 180 days before they can achieve outpatient status. Penal Code § 1600; *People v. Amonson* (2003) 114 Cal.App.4th 463.

G. Treatment of Individuals Committed as Incompetent to Stand Trial

1. Do IST defendants have a right to treatment?

Treatment facilities are required to care for and treat individuals committed as IST in a way that will "promote the defendant's speedy restoration to mental competence." Penal Code § 1370(a)(1)(B)(i).

While IST defendants are waiting for a bed to become available at a state hospital, they often find themselves in a county jail receiving inadequate mental health treatment for long periods of time. This failure to provide adequate treatment may be challenged as a violation of the individual's

right to treatment under the due process clause of the U.S. Constitution. *See Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101. For more information on mental health services in jails, see *County Jails: Mental Health Services* (June 2004), Disability Rights California Publication # 5181.01 (English), #5181.02 (Spanish).

2. Do IST defendants have a right to refuse treatment with psychotropic medication?

Individuals who are committed as IST have a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment to refuse the administration of antipsychotic medication. *Sell v. United States* (2003) 539 U.S. 166. This interest has also been codified under California law. Penal Code § 1370(a)(2)(B)(iii).

There are generally four situations under which the state may try to force an IST defendant to take antipsychotic medication:

a. Involuntary Medication in Response to an Emergency

Penal Code Section 1370(a)(2)(B)(iv) provides that the state may involuntarily medicate an IST in an emergency, as defined by Welfare and Institutions Code section 5008(m).

California Department of Mental Health (DMHI) Long Term Care Division Special Order No. 333.04 (DMH Special Order 333.04) sets forth DMH's standards and procedures for involuntarily medicating individuals found IST. Citing Penal Code section 5008(m), the DMH Special Order provides that state hospitals can prescribe antipsychotic medication for emergency situations, for the preservation of life or for the prevention of serious bodily harm to the individual or others. "Emergency" is defined as an imminent danger to self or others as a result of mental disease, defect or disorder. The Special Order specifies that involuntary medication can be administered only for as long as the emergency exists, and must be provided in the manner least restrictive to the individual's personal liberty. DMH Special Order 333.04.

b. Involuntary Medication Because the IST Defendant Lacks Capacity to Consent

Involuntary medication may be administered if the court determines that: the individual lacks capacity to make decisions regarding antipsychotic medication; the individual's mental disorder requires medical treatment with antipsychotic medication; and, if the individual's mental disorder is not treated with antipsychotic medication, it is *probable that serious harm to the physical or mental health* of the individual will result. Penal Code § 1370(a)(2)(B)(ii)(I).

> "*Probability of serious harm to the physical or mental health*" of the defendant requires evidence that the defendant is presently suffering adverse effects to his physical or mental health, or that the defendant has previously suffered these effects as a result of a mental disorder and his condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant." Penal Code § 1370(a)(2)(B)(ii)(I).

Note that DMH Special Order 333.04 does not mention lack of capacity to consent as a potential basis on which state hospitals may administer involuntary medication to an individual committed as IST.

c. Involuntary Medication because the IST Defendant is a Danger to Others

Under the Penal Code, involuntary medication may be administered if the court determines both: (1) that the defendant is a danger to others, in that he has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another while in custody, or that resulted in his being taken into custody; and (2) that the defendant presents, as a result of mental disorder or mental defect, a *demonstrated danger* of inflicting substantial physical harm on others. Penal Code § 1370(a)(2)(B)(ii)(II).

> "*Demonstrated danger*" may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within six years prior to the time the defendant last attempted to inflict, inflicted, or threatened to inflict

> substantial physical harm on another, and other relevant evidence." Penal Code § 1370(a)(2)(B)(ii)(II).

Although the Penal Code requires a court order for the involuntary administration of medication due to dangerousness, DMH Special Order 333.04 establishes internal procedures for authorizing such medication on an interim basis while a court order is pending. Under the Special Order, interim authority for involuntary medication due to dangerousness can be established by referring the patient to a medical staff Psychotropic Medication Review panel to determine the necessity for psychotropic medication. A social worker or nurse must act as the patient's advocate. At least two of the three members of the panel must find that the patient meets criteria for involuntary psychotropic medication. Medication may then be ordered for 14 days. After 14 days, the panel must review the treatment outcome again and may order continued treatment for up to 180 days, or until court review has been obtained, whichever occurs sooner. To obtain long-term authority to administer involuntary medication on the basis of dangerousness, the Special Order states that when the patient has been referred to the Psychotropic Medication Review panel for the interim administration of psychotropic medication, the state hospital must concurrently file a letter with the court signed by the Medical Director of the facility and the treating psychiatrist attesting to the fact that the patient is a danger to self or others and requesting a court order for involuntary medication. The Special Order specifies that it is not necessary for harm to become unavoidable or take place prior to treatment. DMH Special Order 333.02.

d. Involuntary Medication to Restore Competency

A court may issue an order to medicate an IST defendant in order to restore competency to stand trial only if the defendant does not meet any of the other criteria for involuntary treatment, as discussed above. Penal Code § 1370(a)(2)(B)(iii).

California Penal Code Section 1370(a)(2)(B)(ii)(III) and DMH Special Order 333.02 delineate the requirements that must be met before medicating to restore competency. The statutory provision is modeled after the U.S. Supreme Court decision in *Sell v. United States* (2003) 539 U.S. 166, which sets forth the constitutional requirements under the Due Process Clause. The Special Order requires that the state hospital file a letter with

the court signed by the treating psychiatrist and the Medical Director of the facility attesting to the fact that the statutory criteria for involuntary medication to restore competency are met.

Below is a comparison of the *Sell* requirements, their California statutory counterparts in section 1370(a)(2)(B)(ii)(III), and some of the significant judicial interpretations of the statutory provision to date. A trial court issuing an order to medicate under this subsection must comply with all of these constitutional, statutory, and common law requirements.

For more information on the right to refuse psychotropic medication for all forensic mental health clients, see, *The Right to Refuse Psychotropic Medication for Forensic Mental Health Clients* (October 2005), Disability Rights California Publication #5455.01.

Involuntary Medication for the Purpose of Restoring Competency

Sell v. United States Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Important government interest is at stake (i.e., timely prosecution and ensuring a fair trial)	Serious crime against property or person has been charged
Judicial Interpretations of *Sell* and Penal Code § 1370(a)(2)(B)(ii)(III)	
Merely listing the serious crimes committed is insufficient. A court must consider the facts of the individual case for "special circumstances" that weigh against the government's interest. For example, if the defendant refuses medication, he will likely be confined to an institution for a long period of time, thus diminishing the risk attached to freeing him without punishment. *People v. O'Dell* (2005) 126 Cal.App.4th 562. Given that three out of the four Sell factors require the consideration and balancing of important governmental interests, the state must provide input to the court concerning its interests and how they will be affected by the involuntary medication. *Carter v. Superior Court* (2006) 141 Cal.App.4th 992.	

Sell v. United States Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Medication would substantially further those government interests	Administration of the drug is substantially likely to render the defendant competent; *and*, Medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner
Judicial Interpretations of *Sell* and Penal Code § 1370(a)(2)(B)(ii)(III)	
The expert report must specifically state which condition the hospital is proposing to treat. It is insufficient to simply list a mental disorder without explicitly mentioning that it is the condition being treated. *People v. O'Dell* (2005) 126 Cal.App.4th 562. The expert report must indicate a clear and specific diagnosis. *Carter v. Superior Court* (2006) 141 Cal.App. A court must also consider the actual medication proposed, not just the *class* of the antipsychotic medication (e.g. antidepressants, mood stabilizers, etc.). *Carter v. Superior Court* (2006) 141 Cal.App.4th 992; *People v. O'Dell* (2005) 126 Cal.App.4th 562. Evidence showing that, at best, the defendant has a fifty to sixty percent chance of "improving" if given the recommended medications is not enough to support a court's finding that the medications are substantially likely to render him competent to stand trial. *People v. McDuffie* (2006) 144 Cal.App.4th 880.	
Sell v. United States Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Medication is necessary to further the government interest	Less intrusive treatments are unlikely to have substantially the same results

<table>
<tr><th colspan="2">Judicial Interpretations of Sell and Penal Code § 1370(a)(2)(B)(ii)(III)</th></tr>
<tr><td colspan="2">A hospital's letter simply stating that there are no alternatives is insufficient for a trial court to satisfy this requirement. The hospital opinion must be substantiated with facts relating to alternatives. Carter v. Superior Court (2006) 141 Cal.App.4th 992; People v. O'Dell (2005) 126 Cal.App.4th 562.</td></tr>
<tr><th>Sell v. United States Requirement</th><th>California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement</th></tr>
<tr><td>Administration is in the defendant's best medical interests</td><td>Medication is in the defendant's best medical interest in light of his medical condition.</td></tr>
<tr><th colspan="2">Judicial Interpretations of Sell and Penal Code § 1370(a)(2)(B)(ii)(III)</th></tr>
<tr><td colspan="2">A trial court must consider the actual medication being proposed to make this determination. Carter v. Superior Court (2006) 141 Cal.App.4th 992; People v. O'Dell (2005) 126 Cal.App.4th 562.</td></tr>
<tr><td>Other Evidentiary Considerations</td><td>Although constitutionally permitted, orders for antipsychotic drugs are disfavored and should be issued only on a compelling showing. Carter v. Superior Court (2006) 141 Cal. App. 4th 992; U.S. v. Rivera-Guerrero (2005) 426 F.3d 1130.

A court that is asked to approve involuntary medication must be provided with a complete and reliable medically-informed record, based in part on independent medical evaluations, before it can reach a constitutionally-balanced Sell determination. Carter v. Superior Court (2006) 141 Cal. App. 4th 992; U.S. v. Rivera-Guerrero (2005) 426 F.3d 1130.</td></tr>
</table>

H. Review of IST Status and Restoration of Competency

1. How is IST status reviewed?

After a defendant is found incompetent to stand trial, the treatment facility, regional center, or CONREP outpatient program to which he is committed must submit periodic reports to the court about the defendant's progress. The first progress report must be submitted within 90 days of the defendant's commitment. Penal Code § 1370(b)(1). If the defendant has not regained competency within 90 days, but the report indicates a substantial likelihood that he will regain competency in the foreseeable future, the defendant will remain committed to the treatment facility or outpatient program. Thereafter, the facility or treatment program must submit written progress reports to the court every six months. An IST defendant may contest the recommendations found in the periodic progress reports presented at the 90-day or 18-month status review hearings. *See In re Davis* (1973) 8 Cal.3d 798, 810.

When a progress report indicates that there is no substantial likelihood that an IST defendant will regain competency in the foreseeable future, he must be returned to the committing court for civil commitment proceedings. Penal Code §§ 1370(b)(1), 1370.01(b), 1370.1(b). *See also People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558. If the IST defendant is not eligible for conservatorship and not likely to become competent, or the maximum term of confinement has been reached, the court must release the defendant from further confinement.

Whenever an IST defendant has been detained for 18 months, the law requires a new competency trial pursuant to the procedures set forth in Penal Code section 1369. Penal Code §§ 1370(b)(2); 1370.1(b)(2). At the 18-month competency hearing, the court may also consider alternatives such as LPS or "Murphy" conservatorship proceedings.

2. How does the court determine whether a defendant has been restored to competency?

If during the course of commitment the treating facility or community program director determines that the defendant has regained competency, a Certificate of Restoration of Competency must be filed with the court by certified mail. The defendant must be returned to the committing court no later than ten days after the filing for a restoration hearing pursuant to

Penal Code section 1372. This is necessary because at that point, the state will only pay for ten days of additional state hospital treatment. Penal Code § 1372(a)(2).

At the competency restoration hearing, the court will decide whether to accept the Certificate of Restoration of Competency and also whether the defendant can post bail or be released on his own recognizance. The defense or the prosecution can also request a competency restoration hearing. Penal Code §§ 1372(c), (d). There is no right to a jury trial at the competency restoration hearing. *People v. Murrell* (1987) 196 Cal.App.3d 822.

A defendant is presumed to be mentally competent at the competency restoration hearing and the party who claims that the defendant remains incompetent has to prove otherwise by a preponderance of the evidence. *People v. Rells* (2000) 22 Cal.4th 860.

3. What happens after a defendant is determined to be restored to competency?

After competency is restored, criminal proceedings are resumed – not begun anew. For example, an IST defendant who has already held to answer on felony charges is not entitled to a new preliminary hearing, absent special circumstances. *Booth v. Superior Court* (1997) 57 Cal.App.4th 91.

When the time of incompetency is relatively short and the trial court is able to resume proceedings, it is not required to declare a mistrial and assign the matter for a new trial. Whether a person is competent to stand trial is a jurisdictional question and cannot be waived by the defendant or counsel. *People v. Smith* (2003) 110 Cal.App.4th 492.

If a defendant requires continued treatment to maintain competency, or if jail placement would create a substantial risk that the defendant would again become incompetent, the court may return the defendant to the treatment facility before criminal proceedings resume. Penal Code § 372(e).

I. Judicial Review of a Competency Determination

1. Can a defendant appeal a determination of his competency to stand trial?

A defendant may appeal a judgment of incompetency to stand trial. *People v. Fields* (1965) 62 Cal.2d 538.

Under the "collateral order" doctrine, a defendant can appeal an IST finding and commitment order before the court issues a final judgment in the case. *U.S. v. Friedman* (9th Cir. 2004) 366 F.3d 975.

In reviewing a determination of IST or an order to involuntarily medicate a defendant to restore competency, an appellate court reviews the trial court record in the light most favorable to the jury's determination and determines whether substantial evidence supports the finding. Evidence is substantial if it is reasonable, credible and of solid value. When experts disagree about defendant's competence, and the jury rules in favor of competence, the reviewing court will uphold the verdict. *People v. Turner* (2004) 34 Cal.4th 406; *Carter v. Superior Court* (2006) 141 Cal.App. 4th 992.

Defense counsel's failure to raise the issue of IST in the trial court does not waive the issue on appeal. *People v. Ary* (2004) 118 Cal.App.4th 1016.

The appellate court does not review the propriety of the trial courts competency ruling based on evidence that was not presented to it at the time the ruling was made. *People v. Panah* (2005) 35 Cal.4th 395.

In overturning a finding that a defendant was competent to stand trial, the court did not abuse its discretion by subjecting the jury verdict to closer that usual scrutiny because the right to jury trial on the issue of competency is statutory rather than constitutional, the facts were uncontested, and the finding on the issue of competence did not necessarily affect the questions of guilt or penalty. *People v. Samuel* (1981) 29 Cal.3d 489.

2. Can a defendant challenge a competency determination through a writ of habeas corpus?

A defendant can challenge a finding of IST and subsequent commitment in the superior court through a writ of habeas corpus. Welf. & Inst. Code § 7250; Penal Code § 1473.

A defendant's procedural due process claim in the trial court that he was tried while mentally incompetent was sufficient to preserve a substantive due process claim on federal habeas corpus review.
Lounsbury v. Thompson (9th Cir. 2004) 374 F.3d 785.

J. Alternatives to Incompetency to Stand Trial Proceedings

1. Mental Health Services Under the LPS Act

When a court believes that short-term psychiatric treatment may resolve any potential problems, a defendant with a mental illness or a developmental disability may be transferred to the county mental health system for evaluation and treatment as either a voluntary or involuntary patient. Penal Code §§ 4011.6; 4011.8. Once transferred, the defendant will be concurrently subject to both criminal proceedings and to LPS commitment, and will be protected by the patients' rights provisions found in the LPS Act, including the right to refuse treatment. Welf. & Inst. Code §§ 5000, *et seq.*

2. Diversion of Defendants with Mental Retardation

Under Penal Code sections 1001.20 through 1001.34, diversion is available to a defendant with a cognitive developmental disability who is charged with a misdemeanor, or a charge that is reduced to a misdemeanor. If found eligible, the court refers the defendant to the appropriate regional center for an evaluation as to whether the defendant is eligible for treatment and habilitation. Upon consultation with the district attorney, public defender, probation department, and regional center, the court will determine whether diversion is appropriate. Penal Code §§ 1001.22, 1370.1(a)(1)(B)(i).

A defendant with a developmental disability who is diverted from IST proceedings remains subject to involuntary civil commitment. Welf. & Inst. Code §§ 5000 *et seq.*, 6502; Penal Code § 1370.1(c)(2). *See also In re Hop* (1981) 29 Cal.3d 82.

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 2

Not Guilty by Reason of Insanity (NGRI) Commitment and Restoration of Sanity

Disability Rights California

California's protection and advocacy system

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Table of Contents

A. Introduction

A distinguished jurist once wrote that "our collective conscience does not allow punishment where it cannot impose blame."[1] As old and revered a part of criminal philosophy as the insanity defense may be, no one should be lulled by antiquity or reverence. The belief in a moral high ground in light of evidence to the contrary is not realistic. As N. Morris stated, the insanity defense can also be seen as a "tribute to our capacity to pretend to a moral position while pursuing profoundly different practices."[2] And it is that practice – how insanity acquittees fare after having been found not guilty – that must be the primary concern of defense attorneys and mental health advocates, especially when "by reason of insanity" results in greater disadvantage than "guilty."

Too often, defense lawyers raise the insanity defense because they believe that commitment to the state mental health system will ultimately benefit their clients. However, a finding of not guilty by reason of insanity (NGRI) might not be best for their clients in the long run, in comparison to staying in the criminal justice system. Commitment to a state hospital or a Conditional Release Program, when it occurs, may result in a far greater curtailment of the client's liberty than had the client remained in the criminal justice system.

Although the law holds insanity acquittees unaccountable for their actions and imposes mandatory treatment in lieu of punishment, they are frequently confined for longer periods than their criminal defendant counterparts. A 1995 study found that in California, the median length of confinement for insanity acquittees was 1,359 days, yet for those unsuccessful in their NGRI pleas (and thus found guilty) was 610 days.[3]

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[1] Judge David Bazelon, American Bar Association Criminal Justice Mental Health Standards, 324 (1986).

[2] Morris, N., Madness and the Criminal Law, Chicago, Ill: University of Chicago Press (1982).

[3] Silver, E., Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants, 19 Law

B. Insanity Defense: Definition and Exclusions

1. *Introduction*

The plea of not guilty by reason of insanity is an affirmative defense to a criminal charge, although one that does not negate an element of the offense. Penal Code §§ 25, 28. It is one of six pleas that can be made to an indictment or information. Penal Code § 1016. The term "insanity" connotes a legal definition, not a clinical diagnosis. Even individuals with the most severe mental disability may not be insane unless they meet the strict legal test for cognitive incapacity. The legal test for determining insanity has continually changed through case law and legislation, driven in part by politics and public sentiment.

2. *What is the definition of "insanity?"*

Proposition 8, the "Victims' Bill of Rights," which went into effect by initiative measure in 1982, abolished the diminished capacity defense and codified the "*M'Naghten* test" for insanity. Penal Code § 25(b). The *M'Naghten* test is named after the first modern British insanity defense case, which established a legal standard that is substantially identical to the standard used in California today. *M'Naghten's Case* (H.L. 1843) 8 Enq. Rep. 718.

In 1978, the California Supreme Court had abandoned the *M'Naghten* test for the broader American Law Institute (ALI) test for insanity. *People v. Drew* (1978) 22 Cal.3d 333. The ALI test provides that a person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect she[4] lacks substantial capacity either to appreciate the criminality of her conduct or to conform her or her conduct to the requirements of law. *In re Ramon M*. (1978) 22 Cal.3d at 422. Because the *M'Naghten* test was in effect before the ALI test was adopted, case law that applied the *M'Naghten* test prior to *Drew* should have precedential effect for later cases decided under Penal Code section 25.

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and Human Behavior 381 (1995).

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

Under the current test, a defendant will be found NGRI if it can proven by a preponderance of the evidence that the individual was either (1) incapable of knowing or understanding the nature and quality of the act, or (2) incapable of distinguishing right from wrong at the time she committed the offense. Penal Code § 25(b)[5].

Jury instructions under the *M'Naghten* test need not specify that the jurors may consider the combined effects of both a mental disease and a mental defect. *People v. Kelly* (1992) 1 Cal.4th 495.

Under the second prong of the *M'Naghten* test, the issue is whether the dependant was able to distinguish the moral wrongfulness of hir act, regardless of whether he knew the act was illegal. *People v. Stress* (1988) 205 Cal.App.3d 1259.

Unlike in some other states, the fact that the defendant was acting under an "irresistible impulse" is not a defense in California. *People v. Hubert* (1897) 119 Cal. 216; *People v. Severance* (2006) 138 Cal.App.4th 305.

3. *Does the insanity defense apply to people with personality, adjustment, seizure, or substance abuse disorders?*

A finding of insanity cannot be found "solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances." Penal Code § 25.5. *See also People v. Fields* (1983) 35 Cal.3d 329 (to classify people with antisocial personality as insane would place people in mental institutions for whom there is currently no suitable treatment and who would be a constant danger to staff and other inmates); *People v. McCaslin* (1986) 178 Cal.App.3d 1 (applying *Fields* to the *M'Naghten* test). However, as discussed below, a diagnosis of antisocial personality disorder may constitute substantial evidence of a

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5. Although Penal Code section 25 states the two-prong test in the conjunctive ("and"), the California Supreme Court has held that the disjunctive ("or") is correct and that both prongs remain alternatives. *People v. Skinner* (1985) 39 Cal.3d 765; *People v. Stress* (1988) 205 Cal.App.3d. 1259. *See also People v. Kelly* (1992) 1 Cal.4th 495 (*M'Naghten* test is constitutional).

mental disorder to support an extension of an NGRI commitment if the diagnosis is based on other criteria, in addition to repeated criminal or antisocial behavior. *People v. Superior Court* (*Blakely*) (1997) 60 Cal.App.4th 202.

Penal Code section 25.2 erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless of whether the substances caused organic damage or a settled mental defect or disorder that persisted after the immediate effects of the intoxicant subsided. In other words, "if an alcoholic or drug addict attempts to use her problem as an escape hatch, she will find that section 25.5 has shut and bolted the opening." *People v. Robinson* (1999) 72 Cal.App.4th 421.

It is important to note that Penal Code section 25.5 was enacted in the wake of the three strikes law, with the expressed purpose of narrowing the availability of the insanity defense. According to the sponsor, the statute's exclusionary provisions "will prevent potential abuse of the plea and therefore, appropriately direct these individuals to the correctional system rather than state hospitals. This will allow state resources to be utilized for the purpose of serving those individuals who would benefit most." Sen. Com. on Judiciary, analysis of Sen. Bill No. 40X (1993- 1994 Reg. Sess.) as amended Apr. 18, 1994. The reason to exclude substance abuse was explained as follows: "The individual with a major mental disorder does not choose the illness. However, difficult as it may be, a drug or alcohol abuser does have a choice. Typically, these individuals have the capacity to distinguish between right and wrong and should be held responsible for their crimes." Assem. Public Safety Com., Republican analysis of Sen. Bill No. 40X (1994) p. 17; *See also* Sen. Com. on Judiciary, analysis of Sen. Bill No. 40X, *supra*, at 21.

4. ***Does the insanity defense apply to people with developmental disabilities, head trauma, or other degenerative brain disorders?***

Although the diminished capacity defense has been abolished under Penal Code section 25(a), "idiots" are still considered incapable of committing crimes under Penal Code section 26. Although the statute does not include a definition of "idiot," this may be a viable defense for defendants with mental retardation, head trauma, fetal alcohol syndrome, or other

degenerative brain disorders. The test for "idiocy" has been held to be the same as for insanity under the ALI Test. *See In re Ramon M.* (1978) 22 Cal.3d 419.

C. Pleading NGRI

1. *What happens when a defendant pleads NGRI?*

The insanity defense is used primarily when the criminal charge is a serious felony. If a defendant pleads NGRI, the court will determine guilt and sanity in separate phases of the trial.

A defendant may join a plea of NGRI with one or more other pleas. Penal Code § 1016. If a felony defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and sanity are tried separately. In such circumstances:

> the defendant shall first be tried as if only [the not guilty plea] had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. Penal Code § 1026(a).

In the sanity phase of a trial, the burden is on the defendant to prove by a preponderance of the evidence that she was insane at the time of the offense. *People v. Flores* (1976) 55 Cal.App.3d 118.

As in the determination of guilt, the verdict of the jury that the defendant was insane at the time of the offense must be unanimous. *People v. Troche* (1928) 206 Cal. 35.

Although guilt and sanity are separate issues, the evidence as to each may be overlapping. Accordingly, a finding at the guilt phase concerning whether the defendant had the mental state required to commit the charged

crime may be relevant to, but will not be determinative of, the issue of insanity. *People v. Hernandez* (2000) 22 Cal.4th 512; *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112; Penal Code §§ 21, 28, 29.

A defendant waives the privilege against self-incrimination and the right to counsel regarding expert testimony to the extent necessary to permit useful sanity examinations by mental health experts. However, statements made by the defendant during those examinations are admissible only to show the basis for the expert's opinion and not for proof of the facts described. *In re Spencer* (1965) 63 Cal.2d 400; *People v. Jantz* (2006) 137 Cal.App.4th 1283.

When a jury deadlocks during the sanity phase of a trial, the trial court may not dismiss the insanity proceedings under Penal Code section 1385(a) on the ground that a retrial would "unduly burden judicial resources." *People v. Hernandez* (2000) 22 Cal.4th 512.

2. ***Can minors plead NGRI?***

Minors may use the insanity defense in juvenile court proceedings, and can be committed to a state hospital or outpatient treatment program up to the age of 25. Like adults, they have a right to petition for restoration of sanity pursuant to Penal Code section 1026.2 to obtain early release. However, they can also have their commitment extended beyond the jurisdictional age of 25 under the provisions of Penal Code section 1026.5. *See* Welf. and Inst. Code §§ 702.3, 607(d).

D. Disposition and Place of Commitment

1. ***Where will an insanity acquittee be committed?***

If a court or jury finds that a defendant was insane at the time of the offense, the court must determine whether to confine her in a state hospital or treatment facility, or place her on outpatient status. If the underlying charge is a violent felony, the acquittee must remain in a state hospital for at least six months before the court can consider discharge to outpatient status. Penal Code § 1601(a).

Although few NGRI acquittees are immediately released to outpatient commitment, a defendant who pleads NGRI to a federal crime is not statutorily entitled to a jury instruction stating that a finding of insanity will

result in involuntary commitment to a mental institution. *Shannon v. U.S.* (1994) 129 L.Ed.2d 459.

When an insanity acquittee has not recovered her sanity at the time of sentencing, the court will commit her to a state hospital, treatment facility or outpatient program for care and treatment. Before making any placement decision however, the court must first refer her to the local community program director for evaluation. This referral is usually to the local CONREP director. The director or designee issues a report and the court will usually follow the placement recommendation. If the underlying charge is a violent felony, the acquittee must remain in a state hospital for at least six months before the court can consider discharge to outpatient status. Penal Code § 1601(a).

If it appears that the defendant has fully recovered her sanity at the time of sentencing, the court should remand the defendant to the sheriff's custody pending a sanity determination "in a manner prescribed by law." Penal Code § 1026(b). Some courts have interpreted this phrase to mean involuntary commitment proceedings under the LPS Act. *In re Slayback* (1930) 209 Cal.480, 484; *People v. Kelly* (1973) 10 Cal.3d 565, 577-68, fn.18.

The standard for determining whether an NGI acquittee will be evaluated for placement as required by section 1026(b) is “full recovery.” This means that an evaluation will be ordered “if there is any evidence that the defendant is still suffering from a mental illness.” *People v. De Anda* (1980) 114 Cal.App.3d 480. Moreover, the taking of psychiatric medication counts as evidence of mental illness. *People v. De Anda* (1980) 114 Cal.App.3d 480, 489-90 (holding that, because the purpose of section 1026 is to protect the public and the defendant, “psychopharmaceutial restoration of sanity should not be considered a ‘full’ recovery).

If an insanity acquittee is committed to a state hospital, the hospital or treatment facility must submit status reports to the court every six months. Penal Code § 1026(f). If she is committed to the outpatient conditional release (CONREP) program, the community program director of the program to which she is assigned must submit status reports to the court every three months. Penal Code § 1605(d).

2. *How can an insanity acquittee be transferred to a different placement?*

The county superior court that committed an insanity acquittee retains jurisdiction and must approve transfer to another hospital, off-grounds leave, and outpatient placement. The court also has the authority to transfer an individual to a local treatment facility or back to a state hospital. Either the acquittee or the prosecutor may contest such a transfer. If contested, the court will hold a hearing using the same procedures and standards of proof as those used in probation revocation hearings. Penal Code § 1026(c).

NGRI acquittees who are not residents of California have the right to "to be promptly and humanely returned under proper supervision to the states in which they have legal residence." Penal Code § 1026(b); Welf. and Inst. Code § 4119.

E. Length of Commitment under Penal Code section 1026

1. *What is the duration of an NGRI commitment?*

Under Penal Code section 1026.1, the court may release an insanity acquittee who has been committed to a state hospital conditionally to another placement that is considered a lower level, or unconditionally for an outright release, only under one or more of the following circumstances:

a. As an unconditional release upon expiration of the maximum term of commitment (Penal Code § 1026.5);

b. As an unconditional release upon successful completion of CONREP and a court finding of restoration of sanity (Penal Code § 1026.2); or

c. As a conditional release to outpatient (CONREP) status (Penal Code §§ 1603, 1604).

The maximum term of commitment for an insanity acquittee is the longest sentence that she could have received for the underlying crime(s) as charged. The U.S. Supreme Court has held that a defendant acquitted as NGRI does not have the right to release merely because she has been in a hospital longer than she would have been incarcerated if convicted. *Jones*

v. United States (1983) 463 U.S. 354. However, the California Supreme Court has held that principles of equal protection preclude retention of NGRI acquittees committed to state hospitals beyond the maximum term of punishment for the underlying offense. *In re Moye* (1978) 22 Cal.3d 457; Penal Code § 1026.5.

Under California's determinate sentencing scheme, the court must impose the longest term for the base offense, adding any additional enhancements or consecutive sentences. California allows for extensions of time, adding two additional years to the base term as long as the criteria for extended commitment are met. Penal Code § 1026.5.

An insanity acquittee does not receive conduct or work credits, and does not receive any credit toward the maximum term of commitment for time spent on outpatient status through CONREP. Penal Code §§ 1026.5(a)(1), 1600.5. *People v. Bodis* (1985) 174 Cal.App.3d 435. In many cases, the maximum term for an insanity acquittee is essentially a life sentence because of the strict application of this statutory scheme.

A defendant cannot receive pre-commitment conduct credit for the time incarcerated in jail prior to the NGRI finding and subsequent placement. Whether a defendant receives credit toward the maximum term for time served in transitional housing depends on whether the placement was so restrictive that the defendant was "in custody" while placed there. *People v. Mord* (1988) 197 Cal.App.3d 1090.

F. Restoration of Sanity and Release

1. ***What is the substantive standard for a detemination of restoration of sanity?***

The relevant standard for restoration of sanity proceedings is not whether the individual committed is legally insane, but whether she has improved to the extent that she is no longer a danger to the health and safety of herself or others. Penal Code § 1026.2(e); *People v. Blackwell* (1981) 117 Cal.App.3d 372; *In re Franklin* (1972) 7 Cal.3d 126.

It is error for a trial court in a restoration of sanity hearing to disregard the effect of psychotropic medications on the individual's behavior. If evidence shows that an acquittee is no longer a danger to herself and/or others while in a medicated condition, and she will continue to take medication, then the

requirements for restoration of sanity are met. *People v. Williams* (1988) 198 Cal.App.3d 1476.

2. *What are the procedures for a determination of restoration of sanity?*

a. Overview: Two-Step Process

Restoration of sanity is a two-step process. In both steps, the acquittee has the burden of proving by a preponderance of the evidence that she is not dangerous due to mental defect, disease, or disorder. First, in an "outpatient placement" hearing, the court must find that the insanity acquittee would no longer be a danger to the health and safety of others if released under supervision and treatment in the community. After such a finding, the court will place the acquittee on outpatient status in CONREP for at lease one year. Second, usually after one year of outpatient commitment, a court or jury must determine through a restoration hearing whether the acquittee has been fully restored to sanity. A finding of restoration will result in the individual's unconditional release. An insanity acquittee may bypass the mandatory one-year of outpatient commitment and have an earlier trial only when the community program director recommends an early release. Penal Code § 1026.2(h).

There is also a mandatory one-year review of an acquittee's outpatient or CONREP status under Penal Code section 1606. At that review, the judge may renew the acquittee's outpatient status for one year, revoke outpatient status and order confinement to a treatment facility, or discharge the individual from commitment. The right to a full restoration trial is separate from the Penal Code section 1606 yearly review, and counsel should consider having both hearings.

b. Initiating a Restoration of Sanity Petition

A petition for restoration of sanity may be filed only after the insanity acquittee spends at least six months committed to a hospital or outpatient program. Penal Code § 1026.2(d).

An NGRI acquittee may seek total release from the state mental health system after completing one year on outpatient status with CONREP, unless the community program director recommends earlier unconditional release. Penal Code § 1026.2(e), (h).

An insanity acquittee, medical director, or community program director may petition the superior court for restoration of sanity once per year. Penal Code § 1026.2(j). When the acquittee files the petition, the court can take no action without first obtaining a written recommendation from the medical director of the state hospital or from the CONREP director if the acquittee is already on outpatient status. Penal Code § 1026.2(1). The district attorney, mental health facility, and CONREP program director must receive notice of the hearing at least 15 judicial days in advance. Penal Code § 1026.2(a).

c. The First Step: The Outpatient (Placement) Hearing

At the initial outpatient placement hearing, the insanity acquittee must prove by a preponderance of the evidence that she would no longer 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. Penal Code § 1026.2(e); *People v. Sword* (1994) 29 Cal.App.4th 614.

Insanity acquittees do not have the right to a jury trial at an outpatient placement hearing. *People v. Tilbury* (1991) 54 Cal.3d 56; *Barnes v. Superior Court* (1986) 186 Cal.App.3d 969.

If the court finds in the acquittee's favor at an outpatient placement hearing, the community program director must recommend to the court the most appropriate outpatient program. The court may accept or reject the director's recommendation, and may exercise its discretion to place the individual in a facility or program that is not administered by CONREP. Penal Code § 1026.2(g). The court must not merely rubber stamp the recommendations of medical experts, but should come to its own conclusions. *People v. Superior Court (Almond)* (1990) 219 Cal.App.3d 607; *People v. Sword* (1994) 29 Cal.App.4th 614. However, the factors supporting the trial court's decision must be both adequate and supported by the record. *People v. Cross* (2005) 127 Cal.App.4th 63.

If the court orders release to CONREP, this placement in the community must occur within 21 days. Penal Code § 1026.2(h). The CONREP commitment will last for one year, unless the community program director recommends early release, in which case the court will proceed to the second step of the restoration process and will hold a restoration trial sooner than one year from the commencement of CONREP status. Penal

Code §§ 1026.2(e), (h). At the end of the one-year period, the court will hold a restoration hearing as described below.

Challenges to the validity of California's mandatory one-year conditional release program for insanity acquittees are unlikely to succeed. Courts have held that the statutory scheme is reasonably related to the purpose of public protection and, therefore, does not violate due process. *People v. Beck* (1996) 47 Cal.App.4th 1676. It does not violate equal protection because, unlike civilly committed persons, insanity acquittees have demonstrated dangerousness by committing a criminal offense. *Id.* Also, even though pre-1986 versions of section 1026 required only 90 days rather than one year in confinement before the filing of a restoration petition, any increase in the confinement of acquittees sentenced before that time is permissible because NGI commitments are rehabilitative rather than punitive. *People v. Superior Court (Woods)* (1990) 268 Cal.App.3d 614.

d. The Second Step: Full Restoration and Unconditional Release

Despite a defendant's request for a bench trial, the prosecution has a right to a jury trial under Penal Code section 1026.2 because a restoration hearing has "features and indicia peculiar to a criminal action" and thus, requires adherence to criminal procedure. *People v. Coleman* (1978) 86 Cal.App.3d 746; *People v. Superior Court* (*Almond*) (1990) 219 Cal.App.3d 607.

Courts have uniformly held that restoration of sanity proceedings are primarily civil in nature, noting that the purpose of confinement is for treatment rather than punishment. *In re Franklin* (1972) 7 Cal.3d 126; *People v. Superior Court* (Woods) (1990) 219 Cal.App.3d 616; *People v. Juarez* (1986) 184 Cal.App.3d 570; *People v. Mapp* (1983) 150 Cal.App.3d 346.

At a restoration hearing, the insanity acquittee has the burden of proving by a preponderance of the evidence that she is no longer dangerous. Penal Code § 1026.2(k); *Hartman v. Summers* (9th Cir. 1995) 878 F. Supp. 1335; *People v. Sword* (1994) 29 Cal.App.4th 614. The relevant standard is not whether the individual committed is legally insane, but whether she has improved to the extent that she is no longer a danger to the health and

safety of herself or others. *People v. Blackwell* (1981) 117 Cal.App.3d 372; *In re Franklin* (1972) 7 Cal.3d 126. In making this determination, the court may not disregard the effect of psychotropic medications on the acquittee's behavior. If evidence shows that an acquittee is no longer a danger to herself and/or others while in a medicated condition, and that she will continue to take medication, then the requirements for restoration of sanity are met. *People v. Williams* (1988) 198 Cal.App.3d 1476.

Court rules may allow only six peremptory juror challenges in restoration trials. *People v. Jones* (1987) 192 Cal.App.3d 400.

A decision in a restoration trial requires a three-quarters jury verdict, as in a civil trial. *In re Franklin* (1972) 7 Cal.3d at 149.

The court may direct a verdict if the petitioner does not produce substantial evidence. *People v. Mapp* (1983) 150 Cal.App.3d 346.

A trial court should not inform jurors in a restoration of sanity hearing that a finding of restoration will mean that the patient will no longer receive mandatory treatment. *People v. Kipp* (1986) 187 Cal.App.3d 748.

An order in a restoration trial denying a patient's release can be appealed. *People v. Coleman* (1978) 86 Cal.App.3d 746.

3. ***Where will an insanity acquittee be placed pending a restoration hearing?***

Pending a restoration of sanity hearing, an acquittee shall be confined in a facility near the court. That facility must continue to provide treatment, adequate security, and to the greatest extent possible, minimize interference with the defendant's treatment program. The facility may be the county jail only if the jail will continue to provide treatment and adequate security, minimize interference with the patient's treatment program, and be able to provide accommodations which ensure both the patient's safety and the safety of the general population of the jail. If the county jail does not meet these conditions, the court must order the transfer to an appropriate facility or make other appropriate orders. Penal Code § 1026.2.

G. Extension of Commitment: Penal Code section 1026.5

1. *What is the substantive standard for extending an NGRI commitment?*

The court may extend an insanity commitment beyond the maximum term of commitment every two years if the underlying crime was a felony and if, by reason of a mental disease, defect, or disorder, the acquittee represents a substantial danger of physical harm to others. Penal Code § 1026.5(b).

- One single recent act of violence unrelated to the original crime may constitute substantial evidence of dangerousness to support an extension. *People v. Superior Court* (*Blakely*) (1997) 60 Cal.App.4th 202.

- Evidence that in the month prior to the filing of a petition for extension an NGRI aquittee shot another patient constituted sufficient evidence of dangerousness. *People v. Echols* (1983) 138 Cal.App.3d 837.

- Evidence that NGRI aquittee walked around the state hospital with clenched fists, made numerous threats to staff, did not cooperate with therapists, and physically harmed staff and patients without provocation was sufficient to affirm an extension order. *People v. Beard* (1985) 173 Cal.App.3d 1115.

An insanity acquittee may rely on evidence of good behavior while she was in the hospital to show that her commitment should not be extended (or that she should be conditionally or unconditionally released).

Administrative Directives (AD) are operating policies of the specific state hospital and often will list eligibility factors for either additional services or reduction of services. For example, increased grounds access in the form of level or type of grounds passes will be granted based in part on good behavior.

Vocational training would be offered to an individual who displays good behavior. Since most state hospitals will have either a closed or open unit, placement on an open unit which affords an individual more physical freedom is subject to eligibility requirements as listed in an AD.

Absence of documents recording incidents of harmful behavior will imply good behavior.

Locating the AD document that relates to the good behavior, reviewing and admitting the document in court could be useful evidence.

Examples of this type of evidence may include:

- Privileges that the hospital granted to the individual on the basis of her good behavior;
- 90-Day treatment team reports discussing the individual's good behavior;
- Grounds passes that the individual has earned;
- Vocational training programs in which the individual was eligible to participate because of her good behavior;
- The absence of Special Incident Reports in which the individual is the subject of a complaint of harmful behavior;
- The absence of seclusion or restraint measures taken in response to dangerous behaviors; and
- The individual's eligibility to be on an open unit.

To satisfy due process, the standard for extending an NGRI commitment must be interpreted as requiring proof that the individual's mental disease, defect or disorder causes her to have serious difficulty controlling her dangerous behavior. *People v. Bowers* (2006) 145 Cal.App.4th 870.

Due process does not require that the standard for legal insanity and the standard for extension of commitment for insanity acquittees be the same. *People v. Wilder* (1995) 33 Cal.App.4th 90.

A diagnosis of antisocial personality disorder may be substantial evidence of a mental disorder under Penal Code section 1026.5 if the diagnosis is based on other criteria, in addition to repeated criminal or antisocial behavior. *People v. Superior Court* (*Blakely*) (1997) 60 Cal.App.4th 202.

Amenability to treatment is not necessary to support that an extension of commitment under Penal Code section 1026.2. *People v. Bennett* (1982) 131 Cal.App.3d 488. However, an acquittee may establish an affirmative defense if she can prove by a preponderance of the evidence that she is amenable to treatment and that she will be compliant with treatment if released. *People v. Bolden* (1990) 217 Cal.App.3d 1591.

An extension of commitment may be maintained on the basis of a mental disorder that is different than the one for which the defendant was originally committed as an insanity acquittee, as long as the subsequent disorder causes the defendant to represent a substantial danger of physical harm to others. *People v. McClure* (1995) 37 Cal.App.4th 686.

Note that prior to 1985, NGRI extensions were only allowed for persons who had been held for violent felonies. Insanity acquittees committed for nonviolent felonies prior to 1985 might be able to successfully challenge the extension or withdraw their insanity plea because the law changed after their original commitment.

2. *What are the procedures for extending an NGRI commitment?*

Unlike restoration proceedings, extension proceedings are essentially criminal in nature. The patient has all the rights guaranteed to criminal defendants under the federal and state constitutions for criminal proceedings. Penal Code § 1026.5(b)(7). But, *see People v. Wilder* (1995) 33 Cal.App.4th 90 (extension proceedings are essentially civil in nature, notwithstanding the fact that they include many constitutional protections relating to criminal proceedings).

To extend an insanity commitment past the maximum term, the state hospital or the local program director must first submit a report and recommendation to the district attorney six months before the patient's maximum expiration date. The district attorney must then file an extension petition no later than three months before the maximum expiration date, unless good cause is shown. Penal Code § 1026.5(b)(2). A trial is then held within 30 days of the patient's maximum release date, unless the parties waive time or show good cause for delay.

In an extension hearing, the prosecution has the burden to prove beyond a reasonable doubt that the patient represents a substantial danger of

physical harm to others by reason of a mental disease, defect, or disorder. *People v. Angeletakis* (1992) 5 Cal.App.4th 963. The burden then shifts to the acquittee to prove by a preponderance of the evidence that medication controls her dangerousness and that she will take it without fail in an unsupervised environment. *People v. Bolden* (1990) 217 Cal.App.3d 1591.

The time requirements under Penal Code section 1026.5 for filing a petition for extension are mandatory, although the prosecutor may show good cause for missing filing and service deadlines. *People v. Pacini* (1981) 120 Cal.App.3d 877; *People v. Johns* (1981) 119 Cal.App.3d 577; *People v. Mord* (1988) 197 Cal.App.3d 1090; *People v. Minahen* (1986) 179 Cal.App.3d 180. On the other hand, a finding that an extension petition was not timely filed does not necessarily void the individual's commitment under a subsequent extension in which the petition was timely. *See People v. Price* (2007) 55 Cal.3d 81, 86 no. 5, review granted 61 Cal.3d 1.

An NGRI extension trial shall be by jury unless waived by both parties. Penal Code § 1026.5(b)(4) . Defense counsel can waive the right to jury even over the acquittee's objection. *People v. Givan* (2007) 156 Cal.App.4th 405; *People v. Powell* (2004) 114 Cal.App.4th 1153.

The jury verdict in an NGRI extension trial must be unanimous. *People v. Angeletakis* (1992) 5 Cal.App.4th 363.

It is improper for a trial court to instruct jurors in an extension trial that if they find that the defendant is not dangerous she will no longer receive mandatory treatment or court supervision. *People v. Kipp* (1986) 187 Cal.App.3d 748.

Due process does not require that an insanity acquittee be competent to stand trial during an extension hearing. *Juarez v. Superior Court* (1987) 196 Cal.App.3d 928; *People v. Angeletakis* (4th Dist.1992) 5 Cal.App.4th 963.

3. ***What are the effects of an NGI commitment extension?***

There is no statutory limit to the number of two-year extensions that can be imposed under Penal Code section 1026.5(b). Therefore, a defendant can remain committed as NGRI indefinitely, as long as the criteria for extended commitment are met.

An extension of commitment places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the patient's mental disorder. Penal Code § 1025.5(b)(11).

An individual whose commitment has been extended is eligible for outpatient CONREP status if she petitions for restoration of sanity or if the state hospital applies for outpatient commitment. Penal Code §§ 1600 *et seq.*; 1026.5(b)(7). (*See* Restoration of Sanity and Release, above, on the maximum time of commitment before a petition may be filed.)

H. Right to Advisement of Effect of Insanity Plea

1. *What is the "Lomboy rule"?*

A defendant pleading NGRI must be advised about the possibility that her commitment could be extended indefinitely. *People v. Lomboy* (1981) 116 Cal.App.3d 67. However, courts have been split as to the evidence that is required to establish the adequacy of the advisements, the effect of a defendant's failure to promptly challenge the adequacy of the advisements, the appropriate remedy for inadequate advisements, and whether the *Lomboy* rule can be applied retroactively.

2. *What type of Advisements are required under Lomboy?*

The Second District of the Court of Appeal dismissed a *Lomboy* challenge because the person who had been committed only relied on the record of her court proceedings, but did not show that her attorney did not tell her about the possibility of indefinite commitment, or that she would not have entered into an NGRI plea if she had known about the possibility of indefinite commitment. *People v. Superior Court (Wagner)* (1989) 258 Cal.Rptr. 740.

The Second District also found that a defendant had sufficiently shown a failure to advise when, even after the defendant reached the hospital and heard about extension petitions in other people's cases, she did not know that she himself could be extended because the terms of her plea agreement, which were in writing and signed by the defendant, said that the maximum term of punishment was seven years. *People v. McIntyre* (1989) 209 Cal.App.3d 548.

The Fourth District Court of Appeal accepted a defendant's statements

that, even though she knew that she should have been advised about the consequences of her plea, she did not know that she could challenge the validity of her plea based on *Lomboy*. This explanation, combined with the failure to make a *Lomboy* challenge at her first extension hearing, was enough to show that the defendant really didn't know about her *Lomboy* rights. *In re Robinson* (1990) 216 Cal.App.3d 1510.

3. ***Can Lomboy rights be waived?***

The *Wagner* court held that waiting until an extension petition had been filed before making a *Lomboy* challenge was impermissible when there was no proof that the defendant did not know she could make a *Lomboy* challenge sooner and when it appeared that the defendant waited to bring the challenge so that she could reap the benefits of being in a hospital rather than prison, and so she could avoid parole. The problem was that the delay in bringing the *Lomboy* challenge was for "tactical" reasons rather than because the defendant did not know about her *Lomboy* rights. *People v. Superior Court (Wagner)* (1989) 258 Cal.Rptr. 740.

The *Robinson* court excused the defendant's delay in bringing a *Lomboy* challenge because there was proof that, even though she knew that she should have been advised about the consequences of her plea, she did not know that the failure to advise gave her grounds to challenge her plea, and because she had already been extended once, so her failure to raise *Lomboy* issues at her first extension hearing did not give her any advantage. Instead, her failure to make a *Lomboy* challenge earlier meant that she spent more, rather than less, time in the hospital. *In re Robinson* (1990) 216 Cal.App.3d 1510.

The First District Court of Appeal held that a defendant's failure to challenge the absence of *Lomboy* advisements at a previous extension hearing did not constitute a waiver of her *Lomboy* rights, because the original failure to raise the issue provided not advantage to the defendant and served to increase the length of her commitment. *People v. Minor* (1991) 227 Cal.App.3d 37.

4. ***What is the effect of a violation of Lomboy rights?***

The *McIntyre* and *Minor* courts both held that an insanity commitment resulting from inadequate *Lomboy* advisements was void. Therefore, the state must release the individual or seek civil commitment. *People v. Minor*

(1991) 227 Cal.App.3d 37; *People v. McIntyre* (1989) 209 Cal.App.3d 548.

The *Robinson* court held that the effect of inadequate Lomboy advisements was to allow the defendant the chance to withdraw her NGI plea. *In re Robinson* (1990) 216 Cal.App.3d 1510.

5. ***Is the Lomboy rule retroactive?***

The First and Second District Courts of Appeal have held that *Lomboy*, which was decided on February 20, 1981, applies retroactively to NGRI pleas that were entered into before that date, at least as far back as September 28, 1979, and possibly as far back as September 18, 1974. *People v. Minor* (1991) 227 Cal.App.3d 37; *People v. McIntyre* (1989) 209 Cal. App.3d 548. However, a different division of the Second District held that *Lomboy* only applies to pleas entered into after 1981. *People v. Superior Court (Bannister)* (1988) 203 Cal.App.3d 1525.

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 3

Sexually Violent Predators (SVPs)

Disability Rights California

California's protection and advocacy system

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Table of Contents

A. Introduction

1. How did SVP commitments come about?

In 1995, California enacted a controversial commitment law which affects people who had been convicted of certain sex offenses, sentenced to prison, and already served time. The Sexually Violent Predator Act (SVPA), effective in 1996 and amended in 2007 after the passage of California Proposition 83 ("Jessica's law") by voters on November 7, 2006, established a procedure that results in the mental health commitment of a class of people who are not necessarily mentally ill, and without regard to whether their "condition" is amenable to treatment. The SVPA is codified in California Welfare & Institutions Code sections 6600 – 6609.3.0.

The Legislature's purpose for originally enacting the SVPA in 1995 is as follows:

The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These people are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence. The Legislature further finds and declares that it is in the interest of society to identify these individuals prior to the expiration of their terms of imprisonment. It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society. The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes.

Stats. 1995, chs. 762, 1 & 763, 1.

The SVPA has been upheld against several constitutional challenges, including challenges based on a violation of due process and equal protection. *Hubbart v. Knapp* (2004) 379 F.3d 773; *People v. Yartz* (2005) 37 Cal.4th 529.

2. Is a SVP commitment a further prison sentence?

No. If someone is found to meet the legal definition of a SVP, he[1] is committed for treatment for a mental disorder which predisposes him to engage in sexually violent criminal behavior. The commitment is not for a punitive purpose. (Stats.1995, ch. 763, § 1.) *Hubbart v. Superior Court*, (1999) 19 Cal.4th 1138.

B. Definition of "Sexually Violent Predator"

1. What is the statutory definition of SVP?

Under California law, a sexually violent predator is defined as a person: (a) who has been **convicted of a sexually violent offense against one[2]** or more victims for which he received a determinate sentence; (b) who has a **diagnosed mental disorder**; and (c) that makes him a **danger to the health and safety of others** in that it is **likely** that he will **engage in sexually violent criminal behavior**. Welf. & Inst. Code § 6600(a)(1).

2. What convictions qualify as a sexually violent offense?

The SVPA enumerates the types of sex crimes that qualify as "sexually violent offenses" when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity.

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

[2]. Proposition 83, passed by voters in November 2006, lowered the number of convicted sexually violent offenses from two to one.

Welf. & Inst. Code § 6600(b). *People v. Whitney* (2005) 129 Cal.App.4th 1287; *People v. Fulcher* (2006) 136 Cal.App.4th 41; *People v. Lopez* (2007) 146 Cal.App.4th 1263.

When the victim of an underlying offense is a child under the age of 14 and the offending act involved "substantial sexual conduct," the offense shall constitute a "sexually violent offense" for purposes of Welfare and Institutions Code section 6600 even though not accompanied by force or violence. Welf. & Inst. § 6600.1; *People v. Superior Court (Johannes)* (1999) 70 Cal.App.4th 558.

3. What is the requirement of a "currently diagnosed mental disorder"?

A designation of SVP requires a "currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he will engage in sexually violent criminal behavior." Welf. & Inst. Code § 6600(a). However, the United States Supreme Court has consistently upheld commitment schemes authorizing the use of prior dangerous behavior to establish both present mental impairment and the likelihood of future harm. *Hubbard v. Superior Court*, 19 Cal.4th 1138.

Under the SVPA, the definition of "diagnosed mental disorder" is broader than "mental illness". It includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others. Welf. & Inst. Code § 6600(c).

A person does not have to be amenable to treatment to be designated as an SVP. Welf. & Inst. Code § 6606(b). *Rose v. Mayberg* (2006) 454 F.3d 958; *People v. Rasmuson* (2006) 145 Cal.App.4th 1487

4. What is the dangerousness requirement?

To make the SVP commitment standard consistent with the statutory probable cause standard, the California Supreme Court read into the commitment standard the requirement that the individual be likely to engage in sexually violent "predatory" behavior. *People v. Hurtado* (2002) 28 Cal.4th 1179.

The statutory definition of "predatory" is that the individual's prior acts were directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exits, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization. Welf. & Inst. Code § 6600(e).

The finding of danger to the health and safety of others does not require proof of a recent overt act while the offender is in custody. Welf. & Inst. Code § 6600(d).

C. Initiating of SVP Proceedings

1. How is an SVP commitment initiated?

The Department of Corrections and Rehabilitation (CDCR) and Board of Prison Terms (BPT) are authorized to screen, for possible SVP designation, all inmates in custody who are either serving a determinate prison sentence or who have had their parole revoked.[3] This process involves review of the inmate's background and criminal record, and employs a "structured screening instrument" developed in conjunction with the Department of Mental Health (DMH). Welf. & Inst. Code § 6601(b). When officials determine that an inmate is likely to meet the SVP criteria, he is referred to DMH for a "full evaluation." The evaluation is to be conducted by two practicing psychologists and/or psychiatrists. Welf. & Inst. Code § 6601(d). *In re Wright* (2005) 128 Cal.App.4th 663. With certain exceptions, the evaluation should be completed at least six months

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[2]. A petition may be filed under this section if the individual was in custody pursuant to his determinate prison term, parole revocation term, or a hold placed pursuant to Welfare and Institutions Code section 6601.3. A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law. Welf. & Inst. Code § 6601(a)(2).

prior to the inmate's scheduled release date.[4] Welf. & Inst. Code § 6601(a).

The two mental health evaluators must agree that the inmate is mentally disordered and dangerous within the meaning of section 6600 for proceedings to go forward. Welf. & Inst. Code § 6601(d).

2. What do the mental health evaluators assess when evaluating an inmate for SVP commitment?

The mental health evaluators must assess for diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders. Risk factors to be considered include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder. Welf. & Inst. Code § 6601(c). Information from previous SVP commitment evaluations cannot be used as evidence for a current SVP commitment evaluation. *People v. Salomon Munoz* (2005) 129 Cal.App.4th 421.

3. What does DMH do with SVP evaluations?

When only one of the professionals performing the evaluation determines that an individual meets the SVP criteria, DMH must arrange for further examination by two independent health professionals. Welf. & Inst. Code § 6601(e)-(g). If both mental health professionals conclude that the inmate meets the SVP criteria, the DMH Director must forward a request for a petition for commitment to the county in which the inmate was last convicted. If that county's designated counsel concurs with the recommendation, a SVP petition is filed in superior court. Welf. & Inst. Code § 6601(h) and (i).

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4. However, if the inmate was received by the CDCR with less than nine months of his sentence to serve, or if the inmate's release date is modified by judicial or administrative action, the Director may refer the person for evaluation at a date that is less than six months prior to the inmate's scheduled release date. Welf. & Inst. Code § 6601(s)(1).

4. If an inmate refuses to be interviewed by DMH evaluators, can he still be designated an SVP?

Yes. A 4th Appellate District court held that "a sex offender cannot deny the state access to the workings of his mind and then claim a lack of proof that he has a 'current' psychological disorder. Because he refused to be interviewed by the state's experts, who could have formed an opinion as to his present dangerousness, defendant has forfeited the claim that the state did not prove that he was currently dangerous." *People v. Sumahit* (2005) 128 Cal.App.4th 347.

5. Is it illegal to be held in custody beyond the scheduled release date in order to be evaluated for SVP commitment?

It depends. Upon a showing of good cause the BPT may order a person to remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation. Welf. & Inst. Code § 6601.3. A petition that is not filed within 45 days after the release date will be dismissed. *People v. Superior Court* (2008) 159 Cal.App.4th 301.

6. What happens after a SVP petition is filed in superior court?

If the superior court determines that an SVP petition, on its face, would support a finding of probable cause, the judge will order that the person be detained in a secure facility until a probable cause hearing can be completed. All proceedings under the SVPA, including the probable cause hearing and trial, are civil rather than criminal in nature. *Seling v.* Young (2001) 531 U.S. 250; *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136.

D. The Probable Cause Hearing

1. When does the probable cause hearing occur?

The probable cause hearing is held within 10 calendar days from the order issued by the judge, and may only be continued upon a showing of good cause by the party requesting the continuance. Welf. & Inst. Code §§ 6601.5, 6602(b). The probable cause hearing must be held before the expiration of parole or before the expiration of the 45-day temporary parole hold specified in Welfare and Institutions Code section 6601.3.

Welf. & Inst. Code §§ 6601.3, 6601.5; Cal. Code Regs. tit. 15, § 2600.1. *People v. Hayes* (2006) 137 Cal.App.4th 34.

2. What is the standard for probable cause?

The superior court must find probable cause of the following:

(i) a statutorily defined diagnosed mental disorder;

(ii) future dangerousness, i.e., whether a person is likely to commit sexually violent behavior upon release;

(iii) that the future acts of sexual violence will be predatory; and,

(iv) conviction of at least one qualifying offense.

Cooley v. Superior Court (2002) 29 Cal.4th 228.

3. What procedural rules apply to the probable cause hearing?

The inmate is entitled to counsel at the probable cause hearing. Due process requires that the SVP probable cause hearing be a full evidentiary hearing, similar to a preliminary hearing in criminal matters, and should allow the admission of both oral and written evidence. *People v. Butler* (1998) 68 Cal.App.4th 421; *In re Parker* (1998) 60 Cal.App.4th 1453.

Hearsay victim statements found in probation reports are admissible at probable cause hearings to establish the details of the prior sex offenses. *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136.

Evidence Code §§ 1530 and 1531 apply to SVP probable cause hearings and non-certified psychological evaluations of a defendant's purported mental disorder are not admissible. *In re Kirk* (1999) 74 Cal.App.4th 1066.

When no probable cause exists, the petition is dismissed, and the inmate remains subject to parole. Welf. & Inst. Code § 6602(a). If the court finds probable cause within the meaning of Welfare and Institutions Code section 6602, a trial is scheduled to determine whether the person meets the SVP criteria. The individual must remain in a secure facility from the time

probable cause is found and the completion of trial. Welf. & Inst. Code § 6602.

E. The SVP Trial

1. What procedural rules apply to an SVP Trial?

At trial, the individual is entitled to a number of procedural safeguards, including the right to trial by jury, the assistance of counsel, the right to retain experts to perform an examination, and access to all relevant medical and psychological records. Welf. & Inst. Code § 6603(a). Either party may demand a jury trial and if no jury demand is made by either party, the trial will be before the court. Welf. & Inst. Code § 6603(b). The burden of proof is on the state to show that the SVP criteria have been established beyond a reasonable doubt. Welf. & Inst. Code § 6604; *People v. Buffington* (1999) 74 Cal.App.4th 1149. Any jury verdict must be unanimous. Welf. & Inst. Code § 6603(f). There is a statutory right, not a constitutional right, to a jury trial. *People v. Rowell* (2005) 133 Cal.App.4th 447. For other procedural decisions *see People v. Carlin* (2007) 150 Cal.App.4th 322.

If the petitioner's attorney determines that updated evaluations are necessary to properly represent the petitioner, the attorney may request DMH to conduct them. If any of the original evaluators are not available to testify at trial, the attorney may further request that DMH perform replacement evaluations. Welf. & Inst. Code § 6603(c). In the event that the updated or replacement evaluations cause a split opinion as to whether the petitioner meets SVP commitment criteria, DMH must conduct an additional two evaluations. Welf. & Inst. Code §§ 6601(f), 6603(c).

2. How long is an SVP commitment?

Under Jessica's Law, when there is a SVP finding, the person is committed for an **indeterminate term** in a secure DMH designated facility. Welf. & Inst. Code § 6604. For individuals committed as an SVP prior to Jessica's law, California courts are currently split on whether they are now committed under an indeterminate term. Some courts hold that the indeterminate commitment term applies even to people who were committed on two-year terms before Jessica's law was passed. By changing the terms of commitment under the SVPA from two-year terms to

indefinite terms, the California Legislature and then the voters demonstrated an intent to keep those found to be SVPs committed until they no longer meet the definition of an SVP. *Bourquez, et al. v. Superior Court of Sacramento* (2007) 156 Cal.App.4th 1275; *People v. Shields* (2007) 155 Cal.App.4th 559; *People v. Carroll* (2007) 158 Cal.App.4th 503. One court held that the indeterminate term, under to Jessica's Law, for an individual committed as an SVP does not apply retroactively. *People v. Whaley* (2008) 160 Cal.App.4th 779.

While a court has an inherent power to consolidate SVPA petitions for trial, a court cannot exercise this power solely to accommodate consolidation where earlier SVPA petitions are delayed. *People v. Litmon* (2008) 162 Cal.App.4th 383.

A SVP finding tolls the inmate's parole period. Welf. & Inst. Code § 6601(k).

F. Confinement and Treatment

1. Where are SVP civil committees housed?

A person found to be an SVP must be committed to the DMH for appropriate treatment and confined in a secure facility designated by the Director of Mental Health. Welf. & Inst. Code § 6604. The facility should be located on the grounds of an institution under the jurisdiction of the Department of Corrections. *Id.* Presently, males committed under the SVPA are usually confined at Coalinga State Hospital, while females are confined at Patton State Hospital. No person may be placed in a state hospital until there has been a determination of probable cause under sections 6601.3 or 6602. Welf. & Inst. Code § 6602.5(a). People placed on SVP commitment may also be placed on outpatient commitment with CONREP. Welf. & Inst. Code § 6605.

2. What type of treatment is DMH responsible for providing to SVPs?

DMH must provide treatment for any diagnosed mental disorder. Welf. & Inst. Code § 6606(a). *Hydrick v. Hunter* (2006) 500 F.3d 978. This treatment obligation exists even where the chance of success in a particular case is low. Welf. & Inst. Code § 6606(b). The treatment program must meet "current institutional standards for the treatment of sex

offenders," and must be based on a "structured treatment protocol" developed by DMH, as set forth in the SVPA. In particular,

> [t]he protocol shall describe the number and type of treatment components that are provided in the program, and shall specify how assessment data will be used to determine the course of treatment for each individual offender. The protocol shall also specify measures that will be used to assess treatment progress and changes with respect to the individual's risk of re-offense.

Welf. & Inst. Code § 6606(c).

State law provides that individuals who are held under civil process must be "confined separately and distinctly" from individuals awaiting criminal trials and from individuals held under criminal sentence. When a SVPA detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, there is a presumption that the detainee is being subjected to "punishment." *Jones v. Blanas* (2004) 393 F.3d 918.

DMH will meet with each patient who chooses not to participate in a specific course of offender treatment on a monthly basis to explain treatment options available to the patient, offer and re-offer treatment, seek to obtain a patient's cooperation in a course of treatment, and document these steps in the patient's record. The fact that a patient has chosen not to participate in treatment in the past cannot support a conclusion that the patient continues to choose not to participate. Welf. & Inst. Code § 6606(e).

DMH shall ensure that policies and procedures are in place that address changes in patient needs, as well as patient choices, and respond to treatment needs in a timely fashion. DMH is authorized to provide programming using an outpatient/day treatment model, in which treatment is provided by licensed clinicians in living units not licensed as health facility beds within a secure facility setting, on less than a 24-hour a day basis. In providing this treatment, DMH must take into consideration the unique characteristics, individual needs, and choices of people committed under this article, including whether or not a person needs antipsychotic medication, whether or not a person has physical medical conditions, and

whether or not a person chooses to participate in a specified course of offender treatment. Welf. & Inst. Code § 6606(d).

An SVP can be compelled to take antipsychotic medication in a nonemergency situation only if a court makes one of two findings: (1) that the individual is incompetent, or (2) that the individual is dangerous within the meaning of Welfare and Institutions Code section 5300. *In re Calhoun* (2004) 121 Cal.App.4th 1315.

The California Department of Health Services (DHS) allows Coalinga State Hospital to suspend its health facility beds up until 2013. Coalinga State Hospital can voluntarily place suspended beds into active license status by request to DHS as long as those beds meet current operational requirements for licensure. Welf. & Inst. Code § 6606(d).

G. Reviewing and Challenging an SVP Commitment

1. How often does DMH review an SVP's progress in treatment?

The SVPA includes provisions for an annual review of the individual's mental condition. The report will include consideration of whether the committed person currently meets the definition of an SVP, and whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and adequately protects the community. DMH files this annual report with the committing court, with a copy of the report provided to the prosecuting District Attorney and the committed SVP. The individual may retain a qualified expert to examine him. The expert is entitled to access to all records of the individual. If the individual is indigent, a court may appoint a qualified expert to evaluate the SVP. Welf. & Inst. Code § 6605(a).

2. How can an SVP challenge his commitment?

Before the passage of Jessica's law in 2006, a person committed under the SVPA was entitled to a hearing at the end of each two-year term of commitment. Now, DMH must give permission to the committed individual to petition the court if: (1) the person's condition has changed so that he no longer meets the definition of an SVP; or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community. Upon receipt of the

petition, the judge will order a show cause hearing. Welf. & Inst. Code § 6605(b).

If the court determines at that show cause hearing that probable cause exists to believe that the committed person's diagnosed mental disorder has so changed that he is not a danger to the health and safety of others, and is not likely to engage in sexually violent criminal behavior if discharged, then the court will set a full hearing on the issue. Welf. & Inst. Code § 6605(c).

An individual who voluntarily commits himself as an SVP does not have standing to challenge his status as an SVP. To have standing an SVP must show he suffered (1) an "injury in fact" that is (2) "fairly traceable" to the state court's commitment order being challenged, and (3) that is likely [to be] redressed by a favorable decision. *Jackson v. CA Depart. Of Mental Health* (2005) 399 F.3d 1069.

If an SVS files a Section 1983 complaint for a violation of his constitutional rights, the court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his commitment; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the commitment has already been invalidated. *Huftile v. Miccio-Fonseca* (2005) 410 F.3d 1136.

3. What standards apply to a hearing to review an SVP commitment?

At the full hearing, the individual is entitled to the same due process and procedural rights afforded at the initial SVP commitment proceeding. This includes the right to a jury and the right to have an expert evaluation. The court will appoint an expert if the person is indigent and requests an appointment. Welf. & Inst. Code § 6605(d).

At the full hearing, the state must prove beyond a reasonable doubt that the committed person's diagnosed mental disorder remains such that he is a danger to the health and safety of others, and is likely to engage in sexually violent criminal behavior if discharged. Welf. & Inst. Code § 6605(d). A favorable ruling entitles the committed person to unconditional release and discharge. However, if the state prevails, the SVP commitment will run for an indeterminate period from the date of the ruling. Welf. & Inst. Code § 6605(e).

H. Unconditional Release

Judicial review of an SVP's commitment can be sought by a writ of habeas corpus pursuant to the procedures set forth in Welfare and Institutions Code section 7250. This petition is made in the superior court from which the commitment was made. If the superior court determines that the person is no longer a SVP, he will be unconditionally released and discharged. Welf. & Inst. Code §§ 6605(f), 6608(a).

I. Conditional Release

1. What is a conditional release?

An SVP can be conditionally released into the community in two ways:

(a) DMH Outpatient Recommendation

The Director of DMH may file a report and recommendation for conditional release when it appears that an individual's diagnosed mental disorder has "so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community." Welf. & Inst. Code § 6607(a); or

(b) The SVP Petition for Outpatient Placement

After one year of commitment, an SVP may petition for conditional release and subsequent unconditional discharge without the recommendation or concurrence of DMH. Welf. & Inst. Code §§ 6608(a), (c), (h). However, the court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." Welf. & Inst. Code § 6608(a). No action on the petition may be taken by the court without first obtaining the written recommendation of the treatment facility director. Welf. & Inst. Code § 6608(j).

2. How does the conditional release hearing work?

Like restoration of sanity, a petition for release is a two-step process:

(a) Conditional Release Hearing

First, the court will hold a hearing to determine whether the person would be a danger to the health and safety of others in that it is likely that he will engage in sexually violent criminal behavior due to his diagnosed mental disorder, if under supervision and treatment in the community. Welf. & Inst. Code § 6608(d). The petitioner has the burden of proof by a preponderance of the evidence. Welf. & Inst. Code § 6608(i). If the court finds for the SVP, the court will order placement with an appropriate conditional release program (CONREP) for one year. Welf. & Inst. Code § 6608(d). All CONREP provisions found in Penal Code section 1605 through section 1610 dealing with supervision and revocation shall apply to any person committed under the SVPA. Welf. & Inst. Code § 6608(e).

(b) Unconditional Release Hearing

Second, at the end of one year, the court will hold another hearing to determine if the person should be unconditionally released from commitment on the basis that, by reason of a diagnosed mental disorder, he is not a danger to the health and safety of others in that it is not likely that he will engage in sexually violent criminal behavior. Welf. & Inst. Code § 6608(d). The petitioner has the burden of proof by a preponderance of the evidence. Welf. & Inst. Code § 6608(i). The court cannot make this determination until the person has completed at least one year in CONREP. Welf. & Inst. Code § 6608(d). If the court rules against the petitioner, the person may remain on outpatient status with the CONREP program. Welf. & Inst. Code § 6608(d).

If the court denies the petition for conditional release or denies the petition for unconditional discharge, the petitioner may not file a new petition until one year from the date of denial. Welf. & Inst. Code § 6608(h).

3. Are there any restrictions on where an individual can live from an SVP commitment?

No. A person conditionally released will be placed in the "county of domicile" prior to the person's incarceration, unless the court finds that extraordinary circumstances require placement outside the county of domicile. Welf. & Inst. Code § 6608.5(a). "County of domicile" means the county where the person has his true, fixed, and permanent home and principal residence and where the person has the intention of returning. If

no county can be verified, the county of domicile is the county in which the person was arrested for the crime for which he was last incarcerated. Welf. & Inst. Code § 6608.5(b)(1). "Extraordinary circumstances" means circumstances that would inordinately limit DMH's ability to effect conditional release of the person in the county of domicile in accordance with § 6608. Welf. & Inst. Code § 6608.5(c).

When recommending specific placement for community outpatient treatment, the department will consider the following:

(1) the concerns and proximity of the victim or the victim's next of kin; and,

(2) the age and profile of the victim or victims in the sexually violent offenses committed by the person subject to placement.

Welf. & Inst. Code § 6608.5(e).

The court will review DMH's proposed community placement and location of the individual. The court can approve, modify, or reject DMH's recommendations. Welf. & Inst. Code § 6609.1(c).

Placement shall not be within one-quarter mile of any public or private school providing instruction in kindergarten or grades 1-12, if either of the following conditions exist:

(1) The person previously been convicted of a violation of the following:

(i) Three or more acts of substantial sexual conduct with a child under the age of 14 years while living with the child for at least three months; Penal Code section 288.5; or

(ii) Lewd acts upon a child under age 14 (or if the victim is 14 or 15 and the perpetrator is at least 10 years older); Penal Code section 288; or,

(2) The court finds that the person has a history of improper sexual conduct with children.

Welf. & Inst. Code § 6608.5(f).

4. Is an SVP on conditional release provided with any assistance in finding housing?

Yes. The county of domicile will appoint a county agency to assist in locating and securing housing. The county of domicile will notify the department of the name of the agency at least 60 days before the date of the potential or expected release. Welf. & Inst. Code § 6608.5(d).

5. How can conditional release be revoked?

Please see the Chapter on Conditional Release Program (CONREP). The revocation of an individual's conditional release, due to his refusal to incriminate himself as part of his sex offender treatment, violates his Fifth Amendment right against compelled self-incrimination. *U.S. v. Antelope* (2005) 395 F.3d 1128.

6. Does law enforcement play a role in monitoring SVPs on conditional release?

Yes. DMH may enter into an interagency agreement or contract with the Department of Corrections and Rehabilitation (CDCR) or with local law enforcement agencies for supervision or monitoring services of SVPs who are conditionally released into the community. Welf. & Inst. Code § 6608.7.

DMH will provide the court with a copy of the written contract entered into with any public or private person or entity responsible for monitoring and supervising the patient's outpatient placement and treatment program. Subcontracts between the contractor and clinicians providing treatment and related services to the patient are not required by the court. Welf. & Inst. Code § 6608.8(a).

The court has the discretion to order DMH to provide a copy of the written terms and condition of conditional release to the sheriff or chief of police, or both, that have jurisdiction over the proposed or actual placement community. Welf. & Inst. Code § 6608.8(c). Terms and conditions of the conditional release cannot be altered by DMH except in emergencies. Welf. & Inst. Code § 6608.8(d)(1). An emergency situation is where it is necessary to protect public safety or the safety of the person. Welf. & Inst. Code § 6608.8(d)(5). If DMH has proposed changes, the patient under conditional release shall be provided notice, along with the district attorney or designated county counsel. The court on its own motion, or upon the

motion of either party to the action, may set a hearing on the proposed change. Welf. & Inst. Code §§ 6608.8(d)(2), (3).

Within ten days of a request by the chief of police of a city or the sheriff of a county, DMH must provide the following information concerning each person committed as a SVP who is receiving outpatient care in a conditional release program in that city or county: name, address, date of commitment, county from which committed, date of placement in the conditional release program, fingerprints, and a glossy photograph no smaller than 3-1/8 X 3-1/8 inches in size, or clear copies of the fingerprints and photograph. Welf. & Inst. Code § 6609.

7. Who is notified when an SVP is released?

In a lead-up to a possible release in which DMH recommends a community placement location, DMH notifies the sheriff or chief of police, or both, the district attorney, or the county's designated counsel about the following:

(i) the community in which the person may be released for community outpatient treatment;

(ii) The county that filed for the person's civil commitment; and,

(iii) The community in which the person maintained his last legal residence.

Welf. & Inst. Code §§ 6609.1(a)(1)(A)-(C)

Upon request, the victim, witness, or next of kin of the victim are entitled to be notified of the scheduled release of the individual under an SVP commitment. Welf. & Inst. Code § 6609.3.

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 4

MENTALLY DISORDERED OFFENDERS (MDO's)

Disability Rights California

California's protection and advocacy system

Toll Free No. 800.776.5746
www.disabilityrightsca.org

Table of Contents

A. Introduction

1. 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.*

2. 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).

3. 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.

4. 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."

2. 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).

3. 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 she[1] 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).

4. 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).

5. 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.

6. What constitutes a crime committed with "force or violence?"

a) 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.

b) 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.

c) 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.

d) 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.

2. 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.

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

a) 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.

b) 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).

c) 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).

d) 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.

e) 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.

f) 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.

g) 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.

2. 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.

2. 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.

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[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.

2. 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.

3. 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).

2. 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.

FORENSIC MENTAL HEALTH

LEGAL ISSUES

Chapter 5

Conditional Release Program (CONREP)

Disability Rights California

California's protection and advocacy system

Toll Free No. 800.776.5746
www.disabilityrightsca.org

Table of Contents

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

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[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 he[2] 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.

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[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

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[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

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[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*

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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 excepted 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 l203.2 (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).