

## **FORENSICS**

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The rights of people receiving mental health treatment vary depending on which forensic commitment they are being held under, otherwise known as their legal status, as well as their current placement (state hospital, jail, etc.). In recent years, there have been two significant changes to the rights of forensic patients—one is in the area of adoption of regulations to clarify patient rights for forensic commitments in state hospitals; the other is case law and subsequent legislation regarding the right to refuse psychotropic medications for certain forensic commitments.

### **JAIL INMATES**

Mental health services in a jail must include: screening for mental health problems, crisis intervention and management of acute psychiatric episodes, stabilization and treatment of mental disorders, and medication support services (California Code of Regulations (CCR) Title 15, § 1209(a)). Use of restraints is governed by CCR Title 15, section 1058, while other rights such as library, correspondence, visiting, exercise, reading materials, access to phones, religion, and grievance procedure can be found at CCR Title 15, sections 1061-1073.

### **Transfer of patients from jail to acute psychiatric hospital**

An inmate who had been identified as “mentally disordered” and who appears to be a danger to oneself or others, or to be gravely disabled, shall be transferred for further evaluation to a designated Lanterman Petris Short (LPS) treatment facility. They may be involuntarily held on an LPS hold where they will have the same rights as other LPS clients, including the right to change to voluntary status (Penal Code §§ 4011.6, 4011.8; CCR Title 15 § 1209(b)).

Upon transfer to the LPS designated facility, the transferee can only be held under the same provisions that apply to any other civilly committed individual, i.e., Welfare and Institutions Code sections 5150, 5250, 5260, 5300 and 5350. The transferee has a right to judicial review of the detention as specified in Welfare and Institutions Code section 5275 and all rights afforded patients under Welfare and Institutions Code sections 5325 et seq. ( Penal Code §4011.6).

If the person is detained in a mental health facility, the time spent in the facility counts as part of the person's sentence. The person in charge of the jail or juvenile facility must inform the person in charge of the mental health facility of the expiration date of the person's sentence. If the person is to be released from a mental health facility before the completion of their sentence the facility must notify the jail or juvenile detention facility. The person would complete his sentence in jail or juvenile detention facility.

## **STATE PRISONERS**

In general, before a prisoner can file a lawsuit regarding conditions in prison/conduct of staff, they must pursue an administrative appeal. California Department of Correction & Rehabilitation (CDCR) Form 602 must be used for this appeal.

### **Prison conditions**

There has been extensive recent litigation regarding prison conditions. Much of this information can be accessed through the Prison Law Office, <http://www.prisonlaw.com>

Some of the major cases include the following:

Plata v. Davis (Schwarzenegger): Prisoners alleged that California officials inflicted cruel and unusual punishment by being deliberately indifferent to serious medical needs – has resulted in the courts ordering that California's prison medical care system be placed under the control of a court-appointed receiver. (case no. C01-1351 TEH). The case can be found at 2005 WL 2932253 (N.D. Cal).

Coleman v. Wilson: The court found that the entire mental health system operated by the California Department of Corrections was unconstitutional and that prison officials were deliberately indifferent to the needs of mentally ill inmates. All thirty-three institutions in the CDCR are presently being monitored by a court-appointed special master to evaluate the CDCR's compliance with the Court's order. The case is reported at 912 F.Supp.1282 (E.D. Cal. 1995).

Armstrong v. Davis (BPT): The trial court judge issued an order for the Board of Prison Terms to remedy its failure to comply with the Americans with Disabilities Act during parole hearings. The case was upheld by the Ninth Circuit Court of Appeals [275 F.3d 849](#) (2001)

Armstrong v. Wilson: After finding that the California Department of Correction was violating the Americans with Disabilities Act and the

Rehabilitation Act, the Court issued an injunction to improve access to prison programs for prisoners with physical disabilities at all of California's prisons and parole facilities. The case is reported at 942 F.Supp. 1252 (N.D. Cal. 1996) aff'd [124 F.3d 1019](#) (9th Cir. 1997).  
Mental Health Treatment

Regulations regarding mental health services for prisoners can be found starting at CCR, Title 15 section 3360. Under CDCR regulations (CCR, Title 15, sec. 3363), inmates/Parolees shall be informed any time they are the object of particular mental health diagnosis or treatment program. They have the right to refuse such assignment without being subject to discipline or other deprivation, except:

(a) When mental health evaluation is required by law or court ordered

(b) When an inmate is placed in a mental health program for diagnostic study by the action of a classification committee, acting on specified information. A physician or other licensed practitioner may act in an emergency situation to place an inmate in psychiatric segregation under observation and treatment for a period of up to five working days pending classification action, providing the reasons for this action are documented.

(c) When diagnostic study has led to a diagnosis of existing or recurrent mental illness which renders the inmate dangerous to self or others, or gravely disabled.

(d) If there is a special condition of parole requiring attendance at a parole outpatient clinic, interviews may be imposed upon the parolee. However, no medication will be administered by these clinics without the specific informed consent of the patient

In a recent unpublished case, the Sixth District Court of Appeals found that imposing a probation condition of taking psychotropic medications as prescribed was not a violation of rights given the facts of the case. People v. Romayor, 2005 WL 3418274 (December 14, 2005, case no. H028599). The test for whether a condition of probation which requires or forbids conduct which is not itself criminal is valid is if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." People v. Lent (1975), 15 Cal.3d 481 at 486, 124 Cal.Rptr. 905.

## **Prisoners and Psychotropic Medications**

The state may only involuntarily medicate a prisoner in an *emergency situation* for up to 72-hours (Keyhea injunction Section III(J)<sup>1</sup>; CCR, Title 15 sec. 3364(a), and 1217; Penal Code § 2600) or after a judicial determination in compliance with the injunction process specified in Keyhea v. Rushen (1986), 178 Cal. App. 3d 526, 223 Cal.Rptr. 746. The Keyhea process is summarized below.

### **Certification for Involuntary Medication for Up to 21 Days**

If either the prisoner doesn't meet the criteria for emergency medication or the facility wishes to administer involuntary psychiatric medications longer than 72 hours, a certification review hearing must take place to determine if probable cause to involuntarily medicate exists.

A notice of certification must be delivered to the prisoner and a hearing held before an administrative law judge within ten days (unless the prisoner files a writ of habeas corpus prior to the hearing) to determine if either the prisoner is:

1. Gravely disabled and incompetent to refuse medication; or,
2. Poses a danger to self or others as a result of a mental disorder. (Keyhea injunction, Section II(A)). Danger to others is defined in substantial accord with Welfare and Institutions Code section 5300 with "custody" being defined as confinement in an inpatient psychiatric unit (Keyhea injunction, Section I(4),(5))

### **Process for Involuntary Medication Beyond 24 Days**

Involuntary medication beyond 24 days (including the initial 72 hours) requires a petition and court order from the superior court. The order authorizing involuntary medication must find, by clear and convincing evidence that the prisoner, as a result of mental disorder, is gravely disabled and incompetent to refuse medication or is a danger to self or others. (Keyhea injunction Section III(F))<sup>2</sup>. The court has the authority to

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<sup>1</sup> A copy of the Keyhea injunction may be found at <http://www.documents.dgs.ca.gov/oah/forms/KEYHEA-67432.doc>

<sup>2</sup> Keyhea injunction, Section I(4), III(I)(2); Department of Corrections v. Office of Admin. Hearings (1998) 66 Cal.App.4th 1100, 1108.

order an independent forensic psychiatrist to assist inmates in the hearing.<sup>3</sup>

### **Transfer of State Prison Inmate for Mental Health Treatment to Correctional Medical Facility (CMF)**

Prison inmates transferred to Correctional Medical Facility for inpatient psychiatric treatment because of acute mental illness have the right to a hearing conducted by an independent psychiatrist regarding the necessity for transfer, if requested. The hearing must take place within seven days of the transfer. An adverse decision may be appealed within 30 days and is entitled to a ruling within 20 working days (California Code of Regulations (CCR), Title 15 § 3379(d)(3)).

### **Transfer of State Prison Inmate for Mental Health Treatment to Department of State Hospital**

If the CDCR believes that treatment in a state hospital may expedite rehabilitation of a prisoner with a mental disability, it may, (with the approval of the Board of Parole Hearings for processing an indeterminate sentence), refer such prisoners to the Department of Mental Health (DMH) or to the Department of Developmental Services (DDS) (Penal Code § 2684).

Before the CDCR can transfer an inmate involuntarily under Penal Code section 2684, it must provide certain procedural rights. In Vitek v. Jones, the U.S. Supreme Court set out minimum due process requirements that must be met before transferring inmates to mental health facilities. Vitek v. Jones, 445 U.S. 480 (1980); CCR, Title 15 sec. 3369.1

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<sup>3</sup> Department of Corrections v. Anthony, 53 Cal.App.4th 780, 790 (1997) (stating that the right to refuse treatment “is rendered meaningless if a person cannot adequately and through competent assistance of counsel and necessary experts challenge a psychiatric determination that he or she is competent to refuse antipsychotic medication.”).

**INCOMPETENT TO STAND TRIAL (IST) - Penal Code 1370**

Defendants found incompetent to stand trial are those who, as a result of a mental disorder or developmental disability, cannot understand the nature of the criminal proceedings or assist their attorneys in conducting their defense (Penal Code § 1367).

**Procedure**

If, prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent, and then the court may order a hearing on the issue of mental competence in the superior court (by judge or jury) (Penal Code §§ 1368, 1369).

When a doubt regarding competency to stand trial is raised regarding a defendant with a developmental disability,<sup>4</sup> the court follows 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.

The law 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 or her to a county mental health facility for evaluation and treatment pursuant to Penal Code section 4011.6 (involuntary commitment to a county facility for mental health evaluation under the LPS Act) (Penal Code 1367.1). This code section was held unconstitutional on equal protection grounds (a felony defendant is not required to undergo evaluation and treatment under LPS prior to a competency determination) by the Second District Court of Appeals (Pederson v. Superior Court (2003) 105 Cal.App.4<sup>th</sup> 931, 130 Cal. Rptr.2d 289). At this time, this decision is only binding (required to be applied) in the counties that the Second District Court of Appeals covers; advocates

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<sup>4</sup>[7] "Developmental disability" means a disability that originates before age 18, continues indefinitely, and constitutes a substantial handicap. It includes mental retardation, cerebral palsy, epilepsy, and autism but excludes conditions solely physical or psychiatric in nature. Penal Code §1370.1(a)(1)(H).

are encouraged to research the state of the law in this area to see if there have been more recent changes.

The court may order the appointment of one psychiatrist or licensed psychologist (two if the defendant feels competent to stand trial). The psychiatrist or psychologist shall evaluate the defendant to determine if they are 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 self or others (Penal Code § 1369).

### **Placement**

If a Misdemeanor Incompetent to Stand Trial (MIST) defendant is found mentally incompetent after the 1369 hearing, the defendant cannot be committed to a state hospital 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 defendants may also be placed directly in the Conditional Release Program (CONREP) for outpatient treatment (Penal Code § 1601(b)). The Conditional Release Program is discussed in section VIII of this chapter.

Felony incompetent to stand trial defendants usually receive evaluation and treatment at state hospitals. If the crime charged is a serious felony, inpatient treatment is mandatory. After six months at the state hospital, the felony defendant becomes eligible for CONREP outpatient treatment.

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

For people committed as developmentally disabled IST commitments, the court considers the regional center's recommendation for placement. Placement may be in the state hospital, developmental center, or other specified residential or outpatient placements (Penal Code § 1370.1). 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)).

### **Maximum Commitment Term**

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, conservatorship proceedings may be initiated (Penal Code 1370.01(c)(2)).

The maximum confinement time is the same for either an IST defendant who is charged with a felony or for an IST defendant who has a developmental disability: either 3 years or the maximum term of imprisonment provided by law, whichever is shorter. (Penal Code § 1370(c)(1)).

### **Restoring Competency**

The commitment ends when (1) the IST defendant has spent the maximum allowable time in the treatment facility, or (2) the IST defendant is judged competent to stand trial.

The treatment facility makes regular written reports to the court about the IST defendant's mental condition (Penal Code §§ 1370(b)(1), 1370.01(b)), 1370.1(b)(1)).

If the treatment facility believes that the defendant has regained competence, the facility files a Certificate of Restoration of Competency with the court, which then holds a hearing to determine competency (Penal Code § 1372). Likewise, after 18 months, the court shall hold another hearing to determine competency (Penal Code §§ 1370(b)(2), 1370.1(b)(2)).

If the defendant believes that competency has been regained, but the treatment facility or community program director disagrees, the defendant may challenge the commitment by writ of habeas corpus (Welfare & Institutions Code § 7250; Penal Code § 1473).



**Involuntary Medication of Incompetent to Stand Trial Commitments**

An individual committed as incompetent to stand trial (IST), may only be involuntarily medicated with psychotropic medication if:

- (1) There is an emergency (short term),
- (2) Or if a court has found that
  - (a) An individual lacks capacity to refuse,
  - (b) The individual meets the Welfare and Institutions Code section 5300 criteria for dangerousness,
- (3) Or, specific criteria regarding the necessity to medicate for restoration of competency to stand trial are met. (Cal. Penal Code § 1370(a)(1)(F)(2)(B)(ii) (I-III), 1370.01(a)(2)(B)(ii)).

The following requirements must be met, pursuant to Penal Code section 1370(a)(2)(B)(ii)(1)(III) and People v. O'Dell (2005) 126 Cal.App.4<sup>th</sup> 562, 23 Cal.Rptr.3d. 902 for the court to issue orders to involuntarily medicate an individual for the purposes of restoration of competency to stand trial:

- the people have charged the defendant with a serious crime against the person or property;
- involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial;
- the 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;
- less intrusive treatments are unlikely to have substantially the same results; and
- Antipsychotic medication is in the patient's best medical interest in light of his or her medical condition (Penal Code section 1370(a)(2)(B)(ii)(1)(III)).

In any hearing on such a request the court shall make specific findings of fact with respect to:

- (1) The important governmental interest at stake in bringing defendant to trial, considering the facts of defendant's individual case;
- (2) The manner in which the governmental interests of timely prosecution and a fair trial are furthered by the medication, i.e., whether involuntary medication is substantially likely to render defendant competent to stand trial and is unlikely to have side effects

that interfere with defendant's ability to understand the nature of the criminal proceeding or assist counsel in the conduct of a defense in a reasonable manner;

(3) The necessity of the specific medication to further those interests, i.e., whether less intrusive treatments are unlikely to have substantially the same results; and

(4) The appropriateness of the specific medication to serve defendant's best medical interest in light of his medical condition.

The State must identify the following:

(1) The medical (psychiatric) condition it proposes to treat with the antipsychotic medication,

(2) The specific antipsychotic medication it proposes to administer,

(3) The likelihood the medication will render defendant competent to stand trial,

(4) The medication's side effects, and

(5) Any alternative, less intrusive treatments (People v. O'Dell (2005) 126 Cal.App.4<sup>th</sup> 562, 573-4, 23 Cal.Rptr.3d. 902, 908).

### **Continued Treatment**

An IST defendant can be kept in treatment beyond the maximum commitment time if the defendant is placed on an LPS conservatorship or a *Murphy* conservatorship, or committed to the Department of Developmental Services under Welfare and Institutions Code section 6500.

### **MURPHY CONSERVATORSHIP – Welfare & Institutions Code 5358**

If at the end of the commitment period, the defendant meets the criteria for a *Murphy* conservatorship, the commitment may be "extended."

This extension beyond the maximum period of commitment may be ordered for an IST defendant who:

(1) Remains incompetent,

(2) Has been charged with a violent felony which has not been dismissed, and

(3) Represents a substantial danger of physical harm to others (Penal Code § 1370(c)(2), Welfare & Institutions Code § 5008(h)(1)(B)).

The court may order the county public conservator to initiate *Murphy* conservatorship proceedings at any time after the defendant has served

the maximum term of confinement, or if treatment facility indicates there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future (Penal Code §§ 1370(c)(2), 1370(b)(1)).

### **Individuals Diagnosed with Mental Retardation**

In addition, individuals diagnosed with mental retardation may be committed to the State Department of Developmental Services (DDS) under section 6500 et. seq. of the Welfare and Institutions Code if they are a danger to themselves or others. The definition of dangerousness to self or others 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 (Welfare & Institutions Code § 6500).

The 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 (Welfare and Institutions Code § 6509). The commitment lasts for a year and can be renewed (Welfare and Institutions Code §6500).

## **NOT GUILTY BY REASON OF INSANITY, NGI– Penal Code 1026**

Defendants found Not Guilty by Reason of Insanity (NGI) are those who, because of a mental condition, were unable to understand the nature and quality of the crime committed, and (*or*) were unable to tell right from wrong when committing the crime (Penal Code § 25).

### **Placement**

When the judge or jury finds a defendant NGI, the court will commit the defendant to a state hospital, a mental health facility, or an outpatient program (Penal Code § 1026). Before making any placement decision, the court must refer the defendant to the local community program director for a recommendation, which the court usually follows. If the underlying charge is a serious felony, as defined in Penal Code section 1601, the defendant must remain in a state hospital for at least six months before becoming eligible for outpatient treatment.

### **Restoration of Sanity**

Restoration of Sanity is a two-step process.

At the first step, if the court finds that the NGI defendant no longer poses a danger to oneself or others because of a mental disorder, the defendant will be released to CONREP for a year for outpatient treatment.

At the second step, which occurs after a year in CONREP, the judge or jury determines whether the defendant has been "fully restored" to sanity. If so, the defendant is unconditionally released from CONREP (Penal Code §§ 1026.2(e), 1603, 1604)).

The community release provisions of Penal Code section 1026.2(e) do not apply if the individual has additional time to serve on a prison sentence (i.e., the crime for which the individual was found NGI was committed while they were already serving a prison sentence) or if restoration of sanity ends a stay of a previously imposed sentence (Penal Code § 1026.2(m)). Such individuals are not eligible for outpatient treatment and on a finding of restoration of sanity must be transferred to the Department of Corrections or the original sentencing court (Penal Code §1026.2(m)).

Outpatient treatment is further covered under the Conditional Release Program (CONREP) section VIII below.

### **Length of Commitment**

A commitment is as long as the longest permitted prison sentence for the crimes the person was convicted of, including the upper term of the base offense and any additional terms for enhancements or consecutive sentences that could have been imposed. Credit for time served under Penal Code section 2900.5 (time in custody prior to imposition of sentence) may be deducted, but the term may not be reduced for good behavior or time worked while in custody (Penal Code § 1026.5(a)(1)).

The defendant is released from inpatient treatment when:

- (1) sanity is "restored" and the defendant is released to CONREP as an outpatient, or
- (2) the defendant has been in the hospital for as long as the maximum possible sentence for the underlying crime.

### **Continuing Treatment**

The court may extend a defendant's commitment beyond the maximum term every two years if the underlying crime was a felony and if, by reason of a mental disorder, the defendant represents a substantial danger of physical harm to others (Penal Code §§ 1026.5(b)(l), 1026.5 (b)(8)). Under this provision, a defendant can remain hospitalized or committed indefinitely.

### **Involuntary Medication**

The law governing persons committed as NGI's regarding their right to refuse medication is not clear.

In In re Locks (2000) 79 Cal.App.4th 890, 94 Cal.Rptr.2d 495, the California Court of Appeals concluded that individuals who are found to be not guilty by reason of insanity do not have a right to refuse medication. The court noted that under Keyhea, a judicial determination of incapacity and grave disability or that the prisoner poses a danger to self or others is required in order to involuntarily medicate; however, the Locks court reasoned that the judicial determination that the prisoner was not yet restored to sanity and not eligible for release under Penal Code Section 1026.2 creates the presumption that the patient is still a danger to self or others. Therefore, the person committed has no right to refuse medication.<sup>5</sup>

In In re Qawi, (see MDO section below for a discussion of this case), the California Supreme Court criticized the reasoning of the Locks court. First,

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<sup>5</sup> In re Locks, 79 Cal.App.4th 890, 896 (2000).

the court stated that persons committed as NGIs should have their own specific criteria for suspending the right to refuse and that the application of Penal Code Section 2972(g) was not obvious.<sup>6</sup> Second, the court stated that “dangerousness to others” cannot be presumed because of a denial of release. Rather, “particular findings of recent acts of dangerousness pursuant to Welfare and Institutions Code Section 5300” are required.<sup>7</sup> Further, the Calhoun Court’s application of Qawi’s equal protection analysis to SVPs would seem to extend to NGIs as well. See In re Calhoun (2004) 121 Cal. App. 4<sup>th</sup> 1315, \*\*\*Cal.Rptr.2d\*\*\*.

The California Supreme Court did not overrule the Locks case in deciding Qawi because the issue of whether Penal Code section 2972(g) (the code section relied on in Qawi) applies to NGI’s was not explicitly before them.

## **MENTALLY DISORDERED OFFENDERS, MDO – Penal Code 2962 et al**

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<sup>6</sup> In Re Qawi, 32 Cal.4th 1, 27 (2004).

<sup>7</sup> Id.

An individual may be subject to treatment as a Mentally Disordered Offender (MDO) if they are a prisoner who, at the time of or upon termination of parole, meets the following criteria (Penal Code §§ 2960, 2962):

- (1) The prisoner has a treatable, severe mental disorder that was one of the causes of the commission of the crime, for which the defendant was incarcerated,
- (2) The disorder is not in remission or cannot be kept in remission without treatment,
- (3) The prisoner has been in treatment for the disorder for 90 days or more in the year prior to her parole or release date,
- (4) The disorder causes the prisoner to be dangerous to others, and
- (5) The crime for which the prisoner is was incarcerated involved force or violence or caused serious bodily injury as specified in Penal Code section 2962(e).

If the individual disagrees with the recommendation, they may request a Board of Parole Hearings (BPH) (Penal Code §2966(a)). If the BPH rules against the individual a petition may be filed in superior court challenging the determination (Penal Code § 2966(b)). After 60 days of inpatient treatment, the individual may request a hearing regarding outpatient treatment (Penal Code § 2964(b)).

### **Placement**

Once certified, the inmate is committed for inpatient treatment at a state hospital, unless designated officials from DMH certify that outpatient treatment is appropriate or the inmate wins an outpatient hearing before the BPH (Penal Code § 2964). When outpatient placement is found to be appropriate, MDO parolees go into the Conditional Release Program (CONREP).

### **Length of Commitment**

MDO commitment is technically a special condition of parole, and thus lasts the length of the parole period. The length of the parole period is determined by statute, and depends on the type of sentence imposed. Most prisoners have a maximum parole period of three years (Penal Code §§ 3060.5, 3057).

If a prisoner's severe mental disorder is not in remission or cannot be kept in remission without treatment, and if the parolee is therefore dangerous to

others, involuntary MDO commitment may be extended beyond the period of parole in one year increments, potentially indefinitely (Penal Code §§ 2970, 2972(c)).

### **Revocation of Outpatient Status**

The community program 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 in a secure mental health facility, or within 21 days if good cause exists. In lieu of revocation, the community program director or DMH may also hospitalize an MDO parolee pursuant to the LPS civil commitment scheme (Penal Code § 2964(a)).

### **Involuntary Medication**

A person committed as an MDO can be compelled to take antipsychotic medication in a non-emergency situation only if a court, at the time the person is committed or recommitted, or in a separate proceeding, makes one of two findings:

- (1) The person lacks the capacity to make decisions about his medical treatment; *or*
- 2) The person is dangerous within the meaning of Welfare and Institutions Code section 5300.

The rights of persons committed as MDO's to refuse medication can be further limited by State Department of Mental Health regulations necessary to provide security for inpatient facilities<sup>8</sup> (In re Qawi (2004) 32 Cal.4th 1, 9-10, 7 Cal.Rptr.3d 780).

Section 5300 requires two types of findings of dangerousness. First, there must be a generalized finding of "demonstrated danger" to others. "Demonstrated danger may be based on assessment of [the person's] present mental condition, which is based upon a consideration of past behavior of the person within six years prior to the time the person attempted, inflicted, or threatened physical harm upon another, and other relevant evidence." (Welfare & Institutions Code, § 5300.5).

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<sup>8</sup> Currently, the State Department of Mental Health has not adopted any such regulations. DMH Special Orders or Administrative Directives have not gone through the process of being adopted as regulations.



In addition to demonstrated danger, one of the following findings establishing recent<sup>9</sup> acts or threats of violence must be made in order to effect a section 5300 commitment;

- (a) The person has attempted, inflicted, or made a serious threat of substantial physical harm upon the person of another after having been taken into custody, and while in custody, for evaluation and treatment ,
- (b) The person had attempted, or inflicted physical harm upon the person of another, that act having resulted in his or her being taken into custody,
- (c) The person had made a serious threat of substantial physical harm upon the person of another within seven days of being taken into custody, that threat having at least in part resulted in his or her being taken into custody.

(Welfare & Institutions Code § 5300; see also Welfare & Institutions Code § 5304, subd. (a), In re Qawi (2004) 32 Cal.4th 1, 20).

### **MENTALLY DISORDERED SEX OFFENDER**

**The MDSO statutes were repealed in 1982.** However, persons committed as MDSOs before the repeal date can remain under such commitments subject to the continuing jurisdiction of the repealed statutes. A Mentally Disordered Sex Offender is any person who, by reason of a mental disorder, has a predisposition to commit sexual offenses to such a degree that the defendant is a danger to the health and safety of others. (former Welfare & Institutions Code §§ 6300-6331; Historical Note to Welfare & Institutions Code § 6300).

### **SEXUALLY VIOLENT PREDATORS, SVP – Welfare & Institutions Code 6600 et al**

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<sup>9</sup> In footnote 7 of the case, the Qawi court interpreted “recent” for MDO’s to mean within the year prior to the commitment or recommitment.

The term "sexually violent predator" means a person who:

- 1) Has been convicted of a sexually violent offense against two or more victims, and
- (2) Has a diagnosed mental disorder,
- (3) The disorder makes him/her a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent predatory criminal behavior (Welfare and Institutions Code § 6600(a)(1)).

"Sexually violent offense" means an act specified in Welfare and Institutions Code section 6600, subdivision (b) when committed by force, violence, duress, menace, or fear of immediate, and unlawful bodily injury on the victim or another person or when committed on a child under the age of fourteen years and the offending act or acts involve "substantial sexual conduct" as defined in Welfare and Institutions Code section 6600.1, and when the act results in a conviction or a finding of not guilty by reason of insanity (Welfare and Institutions Code § 6600(b)).

"Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization (Welfare and Institutions Code § 6600(e)).

SVP commitments may only be sought for prisoners under sentence to the Department of Corrections or whose parole has been revoked (Welfare and Institutions Code § 6601(a)). If the screening finds that the individual is likely to be an SVP, the individual is referred for a "full evaluation" by the Department of Mental Health (Welfare and Institutions Code § 6601 (c)). If the appointed mental health professionals agree that the prisoner meets SVP criteria, information is forwarded to the county that convicted the prisoner (Welfare and Institutions Code § 6601(d-i)).

If the district attorney or county counsel decides to file a petition for commitment, a probable cause hearing and trial are held (Welfare and Institutions Code § 6602). SVP's are committed by the court to the custody of DMH for a two-year term, with a right to annual review (Welfare and Institutions Code §§ 6604, 6605). If a court finds the person is no longer an SVP, they are unconditionally released and discharged.

## **Placement**

Men committed under Welfare & Institutions Code section 6600 (pre-trial detainees) are held at Atascadero/Coalinga State Hospital or in county jail as they wait a probable cause hearing. Once the judge or jury has determined the person is a sexually violent predator they are committed to Atascadero/Coalinga State Hospital in the custody of the Department of Mental Health. Women committed under this section are placed at Patton State Hospital.

After confinement of at least a year, an SVP may be placed in a conditional release program if a court finds at a hearing that the person would not be a danger to the health and safety of others in that it is unlikely that he or she will engage in sexually violent criminal behavior owing to his or her diagnosed mental disorder if under supervision and treatment in the community (Welfare and Institutions Code §§ 6607, 6608).

### **Involuntary Medication**

In a non-emergency, an SVP has the right to refuse the involuntary administration of antipsychotic medication unless found by a court to be incompetent to refuse treatment or to be a danger to others (In re Calhoun (2004) 121 Cal App. 4<sup>th</sup> 1315, 1354, 18 Cal Rptr.3d 315).

### **Treatment**

According to the State DMH website, the treatment program for people in the SVP program, is structured into five phases.

#### **1. Treatment Readiness**

- (a) Facilitates the participants' transition from the prison culture to the treatment environment.
- (b) Prepares participants to take an active role in their therapy.
- (c) Uses didactic methods to educate participants on such topics as hospital attitudes, interpersonal skills, anger management, mental disorders, victim awareness, cognitive distortions, and relapse prevention

#### **2. Skills Acquisition**

- (a) Shifts participants' focus from education and preparation to personal therapy.
- (b) Teaches coping strategies, behavioral skills, pro-social thinking, and emotional awareness, to increase self-control.
- (c) Requires that the participants:
  - Acknowledge and discuss past sexual offenses;
  - Express a desire to reduce their risk of re-offending;

Agree to participate in required assessment procedures;  
Be willing and able to conduct themselves appropriately in a group setting.

### 3. Skills Application

(a)Integrates the skills participants learned during Phase II into their daily lives.

(b)Broadens and deepens their skills in relapse prevention, coping with cognitive distortions, and developing victim awareness.

(c)Causes participants to examine their daily experience in unit life and to practice their behavioral interventions through extensive use of journals and logs.

(d)Requires that participants:

- Accept responsibility for past sexual offenses;
- Articulate a commitment to abstinence that is reflected in current behavior;
- Understand the trauma resulting from their sexual crimes;
- Are able to correct deviant thoughts;
- Demonstrate ability to manage deviant sexual urges and impulses;
- Show good ability to cope with high risk factors for re-offending;
- Cooperate with institutional supervision;
- Display skills necessary for self-regulation;
- Demonstrate ability to maintain appropriate relations with female staff;
- Display skills necessary to avoid emotional identification with children.

### 4. Discharge Readiness

(a)Develops a detailed Community Safety Plan developed in conjunction with the offender's assigned Conditional Release Program (CONREP).

(b)Involvement of family members and significant others in the relapse prevention plan.

(c)Focuses on how the skills in relapse prevention, managing cognitive distortions, victim empathy, and coping strategies will generalize and transfer to the community setting.

(d)Treatment teams must determine that participants:

Can fully describe the negative impact of abuse on their victims;  
Acknowledge and accept past sexual offenses

Articulate commitment to abstinence;  
Correct all cognitive distortions;  
Able to control deviant sexual urges and interests;  
Can describe a complete range of prospective high-risk factors and internal warning signs;  
Cope with risky situations and thinks in ways that reduce his likelihood for re-offending in their daily lives;  
Follow rule and comply with requirements of supervision;  
Display no inappropriate impulsivity or inappropriate emotions;  
Relate well with women and able to avoid emotional identification with children;  
Conditional Release Program in the county of commitment is willing to accept participant into outpatient treatment and supervision.

#### 5. Community Outpatient Treatment under CONREP

- (a) Is administered in the offenders' county of commitment.
- (b) California Superior Court approves and orders placement into this final phase of treatment.
- (c) Transfers the site of ongoing treatment from ASH/CSH to the community setting.
- (d) Provides intensive on-going supervision and monitoring to facilitate early detection of relapse and ensure community safety.

<http://www.dmh.ca.gov/Statehospitals/Coalinga/Treatment.asp>

### **CONDITIONAL RELEASE PROGRAM (CONREP)**

CONREP is a statewide program of mental health outpatient treatment in local communities under court supervision. When an individual is committed to CONREP, the individual remains within the constructive custody of the Department of Mental Health (DMH) (Penal Code §§ 1605, 1615). Courts may order immediate outpatient commitment with CONREP instead of confinement in a state hospital if the defendant's crime was not classified as dangerous and if the community program director reports that the defendant will not be a danger to the health and safety of others and will benefit from such outpatient status (Penal Code §§ 1601, 1602).

People on Incompetent to Stand Trial (IST), Not Guilty by Reason of Insanity (NGI), Mentally Disordered Offender (MDO), and Mentally Disordered Sex Offender (MDSO) commitments are all eligible for

outpatient placement in the CONREP program. Individuals on Sexually Violent Predator (SVP) commitments are also eligible for CONREP.

Note that NGI defendants must be committed to CONREP for one year before they can be fully "restored to sanity" and unconditionally released.

### **Placement**

The director of the state hospital or treatment facility, along with the community program director, must recommend to the court that the defendant would benefit from outpatient status, and would not be a danger to the health and safety of self or others. Once completed, the court then holds a hearing to approve the outpatient plan (Penal Code §§ 1603, 1604). Persons committed under NGI may also petition the committing court themselves for release to the CONREP program (Penal Code 1026.2).

For MDO patients, however, the Board of Parole Hearing (BPH), rather than the court, makes the decision about CONREP placement (Penal Code § 2964(a) and (b)).

NGI and IST defendants charged with serious felonies as defined in must first spend six months in the state hospital or other mental health facility before they are eligible for CONREP placement (Penal Code § 1601).

### **Length of Commitment**

CONREP outpatient status lasts for one year, and is subject to renewal. After one year, the court must hold a hearing no later than 30 days from the one-year anniversary and renew, revoke, or discharge the patient from CONREP (Penal Code § 1606). For MDSOs, NGIs, and MDOs, time spent on outpatient status, except when placed in a locked facility, is not counted as actual custody and is not credited towards the person's maximum term of commitment (although for MDOs, their maximum period of parole is not extended by placement in CONREP) (Penal Code § 1600.5).

Once per year, patients on NGI commitments may also seek release from outpatient commitment by applying for complete restoration of sanity (Penal Code § 1026.2).

### **Revocation**

If at any time during the outpatient period, the outpatient treatment supervisor is of the opinion that the person requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision;

the community program director shall request revocation of outpatient status from the superior court (Penal Code § 1608). In addition, if at any time during the outpatient period or placement with a local mental health program pursuant to subdivision (b) of Section 1026.2 the prosecutor is of the opinion that the person is a danger to the health and safety of others while on that status, the prosecutor may petition the court for a hearing to determine whether the person shall be continued on that status (Penal Code § 1609).

The CONREP director may confine the patient to a mental health facility, or even a jail, pending the revocation hearing if the defendant determines that the patient is dangerous to self or other (Penal Code § 1610). However, CONREP may house the patient in the county jail only if the jail provides treatment for the patient, as well as security for both the patient and the other inmates. The patient must be separated from the general population of the jail (Penal Code § 1610(b)).

The CONREP director must submit a written application for the court's consideration within one judicial day of the transfer stating the justification for jail confinement (Penal Code § 1610(a)). A CONREP patient confined in a facility pending revocation has the rights under Welfare and Institutions Code section 5325 and may file a writ of habeas corpus protesting the confinement (Cal. Penal Code § 1610(c)).